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

In the matter between: CASE NO: 49616/2013

LE GRELLIER, GAIL	1st Applicant
BOTHA, RENIER	2nd Applicant
LEPAR, DAVID	3rd Applicant
SMITH, CAREL	4th Applicant

and

LUKHIMANE M.A. N.O.	1st Respondent
AFFIRM MARKETING SERVICES (PTY) LIMITED	2nd Respondent
BEEFMASTER (PTY) LIMITED	3rd Respondent
H BIRKENMEYER (PTY) LIMITED	4th Respondent
DR GEBKA, HELLIG & KLUG INC.	5th Respondent
DR RITZ INC.	6th Respondent
ETERNAL FLAME INVESTMENTS (PTY) LIMITED	7th Respondent
EXPECTRA 89 (PTY) LIMITED	8th Respondent
HESTICO (PTY) LIMITED	9th Respondent
HETTAS CC	10th Respondent
CONVISTA CONSULTING (PTY) LIMITED	11th Respondent
IDI TECHNOLOGY SOLUTIONS (PTY) LIMITED	12th Respondent
PROGRESSIVE PACKAGING (PTY) LIMITED	13th Respondent
WORLD CARGO SERVICES (PTY) LIMITED	14th Respondent
CONDUIT RISK AND INSURANCE HOLDINGS (PTY) LIMITED	15th Respondent
DELL COMPUTER (PTY) LIMITED	16th Respondent
THE BRAND UNION (PTY) LIMITED	17th Respondent
ULTRA LITHO (PTY) LIMITED	18th Respondent

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

1st – 3rd APPLICANTS' HEADS OF ARGUMENT

A. INTRODUCTION

1. This is an application in terms of section 30P of the Pension Funds Act 24 of 1956 ("**the PFA**") for an order, *inter alia*, setting aside the first respondent's ("**the**

Adjudicator") determination dated 3 July 2013 ("**the 3 July 2013 determination**"), in terms of which the Adjudicator:

1.1 declared that the applicants did not manage the IF Umbrella Provident Fund and the IF Umbrella Pension Fund (collectively referred to herein as "**the IF Funds**") properly and as a result, caused financial loss to them and ultimately to their members;

1.2 ordered the IF Funds to compute the amount of the financial loss to them and their members occasioned by the rebuilding of the IF Funds' data, having regard to the investment returns earned by the IF Funds;

1.3 ordered the applicants personally (jointly and severally) to pay the IF Funds the amount of the financial loss, less the amount of R1 million already paid by Mr Tony Kamionsky ("**Kamionsky**") and Dynamique Consultants and Actuaries (Pty) Limited ("**Dynamique**") to the IF Funds.

2. The *dramatis personae* are the following:

2.1 the IF Funds, established on 1 January 2004, and cited as the 32nd and 33rd respondents in this matter;

2.2 the Dynamique SA Umbrella Provident Fund and the Dynamique SA Umbrella Pension Fund (collectively referred to herein as "**the Dynamique Funds**");

2.3 Integrated Futures (Pty) Limited ("**Integrated**"), the administrator of the IF Funds over the period 1 January 2004 to 30 November 2005;

2.4 Dynamique, the administrator of the IF Funds over the period 1 December 2005 to 31 January 2008;

2.5 Aon South Africa (Pty) Limited ("**Aon**"), the administrator of the IF Funds from 1 February 2008;

2.6 Ms Gail Le Grellier ("**Le Grellier**"), a trustee of the IF Funds over the period 22 November 2006 to 10 February 2011, and the first applicant in this matter;

2.7 Mr Renier Botha ("**Botha**"), a trustee of the IF Funds over the period 13 March 2006 to 10 February 2011, and the second applicant in this matter;

2.8 Mr David Lepar ("**Lepar**"), a trustee of the IF Funds over the period 9 July 2008 to 10 February 2011, and the third applicant in this matter;

2.9 Mr Carel Smith ("**Smith**"), a trustee of the IF Funds over the period 9 July 2009 to 30 June 2010, and the fourth applicant in this matter;

2.10 Kamionsky, a trustee and chairperson of the IF Funds over the period 1 December 2005 to 31 January 2008 and the sole director, shareholder and controlling mind of Dynamique, and the 34th respondent in this matter;

2.11 the employers participating in the IF Funds (the 2nd – 30th respondents), one of which is Dell Computer (Pty) Limited ("**Dell**"), and the employees of the 2nd to 30th respondents who are members of the IF Funds (collectively referred to herein as "**the complainants**").

2.12 Deloitte & Touche ("**Deloitte**"), an independent firm of registered auditors providing, *inter alia*, audit, consulting and financial advisory services to select clients.

B. THE COMPLAINT

3. The applicants are erstwhile trustees of the IF Funds. During their tenure as trustees, they were advised by the IF Fund's new administrator, Aon, that the membership data of the IF Funds was inaccurate. They accordingly resolved at a trustees meeting held on 15 June 2010, to appoint Deloitte to rebuild the records of the IF Funds and the Dynamique Funds at a cost of R18 162 480.00 including VAT,[1] and that the costs of such rebuild be paid by the IF Funds and the Dynamique Funds by way of a levy of approximately 2.5% against the assets of the IF Funds and the Dynamique Funds.[2]

4. As a result of this resolution, the complainants on 3 May 2011, lodged a complaint with the Adjudicator in terms of section 30A of the PFA, alleging maladministration by the IF Funds' board of trustees (i.e. the applicants) in debiting the fund credits of members with the costs of the rebuild exercise.[3]

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[1] Bundle p249.
[2] Bundle p255.
[3] Bundle p264.

5. The complaint comprises of two legs:

5.1 first, it is alleged that the applicants' decision to effect the rebuild exercise was an improper exercise of their powers as trustees of the Funds;

5.2 second, it is alleged that the complainants have sustained or may sustain prejudice in consequence of the maladministration of the Funds, whether by act or omission.

6. The applicants were not accused of maladministering the IF Funds themselves. The complaint was that as trustees, the applicants were responsible for the actions of the administrator, namely, Dynamique, and to the extent that Dynamique had maladministered the IF Funds, the applicants were responsible either vicariously or because they failed to exercise proper oversight functions over Dynamique.

7. The Adjudicator upheld the complaint in the 3 July 2013 determination.

C. OVERVIEW

8. At the outset, it is important to bear in mind that the applicants were not trustees of the IF Funds on their inception. They were appointed much later and it was during their tenure as trustees that they became aware of the fact that annual financial statements for the IF Funds had not yet been audited. They were told by the administrator, Dynamique, that the IF Funds had obtained an extension in this regard and that processes were underway to finalize them..

9. These representations were accepted in good faith by the applicants, Le Grellier and Botha at the time.

10. Indeed during the course of regular trustee meetings held in late 2006 and 2007 when Le Grellier and Botha raised concerns about the lack of proper administration reports, Dynamique and Kamionsky provided plausable explanations and ameliorated their concerns. It was only when Dynamique departed and AON appointed in 2008 and after AON began reconciling membership data, that the applicants were told and thus became aware of the fact that the IF Funds' membership data lacked intergrity and was unreliable.

11. The complainants seek to hold the applicants accountable for the unreliability of the membership data as though the applicants were the cause thereof. But this approach fails to recognise that the unreliability of membership data did not arise when the applicants became trustees of the IF Funds. On the contrary, it had its origins when the IF Funds were incorporated and when none of the applicants were trustees.

12. It is therefore not surprising that the complainants resort to the contention that the applicants must nevertheless be responsible because they failed to properly oversee Dynamique's administration of the IF Funds.

13. Quite apart from the fact that on the evidence contained in the applicants' founding papers, it is apparent that the applicants (Le Grellier and Botha) exercised proper and reasonable oversight over Dynamique, and the complaint lacks causality in that it does not suggest what the applicants should have done and when they should have done so. This is critical because if the end result is the same, then the

complainants cannot be said to complain about having suffered any prejudice as a result of the applicants' alleged failure to properly oversee Dynamique's administration of the IF Funds.

