

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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 HEADS OF ARGUMENT

A. Introduction

1. At the outset I would like to request the Honourable Court's indulgence at me submitting these Heads of Argument myself. I am not a lawyer but unfortunately I am not in a position to afford lawyers and advocates. I therefore apologise in advance if these Heads of Argument do not follow all the usual conventions or do not contain the legalese that one would normally expect in such Heads of Argument. This should however not detract from the fact that what I have to say is material and important and I kindly ask the Honourable Court to take into consideration what is set out herein.

2. I am the only Respondent with first-hand knowledge of the underlying events¹ to which the Pension Funds Adjudicator determination, now being appealed by the Applicants, relates. So damaging is the information in my possession to the Applicants that the Applicants tried to keep me out of this application by excluding me as a Respondent even though I am a party to the Adjudicator complaint they are appealing. I then had to bring an intervention application² to ensure that the information in my possession is placed in front of this Honourable Court, so important this information is. The effort that the Applicants went to to keep this information away from the Honourable Court should be a clear warning bell to the Honourable Court to pay particular attention to what I have to say.

¹ Bundle p738 para 6 et seq

² Bundle p739 para 8

3. In *Elgin Fireclays Ltd. V Webb*³ at p 749 Watermeyer C.J. said: "*It is true that if a party fails to place the evidence of a witness, who is available and able to elucidate the facts, before the trial court, this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him*".
4. My original intention in entering this matter, as clearly explained in my Affidavits⁴, was always just to submit relevant information before the Honourable Court and not to oppose this application.
5. However, at the 11th hour the Applicants then changed their Notice of Motion to include a request for a cost order against myself and this necessitated me opposing this application and filing these Heads of Argument.
6. Throughout these Heads of Argument my references to 'PFA' refer to the Pension Funds Adjudicator.
7. Throughout these Heads of Argument my references to 'Complaint' refer to the complaint⁵ that gave rise to the PFA determination⁶ that the Applicants are now appealing. The Applicants refer to this Complaint as the 'Dell Complaint' however it should be noted that Dell was just one of the participating employers who had brought this complaint against the Applicants on behalf of the approximately 11,000 members who lost money on the

³ *Elgin Fireclays Ltd. V Webb* 1947 (4) SA 744 (AD) at p 749

⁴ Bundle p738 para 4

⁵ Bundle p465 et seq

⁶ Bundle p293 et seq

Funds as a result of the actions of the Applicants. It is therefore more correct to refer to the members' Complaint as opposed to the Dell Complaint.

8. Throughout these Heads of Argument my references to 'Dynamique' refer to Dynam-ique SA Consultants and Actuaries (Pty) Ltd.

B. The request for a cost order against myself

9. If I had sued the Applicants forcing them to come to court to defend themselves then it would be understandable to request a cost order against me should I not be successful. However, in this case I was not even a party to the application⁷ at the time the Applicants brought their application and hence there is no merit whatsoever in requesting a cost order against me and this request should be dismissed outright.
10. The Applicants had a PFA determination⁸ that went against them and in view of this they made a voluntary decision to bring this application and hence the Applicants should be responsible for the costs of this application regardless of whether their application is successful or not.
11. In addition, in this application the Applicants have actually used the threat of cost orders against anyone who opposes their application⁹ as a scare tactic to

⁷ Bundle p739 para 8

⁸ Bundle p293 et seq

⁹ Bundle p3 para 3

dissuade the Complainants, and other parties, from opposing their application. This constitutes bullying and improper threats by the Applicants.

12. In the 4th Applicant's Heads of Argument he claims he incurred costs due to me submitting new complaints which do not form part of the Complaint and which lie outside of this Court's section 30P jurisdiction¹⁰. In this regard the 4th applicant provides no specifics of what he is referring to here. Regardless, this argument is without merit as all the information I have submitted most certainly does relate to this Complaint (I deal with this in more detail further on). In addition the 4th Applicant has not shown any of the information I have submitted in this Application to be untrue.
13. The 4th Applicant forgets that the only reason I had to intervene was that he, and the other Applicants, had not been forthright¹¹ with this Honourable Court and had withheld material information from this Honourable Court. One example of this is the 4th Applicant, and other Applicants, did not mention in their Founding Affidavit that they had not paid the insurance premium on the Fund's indemnity policies leading to the cover lapsing. It was myself who had to bring this to the attention of the Honourable Court.
14. The Applicants also try dismiss my evidence by accusing me of being vexatious¹² in their Heads of Argument. This is opportunistic and the Applicants provide no evidence to support this allegation. It is merely just

¹⁰ 4th Applicants Heads of Argument p16 para 37

¹¹ Bundle p743 para 22 and p779 para 75

¹² 1st – 3rd Applicants Heads of Argument p59 para 98

another attempt by the Applicants to keep the information I am in possession of away from the Honourable Court. The Applicants know that I know too much and hence they have consistently tried to keep my information away from this Honourable Court. Given the Applicants have no basis for attacking my information based on merit I guess they have no alternative but to resort to ridiculous claims like I am being vexatious.

15. In conclusion there is absolutely no merit in the Applicants' requests for a cost order against myself and these requests should be dismissed outright.

C. The issues to be determined for this application

16. The Applicants are trying to limit this matter to just the consideration of whether they can be held liable for alleged maladministration by the administrator¹³, and in so doing trying to keep the Honourable Court away from scrutinising the actions they took in response to the alleged maladministration.
17. It is no surprise the Applicants are trying to limit this application in this way as their only chance of escaping liability is if the Honourable Court ignores all their actions in relation to their spending of R20m of members' money redoing everything and just focuses on the issue of whether a trustee can be held liable for maladministration.

