TONY KAMIONSKY'S SUBMISSION
TO
THE DYNAM-IQUE COMMISSION OF ENQUIRY

I, the undersigned, TONY KAMIONSKY, do hereby make oath and state as follows:

The contents of this affidavit are within my personal knowledge, unless otherwise indicated, and are both true and correct.

Executive Summary

In about June 2010 the then trustees of the Funds, namely Botha, Lepar and Smith, discarded all the records and had Deloitte rebuild everything costing the Members approximately R20m in total.

This Rebuild was a fundamentally flawed exercise that was never going to produce correct records.

The Rebuild flouted pension administration laws, practices and governance. In addition, the Rebuild did not achieve its objectives, instead it created an asset liability mismatch and produced a set of incorrect member values.

The Rebuild was therefore fruitless and wasteful expenditure.

There was never any maladministration by Dynamique. Botha, Lepar and Smith, or any other party for that matter, never produced any evidence of any wrongdoing by Dynamique or myself. They also never produced any evidence that the Dynamique records were wrong and in fact the records they discarded may have actually been correct.

In addition Botha, Lepar and Smith allowed the Funds' insurance policies to lapse by not paying the premiums, leaving the Funds with no insurance cover to pick up the Rebuild cost.

The trustee that came after Botha, Lepar and Smith, namely Rollason, failed to disclose a material conflict of interest and hindered the Members' efforts to recover money from Botha, Lepar and Smith.

Definitions

'Funds' hereinafter refers to the Dynam-ique SA Umbrella Pension and Provident Funds and the IF Umbrella Pension and Provident Funds, which funds are the retirement funds to which this Commission of Enquiry relates. These Funds have now been liquidated.

'Deloitte' hereinafter refers to the registered auditing company Deloitte& Touche.

'Rebuild' hereinafter refers to the decision by the then trustees to scrap the records of the Funds in about June 2010 and to employ Deloitte to recreate the Funds records at a cost of

approximately R18.2m, which events are the subject matter of this Commission of Enquiry. In addition to the Deloitte cost there were legal fees and trustee fees associated with the Rebuild which is why this submission hereinafter refers to R20m as the approximate cost of the Rebuild.

'Members' hereinafter refers to the approximately 11,000 members of the Funds at the time of the Rebuild who were charged 2,5% of their then fund values due to the cost of the Rebuild.

'Botha, Lepar and Smith' hereinafter refers to Renier Botha, Maurice David Lepar and Carel Smith, being trustees at the time of the Rebuild and the majority of the trustees who commissioned the Rebuild.

'Rollason' hereinafter refers to a trustee of the Funds after Botha and Lepar resigned as trustees on 1 February 2011 (Smith resigned prior to that date).

'Dynamique' hereinafter refers to Dynam-ique SA Consultants and Actuaries (Pty) Ltd which was a licensed pension fund administration company and which was the administrator to the Funds for the following periods:

- Dynam-ique SA Umbrella Pension and Provident Funds: from their formation in August 2005 until end January 2008
- IF Umbrella Pension and Provident Funds: from Dec 2005 when Dynamique took over the administration of these funds from Integrated Futures (Pty) Ltd until end January 2008. These funds were established in April 2004 and administered by Integrated Futures (Pty) Ltd until Dynamique took over the administration.

'AON' refers to AON South Africa being the pension fund administration company who bought the Dynamique retirement fund book of business effective 1 February 2008 and who took over the administration of the Funds from that date.

'Adjudicator' hereinafter refers to the Pension Funds Adjudicator.

'The Appeal' hereinafter refers to the High Court appeal brought by Botha, Lepar and Smith against the Adjudicator's determination that they should reimburse the Funds for the loss suffered by the Members due to the Rebuild.

'Item 1', 'Item 2' etc. refers to documents that formed part of the court bundle in The Appeal, a copy of which documents can be found on the Vault page of the Commission of Enquiry's website.

'Founding Affidavit' refers to Botha, Lepar and Smith's founding affidavit in The Appeal, a copy of which can be found in Item 1 pg 8. This affidavit was made by another trustee on behalf of herself, Botha, Lepar and Smith.

'PFA' hereinafter refers to the Pension Funds Act.

'ABC01', 'ABC02' etc. refers to a specific Member or specific participating employer of the Funds, as the context denotes, whose name has been redacted from this submission so as not to reveal any sensitive information or so as not to cause any individual undue anxiety. A list of who exactly these references relate to has been given to the Chair of the Commission

of Enquiry to enable the Chair to verify the accuracy of what is being stated in this submission.

'Fruitless and wasteful expenditure' hereinafter refers to expenditure which was made in vain and would have been avoided had reasonable care been exercised.

Introduction

My name is Tony Kamionsky. I am an actuary with over 20 years' experience in the insurance, employee benefits and pension administration industries. I am a director of Dynamique and have been so since its formation in about May 2005. I was also a trustee of the Funds for the period that Dynamique administered the Funds.

My direct involvement with the Funds ended on 1 February 2008, some 2,5 years prior to the Rebuild.

The Rebuild – money well spent or fruitless and wasteful expenditure

The reason put forward for the Rebuild

The reason put forward by Botha, Lepar and Smith as to why they commissioned the Rebuild was that the Dynamique records were questionable due to maladministration by Dynamique which necessitated the Dynamique member records being discarded and being rebuilt from scratch at a total cost to the Members of approximately R20m.