14. We illustrate the point with the following example. Le Grellier took office in November 2006. If it is alleged (which it is not) that she ought to have immediately discovered the maladministration by Dynamique, what is it that she should have done? Should she have terminated Dynamique's administration in 2007 and, if so, what would a new administrator do on appointment? Would a new administrator have immediately drawn Le Grellier's attention to their inability to finalise the financial statements because of the unreliability of the membership data or would that have taken some time to discover? But more importantly, and irrespective of whether it was immediate or some time later, would the discovery have necessitated a rebuilding exercise from inception in any event?

15. What the aforegoing patently demonstrates, is that the steps taken by the applicants, once they knew the extent of the problem, in resolving to undertake a rebuild exercise (which co-incidentally is supported by the IF Funds themselves), were both necessary, prudent, and we would submit, inevitable.

16. It is therefore difficult in these circumstances to understand why the complainants have directed their grieviance towards the applicants.

D. THE ISSUES AND APPROACH TO BE ADOPTED

17. The following issues fall to be determined in this application:

17.1 whether the applicants, as trustees of the IF Funds, ought to be held personally liable for Dynamique's and Kamionsky's maladministration;

17.2 whether the applicants' decision to treat the costs of the rebuild exercise as a special *ad hoc* expense to the IF Funds was a proper exercise of their powers as trustees;

17.3 whether the costs of the rebuild exercise ought to have been recovered from the professional indemnity insurance cover held in respect of the trustees and the IF Funds.

18. In assessing the relevant events leading up to the cost of the rebuild exercise and the applicants conduct in connection therewith, the applicants have relied upon the minutes of the trustees' meetings over the relevant period. Although Dell admits the correctness of the contents of those minutes,[4] it has objected to their inclusion in the documentation before this Court on the basis that they were not furnished to the Adjudicator.

19. This objection can be disposed of at once.

19.1 Firstly, an application under section 30P is regarded as an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information. The Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit,

[4] Bundle p448, para 6.7.

provided that it determines substantially the same "*complaint*" as the one determined by the Adjudicator.[5]

19.2 Secondly, whilst the minutes themselves were not furnished to the Adjudicator, Le Grellier referred to what was discussed at the relevant meetings over the period November 2006 to February 2008 in her response to the Adjudicator on 1 May 2013.[6] Notwithstanding her reference to these meetings, at no stage did the Adjudicator ever request copies of the minutes. Nor did Dell or any of the other complainants. That was why the minutes were never put before the Adjudicator.

19.3 Having already referred to what was discussed at the relevant meetings in Le Grellier's response to the Adjudicator, the minutes of those very meetings thus do not constitute new evidence.

19.4 Thirdly, to the extent that this honourable Court may nevertheless regard the minutes as new evidence and that the applicants are required to apply for leave to place them before this Court, the applicants have done so in their replying affidavit to Dell's answering affidavit.[7] There can be no prejudice to Dell since it has had an opportunity to consider the minutes, and after having done so, does not dispute what is recorded therein.

20. Before addressing each of the issues below, regard must be had to the approach to be adopted in proceedings under section 30P of the PFA, as held by Brand JA in Meyer v Iscor Pension Fund:[8]

[5] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para 8.
[6] Bundle p311.
[7] Bundle p587, para 7.4.
[8] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para 8.

> "*Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634E-635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side who is formally the applicant to set the adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in Plascon-Evans, the matter must therefore, in essence, be decided on the version presented by the other side unless that version can, in the words of Corbett JA, be described as 'so far-fetched and clearly untenable that the court is justified in rejecting [it] merely on the papers.*"

21. Moreover, not only has Dell accepted the correctness of what is contained in the various minutes attached to the applicants' founding affidavit, it has elected not to deal with any of the allegations contained under the heading "*Factual Matrix*" in paragraphs 46 to 104 of the applicants' founding affidavit. For the purposes of this application, this honourable Court can therefore accept all of these allegations as correct.[9]

E. THE MALADMINISTRATION

E.1 The trustees' statutory duties

22. Sections 7C and 7D of the PFA provide as follows:

> "***7C. Object of board.***

[9] Ebrahim v Georgoulas 1992 (2) SA 151 (B) at 153D; United Methodist Church of South Africa v Sokufundumala 1989 (4) SA 1055 (O) at 1059A; Moosa v Knox 1949 (3) SA 327 (N) at 331.

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

(2) In pursuing its object the board shall—

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

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

(c) avoid conflicts of interest;

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

(e) act independently;[10]

(f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act;[11] *and*

(g) comply with any other prescribed requirements.[12]

7D. Duties of board

(1) The duties of the board shall be to-

[10] Section 7C(2)(e) was added to the PFA after the events in question by section 9 of Act 45 of 2013.
[11] Section 7C(2)(f) was added to the PFA after the events in question by section 9 of Act 45 of 2013.
[12] Section 7C(2)(g) was added to the PFA after the events in question by section 9 of Act 45 of 2013.

(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 and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed;[13]

(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;[14]

(g) comply with any other prescribed requirments.[15]

(2)(a) The board may, in writing and in accordance with a system of delegation set out in the rules, delegate any of its functions under this

[13] Section 7D(1)(c) was added to the PFA after the events in question by section 10(a) of Act 45 of 2013.
[14] Section 7D(1)(f) was added to the PFA after some of the events in question by section 4 of Act 11 of 2007.
[15] Section 7D(1)(g) was added to the PFA after the events in question by section 10(b) of Act 45 of 2013.

Act to a person or group of persons, or a committee of the board, subject to conditions that the board must determine.[16]

(b) The board is not divested or relieved of a function delegated under paragraph (a) and may withdraw the delegation at any time."

23. Significantly, section 7C(1) does not state that the duty of the board of a fund is to *manage* the fund, only that the board must "*direct, control and oversee the operations of the fund*". In the circumstances, while members of the board may perform executive functions in relation to the fund, the principal role of the board is equivalent to the role performed by the board of directors of a company; that is to determine strategies rather than personally to take all steps required for their implementation and to exercise oversight over the works done by employees and agents of the fund on its behalf.[17]

24. In paragraph 35 of circular PF130 the registrar states that:

"*The primary function of the board in relation to the business of a fund is to ensure that it (the board) exercises a rigorous oversight function. There should be a clear identification and assignment of operational responsibilities, either to persons with appropriate skills employed by the fund (where the fund is privately-administered), or by way of a written agreement to a licensed administrator or long term insurer (where the fund is underwritten).*"

25. It would be impossible for the board of a retirement fund to take every decision and to perform every act that is required to be taken for its management.[18] For this reason, most, if not all, boards elect to delegate their powers and duties to third

[16] Section 7D(2) was added to the PFA after the events in question by section 10(c) of Act 45 of 2013.
[17] Hunter *et al* "*The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives and circulars*" (2013) pp 154-155.
[18] Kaplan & Another NNO v Professional & Executive Retirement Fund & Others 1998 (4) SA 1234 (W).

parties, including fund administrators. There is nothing unlawful in this provided that:[19]

25.1 the rules of the fund expressly or impliedly permit such delegation;[20]

25.2 the transfer of responsibilities to the delagee does not amount to the board's abdication of those responsibilities;[21]

25.3 the power which is sought to be delegated is not a power to exercise a general discretion which the law vests in the board or which it can reasonably exercise itself;[22] and

25.4 the board monitors and supervises the conduct of the delagee of its functions and the fulfilment of its duties in terms of the delegated authority.[23]

26. Insofar as the IF Umbrella Pension Fund is concerned, Rule 6.8.13[24] of the Rules provides as follows:

> "*The TRUSTEES will be entitled, in their absolute discretion, to make any arrangements for the administration of the FUND and in this regard must appoint the ADMINISTRATOR. The TRUSTEES must ensure that the ADMINISTRATOR is registered in terms of section 13B of the ACT and must*

[19] Hunter *et al* "*The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives and circulars*" (2013) pp 158-159.
[20] Kaplan & Another NNO v Professional & Executive Retirement Fund & Others 1998 (4) SA 1234 (W) at 1239C-G.
[21] Cameron *et al* "*Honore's Law of Trusts*" (5th ed) p326.
[22] Cameron *et al* "*Honore's Law of Trusts*" (5th ed) p327.
[23] Cameron *et al* "*Honore's Law of Trusts*" (5th ed) p327.
[24] Bundle p129.

enter into an administration agreement which complies with Board Notice 101 of 1995 issued in terms of section 13B of the ACT." (underlining added)

27. This Rule thus imposes three obligations on the trustees.

27.1 First, they "*must*" appoint the administrator. They have no discretion.

27.2 Second, the trustees must ensure that the administrator is registered in terms of section 13B of the Act.

27.3 Third, the trustees must enter into an administration agreement with the administrator which complies with Board Notice 101 of 1995[25] issued in terms of section 13B.