¹³ 1st – 3rd Applicants Heads of Argument p9 para 17.1

18. However if one looks at the rationale for the members bringing this PFA Complaint it was because they were unhappy that the Applicants had spent R20m of their money rebuilding the fund and hence any aspect of negligence or mismanagement by the Applicants that contributed to this R20m is most certainly part of this Complaint.

19. This contention is supported by what is stated in the Complaint in the section "*THE NATURE OF THE COMPLAINT*" in clause 6¹⁴ which states as follows:
"There are two legs to the complaint. The first leg is that ... the decision(s) taken by the Respondents ... was an improper exercise of their powers ... The second leg of the complaint is that the Complainants have sustained or may sustain prejudice in consequence of the maladministration" Hence clearly the maladministration was only one leg of the complaint whilst the other leg was that the members were not happy with the decision(s) taken by the Applicants in relation to the spending of R20m of their money.

20. In addition, although the specifics contained in the Complaint focus mainly on maladministration the Complaint needs to be seen in context of what the members (or their representatives) knew at the time they lodged the Complaint, which knowledge was based entirely on the communications, or mis-communications, sent out by the Applicants themselves.

21. The Applicants had only told the members what they wanted them to hear and had refused to answer the questions put to them by the members thus

¹⁴ Bundle p467 para 6

keeping members in the dark as to what was really going on, as evidenced by clause 14¹⁵ of the Complaint in which the following is stated *“As a result of dissatisfaction with the level of communication by the First Respondents and their failure to adequately answer queries made by or on behalf of members of the IF Funds regarding the cost of the rebuild exercise and the decisions taken by the trustees in relation thereto, ...”*.

22. The Applicants therefore cannot now use the members/Complainants’ lack of knowledge, against the members, to limit the scope of the Complaint thereby limiting the Applicants’ liability. Once again it is blatantly clear that the members were unhappy that the Applicants had spent R20m of their money on rebuilding the records and hence everything related to this expenditure is part of this Complaint. Hence the suggestions by the Applicants that evidence showing that they were negligent in relation to things like their failure to consider more cost effective options or in relation to evidence showing they did not pay the insurance premiums is not part of this complaint but are part of some new complaint can be dismissed outright.
23. Further, the PFA accepted, and took into consideration, all the submissions made by myself in relation to the Complaint¹⁶ and the Applicants cannot now exclude some of these submissions. In fact, in terms of the process to be adopted for this appeal as set out by the Applicants themselves¹⁷ there is

¹⁵ Bundle p468 para 14

¹⁶ Bundle p299 para 4.7

¹⁷ 1st – 3rd Applicants Heads of Argument p9 para 19.1

reference to "*with or without additional evidence or information*" but there is no provision for evidence or information to be excluded.

24. It also needs to be borne in mind that a PFA complaint is not as restrictive as Particulars of Claim in a civil matter as PFA complaints are generally drafted by laymen and hence the contents of PFA complaints do not restrict a hearing of that complaint in the same way as Particulars of Claim would restrict a civil matter. In other words the PFA has far more discretion in terms of what can be included in a PFA Complaint compared to the discretion a Court has in a civil matter.

25. Let me illustrate the above points with an example. Let us say hypothetically that there was maladministration that did justify the applicants taking action to fix problems however let us also say that the problems could have been fixed for R2m as opposed to the R20m that the Applicants spent fixing the problems. Now the Applicants seem to be arguing that the Honourable Court should only look at whether the Applicants can be held liable for the maladministration but they would like the court not to look at the fact that they spent R20m of the member's money when the problem could have been fixed for R2m. Clearly this is absurd and it would never have been the intention of the members to exclude this element of liability from the Complaint. In addition such negligence by the Applicants would most certainly fall under what the PFA calls the Applicants' mismanagement of the Funds.

26. Another example which illustrates these points is the non-payment of the insurance premiums. The Applicants did not inform the members about their non-payment of the insurance premiums and hence the fact that the Complainants did not mention the non-payment of premiums in their Complaint cannot now be used as a reason for the Applicants to escape liability on this point by claiming it is not part of the Complaint. In addition such negligence by the Applicants would most certainly fall under what the PFA calls the Applicants' mismanagement of the Funds.

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

27.1. What submissions, if any, made by Kamionsky or any party for that matter, do not form part of this Complaint and should hence be excluded from this application.

27.2. Whether trustees of a fund can be held liable for maladministration by an administrator, and:

27.2.1. if so, whether the Applicants in their capacity as trustees ought to be held personally liable for the maladministration they allege took place on these funds;

27.2.2. if not so, whether the Applicants in their capacity as trustees still ought to be held personally liable for the

maladministration they allege took place given the Applicants themselves held one of the previous trustees to be personally liable in his capacity as trustee for the maladministration they allege took place on these funds;

- 27.3. Whether the Applicants caused or contributed to the loss suffered by members through the decisions and actions they took in relation to the rebuild;
- 27.4. Whether the Applicants were negligent in not paying the premiums on the funds indemnity policies and if so whether this contributed to the loss suffered by the members;
- 27.5. Whether the 4th Applicant ought to be excused from liability based on him abstaining from voting on the rebuild.

D. The approach to be taken for this application

28. According to the Applicants' Heads of Argument¹⁸: *"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.*

¹⁸ 1st – 3rd Applicants Heads of Argument p9 para 19.1

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, provided that it determines substantially the same "complaint" as the one determined by the Adjudicator".

29. I respectfully submit that should this approach be accepted by this Honourable Court it will be a travesty of justice for the following reasons:

30. **Reason 1:** the Complainants are excluded from this appeal:

30.1. The Complainants are not participating in this appeal as they cannot afford the cost of running a High Court matter;

30.2. Hence this approach is tantamount to running a trial where one of the key parties is not present to state their case and only one side is introducing additional evidence and is present to submit their case. That cannot possibly be right and is clearly very unfair to the 11,000 members who lost money in this case due to the negligent actions of the Applicants.