Now in the 8 years since making this claim Botha, Lepar and Smith have not produced any evidence of the Dynamique records being wrong or of this alleged maladministration (I deal with this alleged maladministration in detail further in this submission).

Records discarded may have been correct

Not only has the allegation of maladministration never been substantiated by Botha, Lepar and Smith, or anyone else for that matter, but the evidence shows that the records Botha, Lepar and Smith discarded may have actually been correct at the time they discarded them.

More specifically, in Item 7b page 65 in a letter from AON to the Financial Services Board it states "*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"* (my highlighting). This same statement was repeated in The Appeal in counsel for Botha and Lepar' heads of argument in clause 33.9.3 (see Heads 1st to 3rd applicants pg 22).

So it is not a case of the records discarded being wrong – but rather a case of Botha, Lepar and Smith considering whether the records were right or wrong.

This point is reconfirmed in the member communication sent by Botha, Lepar and Smith themselves to the Members dated 1 November 2010 (Item 71b p 12) which in the opening paragraph Botha, Lepar and Smith state: "*In July 2010 the board of trustees of the above funds appointed Deloitte to perform a member level rebuild of the funds. The reasons for making the decision to undertake this exercise was that the data held in respect of the funds was* ***questionable*** *and the trustees and current administrator were* ***not convinced*** *that it was entirely accurate.*"(my highlighting).

To question whether something is right or wrong or to not be convinced of something does not mean it is wrong – it just means you are not sure whether it is right or wrong. In other words the records may have been correct at the time Botha, Lepar and Smith discarded them and spent the R20m redoing everything.

No expert advice was obtained

A simple reading of Botha, Lepar and Smith's Founding Affidavit confirms that they did not seek professional/expert advice before proceeding with the Rebuild.

It is actually a requirement of the PFA that a trustee seeks expert advice in such situations – clause 7 subsection (D) subsection (e) of the PFA states as follows – "*The duties of a board shall be to … obtain expert advice on matters where board members may lack sufficient expertise*" – end quote.

The requirement that this expert advice be independent is dealt with in the Financial Services Board Guidelines – more specifically in Clause 42 of Financial Services Board circular PF130 (copy attached as Annexure TK1), which circular deals with Governance of retirement funds, it states as follows: "*The board shall satisfy itself that any expert advice obtained is independently given. Where the professional gives expert advice in respect of a service provider or the employer or sponsor to the fund then the board should satisfy itself that such advice is not compromised by the relationship of that professional or his or her firm to that service provider, employer or sponsor as the case may be*" – end quote.

Botha, Lepar and Smith appear to have taken some advice from Deloitte - the very party who stood to personally benefit to the tune of R18,2m from the Rebuild. This is evident from Item 112a page 16 which is an affidavit by or on behalf of Botha, Lepar and Smith and in clauses 21.4 and 21.5 of this affidavit they state that Deloitte advised them that the admin system is unreliable and that no reliance can be placed on the data on the system – so the party being paid R18,2million for the job was also the party advising the trustees that the job had to be done.

In addition, to the extent that Botha, Lepar and Smith took advice from AON, the administrator at the time, such advice does not qualify as expert advice as the current administrator would be biased and be looking to protect their own interests. For example, if the current administrator messed up the records it is unlikely they would admit that but they would likely just blame the previous administrator, which is commonly what happens in the retirement funds industry.

Notwithstanding this Botha, Lepar and Smith appear to try impute liability for the Rebuild onto AON in clause 88 of their Founding Affidavit (see Item 1 pg51) in which it states: "…***from the minutes*** *it must be concluded however that Aon was of the opinion as administrator of the funds that an asset liability matching/rebuild project was necessary"* (my highlighting). Nowhere does it state this in the minutes. A simple reading of all the minutes presented in The Appeal confirms that at no time did the administrator/AON tell Botha, Lepar and Smith they should or have to do a rebuild – it is clearly evident from the minutes that the decision to do the rebuild is driven by Botha, Lepar and Smith themselves.

In fact, in Item 75b pg 12 in paragraph 4 of a letter from Aon's lawyer their lawyer confirms the decision for the rebuild was a decision by the trustees and not Aon.

In addition, in the minutes of the meeting held on 26 May 2010 (Item 7b pg52) it states that AON were prepared to go ahead with the values received from Dynamique if Botha, Lepar and Smith approved them doing so however Botha, Lepar and Smith refused them doing this and the minutes state: "*The trustees confirmed that these values were* ***not*** *accurate and* ***could not*** *be accepted – it was resolved that a rebuild exercise is* ***definitely*** *required, subject to a more reasonable cost"*(my highlighting). So it is clear that it was Botha, Lepar and Smith insisting on the rebuild and not the administrator. Nowhere in the minutes does it state how Botha, Lepar and Smith came to the conclusion that the values were not accurate and nowhere does it state what qualifications Botha, Lepar and Smith possessed that made them qualified to make such a determination.

No cheaper solutions were sought nor attempted

A simple reading of Botha, Lepar and Smith's Founding Affidavit confirms they never tried any cheaper options before jumping into discarding the records and doing a full scale rebuild of all the records. Even if there was maladministration it doesn't automatically follow that discarding the records and redoing everything was the correct or only solution and/or that R18.2m had to be spent to fix the problems.

Using an analogy, that is equivalent to me driving down the road and I hear a knocking noise in the engine of my car – so what do I do – I throw away the car and go buy a brand new car – this would just be absurd behaviour on my part.