28. The applicants were not responsible for the appointment of Dynamique, which was appointed on 1 December 2005 by the former trustees, prior to any of the applicants' appointments as trustees. The first obligation imposed by Rule 6.8.13 had therefore been complied with prior to the applicants' appointments.

29. Furthermore, administration agreements had been entered into with Dynamique,[26] and there is no suggestion that any of those administration agreements failed to comply with section 13B of the PFA. The second and third obligations imposed by Rule 6.8.13 were therefore also complied with.

[25] Which was later replaced by Board Notice 24 of 2002, published on 1 March 2002.
[26] An example of which appears at p891 of the bundle in respect of the IF Umbrella Provident Fund.

30. Similarly, Rule 14.1[27] of the IF Umbrella Provident Fund provides that "*The FUND shall be administered by the ADMINISTRATOR appointed by, and acting on the instructions of the TRUSTEES*" (underlining added). The trustees had no discretion in this regard.

31. Out of the applicants, only Botha and Le Grellier were trustees during Dynamique's administration of the IF Funds (Lepar and Smith had been appointed as trustees after Dynamique's administration had been terminated with effect from 1 February 2008).

E.2 The pre-existing issues

32. From the time that Botha and Le Grellier were appointed as trustees of the IF Funds (i.e. 13 March 2006 and 22 November 2006 respectively) until the appointment of Deloitte to do the rebuild exercise on 1 July 2010, there were pre-existing and ongoing issues relating to the financials, the records of the IF Funds and the administration reports prepared by Dynamique.

33. This is evident from:

33.1 the minutes of the trustees' meeting held on 27 September 2006, in which it was recorded that a concern was raised with the administration reports and in particular the large number of outstanding claims and the lack of membership statistics. It was also brought to the trustees' attention that the financials had not yet been submitted;[28]

[27] Bundle p186.
[28] Bundle p203.

33.2 the minutes of the trustees' meeting held on 22 November 2006,[29] which recorded that:

33.2.1 the audit for the IF Funds was still underway and there was a concern that the auditor was taking too long;

33.2.2 the IF Funds were currently enjoying the blanket extension which applied to the 2005/2006 audit period.

33.3 the minutes of the trustees meeting held on 22 March 2007,[30] which recorded that:

33.3.1 the IF Umbrella Pension Fund's queries had been resolved by Dynamique and the documents were ready to be sent to the auditors, but the IF Umbrella Provident Fund was not yet ready and it was expected that its documentation would be ready shortly;

33.3.2 the trustees expressed dissatisfaction about the way the administration reports were presented, both in terms of their content (there was missing information) and in terms of their format;

33.3.3 the trustees requested that the administration reports include contributions paid late and the date invested, bank balances to be made available for all the funds, exception reporting wherever

[29] Bundle p207.
[30] Bundle p210.

possible, and that in future the head of administration should be available to answer queries that the trustees may have regarding the administration reports;

33.4 a complaint received on 5 July 2007 by an intermediary, Mr Anthony Cohen, relating to the late allocation of monies in the IF Funds;[31]

33.5 the minutes of the trustees' meeting held on 5 July 2007,[32] in which it was recorded that the trustees complained that the administration was not where it should be;

33.6 the minutes of the trustees' meeting held on 21 November 2007,[33] which recorded that:

33.6.1 there were problems with the IF Funds pertaining to unreconciled items;

33.6.2 the trustees expressed their concerns at the risks that the IF Funds were exposed to with these unreconciled items;

33.6.3 Botha advised that for this issue to be resolved a forensic auditor may need to be appointed;

33.6.4 the trustees instructed Kamionsky to get the financials completed as a matter of urgency;

[31] Para 63, p29.
[32] Bundle p214.
[33] Bundle p215.

33.6.5 Botha recorded that the administration reports were not of the standard required by the trustees, and the trustees insisted that Dynamique raise the standard and quality of the reports for future meetings;

33.7 the minutes of the trustees' meeting held on 9 July 2008,[34] which recorded that:

33.7.1 concerns were raised regarding the poor administration and management of the IF Funds by Dynamique;

33.7.2 there were serious problems with the IF Funds and stringent measures had to be put in place to remedy the situation;

33.7.3 an administration committee was established to monitor the administration;

33.7.4 concerns were raised on the mismatches on investments;

33.8 the report by the IF Funds' auditors, VVR & Company, dated 1 August 2008, recording the following:[35]

"*2. Accounting and administrative issue*

2.1 Fraud Risk

Observation

[34] Bundle p220.
[35] Bundle p683.

The following key areas have been identified as high risk fraud areas during the course of the audit:

ECONOMIC AND REGULATORY ENVIRONMENT

- *Management does not monitor significant controls adequately*
- *Management fails to correct known material weaknesses in internal control on a timely basis*
- *Management continues to employ ineffective accounting, information technology or internal auditing staff*
- *Poor corporate governance practices*

LACK OF CONTROLS AND DOCUMENTARY EVIDENCE

- *Poor record keeping*
- *Poor management supervision and monitoring*
- *Poor recruiting procedures for sensitive positions*
- *Poor documentation*
- *Audit scope limitation*
- *Unusual documentary evidence*
- *Incomplete or inadequate records*
- *Poor response to confirmation requests or significant differences*
- *Poor audit preparation*"

33.9 Aon's letter to the Financial Services Board dated 6 August 2010,[36] in which Aon advised that it had been appointed as the administrator of the IF Funds from 1 February 2008 (after replacing Dynamique) and that:

33.9.1 issues were identified at an early stage and as time passed, Aon identified more and more concerns with the integrity of the data and historical administration processes;

33.9.2 the point had been reached where, for a significant number of payments and for the production of annual member benefit statements etc, a comprehensive review of members' electronic records against payment receipts and actual investments, needed to be undertaken;

33.9.3 this level of data interrogation had forced the trustees to consider whether the IF Funds' assets and liabilities were correctly reflected at a member, participating employer and fund level. The trustees therefore decided to appoint Deloitte to reconstruct each participating employers' records at a member level to ensure that the assets were correctly reflected and that no member was being disadvantaged;

33.9.4 the project was very extensive with 160 months of administrative records and transactions to be reconstructed;

[36] Bundle p253.

33.9.5 as a result of concerns regarding the data integrity, the IF Funds were unable to produce annual financial statements from 2007 to 2008.

34. Although Kamionsky contends that there was nothing wrong with the Funds' records and that the rebuild exercise was unnecessary (which contention is opportunistically and contradictorily endorsed by Dell and addressed below), it is submitted that in these circumstances, there can be little doubt that it was necessary to rebuild the IF Funds' records. Indeed, in its answering affidavit Dell states that:

34.1 the record-keeping of the IF Funds from their establishment in January 2004 "*to at least the end of their 2008 financial years was grossly deficient*";[37] and

34.2 "*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 year*".[38]

E.3 Oversight by the applicants

35. During this period (13 March 2006 – 31 January 2008 in respect of Botha, and 22 November 2006 – 31 January 2008 in respect of Le Grellier), Botha and Le Grellier exercised oversight over Dynamique's administration of the IF Funds and monitored and supervised its conduct.

[37] Bundle p450, para 9.
[38] Bundle p459, para 30.3.