31. **Reason 2:** the PFA is more experienced in retirement fund matters than this Honourable Court:

31.1. No disrespect is intended to this Honourable Court however it cannot be disputed that the PFA deals with retirement fund

matters on a daily basis whereas this Honourable Court probably only deals with a retirement fund matter very occasionally. In addition the PFA is actively involved in the retirement fund industry and hence would be more knowledgeable than this Honourable Court in the practices and expectations within this industry and in terms of what is considered reasonable behaviour for role players in this industry.

31.2. We therefore now have a situation where a less experienced 'authority' will be disregarding the determination made by a more experienced 'authority' and overruling the more experienced 'authority'.

32. **Reason 3:** only one party has lawyers and advocates:

32.1. Only the Applicants in this appeal have lawyers and advocates representing them. The whole point of introducing the PFA was to provide an accessible, low-cost dispute resolution mechanism in a manner where the man on the street could take on providers or trustees on a level playing field.

33. **Reason 4:** it establishes a dangerous precedent:

33.1. Adopting this approach could open up the flood gates to every Adjudicator determination being appealed thereby giving every

person or entity being found liable by the PFA a second bite at the apple, as what is happening in this application.

33.2. We therefore may as well scrap the PFA and let people with Complaints come straight to this Honourable Court. This naturally defeats the whole point of the PFA which was brought about by the Pension Funds Act as a way of providing expedited low-cost resolutions to disputes in the retirement fund industry.

34. **Reason 5:** it means there is a different justice system in South Africa for the rich and the poor:

34.1. If you are rich you have two bites at the apple, being a hearing before the PFA and a hearing before the courts. Whereas if you are poor you only get one bite of the apple, being a hearing before the PFA.

35. For all the reasons given above it could never have been the intention of the legislation to make a PFA appeal a fresh rerunning of the matter in conjunction with an automatic right of appeal and if the Honourable Court adopts this approach it would really be a travesty of justice.

36. In the interests of justice the appeal of a PFA determination should therefore not just discard the determination by the PFA and the determination should only be reviewed by the Courts if it can be shown, to the Court's satisfaction,

there is a material error of law has been made or that the PFA's decision was so unreasonable that no reasonable adjudicator (based on the same facts and applying the same legal principles) would have arrived at such a decision.

37. Clearly the Applicants have not established such material errors in law nor have they shown such unreasonableness. Instead the Applicants have just viewed this application as a second bite at the apple, merely regurgitating page after page of background information and then hoping that this Honourable Court comes to a different decision.

E. The allegations of maladministration and negligence against Dynamique and Kamionsky

38. There are numerous statements throughout the Applicants' affidavits and Heads of Argument alleging maladministration and negligence by Dynamique and Kamionsky
39. This is nothing but defamatory unsubstantiated allegations by the Applicants. At no time has either Dynamique or Kamionsky, in any capacity, ever been found guilty of any wrongdoing whatsoever.
40. In this regard the burden of proof was always with the Applicants however in the 6 years since they first made the allegations of maladministration and negligence they have never been able to produce any credible evidence whatsoever (I come back to this point in more detail later).

41. As an example of how the Applicants lack any credible evidence whatsoever, the Applicants state in their Heads of Argument¹⁹: "*89. During the course of Dynamique's administration of the Funds, and unbeknown to the applicants at the relevant time:*

41.1. *89.1 reinvestments (i.e. interest and dividends) were not credited to members' accounts;*

41.2. *89.2 redemptions were paid from monies owing to other members;*

41.3. *89.3 switches between investments were not correctly recorded in members' accounts;*

41.4. *89.4 inaccurate deposits of monies were deposited in the bank accounts of other funds which Dynamique also administered;*

41.5. *89.5 monies were invested in, or disinvested from, incorrect investment portfolios;*

41.6. *89.6 Dynamique failed to indentify and or rectify these errors; and*

41.7. *89.7 as a result of this monthly and annual audits were not performed".*

¹⁹ 1st – 3rd Applicants Heads of Argument p51 para 89

42. In response to this statement by the Applicants:
- 42.1. It is hearsay as the Applicants put forward no evidence whatsoever to support any of these allegations. You would think 6 years down the line the Applicants would be able to put forward concrete evidence of maladministration as opposed to just repeating the same unsubstantiated statements that they made 6 years ago.
- 42.2. None of these items justify rebuilding all the records, as they all could have been addressed via simple inexpensive means, for example, to identify interest and dividends not credited to member accounts you simply call an investment allocation report off the administration system and request an investment statement from the investment manager and then you cross-check the two. Redoing all the records will do nothing to correct this issue. Furthermore you can't just assume that interest and dividends should have been allocated to members as it is not uncommon to use such amounts to cover fund costs e.g. trustee fees.
- 42.3. These statements confirm how the Applicants don't have a proper understanding of pension fund administration, for example, they seem to think that "*redemptions were paid from monies owing to other members*" is a problem however it is standard practice in pension fund administration to net off transactions to avoid unnecessary investments/disinvestments and avoid unnecessary

investment costs. For e.g. if a contribution of R100k comes in and there is a claim of R100k to pay then it is perfectly normal and acceptable to net off these cash flows.

42.4. These statements are factually incorrect, for example, saying Dynamique failed to identify and or rectify these errors is incorrect as the Deloitte's report actually confirmed, for example, that monies paid into the incorrect bank accounts by employers had been transferred into the correct bank accounts by Dynamique.

42.5. In addition the adequacy of the controls can only be assessed in relation to the prevalence of the abovementioned issues. For example if 90% of member investments were made into the incorrect portfolio that could suggest inadequate controls and possible maladministration however if 1% of member investments are made into the incorrect portfolios then that would suggest good controls.