Let me give one example of a more cost-effective solution. In clause 3 of Item Heads 1st to 3rd applicants pg 5 their counsel states: "*Botha, Lepar and Smith 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*". That is an absurd response – all you have to do if you believe membership data is inaccurate is download the membership data for each participating employer and give it to that participating employer to check – the employer then advises you of the inaccuracies, if any, and you adjust the records accordingly – and just like that you have saved R20m.

Another simple cost effective solution is that the previous administrator Dynamique could have and would have fixed the problems for free but Botha, Lepar and Smith never even approached Dynamique to inform them of any problems or give them a chance to fix any problems – not only am I confirming this but this is evident from a simple reading of Botha,

Lepar and Smith's Founding Affidavit. It is standard practice and the behaviour of the reasonable man that if a contractor does work for you and there are things you are not happy with then the very first thing you do is inform the contractor and give them an opportunity to fix any problems. For example, if I build a house and there are some things I am not happy with I don't just knock the entire house down and start again. The first thing I do is call in the builder – show them what I am not happy with – and give them an opportunity to fix the problems.

Could Dynamique have fixed any problems after selling the business to AON? Most certainly yes. AON did not buy the entity Dynamique but just the retirement fund administration book of business from Dynamique. Hence Dynamique continued to exist after the sale of the business and although Dynamique wasn't then administering pension funds I was available to investigate and assist with any problems and Dynamique could easily have employed any contract staff required to fix any problems.

But what if Dynamique refused to fix any problems? Well then, and only then, Botha, Lepar and Smith would have had a right to call in a third party to fix any problems.

Only 2 quotes were obtained for the rebuild

It is evident from their submissions in The Appeal that Botha, Lepar and Smith only sourced 2 quotes for the Rebuild (see for example Item 71b pg 12). In addition, it is common knowledge that the big 4 auditing firms charge very high fees.

To put the R18.2m charged by Deloitte into perspective, it is some three to four times as much as all the fees Dynamique charged, over the entire time they were the administrator (and bear in mind that the fees charged by Dynamique were for far more than the creation and audit preparation of the records as Dynamique was also paying claims, paying monies to insures and asset managers, reporting to the authorities, producing benefit statements, paying for an administration system, etc, etc.). Hence spending R18.2m to redo work that cost maybe R4m to do in the first place is, using an analogy, equivalent to spending R2m on a house then deciding you are not happy with the house and so you knock it down and call in the most expensive builder in the country and spend R8m rebuilding the house.

To give further perspective to this R18.2 Deloitte fee, if I employ 3 competent full-time administrators at a cost of R30k per month each for a period of 3 full years and a strong technical actuarial resource for a full year at a cost of R60k per month the total cost is R3,96m (30k * 12 * 3 * 3 + 60k * 12) which is still nowhere near R18.2m – it is about one-fifth of the Deloitte fee!

In fact, on Botha, Lepar and Smith' own version of events in Item 7b p55 Botha, Lepar and Smith themselves in the trustee meeting of 26 May 2010 stated that a cost of 8m to 11m would be reasonable – in other words even Botha, Lepar and Smith themselves believe the R18.2m spent was excessive.

A comparative quotation for the rebuild

I myself with very little effort was able to obtain a significantly cheaper quotation for this Rebuild exercise. The quote that I obtained was for R3m to R5m and I have attached as Annexure TK2 a copy of this quotation.

With regard to this quotation I can confirm the following:

1. I had never met Mr Firer prior to meeting with him to request this quotation – I had asked an auditor I know if they know of any auditors with experience in pension fund audits and they had referred me to Mr Firer
2. Mr Firer has extensive experience in audits, pension fund audits and forensic audits and is qualified to have carried out the Rebuild together with whatever team of support staff he would have assembled for the job
3. My mandate to Mr Firer was that he must genuinely have been willing to take on the job at the fee he is quoting.
4. In order to ensure that the quote was accurate and credible I wanted Mr Firer to go through all the Rebuild scope, methodology and the findings per participating employer for him to get a full and proper understanding of the work involved. Now clearly this is not something that could be done in 5 minutes and so upfront I agreed with Mr Firer the amount of hours he would spend on putting together the quotation and we agreed that I would pay him his standard hourly charge out rate for these hours. The fee however was paid in full prior to My Firer handing over the quotation to ensure that the payment did not influence his quote in any way.
5. Given my calculation above illustrating that you could employ 3 experienced full-time administrators for 3 years and a strong actuarial resource for a full year at a cost of about R4m this quotation by Mr Firer does not seem unrealistic.
6. In addition, when compared to the total fees charged by Dynamique to do all this work in the first place the quote seems realistic.

As I indicated above Botha, Lepar and Smith themselves had stated that they believe a fee of R8m – R11m would be reasonable. Hence even if we assume that Mr Firer's quote was on the low side and instead assume that his final price would have come to R8m, this means that even if it was found that discarding all the records and rebuilding everything was the correct solution, given the job could have been done for R8m, then R10,2m of the money spent on the rebuild, being the difference between what Deloitte charged (R18,2m) and what the job could have been done for (R8m), was fruitless and wasteful expenditure.

What about the duty of care that trustees owe to the members

The PFA requires that trustees act with due care and diligence – Section 7C subclause (2) subclause (b) of the Act states as follows: "*In pursuing its object the board shall act with due care, diligence and good faith*"

And looking at the case law, In Sackville West v Nourse 1925 AD 516 at 519-520, 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.*"(my highlighting). In other words a trustee must apply greater care when managing the members' money than they would apply when managing their own money.