36. This is evident from the following.

36.1 The minutes of the trustees' meeting dated 27 September 2006[39] record that: a concern was raised with regards to the large number of outstanding claims, to which Mr Brookes of the administrator assured Botha that the backlog had largely been cleared and that an updated report would show relatively few outstanding claims; Botha raised a concern with regard to the lack of membership statistics and requested from the administrator that in future the administration report should reflect the figures i.e. membership as at the beginning of the period, new entrants, withdrawals, deaths, and closing memberships.

36.2 It was brought to Botha's attention that the financials had not yet been submitted and an extension was originally granted and followed by a blanket extension which was granted to all schemes.

36.3 It is important to note that already at that early stage, the issue pertaining to the lack of financials was thus something which Botha (and later Le Grellier) had inherited when he was appointed as a trustee and did not arise or result from his (or Le Grellier's) term of office.

36.4 The minutes of the trustees meeting dated 22 November 2006[40] record that: Botha and Le Grellier were assured that the audits for the IF Funds were underway, that they were currently enjoying the blanket extension which applied to the 2005/2006 audit period and that the administrator would ensure that the audits were completed as soon as possible; issues

[39] Bundle p205.
[40] Bundle p207.

were raised in respect of the administration reports and Dynamique's head of administration (Ms Busisiwe Mfusi) was called into the meeting and assured Botha and Le Grellier that "*Dynamique SA were implementing a Workflow system in 2007 which would allow for more comprehensive and accurate reporting on the claims paid and the outstanding claims"*.

36.5 Botha and Le Grellier concede that with the benefit of hindsight, it is apparent that the industry's blanket extension and the consequent lateness of many financial statements enabled the erstwhile trustees of the Funds and/or the administrators (Integrated and/or Dynamique, Botha and Le Grellier are unsure) to mask certain other administrative and/or accounting problems that were causing late financials.[41]

36.6 Botha and Le Grellier accepted Dynamique's promise that the financials would be completed as soon as possible and that the new workflow system that was to be implemented would result in better reporting.[42]

36.7 The minutes of the trustees' meeting dated 22 March 2007[43] record that: Botha and Le Grellier were assured that the queries relating to the IF Umbrella Pension Fund had been resolved by Dynamique and the documents were ready to be sent to the auditors, and that although the documents for the IF Umbrella Provident Fund were not yet ready, Dynamique was expecting it to be ready "*shortly*".

[41] Bundle p25, para 58.1.
[42] Bundle p26, paras 58.2 & 58.3.
[43] Bundle p210.

36.8 Botha and Le Grellier expressed their dissatisfaction about the way the administration reports were presented, both in terms of their content (there was missing information) and in terms of their format, and requested that the administration reports include contributions paid late and the date invested, bank balances to be made available for all the funds, and exception reporting wherever possible. They also requested that in future the head of administration should be available to answer queries that they may have regarding the administration reports.

36.9 Significantly, Botha and Le Grellier brought up a point regarding whether the trustees had the authority to change the administrator and noted that as the Rules stood at the time they did not, as the Rules specified the administrator to be Dynamique as opposed to any registered administrator appointed by the trustees. Botha and Le Grellier specifically noted their concern with not having the option available of changing administrators.

36.10 Although dissatisfied with this state of affairs, Botha and Le Grellier felt, at that stage, that they had no option but to trust what Dynamique had told them and that the auditors would resolve any issues.[44]

36.11 Botha and Le Grellier were, however, becoming concerned about Dynamique's poor performance and empty promises, which was why they raised their concern about the possibility of changing administrators. Although the minutes do not record this, Botha and Le Grellier recall a much more robust discussion taking place and that Le Grellier had to explain to Kamionsky in some detail about the separateness of the IF

[44] Bundle p28, para 60.1.

Funds from the administrator. Kamionsky seemed to be of the view that the administrator somehow "*owned*" the IF Funds as its product and that the trustees did not have the power to change those arrangements.[45]

36.12 Botha and Le Grellier were also concerned that the administration reporting remained weak and it seemed as if the persons doing the reporting had no idea of the norms and standards expected of administrators in the industry.[46]

36.13 On 24 May 2007, Le Grellier sent an email to Kamionsky advising him, *inter alia*, that:[47]

> *"Our primary duty is to the members of the fund (not the administrator) and as such, we have to act independently of the administrator. I know that this is difficult for you as you are wearing two hats – that it why it is absolutely imperative that myself and Renier know what is going on…"*

36.14 On 5 July 2007 a special meeting of the trustees was held. The purpose was to address a complaint received by an intermediary, Mr Anthony Cohen, relating to the late allocation of monies in the IF Funds.[48]

36.15 The minutes of that meeting record that:[49]

> "*[Kamionsky] gave the trustees background to the problems that Dynam-ique SA had recently had on the IF Funds. The staff member*

[45] Bundle p28, para 60.3.
[46] Bundle 28, para 61.
[47] Bundle p213.
[48] Bundle p29, para 63.
[49] Bundle p214.

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

[Kamionsky] assured the trustees that he was taking Anthony Cohen's complaints seriously and was making every effort to ensure a smooth administration service is provided to all Dynam-ique SA's clients. In this regard Dynam-ique SA had employed an additional 6 staff members over the last 2 months to beef up their administration, accounting and technical teams.

The trustees pointed out that after the last trustee meeting based on the quality of the information provided they did feel that the administration was not where it should be and that they thought it was a matter of time before they get a complaint from either the fund members or the intermediaries. The Trustees are therefore glad that the problems are being addressed."

36.16 Botha and Le Grellier took comfort from the fact that they were assured that Dynamique would employ six new staff members and from the fact that they were assured that corrective action was being taken.[50]

36.17 A further trustees' meeting was held in August 2007. Le Grellier recalls that at that point she believed that Dynamique required substantial guidance with the compliance and governance aspects of the IF Funds, but, despite this, she did not believe that it would be in the IF Funds' best interests if Dynamique was simply fired and replaced with another administrator, and thought that such a move would be premature. She also knew that such a

[50] Bundle p30, para 64.

drastic step would likely be a protracted and confrontational process, given the fact that the board was equally weighted between administrator employed trustees and external/independent trustees.[51]

36.18 The minutes of that meeting record that:[52]

> "*The PO and/or the administrator were not properly prepared to table complete information to the trustees. Information was tabled but the information had not been presented nicely and was difficult to follow and was incomplete…*
>
> *The Trustees insisted that in future trustee packs should be sen[t] to the Trustees a week before the meeting (seven days) to enable the Trustees to have enough time to look at the reports. It was further decided that the Dynam-ique SA Head of Administration should be at the meeting to present the reports to the Trustees. This would also help the Trustees to raise any concerns that they have in this regard.*"

36.19 At the last regular meeting of trustees with Dynamique as the administrator, the minutes record that:[53]

36.19.1 there were problems with the IF Funds pertaining to unreconciled items, with the problem being unreconciled items from the period that Integrated was the administrator;

36.19.2 the trustees expressed their concerns at the risks that the IF Funds were exposed to with these unreconciled items;

[51] Bundle p31, para 65.
[52] Bundle p822.
[53] Bundle p215.

36.19.3 Botha advised that for this issue to be resolved a forensic auditor may need to be appointed;

36.19.4 the trustees instructed Kamionsky to get the financials completed as a matter of urgency and Kamionsky promised to revert to the trustees within the next two weeks after the meeting with a firm audit plan and deadline;

36.19.5 Botha recorded that the administration reports were not of the standard required by the trustees, and the trustees insisted that Dynamique raise the standard and quality of the reports for future meetings.