42.6. Lastly none of these items would stop the monthly and annual audits from proceeding and so the last point by the Applicants is confusing and does not follow from what they state above.

43. The Applicants seem to think that if they repeat these baseless allegations of maladministration and negligence enough times then eventually people will believe them.

44. In fact, recently the FSB, in response to a FSP licence application by myself, conducted a full review of the whole Dynamique debacle, which review included a review of the Deloitte's report (discussed later in more detail) and the FSB came to the decision that there was no credible evidence of any wrongdoing by myself and granted me a FSP license.
45. The Applicants must therefore now once and for all cease and desist from these defamatory allegations against myself and they will most certainly be held to account for the damages they have caused me as a result of their defamatory statements.
46. In addition, neither the Applicants, nor the trustees that succeeded the Applicants, pursued the arbitration that the Applicants initiated against Dynamique²⁰, instead abandoning the arbitration. Now an arbitration costs almost nothing and so there would be no reason to have abandoned the arbitration unless they had no evidence of any wrongdoing, hence illustrating once again that there was never any credible evidence of any wrongdoing against Dynamique.
47. Further, at all times Dynamique offered its members, employers and brokers online access to their administration records²¹ and issued regular benefit statements, things which could never have been done had there been maladministration.

²⁰ Bundle p796 et seq

²¹ Bundle p750 para 34.2

48. In addition, the allegations by the Applicants that Kamionsky is the sole director and shareholder and controlling mind of Dynamique²² are factually incorrect and/or misleading. There were 3 to 8 shareholders and directors at all material times throughout which the alleged maladministration is alleged by the Applicants to have taken place. Therefore the way the Applicants continually try to single myself out is both factually incorrect and defamatory. Perhaps one of the reasons they are doing this is because the 3rd Applicant himself was a shareholder and director of Dynamique at all material times, another thing the Applicants have failed to disclose to this Honourable Court.

49. Lastly, the Applicants suggest in their Heads of Argument that my out-of-court settlement with the Funds is an indication of wrongdoing²³ on my part. This insinuation by the Applicants is opportunistic, baseless and defamatory. I can confirm the following regarding the settlement:

49.1. The settlement was entered into without prejudice and without any admission whatsoever of any wrongdoing;

49.2. The settlement amount was tiny (less than 5%) of the amount being claimed from myself;

49.3. The only reason that I entered into this settlement was because I needed a job and the prospective companies would only hire me once the matter was settled.

²² 1st – 3rd Applicants Heads of Argument p4 para 2.10

²³ 1st – 3rd Applicants Heads of Argument p50 para 88.2

F. Whether a trustee can be held liable for maladministration

50. The Applicants have argued in their Heads of Argument that a trustee cannot be held liable for maladministration by an administrator. Now it is up to the Honourable Court to judge the merits of this argument however what I want to bring to the attention of the Honourable Court is that these very Applicants argued the exact opposite in case 4175/2011²⁴ in the South Gauteng High Court which these Applicants brought on behalf of the Funds²⁵ against one of the previous trustees, being myself.
51. In this other case the Applicants argued in their Particulars of Claim that a trustee can be held liable for maladministration by an administrator.
52. Therefore the Applicants want to have their cake and eat it, having argued both sides of the coin, depending whether they are the ones doing the suing or they are the ones being sued. You can't have it both ways. The fact that in this other matter the Applicants claimed that you can hold a trustee liable for maladministration by an administrator should constitute an informal admission by the Applicants and should in itself be sufficient to hold the Applicants liable for the alleged maladministration.

²⁴ Particulars of Claim attached to Founding Affidavit of 1st Applicant and marked as page 507

²⁵ Bundle p57 para 96

53. These are the arguments put forward in this other matter, by the Applicants themselves, as to why a trustee can be held liable for maladministration, as extracted from their particulars of claim²⁶:

53.1. *"30. As trustee and member of the Plaintiffs' boards the Defendant 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."*

53.2. *"31. As a trustee and member of the Plaintiffs' boards the Defendant 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;"*

53.3. *"32. The Defendant's duties as set out in sections 7C and 7D of the PFA were inter alia as follows:"*

53.3.1. *"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;"*

²⁶ Attachment to Founding Affidavit of 1st Applicant and marked as page 524

- 53.3.2. *"32.2 To act with due care, diligence and good faith;"*
- 53.3.3. *"32.3 To ensure that proper registers, books and records of the operations of the plaintiff funds were kept;"*
- 53.3.4. *"32.4 To ensure that proper control systems were employed by or on behalf of the board;"*
- 53.3.5. *"32.5 To obtain expert advice on matters where the board members may have lacked sufficient expertise; and"*
- 53.3.6. *"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."*
- 53.4. *"33. The Defendant, 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:"

53.4.1.1. *"33.1 failed to ensure that Dynamique complied with its obligations in the prior administration agreements in circumstances where he knew or ought to have known of such non-compliance;"*

53.4.1.2. *"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 Dynamique;"*

53.4.1.3. *"33.3 Failed to ensure that adequate professional indemnity insurance was on place during the tenure of Dynamique, given the state of the administration of the Plaintiffs' pension fund portfolios by*

Dynamique, and/or the amount of Plaintiffs' monies under administration;"

53.4.1.4. *"33.4 failed to obtain or timeously obtain appropriate expert advice to prevent and/or rectify Dynamique'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;"*

53.4.1.5. *"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."*

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

- 53.4.2.1. *"35.1 Dynamique's maladministration and poor record keeping; ..."*
- 53.4.3. *"constituted negligent conduct in breach of his fiduciary duties and his 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."*
- 53.4.4. *"36. As a result of the Defendant's 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, ..."*
- 53.4.5. *"37. In the circumstances the Defendant is liable to the Plaintiffs in the sum of R18,162,480.00"*

G. The mismanagement of the Funds by the Applicants

54. Below I list the various actions of the Applicants that comprised their negligence and mismanagement of the Funds and resulted in, or at the very least significantly enhanced, the loss suffered by members.