In addition, the Rules of the IF Umbrella Pension Fund provide as follows: *"67.2 the trustees must take all reasonable steps to ensure that the interests of members are protected at all times and act with due care diligence and good faith;"*.

The relevance of what the Fund rules say about expenses

Speaking of the Funds' rules, Botha, Lepar and Smith in their Founding Affidavit make much of the fact that the Rules of the Funds allowed for them charging expenses to the Funds and hence they claim they did nothing wrong by charging this R20m to the Funds. There is no dispute that trustees can charge expenses to a fund however not just any expense can be charged to a fund – expenses need to be legitimate and necessary. By way of example, a trustee can't send themselves on a holiday to Mauritius and charge the expense to the fund.

This principle is reinforced by the Adjudicator where in Item 29b pg25 in clause 5.9 of the Adjudicators first determination the Adjudicator states as follows: "*Although the definition of expenses above allows the trustees to deduct any other costs they may regard as expenses, this does not give them an unlimited power to use the members fund credit or contributions allocated to their members fund value to fund any cost resulting from the negligent conduct of the board*".

A fundamentally flawed decision

The rebuild was a fundamentally flawed decision to begin with – you cannot come along 5 or more years after the event and recreate pension fund administration records and anyone who thinks you can doesn't understand the complexities of pension fund administration. Pension fund administration is complex and involves a lot of personal interaction between the administrator and the employer, which interaction is commonly via emails and telephone calls much of which there is no record of 5 years after the event, and hence the rebuild was doomed to failure even before it began.

In this case such issues would have been even more pronounced as Dynamique mainly administered the funds of small and medium enterprises and in that market space you are not dealing with companies who have sophisticated payroll systems or dedicated payroll departments – the payroll admin is often done by a part time person or by the business owner themselves and there are often errors or omissions in the information that is sent through to the administrator, which error or omission commonly gets resolved via a telephone call or email of which there is no record of 5 years down the line.

This flaw comes through clearly in the Deloitte rebuild findings with just one example being the case of member ABC01 from the participating employer ABC02 in the IF Umbrella Provident Fund. This member withdraws from the fund and his withdrawal form states his exit date as 30 September (Item 135g) but the company continued paying contributions for him for October and November – so Deloitte come along some 5 years down the line having adopted the principle that **"cash is king"** (more about this later) and so they allocate this member contributions for October and November – whereas what actually transpired is Dynamique quite correctly at the time queried this with the employer and the employer confirmed that September was the correct withdrawal date and that it was an error on their part to have paid for October and November and so in the December pre billing statement you then see that a credit was passed by Dynamique for the October and November

contributions for this member (Item 135d). Hence the Deloitte rebuild value is wrong and in the liquidation of the Funds this member was overpaid money not due to him – and again this is just one example to illustrate the point.

Another reason why the decision to do the Rebuild was a fundamentally flawed decision is that with the Rebuild costing 2,5% of everyone's fund value, by definition the re-created member values are going to be 2,5% lower than what they should have been – so you know before you even start that the Rebuild values will be wrong. Therefore before proceeding with a rebuild you have to establish to what extent the current values are wrong and only then can you establish whether a rebuild makes sense – you can't just say the current values are wrong so we doing a rebuild – which on their own version of events in The Appeal is what Botha, Lepar and Smith did.

Another reason why the decision to do the Rebuild was a fundamentally flawed decision is that even if the member values were wrong it doesn't automatically mean that scrapping them and redoing everything is the correct solution. When it comes to the type of unitised pension administration that was run by Dynamique the most common cause of values being wrong is that the unit pricing goes wrong. In this case scrapping the records would be a total waste of time and money. On Botha, Lepar and Smith's own version of events in The Appeal they took no steps to establish what exactly was the problem/error with the records, if any.

The method of spreading the rebuild costs was unfair

The way the R20m cost was recovered by Botha, Lepar and Smith from the Members was via a 2,5% charge against each Members' fund value. This decision was however fundamentally flawed and unfair and prejudicial to many of the Members involved as the actual underlying cost/work involved in rebuilding the member records would not had any direct relationship to the size of a Members' fund value. The following two hypothetical examples illustrate this point:

- Member A and Member B had both been in the Fund for the same amount of time and they were invested in the same portfolio. Member A had always contributed R100 p.m. and Member B had always contributed R200 p.m. and so at the time of the Rebuild Member B's fund value was double Member A's fund value. Therefore Member B was charged twice as much as Member A for the Rebuild eventhough the cost/work involved in rebuilding both member's records was exactly the same
- Member C had been in the fund for 3 years contributing R100p.m. and had a fund value at the time of the rebuild of 5,400 and was charged R135 for the rebuild (= 5400*0.025). Member D was in the fund for only 3 months contributing R100pm but had also transferred into the fund R100,000 from their previous fund giving Member D a fund value at the time of the rebuild of R100,330 and hence Member D was charged R2508.25 for the Rebuild (=100,330*0.025). Therefore Member D was charged 18,5 (eighteen and a half) times as much for the rebuild than Member C but yet the cost of rebuilding 3 years of records for Member C would have been significantly greater than the cost of rebuilding 3 months and a transfer value for Member D.

The Members were kept in the dark

After Botha, Lepar and Smith initiated the Rebuild the Members had many valid questions, like why the need for the rebuild, what other options had been considered, etc. etc. However Botha, Lepar and Smith appeared unwilling or unable to answer any of the Members' questions. The evidence of this can be found in Item 7b pg80 in clause 17 of the Adjudicator complaint where the members actually say "*…the failure of the IF Funds or trustees to adequately communicate and supply the requested information is prejudicial to the members or may cause them to sustain prejudice*".