36.20 Significantly:[54]

36.20.1 despite the previous promises and undertakings, there now seemed to be a shift in tack whereby Dynamique was, for the first time, blaming the previous administrator, Integrated, for all the accounting problems;

36.20.2 Botha and Le Grellier started realising that since Dynamique did not have the competence and/or desire to resolve the accounting issues, a forensic auditor may be needed to resolve the issues;

36.20.3 Kamionsky never reverted to the trustees within two weeks after the meeting (or at all) with a "*firm audit plan and deadline*" as

[54] Bundle p33 paras 67.1 - 67.4.

promised and instead, as subsequent events revealed, sold Dynamique's business to AON;

36.20.4 the administration reports were still of a poor quality and virtually useless to the trustees, despite Dynamique's previous promises and undertakings;

36.20.5 after this meeting, Botha and Le Grellier were extremely concerned about Dynamique's poor performance and even considered resigning as trustees if it "*did not get its act together*". Given the fact that at that stage they were unsure of the exact nature and extent of the accounting issues, they were of the view that the most reasonable way of dealing with the administration problems was to continue pressurising Dynamique to fix the problems, rather than to remove Dynamique, appoint a new administrator and pay a second time for the same job to be done;

36.20.6 as external or independent trustees, Botha and Le Grellier were in an inviduous position in that there was an equal number of administrator-appointed trustees, which limited their capacity to act.

36.21 Shortly after that meeting, on 6 December 2007, Le Grellier sent an email to Kamionsky, stating the following:[55]

[55] Bundle p218.

> *"It is around 2 weeks since our trustee meeting. We resolved that the administrator must come up with a plan to sort out the IF Financials. The plan should include target dates etc. Please could we be advised of that plan (we decided on a deadline of 2 weeks). It is absolutely imperative that we get things going on this issue. It is vital for the membership that the financials are finalized, whatever that takes in order to do it. As I indicated, if Dynamique are unable to do the necessary, I suggest you call in Russell Lace and Ludi Schulze of LSRC to assist you. As a trustee I am not happy with the situation at all and simply cannot allow it to continue. Kindly advise as a matter of extreme urgency."*

36.22 Kamionsky replied to that email on 11 December 2007 as follows:[56]

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

37. It is evident from the above, we submit, that Botha and Le Grellier exercised rigorous oversight over the works of Dynamique and monitored and supervised its conduct. They did not abdicate their responsibilities to Dynamique – to the contrary they were obliged in terms of the Funds' Rules to appoint Dynamique as the administrator.

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[56] Bundle p218.

38. The PFA does not provide for vicarious liability of trustees for the negligent conduct of an agent to whom the administration of a fund has been delegated.[57]

39. We submit that the test for liability of a trustee of a pension fund for the actions of the administrator ought, in these circumstances, to be akin to the test for liability of an employer for the acts of an independent contractor, namely, that the liability is personal, not vicarious. It is not a question of the liability of the administrator being passed to the trustees, but a question of the respective individual liability of each of them.[58]

40. The mere fact that Dynamique maladministered the IF Funds does not mean that the applicants are liable or that the steps taken by Botha and Le Grellier may be ignored. Ultimately, the enquiry ought to involve a value judgment.[59]

41. The important question, we submit, is whether the steps taken by Botha and Le Grellier were reasonable in the circumstances.

42. In this regard, Botha and Le Grellier were not responsible for the appointment of Dynamique (nor for that matter Integrated) but believed that it had the necessary ability, integrity and expertise to undertake the administration in a proper manner. Dynamique held itself out as an expert in pension and provident fund administration with the appropriate skills and expertise. Moreover, Dynamique came with the necessary credentials, being approved by the registrar of pension funds in terms of section 13B of the PFA to provide administration services as a professional fund administrator to pension and provident funds.

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[57] As opposed to a trustee of a trust, where such delegation does not relieve the trustee of the responsibility attaching to the office – African Guarantee & Indemnity Co Ltd v Thorpe 1932 NPD 559.
[58] Pienaar & Others v Brown & Others 2010 (6) SA 365 (SCA).
[59] Pienaar & Others v Brown & Others 2010 (6) SA 365 (SCA) at para 12.

43. Botha and Le Grellier had no reason to believe that Dynamique (or its alter ego, Kamionsky) would not perform the administration services in a professional or workmanlike manner and would conceal and mislead them as to the nature and extent of the administration issues.

44. Botha and Le Grellier could not attend to the administration themselves as they did not have the necessary skill and expertise to do so, nor was this required of them as external, independent trustees. It therefore cannot be said that they acted unreasonably.

45. Furthermore, there is no attempt by the complainants to particularise what steps Le Grellier and Botha should have taken and when. This is not surprising, we submit, because on the evidence contained in the applicants' founding papers, it is patently obvious that all reasonable measures were adopted by Le Grellier and Botha and any other steps would ultimately have given rise to the same outcome, namely a rebuild exercise from inception of the IF Funds.

46. Nothing more need be said insofar as Lepar and Smith are concerned as they were not trustees at the time of the maladministration.

E.4 The liability of co-trustees for breach of trust

47. The next question is whether Le Grellier and Botha ought to be held liable for Kamionsky's negligence by virtue of the fact that they were co-trustees over the period March/September 2006 to 31 January 2008. This is not something which formed part of the complaint before the Adjudicator, but we address it out of abundant caution because Dell and Kamionsky seem to suggest in their affidavits

that Le Grellier and Botha ought to be held liable for Kamionsky's negligence as a co-trustee.

48. From the outset, it must be borne in mind that Kamionsky has not been held to be negligent in his capacity as a trustee. His negligence stems from his actions as the controlling mind and representative of the administrator responsible for the maladministration, Dynamique. As such, the question of the liability of co-trustees for breach of trust does not arise in the present matter.

49. However, even if the question of the liability of co-trustees for breach of trust were relevant in the present matter, although it is trite that in exercising its powers the board acts as one,[60] this does not necessarily mean that board members are jointly and severally liable for compensation in respect of a loss caused to the fund or its members by a single board member.

50. In Gross v Pentz[61] it was held that the precise position with regard to the liability of a trustee for a breach of trust committed by one of them is "*not altogether clear*". The Court had to deal with a question of legal standing so it was unnecessary for it to resolve the issue of the liability of a trustee for the "*receipts, acts or defaults*" of a fellow trustee. The Court suggested *obiter* that a trustee who had been "*innocent of any wrongdoing or neglect*" would nevertheless be liable for a breach of trust committed by other trustees, although Corbett CJ added that a re-evaluation of our law could result in a relaxation of this rule.

[60] Zwane v Wiseman & Others [2005] 1 BPLR 92 (PFA) at 93; Adam & Others v Dada & Others 1912 NPD 495 at 503.
[61] 1996 (4) SA 617 (A) at 629 *et seq*.

51. Under English law:[62]

> "*A trustee is not answerable for the receipts, acts, or defaults of his co-trustees, but only for his own acts or defaults such as:*
>
> *(a) where he hands the trust property to his co-trustee without seeing to its proper application;*
>
> *(b) where he allows his co-trustee to receive the trust property without making due inquiry as to his dealing with it;*
>
> *(c) where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution and redress, or to prevent the meditated wrong…*"[63]

52. In Sackville West v Nourse[64] Solomon ACJ held that a trustee's liability:

> "*… depends on culpa, that is the failure to observe that degree of care which a reasonable man would have observed in the circumstances. And one of the circumstances to be considered by a trustee is that he is dealing not with his own money, but with that of the trust. Greater care and caution are required of him in the latter than in the former.*"

53. On this basis, an innocent trustee who is not guilty of negligence nor deliberate wrongdoing should not, we submit, be liable for a breach of trust by a co-trustee. This does not mean that a trustee would be able to escape liability by merely

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[62] The position in the United States of America is similar: Cameron *et al* "*Honore's Law of Trusts*" (5th ed) p376.

[63] The law of Scotland is, like ours, based on civil law and the adoption of the trust bears some resemblance to ours, and under Scottish law a trustee is not liable for the acts of his co-trustees unless he authorised them, or acquiesced in them, or negligently failed to interfere (Cameron *et al* "*Honore's Law of Trusts*" (5th ed) pp 378-379).

[64] 1925 AD 516 at 519-520.

establishing inactivity in the administration of the trust; there must be a satisfactory explanation for the inactivity.[65] As was said in Boyce NO v Bloem:[66]

> "*It is no excuse for a person who by virtue of his office is required to make inquiry, to allege ignorance and he who ought to know is just as much in culpa as he who knows, and he who neglects to know that which he ought to know is not to be excused…*"

54. Cameron *et al* conclude as follows:[67]

> "*The concept that a trustee is liable only for personal lack of due care or dishonesty, including a failure to take reasonable steps to monitor or be informed of the acts and omissions of other trustees, is consistent with the law as applied in almost all countries where trusts are recognised, as well as the principles of Aquilian liability*."