55. All the actions detailed below were included in the submissions to the PFA and were therefore taken into account by the PFA in her coming to her determination that the Applicants had mismanaged the Fund's.

56. The Applicants' mismanagement of the Funds included *inter alia* the following²⁷:

56.1. All they did was attend trustee meetings, and one meeting with the administrator, and express concerns at these meetings. This is totally inadequate actions by trustees who believed the funds were being maladministered. Just attending trustee meetings does not constitute a reasonable and appropriate exercise of a trustee's oversight functions in a situation where those trustees believe there is maladministration. The Applicants had fiduciary duties and duties in terms of the Pension Funds Act, more specifically:

56.1.1. 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;

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

²⁷ Bundle p749 para 32

56.1.3. 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;

56.1.4. 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.

56.2. There was so much more they could have and should have done²⁸.

They could have *inter alia*:

56.2.1. Gone into the offices of the administrator and sat with the administrators for the administrators to show them

²⁸ Bundle p750 para 34

first-hand how the funds were being administered and what the quality of the records on the administration system was like;

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

56.2.3. 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.

56.2.4. 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;

56.2.5. 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;

56.2.6. 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:

56.2.6.1. 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

56.2.6.2. 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;

56.2.6.3. More specifically the IF umbrella pension fund rules contains clauses 6.5.4 and 6.5.5²⁹ (the IF umbrella provident fund rules contain almost exactly the same wording under different clause numbers) which read as follows:

56.2.6.3.1. *"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*

²⁹ Bundle p123 para 6.5.4 and 6.5.5

to by the TRUSTEES and suitably qualified in the matter in dispute."

56.2.6.4. *"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."*

56.3. The Applicants did not make any investigation whatsoever into what the alleged data problems/inaccuracies were³⁰ and without knowing exactly what the problem is it is impossible to know what the correct solution would be and under these circumstances to just decide to scrap everything and rebuild everything is reckless and negligent. Further, in relation to this point:

56.3.1. By way of analogy if I am driving my car and I hear a knocking noise in the engine then I can correctly conclude there is some problem, however it would be reckless and negligent of me to just discard the car and

³⁰ Bundle p764 para 46.1.1

go buy a brand new car. This is essentially what the Applicants did. What should be done in this car analogy is that I should call in the appropriate experts to get to the bottom of what the exact problem with the car is and then once I know the exact problem I can determine the available solutions and I would then be in the position to decide on the most cost effective solution for addressing the problem. This is the actions expected of a reasonable man and what the Applicants should have done.

56.3.2. In the case that you believe the data on the administrators system is inaccurate you could simply extract the data and give it to each participating employer to check. Doing this would have cost the Funds nothing.

56.3.3. Dynamique at all times provided online access to members, employers and brokers, provided benefit statements and provided monthly prebilling statements (which employers checked and confirmed before making payment) and hence it is impossible that there were material data errors from the time Dynamique was the administrator. In addition this online access, benefit statements and prebilling statements means

that the employers, members and brokers had implicitly signed off the data as being correct and so to then spend R20m redoing everything is an absolute waste of money;

56.3.4. The most common cause for an asset liability mismatch on a fund is an error in the investment return allocated to member credits. A simple checking and correcting of the investment return allocations could therefore more than likely have addressed any asset liability mismatch at no cost to the members.

56.3.5. The Deloitte's rebuilt values have never been independently certified as being correct. Given the fact that they carried out this rebuild using spreadsheets and given they made sweeping, incorrect assumptions in their calculations, I have no doubt whatsoever that the rebuilt values would not be correct and in all likelihood they would be less accurate than the values that were handed over by Dynamique meaning that the R20m spent on the rebuild was a total waste of money. The fact that the Applicants and Deloitte's believed that you can administer the funds using spreadsheets indicates that they have no idea whatsoever of the complexities of administering pension funds, especially

unitised funds with member investment choice as was the case with the Funds in question.

- 56.4. The Applicants should have brought in suitably qualified independent advisers but never did (the rules of the fund allowed for this³¹);
- 56.5. The Applicants never requested a change of administrator. The Applicants saying they didn't appoint the administrator is a moot point as the Applicants sanctioned the ongoing appointment of the Administrator and at no time did they request a change to the rules or a change to the administrator;
- 56.6. The Applicants only obtained two quotes, which was totally inadequate for a R20m expenditure. Interestingly they have to date never produced the alleged 2nd quote, so it seems like they actually only got one quote.
- 56.7. The Applicants made no effort whatsoever to find or attempt a more cost effective solution for addressing the problem;
- 56.8. The Applicants did not give the previous administrator (Dynamique) a chance to fix the problems³². In fact they did not even inform Dynamique that there were any problems. This is

³¹ Bundle p125 para 6.7.1.5

³² Bundle p766 para 46.1.5.2

blatant negligence by the Applicants as it is standard practice in the industry, and in fact in any industry, to first go back to the service provider to afford them an opportunity to fix any problems. Had the Applicants just pursued this course of action then any legitimate problems could have been fixed by Dynamique at no cost whatsoever to the members.

56.9. By way of a simple analogy to this point, if you build a house and there are some things you are not happy with the first thing you would do, and it would be expected of the reasonable man, is call in the builder that built the house and give them a chance to rectify the errors. It would be totally unreasonable to immediately just knock down the house and start all over again, which is exactly what the Applicants did in this case.

56.10. The Applicants did not insist that AON fix the problems³³. By virtue of AON taking over the business of Dynamique as a going concern they were legally liable to fix any problems in the data regardless of when such problems arose and the Applicants were remiss in not just insisting that AON fix the problems.