And again this point of lack of information is stated in Item 75b pg5 in paragraph 3 in a letter from Jonathan Mort the lawyer representing the Members at the time where Mr Mort states: "*We are instructed to advise you, on behalf of the members whom we represent, that they are not satisfied with what has been communicated to them to date by the Funds and/or AON*".

I have also attached as Annexure TK3 an example of a letter from a participating employer expressing their unhappiness at the time at the lack of communication.

Botha, Lepar and Smith were bound by the PFA to give the members adequate communication regarding factors impacting their benefits, more specifically, Section 7D of the PFA subclause (c) states as follows: "*Duties of board.—The duties of a board shall be to…(c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund".*

Members being in the dark following the Rebuild limited their ability to take action to recover the money. One example of how the Members being in the dark limited their ability to take action is the non-payment of the insurance premiums (which non-payment I deal with in detail later on). As is evident from the complaint (Item 7b pg 77) the Members at the time asked Botha, Lepar and Smith numerous times for confirmation that the insurance policies will cover the loss but Botha, Lepar and Smith did not answer the question. Now obviously had the Members known about the non-payment of premiums at the time they brought the Adjudicator complaint they most certainly would have mentioned this aspect explicitly in their complaint.

A review of the actual rebuild

Most findings irrelevant or inaccurate

As part of the output of the Rebuild Deloitte prepared a full list of all their findings per participating employer. I am not able to attach this list to my submission for confidentiality reasons however a copy has been given to the Chair of the Commission of Enquiry.

Looking at the actual findings it is immediately apparent that the majority of the findings are totally irrelevant findings that that can be categorised as follows:

- Documentation that could not be found [Comment: this does not mean the values were wrong]
- Documentation that was not signed [Comment: this does not mean the values were wrong]

- Cases where the risk rates on the system did not tie up to the documentation: [Comment: this does not mean the values were wrong – in addition the insurer, participating employer and administrator all accepted the rate on the system so probably the document in Deloitte's possession was just not the final document or was amended by some other correspondence – in most cases Deloitte mirrored what was done on the system in any case]
- Spelling mistakes in member's names: [Comment: this does not mean the values were wrong]
- Surnames that changed: [Comment: this does not mean the values were wrong – it does happen that when women get married they may change their surname]
- Members that went on maternity leave with no documentation: [Comment: this does not mean that the values were wrong]
- Members who changed categories with no documentation: [Comment: this does not mean that the values were wrong – and all the parties accepted this at the time]

Further many of the findings were incorrect. The evidence for this can be found in a detailed response that I prepared to the Deloitte report for the Financial Services Board where I listed examples of findings that were wrong and I supplied the evidence confirming that they were wrong (see Item 135a).

Now irrelevant and incorrect findings equates to fruitless and wasteful expenditure.

Regarding the countless findings that supporting documentation could not be found, at no time did Deloitte or anyone else for that matter approach myself/Dynamique for any information. Had they done so I could have assisted them to find the missing documentation which I know for a fact exists in many cases as I have copies of it.

Attempt to trace every investment and disinvestment was misguided

Excluding the irrelevant and incorrect findings the bulk of the findings consist of findings that investments or disinvestments could not be traced in the market. Deloitte have clearly spent years' worth of time at a cost to the Members of millions of Rands trying to trace every investment or disinvestment in the market/asset managers statements.

This however is misguided and a waste of time and money as not every investment or disinvestment was made in the market due to the standard and well-established pension administration practice of offsetting transactions.

The way offsetting of transactions works is that where the opportunity presented itself Dynamique could or would offset an investment with a disinvestment and as long as both the 'in' and the 'out' are priced at the same unit price then everything balances and everything is 100% correct. So, for example, if you need to invest R100k into a portfolio due to a contribution payment and at the same time you have to disinvest R100k out of that portfolio due to a withdrawal then you can offset these 2 transactions and as long as both transactions are priced at the same unit price (which price is based on when the transactions would have taken place) then your assets match your liabilities and everything is correct.

The reason why an administrator would want to do this is that it could take a number of days to invest money and a number of days to disinvest money and by netting off

transactions you can save all that time and you save any associated transaction costs meaning that it makes good sense to do this.

Had Deloitte just spoken to me upfront before commencing with the Rebuild I could have explained this to Deloitte and saved all this work and cost. By way of analogy this is equivalent to going into the business of building BMW motor cars but not engaging with BMW upfront and so you spend years and years and millions of Rands trying to work out how to assemble these BMW cars when you could have just engaged with BMW and been shown how to do it in a fraction of the time.

For this reason alone a large part of the Rebuild expenditure was fruitless and wasteful expenditure.

This offsetting of transactions also explains why there were more findings by Deloitte for the IF Umbrella Fund participating employers than for the Dynam-ique SA Umbrella Fund participating employers. In the Dynam-ique SA Umbrella Funds Dynamique generally set up separate investment manager contracts for each participating employer whilst in the IF Umbrella Funds the investments were generally pooled across all or many of the participating employers. The reason for the different approach was just a historic thing where Dynamique had adopted the approach of separate investment contracts when establishing the Dynamique Funds but the company who established the IF Umbrella Funds, Integrated Futures (Pty) Ltd, had followed a pooled investment approach.