55. This must be contrasted with a board member who fails to act when made aware of harm intentionally or negligently being caused to the fund or its members by a fellow board member, who may be regarded as a joint wrongdoer and accordingly jointly and severally liable with the person with whom the principal fault lies. In this regard, in Howard v Herrigal[68] it was held that:

> "*… [E]ven in the absence of some positive steps by him in the carrying on of the company's business… [h]is supine attitude may, I suppose, even amount to concurrence in that conduct. Whether such inference could properly be drawn will depend on the facts and circumstances of each case.*"

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[65] Cameron *et al* "*Honore's Law of Trusts*" (5th ed) pp 376-377.
[66] 1960 (3) SA 855 (T) at 865G.
[67] Cameron *et al* "*Honore's Law of Trusts*" (5th ed) p382.
[68] 1991 (2) SA 660 (A) at 674H.

56. In the present case, and having regard to what is set above, we submit that it is clear that Botha and Le Grellier did not adopt a supine approach and acted with the necessary care and caution.

57. As already mentioned, they did not have the skills or expertise to administer the IF Funds and relied, as they were required to do in terms of the IF Funds' Rules, on Dynamique.

58. They therefore ought not to be held jointly and severally liable with Kamionsky for his negligence.

E.5 Section 7F of the PFA

59. In the alternative to the relief sought in prayers 1 and 2 of the amended notice of motion, the applicants seek an order that they be relieved from liability arising from the 3 July 2013 determination in terms of section 7F of the PFA.

60. Section 7F(1) reads as follows:

> *"(1) In any proceedings against a board member in terms of this Act, other than for wilful misconduct or wilful breach of trust, the court may relieve the board member from any liability, either wholly or partly, on terms that the court considers just, if it appears to the court that-*
>
> *(a) the board member has acted independently, honestly and reasonably; or*
>
> *(b) having regard to all the circumstances of the case, including those connected with the appointment of the board member, it would be fair to excuse the board member."*

61. Section 7F was inserted into the PFA by section 11 of the Financial Laws General Amendment Act,[69] which commenced on 28 February 2014.

62. As section 7F came into effect on a date that is subsequent to the conduct that was complained of before the Adjudicator, after the 3 July 2013 determination, and after the date on which this application was launched (13 August 2013), the question that arises is whether the section has any application in these proceedings.

63. We submit that it does for the following reasons:

63.1 firstly, section 7F finds application in *"proceedings against a board member"*. As this honourable Court can consider the matter afresh[70], this application constitutes "*proceedings*" as contemplated in section 7F. Accordingly, the issue falls to be decided on the law as its stands today, including section 7F;

63.2 secondly, even if section 7F had been in operation at the time when the complaints were lodged, and when the 3 July 2013 determination was made, the Adjudicator was not empowered to make any finding having regard to section 7F because only a Court can relieve a board member from liability. That the adjudicator is a creature of statute with no inherent jurisdiction is trite;[71]

63.3 thirdly, we submit that the presumption against retrospectivity does not apply to section 7F. In other words, it *does* apply with retrospective effect

[69] Act 45 of 2013.
[70] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para 8.
[71] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para 8.

in a sense that it is of application to conduct that occurred prior to the date of its enactment. Generally, legislation is not to be interpreted to extinguish existing rights and obligations unless the statute provides otherwise or its language shows such a meaning.[72] However, the presumption against retrospectivity is nothing more than an aid in interpreting the intention of the legislature. The conclusion that a statute was intended to operate with retrospective effect may be more readily arrived at in a case where vested rights would not be affected by a retrospective operation and also where the intention of the legislature was clearly to bestow a benefit or to effect even-handedness in the operation of the law.[73] In this regard, no vested rights of any parties are affected by the application of section 7F. Moreover, section 7F, which is similarly worded to section 77(9) of the Companies Act,[74] is a provision that is for the benefit of an "*innocent*" board member who is found liable through the harsh operation of the law relating to trustees of pension funds, and was, we submit, enacted to effect even-handedness in the operation of the law.

64. There is no suggestion, nor any evidence, that the applicants are guilty of wilful misconduct or wilful breach of trust. Furthermore, it is apparent from what we have set out above that they have acted independently, honestly and reasonably.

65. Having regard to all the circumstances of the case, including those connected with the appointment of the applicants as board members, we therefore submit that it would be fair to excuse them from liability for Dynamique and Kamionsky's maladministration.

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[72] Veldman v DPP, WLD 2007 (3) SA 210 (CC).
[73] Kruger v President Ins Co Ltd 1994 (2) SA 495 (D). Confirmed on appeal in Swanepoel v Jhb CC; President Ins Co Ltd v Kruger 1994 (3) SA 789 (A); See also Ex Parte Chritodolides 1959 (3) 838 (T).
[74] Act 71 of 2008.

F. WERE THE COSTS INCURRED FOR THE REBUILD A PROPER EXERCISE OF THE TRUSTEES' POWERS?

66. The powers of a fund and its board are limited by its rules. Any conduct not authorised by the rules will be *ultra vires* and unenforceable.

67. The Rules of the IF Umbrella Pension Fund provide as follows:

67.1 "*Expenses*" means the costs that cover administration services, consulting services, costs in respect of insured death benefits and insured disability benefits and any other costs that the trustees may regard as "*expenses*" from time to time;[75]

67.2 the trustees must take all reaonable steps to ensure that the interests of members are protected at all times and act with due care diligence and good faith;[76]

67.3 the trustees must: ensure that proper registers, books and records of the operations of the fund are kept; cause true and full accounts of the fund to be kept in accordance with general accounting practice, such accounts to be made up to the financial year end and fairly to present the state of affairs of the fund and its business and financial position and to be audited by the auditor;[77]

[75] Clause 2.6.15, p95.
[76] Clause 6.6.2, p124.
[77] Clause 6.7, p124.

67.4 the trustees have the power to amend the rules by a majority of votes provided that the amendment is not inconsistent with the provisions of the PFA or the Income Tax Act;[78]

67.5 the trustees will be entitled, in their absolute discretion, to appoint consultants and other service providers to assist the trustees in performing their duties and functions where they consider this necessary or prudent;[79]

67.6 the trustees will have the power to take, generally, such steps as are, in its discretion, conducive to the attainment of the objects of the fund;[80]

67.7 the trustees may delegate any of their powers and/or duties and/or responsibilities to another person unless the empowering instrument, on a proper construction thereof, does not permit such power to be delegated;[81]

67.8 the trustees shall, within a period of six months after the financial year end in question, prepare and submit such statements and reports as required by the PFA to the Registrar, provided that where prescribed in the PFA, such statements and reports must be duly audited and reported on by the auditor;[82]

67.9 the trustees must ensure that complete records are kept of all members and of matters essential to the efficient administration of the fund.[83]

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[78] Clause 6.8.12, p129; clause 7.5.1.2, p139.
[79] Clause 6.8.14, p129.
[80] Clause 6.8.16, p130.
[81] Clause 6.9.1, p130.
[82] Clause 6.13.7, p134.
[83] Clause 6.14.1, p134.

68. With effect from 1 July 2009, the Rules of the IF Umbrella Pension Fund were amended as follows:

68.1 to include a definition of "*ad hoc expenses*", meaning costs and expenses that are not necessarily payable monthly and are not necessarily capable of being predetermined and will include fees paid to service providers;[84]

68.2 Rule 4.6 was added, which provided, *inter alia*, that ad hoc expenses would be borne by the fund and will be deducted from the members' fund credits on such basis as may be determined by the trustees from time to time, and the fund would be entitled to make payments in respect of ad hoc expenses to service providers and other creditors.[85]

69. The Rules of the IF Umbrella Provident Fund provide as follows:

69.1 the administration expenses of the fund shall be paid by each employer, subject to the administration agreement entered into with the administrators. Any other general expenses in connection with or incidental to the management of the fund shall be met by the fund;[86]

69.2 the trustees shall cause full and true accounts of the fund to be kept, such accounts to be made up as at the end of each financial year to be audited by the auditor and then to be submitted to the Registrar;[87]

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[84] P149.
[85] P151.
[86] Clause 13.3, p185.
[87] Clause 13.4, p186.