³³ Bundle p767 para 47 et seq

- 56.11. The Applicants were grossly negligent in not paying the insurance premiums³⁴ leaving the members with no cover to carry the loss;
- 56.12. It is common practice in the retirement fund industry for an administrator to blame the previous administrator and so when AON advised the Applicants that there were problems on the Funds that had been caused by Dynamique and not by themselves it was complete ignorance on the part of the Applicants to have just accepted this. As was said in *Boyce NO v Bloem*³⁵ "*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...*"
- 56.13. If the Applicants were spending R20m of their own money then rest assured they would have not been so reckless and cavalier in proceeding with the R20m rebuild and they would have made every effort possible to find a cheaper solution. In *Sackville West v Nourse*³⁶ 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*

³⁴ Bundle p742 para 19 et seq

³⁵ *Boyce, NO v Bloem and Others* 1960 (3) SA 855 (T)

³⁶ *Sackville West v Nourse* 1925 AD 516 at 519-520

care and caution are required of him in the latter than in the former."

56.14. Lastly on this issue, in *Boyce, NO v Bloem and Others*³⁷ it was held "*a trustee does not entitle himself to relief by proving that he has acted reasonably and honestly - he must show that in all the circumstances he ought fairly to be excused.*" Clearly the Applicants have not shown this.

H. The evidence presented by the Applicants in support of the rebuild

57. The primary evidence put forward by the Applicants, pre the rebuild, to suggest there was maladministration at Dynamique is firstly minutes which reflect that the audits of the funds were overdue and secondly what was told to them by AON.

58. Regarding the minutes, the Applicants quote from various minutes reflecting that the audits on the funds were overdue however they produce no evidence that there is any link between audits being late and maladministration. This is not surprising as it cannot be inferred from the fact that audits are late that there is maladministration and it is not uncommon for funds to submit financial statements late. At all times the necessary audit extensions had been granted by the FSB to Dynamique.

³⁷ *Boyce, NO v Bloem and Others* 1960 (3) SA 855 (T)

59. Regarding what AON told the Applicants, the Applicants were advised by Aon that the membership data of the Funds was inaccurate³⁸, however this is hearsay as the Applicants have never actually produced any evidence of this. In addition, as has already been discussed above, the Applicants should have known that AON were biased and may have just been blaming Dynamique for any problems and they should have taken steps to establish what the exactly what the problems were before jumping into a full rebuild. Also as detailed above there is no evidence that a rebuild was the correct solution for any problems that may or may not have existed.
60. In addition, the Applicants try use statements made by Dell as evidence to support their allegations of maladministration. This is opportunistic and totally absurd for the following reason:
- 60.1. The Applicants sent a communication to Dell, and the other participating employers, stating that there had been maladministration;
- 60.2. Dell then made submissions to the PFA and this Honourable Court stating there had been maladministration, which statements were based entirely on what the Applicants had told them and not on any evidence.

³⁸ 1st – 3rd Applicants Heads of Argument p5 para 3

60.3. The Applicants now use the fact that Dell stated there was maladministration to support their claims that there was maladministration³⁹. This is clearly absurd.

61. The primary evidence put forward by the Applicants, post the rebuild, to support their decision to have done the rebuild comes from Deloitte⁴⁰, and in this regard:

61.1. Deloitte is most certainly not an independent party, rather Deloitte is the party that was paid the R20m to do the rebuild and hence they are biased and obviously going to try justify the rebuild. Deloitte would never, after receiving R20m to do a job, come forward and say that the job was a waste of time and a waste of money as that would open themselves up to criticism and demands for a refund. Hence any report or other evidence put forward by Deloitte is worthless and can be immediately set aside.

61.2. In addition the Deloitte report was so plagued by errors, inaccurate statements and other problems that even if they weren't biased their report on the rebuild is worthless. An analysis of the Deloitte report⁴¹ reveals the following:

³⁹ 1st – 3rd Applicants Heads of Argument p23 para 34

⁴⁰ 1st – 3rd Applicants Heads of Argument p44 para 73

⁴¹ Bundle p1014 et seq

- 61.2.1. The decision to scrap the existing database and spend R20m rebuilding everything was fundamentally flawed and driven by conflict of interest and greed on the part of Deloitte's;
- 61.2.2. Deloitte's have deliberately tried to misrepresent the facts and exaggerate the problems;
- 61.2.3. The Deloitte's issues Log is plagued with incorrect findings;
- 61.2.4. The Deloitte's rebuilt member values are wrong;
- 61.2.5. Deloitte's don't understand pension fund administration;
- 61.2.6. There was a callous disregard for the members as evidenced by the lack of attention to detail and the failure to follow due process;
- 61.2.7. The problems found only applied in a handful of instances and in no way justified the decision to rebuild everything;
- 61.2.8. Deloitte's conclusion of the rebuild being required lacks any substance and is totally devoid of any merit;

61.2.9. There is no evidence whatsoever of any maladministration or negligence nor is there any finding by Deloittes of maladministration or negligence.

61.3. Here is just an small sample of the multitude of problems with the Deloittes report and the Deloittes calculations, which I include just to illustrate the types of problems plaguing the Deloittes work⁴²:

61.3.1. One example of the multitude of irrelevant findings: Deloittes state on Megaphase Trading that *the risk rate changed from 3.24% to 3.44% in January 2008 but they could not trace the change to any supporting documentation*. Well so what? The employer, insurer and broker were all happy with the change so it really is a non-issue that source documentation could not be found by Deloittes.

61.3.2. One example of the multitude of incorrect findings: Deloittes state that on Avstar Aviation *no supporting documentation could be found for the fund. No rules, admin agreements or any other information could be found*. This is incorrect as I personally found a copy of this documentation⁴³ in the Dynamique electronic

⁴² Bundle p1014 et seq

⁴³ Bundle p1020 and p1050

folders, which folders were handed over to AON, and hence Deloitte's just did not look properly.