Now when there are separate investment contracts per participating employer there is less opportunities to offset investments with disinvestments and so more of the investments and disinvestments are explicitly made in the market. However with pooled investment portfolios there is more opportunities to offset transactions and hence less of the investments and disinvestments are actually made in the market i.e. when there are pooled portfolios there would be more findings that investments or disinvestments could not be traced in the market.

This offsetting of investments and disinvestments is also one reason why you need a specially designed administration system to facilitate this process and why pension administration cannot be done in a spreadsheet (I come back to this point later).

Methodology adopted by Deloitte was fundamentally flawed

Numerous aspects of the Deloitte' methodology were fundamentally and fatally flawed including, but not necessarily limited to, the following:

Deloitte adopted the principle that 'Cash is King'

Whilst the principle of 'Cash is King' may be sound when it comes to auditing it is a fundamentally flawed principle when it comes to pension fund administration. The example I gave previously with member ABC01 of participating employer ABC02 whose rebuild value was wrong due to 2 months of contributions that shouldn't have been allocated to him even though the cash was paid by the employer is just one example which illustrates why the principle of Cash is King doesn't work with pension fund administration. I also explained previously why in the small and medium enterprises market it can often happen that the payment doesn't tie up to the information on the system or the schedule supplied by the

participating employer. Now in such instances it is sometimes that the cash paid is correct but the employee schedule supplied is wrong whilst in other cases the cash paid is wrong but the employee schedule supplied is correct or in some cases both are wrong. There is therefore no general rule that can be applied and you can't just assume cash is king and each case has to be considered on its own merits.

The Cash is King principle followed by Deloitte is therefore fundamentally flawed and it means the member records they have recreated are wrong. This also explains why it doesn't work to come along 5 or 10 years after the event and start trying to recreate pension fund records.

Arbitrary dates were used for pricing investments

For investments that could not be traced in the market Deloitte adopted the practice that the investment was deemed to have been made on the 15th of the deposit month if the deposit occurred prior to or on the 7th, alternatively the investment date was deemed to be the 15th of the following month if the deposit occurred after the 7th. This approach is fundamentally flawed for a number of reasons, including:

- When it comes to daily unit priced investment portfolios the price can jump around significantly from day to day and hence you can't just pick an arbitrary day on which to price your investments
- As explained above regarding the offsetting of transactions, Dynamique had priced the 'in' and the 'out' at the same price ensuring the assets and liabilities matched however Deloitte have now come along and changed the price of the investment thereby breaking the link between the in (the investment) and the out (the disinvestment) and in doing this Deloitte have created an asset liability mismatch.

The other related methodology adopted by Deloitte was that they adopted the approach that prices for dates falling on a weekend or Public Holiday do not exist and so what they did for those days that Portfolio prices were required, but the date of investment fell on a weekend, they applied the price applicable on the Friday prior to the date, for dates falling on a Saturday and the price applicable on the Monday after the date, for dates falling on a Sunday. This approach is wrong for a number of reasons, including:

- Investments made on a Saturday would only have been invested by the asset manager on the Monday at best
- Investments made into the market should not be priced using the price on the day the investment was made – the way daily pricing administration works is that after the event you look at the asset managers statements to see at what price the money was actually invested into the market and it is that price that should be used to price the investment. Any party with experience in unitised administration would have been aware of this.

For this reason of arbitrary pricing alone the Member values calculated by Deloitte are wrong.

Invalid investment instructions were acted upon

One such example of this was on participating employer ABC03 where the Deloitte finding stated as follows: "*Switch form dated 03/07/2007 was completed …. However, the switch form does not specify an effective date*" and Deloitte went on to state that they dealt with this as follows: "*The switch out has been assumed to have occurred 2 days after the month in*

which the switch documentation was received. We have therefore priced the switch out using the price on the 02/08/2007. The switch in has been priced 6 days after the switch out on the 08/08/2007 as this is how long it appears to take in the market for a switch transaction".

Standard administration practice is to reject any investment instruction that has not been completed correctly. Over and above this, not only is it wrong to just assume an investment date (as explained above) but Deloitte have allocated notional investment returns to members based on non-existent assets which creates an asset liability mismatch and is in breach of the Fund rules as the Fund rules only provide for allocating investment returns that reflect the return on the actual assets held by the Funds.

Investment returns were given based on non-existent assets

In addition to the example above another example of this is on participating employer ABC04 where the Deloitte finding states: "*A single premium investment for …. made in 31/12/2006 has not been made in the market. The cash is still sitting in the bank account. We have therefore allocated this investment to the member on 15/01/2007"*.

This is not correct. For one thing there is no provision in the Rules to allocate notional investment returns on non-existent assets and in addition this is creating an asset liability mismatch. In addition, you can't just assume that the money should have been invested in the market – each case needs to be investigated – maybe the member wanted the money to remain in cash pending a further instruction. You would also have to investigate what the benefit statements and online access reflected regarding this money as if these had reflected this money being in cash then the onus would have been on the parties involved to object at the time.

How should such a case have been handled? Assuming there is a valid claim for money not being in the correct portfolio you don't just backdate the transaction. You calculate what the loss, if anything, is and you then outside of the fund claim that loss, if any, from the party responsible for the loss and when, and only when, the money is received from the responsible party it is allocated to the member as a single premium and that way the assets always match the liabilities.