69.3 the trustees may alter the rules at any time; provided that any change which has an impact on the operation of the fund shall be subject to the consent of the administrators.[88]

70. With effect from 1 July 2009, the Rules of the IF Umbrella Provident Fund were amended in the same respect as the IF Umbrella Pension Fund as set out above.[89]

71. From what is set out above, it is clear, we submit, that the Rules authorised the appointment of a service provider, such as Deloitte, to conduct the rebuild exercise so that the IF Funds' records, books and accounts could be compiled and rectified and so that financial statements could be prepared and signed off by the auditors. This is a view, co-incidentally, that has been endorsed by the new trustees of the IF Funds.

72. Moreover, once it is accepted that the rebuild exercise was necessary as a result of the maladministration (which, we submit, on the evidence, it must), it is self-evident that the decision to authorise the rebuild was a proper exercise of the applicants' powers as trustees.

73. This is corroborated by Deloitte's conclusion that:[90]

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

[88] Clause 15.1, p187.
[89] P195 *et seq*.
[90] P864.

74. The complaint that the applicants should not have undertaken a rebuild exercise or should not have attributed the costs of that exercise to the IF Funds' members, presupposes that the applicants were somehow responsible for Dynamique and Kamionsky's lack of proper administration. But, as we have already demonstrated above, the applicants could not have done anything more and accordingly acted reasonably in detecting the maladministration and taking steps to rectify it.

75. It is significant that Dell does not explain what steps the applicants as trustees should have taken to unearth the maladministration by Dynamique and Kamionsky and when they should have done so. This of course must be seen against the context of the dates of the applicants' appointments as trustees, their entitlement to rely on administration reports by the IF Funds' accredited administrators and the conveying of information at quarterly meetings of the board of trustees where issues such as governance were raised and addressed.

76. The approach adopted by Dell is divorced from any reality and is very much an armchair critic approach. It ignores, amongst other things, that:

76.1 the applicants were external trustees who had not appointed the IF Funds' administrators;

76.2 Le Grellier and Botha were consistently being reassured by Kamionsky that the administration of the IF Funds was in order and that any issues which were raised were being attended to;

76.3 a decision to terminate Dynamique's contract and to replace it could not have been taken overnight and would not in any event have resolved the underlying problems that subsequently surfaced.

77. In the circumstances, we submit that the decision to authorise the rebuild was a proper exercise of the applicants' powers as trustees.

H. THE PROFESSIONAL INDEMNITY INSURANCE ISSUE

78. Clause 6.17.2 of the IF Umbrella Pension Fund Rules provides that 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).

79. Similarly, clause 12.8.2 of the IF Umbrella Provident Fund Rules provides that the trustees shall ensure that the fund is insured against any loss resulting from the gross negligence, dishonesty or fraud of any of the trustees or of the principal officer.

80. Pursuant to these clauses, professional indemnity cover was held on behalf of the IF Funds. Dell contends that the cost of the rebuild exercise should have been met from this cover and that the applicants should be held personally liable because it subsequently transpired that the insurance premiums had not been paid with the result that the cover lapsed and the cost of the rebuild could not be recovered from the IF Funds' insurers.[91]

[91] AA para 22, p454 & AA para 23, p455.

81. The complaint relating to the insurance cover is misconceived for two reasons. The first is that it ignores the fact that until the rebuild exercise was done, there was in fact no claim and no loss suffered by the IF Funds. The second is that the policies of insurance in any event excluded liability relating to "*Any claim/loss arising in any way from the issues raised by the Auditors following their audit for the year ended 28 February 2006*".[92]

82. The first time that a potential claim was made against the IF Funds concerning the alleged negligence of the trustees and/or the administrators was on 8 December 2010 in Jonathan Mort Inc's letter dated 8 December 2010, writing on behalf of Chartered Employee Benefits. Over the period 1 August 2010 to 31 July 2011, policy number FGPC463908368 was operative in respect of the IF Umbrella Pension Fund and policy number FGPC463908365 was operative in respect of the IF Umbrella Provident Fund.[93]

83. The issues raised by the auditors related to the unreliability and material weaknesses in the IF Funds' records which, as we have set out above, stemmed from a time prior to the appointment of the applicants' as trustees, and which ultimately led to the rebuild exercise. This supports the contention that when Le Grellier and Botha were appointed as trustees in 2006 they inherited funds that had already been maladministered by their administrators (although unbeknown to them at the time). They subsequently took all reasonable steps to ensure compliance and thereafter the decision to undertake a rebuild exercise to rectify the IF Funds' records in the interests of the IF Funds and their members.[94]

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[92] RA para 13.1, p590.
[93] RA paras 13.2 & 13.3, pp590-591.
[94] RA 13.4, p591.

84. Aon were tasked with the responsibility to ensure that the premiums for the period 1 August 2010 to 31 July 2011 were paid. As trustees, the applicants were under the impression that this was being done. Aon, however, failed to do so. The IF Funds made full disclosure of this issue to the Adjudicator, in the annual financial reports and confirmed the lapsing of cover in the reports to members. The cover was subsequently reinstated retroactively, however, the specific exclusion relating to any claim or loss arising from the issues raised by the auditors following their audit for the year ended 28 February 2006 remained.[95]

85. The result is that even if the premiums had been paid, any claims which the IF Funds may have made to the insurers relating to the rebuild exercise would have been rejected anyway. The costs of the rebuild exercise could accordingly not have been met from the insurance cover held by the IF Funds.[96] Significantly, the Adjudicator made no adverse finding against the applicants in respect of the insurance issue.

86. Moreover, the insurers have advised that they would have elected to void the policy due to Kamionsky's misrepresentation and non-disclosure. This is evident from the letter addressed by the insurer's attorneys to Kamionsky dated 9 September 2011 in which the following is stated:[97]

> "*17. In the proposal forms submitted on behalf of the Funds in respect of the policies of insurance with effect from 1 August 2009, it was represented that:*

[95] RA para 13.5, p591.
[96] RA para 13.6, p592. This is confirmed in paragraph 15 of the IF Funds' affidavit, p419.
[97] RA para 34.4, p869.

17.1 the Funds had not suffered any loss caused by dishonesty or negligence during the preceding five years;

17.2 after specific investigation, the Funds were not aware of any circumstances that could reasonably be expected to give rise to a claim in terms of the insurance being applied for.

18. At all material times prior to the inception of the policy commencing 1 August 2009 you bore knowledge of material facts relating to errors or omissions, or alleged errors or omissions, with regard to the administration of the Funds by Dynam-ique Consultants.

19. Such information was material to the assessment of the risk and should have been disclosed to the insurers prior to the inception of the policies commencing with effect from 1 August 2009.

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

87. In the circumstances, the contention that the applicants ought to be held personally liable for the costs of the rebuild exercise by virtue of the fact that the insurance policies had lapsed is without merit and falls to be rejected.

I. KAMIONSKY

88. Kamionsky was not a complainant before the Adjudicator and no relief was granted against him. His intervention in these proceedings is rather curious and his attempts

to implicate the applicants and to hold them responsible for the rebuild exercise must, we submit, be seen with great circumspection. There are a number of reasons for this.

88.1 Firstly, Kamionsky's starting premise is that there was nothing wrong with the IF Funds' records and as such there was no need for the rebuild exercise.

88.2 Secondly, and despite this opening premise, Kamionsky concluded a settlement agreement with the IF Funds in which he paid a sum of R1 million as a consequence of the complaint that the IF Funds had been maladministered.