61.3.3. One example of the multitude of incorrect assumptions made by Deloitte's in rebuilding the values: Deloitte's assumed *all unallocated contributions were allocated on the 15th of the month with no allowance made for late receipt of contributions*. This is wrong. Take for example the situation where the administrator was not able to allocate contributions due to non-receipt of schedules from the employer, which schedules were only supplied a number of months later despite numerous follow ups by the administrator. In such instance it is wrong for Deloitte's to just backdate the investment of contributions and this means the members rebuilt values are wrong and Deloitte's have created an asset liability mismatch. It also shows a lack of understanding by Deloitte's of pension fund administration.

61.3.4. One example of the multitude of issues exaggerated by Deloitte's to try make the situation seem a lot worse than it was: Deloitte's found that *payments made into the incorrect bank accounts from participating employers*. This only happened on 3 out of 280

employers i.e. 1%. Further the rebuild did nothing to address this but rather just completing a standard audit would have identified these issues. In fact Deloitte themselves point out that the money was subsequently transferred to the correct fund so it is really a non-issue. Therefore this in no way justifies the rebuild and unrealistically creates the impression of administration problems.

61.4. As already eluded to above the FSB after studying the Deloitte report came to the conclusion that it had no credibility and they granted me an FSP licence.

62. The Applicants also try justify their decision to do the rebuild by quoting in their Heads of Argument from an audit report prepared by VVR Auditors⁴⁴, and in this regard:

62.1. The section of the report quoted starts off with the following heading: "*The following key areas have been identified as high risk fraud areas during the course of the audit*". High fraud risks and errors in data are two very different things and there is no direct link between the two, hence these findings do nothing to support the Applicants allegations of maladministration and the report

⁴⁴ 1st – 3rd Applicants Heads of Argument p20 para 33.8

provides no justification whatsoever for rebuilding all the records. As it happens the rebuild never uncovered any fraud whatsoever.

62.2. The quoted text from VVR audit report details various irregularities in the practices of management (of Dynamique) however at no time did VVR ever meet with the management of Dynamique (which was only myself at the time) to find out what the management practices were and hence this whole audit is very suspicious and is null and void.

62.3. The irregularities listed by VVR would constitute 'Reportable Irregularities' in terms of the Auditing Profession Act⁴⁵ and therefore VVR had a duty to inform the management board of the entity (being myself) of these findings in writing and get the management board's response to these findings. However VVR did not do this and hence they would be in breach of the Auditing Profession Act and hence guilty of an offence. Again this makes the report null and void.

63. It was always the Applicant's onus to prove that the rebuild was required and that it was justified to spend R20m on such a rebuild, however in the 6 years since initiating the rebuild and spending the money the Applicants have not been able to produce a shred of credible evidence supporting their allegations

⁴⁵ Act 26 of 2005

of maladministration or justifying the cost or proving that any benefit was derived from the rebuild.

J. The non-payment of the insurance premiums

64. The failure of the Applicants to pay the premiums on the Funds indemnity policies constitute gross negligence and gross mismanagement of the Funds and the Applicant's attempts to defend their actions in this regard is totally without merit and even absurd.

65. The Applicants try defend their negligence here on two grounds, both of which are totally without merit and both of which can be dispensed with immediately, more specifically:

65.1. **Ground 1:** The Applicants claim the insurance policies in any case excluded the rebuild⁴⁶. This is absurd. The ONLY reason the insurer was able to introduce that exclusion relating to the rebuild was because of the policies lapsing due to the non-payment of the premiums by the Applicants. It was then after the policies lapsed that the insurer agreed to reinstate the policies but subject to an exclusion for the rebuild⁴⁷. Hence the insurer was only able to introduce the exclusion as a consequence of the non-payment of premiums by the Applicants. Had the premiums been paid

⁴⁶ 1st – 3rd Applicants Heads of Argument p48 para 84 and 85

⁴⁷ Bundle p999 para 53 et seq

throughout the exclusion would not have been and could not have been introduced by the insurer;

65.2. **Ground 2:** the Applicants argue that there would have been other reasons for the repudiation of the claim in addition to the non-payment of premiums⁴⁸. Again this absurd. The evidence they draw on for their argument comes from what is stated in a letter from the insurer⁴⁹, however:

65.2.1. The Applicants are being opportunistic and deceitful in this regard as the Applicants know all too well that there were subsequent letters from the insurer⁵⁰ in which it was very clear that the insurer could not substantiate these 'other' reasons for repudiation and in the last of these subsequent letters⁵¹ the insurer confirmed that the only reason for the repudiation not in dispute is the non-payment of premiums by the Applicants;

65.2.2. The Applicants in their capacity as trustees of the Funds had an obligation to challenge any reasons put forward by the insurer for not paying the claims. It is a well-established practice in the insurance industry that

⁴⁸ 1st – 3rd Applicants Heads of Argument p48 para 86

⁴⁹ Bundle p800

⁵⁰ Bundle p810, p814, p817, p819

⁵¹ Bundle p819

an insurer's first response is generally to deny a claim but often the insurer relents when challenged. However in this instance the Applicants, despite having a duty to try get the insurance claim approved, never challenged in any way, shape or form these 'other' reasons put forward by the insurer (which as already stated the insurer could not substantiate). The reason the Applicants did not challenge the insurer regarding these 'other' reasons is obvious, the Applicants knew they had not paid the insurance premiums and hence the Applicants knew it would be a futile exercise to challenge the insurer and furthermore the Applicants were only too happy that they could now point to these 'other' reasons, as invalid as they were, as a way of trying to escape liability for not paying the premiums on the policy.