The basic principle here is that you can't create something out of nothing – what Deloitte have done is in breach of the Rules and in breach of standard, valid administration practices, allocated investment return to a member where that investment never existed. And what this means is that the additional return being allocated to this member is being funded by all the other members in the fund as in the liquidation the deficit created by such notional allocations was spread across all the members and so all the members picked up the cost of this and so once again all the values calculated by Deloitte are wrong.

Actions were taken based on questionable source documentation

One such example of this is on participating employer ABC05 where the Deloitte finding stated: "*The members' investment elections in Everest are incorrect. Per an e-mail found on the G drive, the default portfolio for all members is the SIS Money Market fund. Due to Everest having the incorrect investment elections, the assets in the market are also in the incorrect portfolios*" and Deloitte went on to state that they addressed this as follows: "*We have allocated the monthly contributions per member based on the information found. We have ignored the Everest investment allocation. Where an investment was supposed to be*

made in a different portfolio we have priced that investment on the same day as the investment in the incorrect portfolio. In summary we have rebuilt the member liabilities as they should have happened."

This constitutes a flouting of standard administration practices. Firstly you can't just act on some email you find on a server – standard practice dictates that investment instructions should be completed on a required form and signed by an authorised signatory – and who is to say there was not a subsequent email or instruction which overrode the email referred to. Secondly what about the fact that all parties had online access and benefit statements and accepted where the investments were invested. Thirdly what about the fact that the Rules don't allow for this and it is creating an asset liability mismatch.

Incorrect unit prices were used

One such example of this is on participating employer ABC06 where the Deloitte finding stated: "*The investment for May 2007 was invested on various dates for both Allan Gray Stable Fund and Investec Absolute Income Fund*" and went on to state "*The total number of units purchased was therefore priced on the date on which the largest portion of units was purchased for May 2007*". This is not correct. A weighted average unit price would have been the more correct price to use.

Tiered asset based administrator fees were not correctly calculated

One of the methodologies adopted by Deloitte was that they excluded members who had left the fund. This approach was confirmed in the Deloitte proposal/quotation in which the following was specified as being out of scope: 'Members who have resigned, passed away, or otherwise left the funds unless a specific verifiable query has been raised'.

However this exclusion of members would mean that the tiered asset based administrator fees on certain schemes were wrong in the Rebuild as the asset value is understated when you exclude exited members from the build-up. In fact no mention of these tiered asset based fees was made at all by Deloitte and so there is a big possibility they never brought them in at all. Either way this again means the member values calculated by Deloitte are wrong.

Reinvestments have not been allocated to members

The following was stated amongst the Deloitte findings: "Reinvestments per IM (Investment Manager) statements have not been allocated to participating employers, as there is no basis of splitting the return on investments between the individual participating employers". This is not correct. Just as investment returns are allocated to members so reinvestments can be allocated as a negative investment return which once again highlights that you cannot do pension administration in a spreadsheet (I come back to this point in a while). This once again means that the Deloitte values are wrong.

Timing of investments was out of scope

The following was stated by Deloitte in relation to the scope of the Rebuild: 'The timing of investments in the market relative to the date the contributions are received has been excluded from scope'.

As I already explained, with daily unit priced administration you cannot just ignore the timing of investments and doing so creates an asset liability mismatch and makes the member values wrong.

Conclusion

Deloitte have produced a set of incorrect member records and there has been a flouting of established practices and governance around unitised pension fund administration and there has been a breach of the Fund rules.

You can't do pension administration in a spreadsheet

Deloitte used a spreadsheet to produce their recreated member records. Just for completeness the reason I know the Rebuild was done in a spreadsheet is that amongst the Rebuild documentation there was a document entitled 'Deloitte Deliverable Format Finalisation 4 May 2011' in which it stated '*build up is done in excel as previously presented*'.

The problem with this is that creating pension fund member records is too complex a job to be done in a spreadsheet. If it could be done in a spreadsheet then why would Dynamique, and every other pension administrator for that matter, have spent millions of Rands on administration systems?

One of the primary reasons why pension administration cannot be done in a spreadsheet is because, as I have touched on previously, in order to allow for complications like reinvestments, asset manager and trustee and audit fees, Retirement Fund Tax, tiered asset based fees, etc. etc. a system that can handle actual and notional unit prices is required as these things can't be adequately handled in a spreadsheet.

In addition, there are no controls in a spreadsheet, for example a number could be typed incorrectly into a cell or there could be an error in a formula. Also members can't be given online access to a spreadsheet and spreadsheets can't easily produce benefit statements. Proper systems have controls and reporting for enforcing controls and ensuring accuracy of information. These are important reason why administrators do not and should not use spreadsheets for performing administration functions.

All members received was a value with no supporting details

From the Rebuild all that Members were given was a value but with no supporting breakdowns whatsoever. Members are therefore not in a position to verify whether the value calculated for them in the Rebuild is correct or not. To just give a value to a member without giving the breakdown to enable the person to verify their value constitutes a breach of every practice, law, governance requirement and convention relating to pension fund administration. The ironic thing is Botha, Lepar and Smith alleged the Dynamique member values were wrong but at least with the Dynamique values each Member could themselves determine whether their value was right or wrong as they were given online access to all their records and annual benefit statements. However with the Rebuild the Members were just given a value with no opportunity whatsoever for them to verify that value.

By way of an analogy this is like going to the supermarket and you go to the checkout with a trolley full of goods and they waive a scanner over it and say you owe R2500 and you ask for a slip so that you can check the total and they say ”sorry we are not giving you a slip you must just take our word for it.” - this is just absurd.