88.3 Thirdly, Kamionsky complains that the applicants have maladministered the IF Funds by agreeing to do a rebuild exercise in circumstances where such an exercise was not warranted – because, according to Kamionsky, the membership data was not unreliable. This "*complaint*" is not substantially the same as the complaint that was before the Adjudicator and determined by her. The Court's jurisdiction is limited to a consideration of "*the merits of the complaint in question*". It must thus determine substantially the same "*complaint*" as the one determined by the Adjudicator.[98] This Court therefore does not have jurisdiction to determine Kamionsky's newly introduced "*complaint*".

88.4 Fourthly, Kamionsky's contention that there was nothing wrong with the Funds' records and as such there was no need for the rebuild exercise can

[98] Meyer v Iscor Pension Fund 2003 (2) SA 715 (SCA) at para 8.

be rejected out of hand as it is inconsistent with the objective facts, as we will demonstrate below. Moreover, Kamionsky fails to introduce any evidence in support of his bald conclusion, which is merely self-serving.

89. During the course of Dynamique's administration of the Funds, and unbeknown to the applicants at the relevant time:

89.1 reinvestments (i.e. interest and dividends) were not credited to members' accounts;

89.2 redemptions were paid from monies owing to other members;

89.3 switches between investments were not correctly recorded in members' accounts;

89.4 inaccurate deposits of monies were deposited in the bank accounts of other funds which Dynamique also administered;

89.5 monies were invested in, or disinvested from, incorrect investment portfolios;

89.6 Dynamique failed to indentify and or rectify these errors; and

89.7 as a result of this monthly and annual audits were not performed.

90. After the IF Funds' subsequent administrator, Aon, was unable to rectify the problems caused by Dynamique, the trustees at the time (including the applicants)

then resolved that the most prudent course to adopt was to appoint Deloitte to undertake a data rebuilding exercise.

91. Although in its supplemented complaint Dell opportunistically (and in contradiction to its initial complaint) sought to align itself with Kamionsky's contention that there was no maladministration to justify the cost of the rebuild:

91.1 in paragraph 30.3 of its answering affidavit filed in these proceedings it states that "*The reality is that there was woefully deficient record-keeping by the Funds from their inception until at least the end of the 2008 financial years*"; and

91.2 in paragraph 30.4.2 Dell quotes correpondence from Aon's chief executive officer dated 8 October 2012 in which he states the following:

> "*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.*"

92. These sentiments were supported by the Deloitte report.[99]

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

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

[99] Bundle p899.

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

- *The full analysis (re-build) of the umbrella fund accounts at member level for the umbrella funds from inception to 31 January 2008:*

  …

- *The scope covered the Dynami-que Pension Fund, Dynami-que Provident Fund, IF Pension Fund and the IF Provident Fund and included all the participating employers (approximately 280 in total) and their member accounts (comprising approximately 11 500 members)…*

- *Review and analysis of the relevant information relating to the umbrella funds contained in the documentation and electronic data provided by Aon.*

- *Cash book reconciliations for each of the 4 umbrella funds to bank statements provided.*

Delivery at the conclusion of the project:

- *A schedule of members with closing values as at the year-end date*

- *Details of contributions, investments, deductions, voluntary contributions, and any Section 14 transfers*

- *A schedule of investments which are found to be not in accordance with funds'/members' mandates and the proposed corrective action*

- *Cashbook reconciliations for each of the 4 umbrella funds*"

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

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

…

… Our process included the following:

…

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

92.3 Deloitte had to take the following additional steps (at the cost of the Funds) in order to try and source as much supporting data as possible, as a result of Dynamique's maladministration:

92.3.1 Aon was requested to search and provide as much of the missing data as possible;

92.3.2 Aon sent out communications to all brokers requesting that they provide as much data to Deloitte as they may for purposes of the exercise;

92.3.3 where brokers were forthcoming with information (which were only a few), such data was further analysed and incorporated into the full data set;

92.3.4 a full set of bank statements for the period to 31 January 2008 for all four bank accounts was requested directly from the bank;

92.3.5 most of the missing fund rules were obtained from two sources, namely the FSB and from the auditor;

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

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

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

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

- *Given the known issues with Everest, no reliance can be placed on its data. Rather Everest is to be used as a supporting tool and in instances where it was appropriate, the output can be compared to Everest*

- *The re-build is based on source documentation/information as far as possible;*

- *Cash is King principle. Given that much of the source data for transactions was missing, it was decided that any decisions on how to treat a transaction, would be based on the evidence of a cash transaction, and this would take precedent over any transactions recorded in Everest which could not be supported*"

92.6 Under the heading "*Specific Reconstruction Issues / Findings"* the following is significant:

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

- *Payments made into the incorrect bank accounts from participating employers*
- *Transactions allocated to the incorrect umbrella fund*
- *Investments in Everest and in the market allocated to incorrect participating employers*
- *Missing investments in the market for various months' contributions*
- *Lack of member information from participating employers*
- *Timing of investments in the market not in line with Fund's service level agreement*
- *Risk rates not consistently applied*
- *Assets allocated to the incorrect products in the market*
- *Switches not done in accordance with the switch instructions*
- *Fund rules not always loaded correctly on Everest (exclusive versus inclusive, incorrect contribution and expense rates)*

- *Duplicate/missing members recorded on Everest*

- *Everest reports for the same period and funds show different member details*

- *Missing member investment elections in Everest for some months*

- *Pooled asset accounts for IF pension and provident funds*

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

93. Furthermore, the IF Funds' new trustees endorsed Deloitte's findings and sent the following communication to intermediaries, participating employers and members:[100]

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

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

94. Seen in the light of this, Kamionsky's version, even on paper, that there was nothing wrong with the IF Funds' data and that the applicants were negligent in authorising the rebuild exercise, can be rejected as being far-fetched and clearly untenable. On the contrary, it is, with respect, clear that the rebuild was the only responsible thing to have done once the extent of the problems came to light, which was only after Dynamique and Kamionsky had left.

[100] Bundle p927.

95. When the extent of Dynamique's neglect was discovered, in January 2011, the IF Funds (together with Dynamique Funds) instituted action against Kamionsky for payment of the sum of R18 162 480.00 (i.e. the amount of the rebuild exercise) as a result of, *inter alia*, the breach of Kamionsky's fiduciary duties owed to the Funds and his failure to prevent or rectify Dynamique's maladministration and poor record keeping. The action was eventually settled on the basis of Kamionsky making payment of R1 million to the Funds. If Kamionsky and Dynamique had acted with due diligence and complied with their obligations, as Kamionsky alleges, it begs the question as to why they made payment of R1 million. Kamionsky fails to explain this in his answering affidavit.

96. The Adjudicator found in paragraph 5.26 of her determination that the R1 million paid by Kamionsky and Dynamique in this regard was negligible, having regard to the amount of the financial loss suffered by the IF Funds, the Dynamique Funds and their members as a result of Dynamique's maladministration and the subsequent rebuild exercise. The Adjudicator found further that a reasonable settlement should have taken into account the financial prejudice to the IF Funds, the Dynamique Funds, and their members.

97. Kamionsky had hoped that this settlement with the IF Funds and the Dynamique Funds and the Adjudicator's determination would be the end of the matter insofar as he and Dynamique were concerned. That, we submit, is the real reason why he has sought to intervene in this application and why he has filed an answering affidavit and further affidavit (without having obtained leave to do so), which have not contributed anything to the determination of the issues at hand and have merely caused delay and unnecessary additional costs, in the hope that a final order can be made against the applicants.

98. Kamionsky's conduct is vexatious and he should therefore be ordered to pay the costs of the application, jointly and severally with Dell.

J. CONCLUSION

99. In the circumstances, the 1st to 3rd applicants seek an order in the following terms:

99.1 the 3 July 2013 determination be set aside in terms of section 30P of the PFA;

99.2 the Adjudicator's determination be substituted with an order dismissing the complaint;

99.3 alternatively to paragraphs 99.1 and 99.2 above, the applicants be relieved from liability arising from the 3 July 2013 determination in terms of section 7F of the PFA;

99.4 Dell and Kamionsky be ordered to pay the costs of this application, including the costs of two counsel, jointly and severally, the one paying the other to be absolved.

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22 AUGUST 2016