- 65.2.3. This point can be reinforced with an analogy. Assuming you have a car accident and the insurer declines the claim on the basis that you were speeding, any reasonable person would challenge the insurer on this and the onus would be on the insurer to prove you were speeding. However, assuming you never paid the premium on the policy and assuming the insurer declines the claim on the basis of the policy having

lapsed due to non-payment of premium and on the basis that you were speeding. In this case you would not challenge the insurer on the speeding issue (eventhough it is null and void until proven by the insurer) as you know it would be futile given you never paid the premium and furthermore the speeding issue gives you a convenient and opportunistic basis for having something else to blame other than your non-payment of the premium.

66. In conclusion on this point, the Applicants' non-payment of the insurance premiums constitutes gross mismanagement of the Funds and is indefensible and on this issue alone the Honourable Court can uphold the PFA determination that the Applicants mismanaged the Funds.
67. Interestingly, after the Applicants argue that the non-payment of the premiums is a non-issue, they then go on to try blame AON for the non-payment of insurance premiums⁵². Blaming AON however has no merit as 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

⁵² 1st – 3rd Applicants Heads of Argument p48 para 84

are of the view AON didn't do what they were supposed to. Interestingly, in the high court civil claim that the Applicants did bring against AON, no mention was made of these insurance premiums or that AON were responsible for the payment of these insurance premiums.

68. Lastly on the issue of the non-payment of the insurance premiums, the Applicants state in their Heads of Argument that "*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.*"⁵³ This is blatantly untrue and a simple reading of all the relevant documents confirms that the Applicants never informed these parties of the non-payment of the insurance premiums but rather it was myself who exposed the issue of the non-payment of premiums and brought the matter to the attention of the members, the PFA and this Honourable Court. In this regard I had to bring an application in the South Gauteng High Court forcing the trustees and the insurer (the trustees had instructed the insurer not to give me any information) to give me information on the insurance policies and it was only then that the non-payment of premiums by the Applicants was discovered.
69. In addition to the non-payment of the premiums, the Applicants were negligent in proceeding with the rebuild without even having notified the insurer of the potential claim⁵⁴. The Applicants were obliged in terms of the

⁵³ 1st – 3rd Applicants Heads of Argument p48 para 84

⁵⁴ Bundle p778 para 71

policy to have given notice to the Insurer of any such circumstance which could give rise to a claim⁵⁵.

70. In fact not only did the Applicants not notify the insurer of the claim at the correct time, they went ahead and approved a R20m rebuild without the permission of the insurer and before the insurer even knew about the claim. In terms of my car accident analogy, this is equivalent to having a car accident, going ahead and having the car repaired and then only 6 months later advising the insurer about the accident. In such instance the insurer would have valid grounds for rejecting the claim.

K. The 4th Applicants abstention from voting on the rebuild

71. The 4th Applicant argues in his Heads of Argument that he should be excused from liability on the basis that he did not vote in favour of the rebuild⁵⁶.
72. The implication of this request is that the 4th Applicant seems to now be admitting that there is liability attached to the Applicants for commissioning the rebuild i.e. spending R20m rebuilding everything was not the correct thing to do and now the 4th Applicant wants to be relieved of his liability in this regard on the basis that he did not vote in favour of the rebuild.
73. In my view the 4th Applicant having abstained from voting does not excuse him from liability for the following reasons:

⁵⁵ Bundle p1051 para 2 and p1053 para 1

⁵⁶ 4th Applicants Heads of Argument p9 para 18

- 73.1. He hasn't provided any concrete basis for the alleged conflict of interest. The rebuild concerned a period where the administration was done by another administrator so it is not apparent why the fact that he works for AON posed a conflict of interest.
- 73.2. The 3rd Applicant was also an AON representative on the Board of Trustees (the Board was made up of 2 AON representatives and 2 independent trustees) and yet the 3rd Applicant was able to vote on the rebuild.
- 73.3. If a trustee votes against a decision then they are clearly against that decision however by abstaining a trustee is saying that he accepts the decision taken by the majority of the Trustees who do vote and hence the 4th Applicant did actually implicitly accept the decision to do the rebuild.
- 73.4. The 4th Applicant happily went along with the decision to do the rebuild and at no point did he register any opposition to the spending of the R20m on the rebuild.
- 73.5. In *Adam and others v Dada and others*⁵⁷ at p503 Broome J said:
"The trustees must be regarded as having acted together as one body during their common periods of office... We see no reason why the general rule should not be applied that where one or two

⁵⁷ 1912 N.P.D. 495

or more trustees allows trust funds to be under the sole control of the other or others, they are each and all liable jointly and severally, to make good to the trust estate the loss arising from any misapplication of trust moneys during their tenure of office'.

73.6. Further Honore's South African law of trusts⁵⁸ states the law thus (at 308): "*Those persons who were trustees at the time of the breach of trust are, in the absence of a provision in the trust instrument to the contrary, jointly and severally liable for it: they are co-principal debtors in solidum. It is no defence for a trustee that he did not take an active part in the affairs of the trust or had attempted to resign.*"

73.7. Lastly, if the Honourable Court excuses the 4th Applicant from liability on the basis that he abstained from voting it would set a dangerous precedent as every Trustee, so as to avoid liability, will simply abstain from voting on big decisions.

L. Conclusion

74. The PFA is experienced in retirement fund matters and after considering all the evidence the PFA correctly found that the Applicants had mismanaged the Funds causing a loss to the members and the PFA ordered the Applicants to refund this loss to the members.

⁵⁸ Honore's South African law of trusts 4th ed (by Hanore and Cameron)

75. The Applicants have not made out a valid case for this Honourable Court to now overturn the determination made by the PFA and this appeal is nothing more than the Applicants having a second bite at the apple.
76. The Honourable Court should therefore uphold the PFA's determination.
77. The costs of this application should be borne by the Applicants.

TONY KAMIONSKY
Thirty-Fourth Respondent
21 September 2016