The Deloitte values are wrong

Based on everything I have said above the Deloitte values are wrong.

The ironic thing is that in clause 116 of Botha, Lepar and Smith’s Founding Affidavit (see Item 1 pg67) they said they could not allow the funds to continue operating on the basis of incorrect and inaccurate member records – so what did they do – they scrapped these records (which remember have never been shown to have been inaccurate) and created their own set of incorrect and inaccurate member records and the Members had to pay R20m for this fruitless and wasteful expenditure.

Even if one ignores the fact that the Rebuild member values are in aggregate R20m lower than the Dynamique member values, neither Botha, Lepar and Smith nor anyone else for that matter has produced any evidence that the Rebuild member values are more accurate than the Dynamique member values.

Auditing and pension fund administration are different jobs

An administrator does the work and an auditor checks the work i.e. an auditor does the audits and reviews the records but does not create the records themselves. However with the Rebuild we have a situation of an auditing company actually creating the records i.e. the work done by Deloitte in the Rebuild constitutes administration and not auditing work.

Just as you wouldn’t get a dentist to perform heart surgery on you so should you not get an auditor to do pension fund administration – they are two different skills – yes administrators and auditors work together when the auditor audits a pension fund but they are separate specialities where one cannot do the others job. Someone having worked as an auditor for 30 years would most likely still not be qualified to administer pension funds and similarly someone who has worked as a pension fund administrator for 30 years would still not be qualified to audit a fund.

So why did Botha, Lepar and Smith hire an auditor to do pension fund administration? Even if a rebuild was hypothetically required this should have been done by a pension fund administration company and not an auditing company. My previous section on why the methodology used was fundamentally flawed highlights the problems encountered when this rule is not adhered to.

This also raises another important question: were Deloitte legally allowed to do pension fund administration work i.e. were they an approved S13b administrator? As far as I can determine they were not when Botha, Lepar and Smith hired them or at any point during their work on the Rebuild.

Now in this regard the PFA provides as follows:

13B. Restrictions on administration of pension funds
(1) No person shall administer on behalf of a pension fund the receipt of contributions or the disposition of benefits provided for in the rules of the fund, unless such person has been approved by the registrar and continuously complies with such conditions as may be prescribed.

37. Penalties
(1) Any person who -
(a) contravenes or fails to comply with section 4, 10, 13A, 13B or 31;
is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

The rebuild did not achieve its objectives

The Rebuild as per the engagement documentation from Deloitte (see Item 75b pg75 and Item 7b pg63) was an exercise to produce a correct set of member records and to facilitate the matching of the assets and liabilities of the Funds. It is however evident from everything I have said above that the member records produced are incorrect and as far as an asset liability match is concerned it is evident from the actuarial valuations of the Funds post the rebuild (Items 110 and 111) there is an asset liability mismatch after the rebuild. Hence the Rebuild did not achieve its objectives – and it was never going to achieve its objectives and therefore the R20m spent on the Rebuild was fruitless and wasteful expenditure.

The Members are therefore due a partial or full refund from Deloitte.

There are a number of things that are ironic about all of this:

1. Botha, Lepar and Smith had stated at some point that the Funds would be paralysed if they did not do the Rebuild – in fact it was the total opposite – the Rebuild totally and permanently paralysed the Funds and the Funds were never again able to properly pay withdrawals and eventually had to just be put into liquidation
2. In Deloitte's quotation to the Funds they stated as follows: "*The 'One Deloitte' value proposition*" and below that they listed "*Our in-depth understanding of the retirement fund industry, industry regulations and best practices".* They went on to say: "*Meet the team: We have put together a team structure that comprises a core team of suitably experienced individuals, with experience both in financial services/funds administration and in account reconstruction/reconciliations, and supported by subject matter experts*."

The allegation of maladministration against Dynamique

In The Appeal it is evident that Botha, Lepar and Smith's defence rests on their allegation that there was maladministration by Dynamique. Now there is no obligation on the Members or myself to prove that there was not maladministration. The onus was on Botha, Lepar and Smith to prove there was maladministration. They haven't done this and no maladministration was proven at any time against me. In other words, it is not a case of he said she said but rather the obligation rests on the person making the allegation to prove their claims and Botha, Lepar and Smith, or anyone else for that matter, have not done this.

Notwithstanding this, for completeness sake and in case there is any lingering doubt that any person has, I address this maladministration allegation below.

Maladministration never defined

Firstly in this instance what exactly is Botha, Lepar and Smith's definition of maladministration and what exactly constitutes this maladministration – nowhere do they define the term or give any specifics.

It bears mentioning that 8 years down the line Botha, Lepar and Smith, or anyone else for that matter, have not been able to produce any evidence of maladministration.

Onus to prove maladministration

In The Appeal Botha, Lepar and Smith said that my defence to the claim of maladministration constituted a series of bald denials. Well firstly as already stated they were the ones who spent R20million of the Members money based on their claim that there was maladministration and so the onus rests fully on Botha, Lepar and Smith to prove there was maladministration. It is not my onus nor the onus of the Members to prove there was not maladministration.

Going back to my hypothetical car scenario where I throw away a car because of a noise I hear in the engine – the onus is not on someone else to prove that the engine was not damaged beyond repair – the onus would rest fully on me to prove that it was warranted to throw away the car and buy a new car.

And in this case Botha, Lepar and Smith did not only have to prove there was maladministration – they also had the onus to prove that the only solution to any such maladministration was throwing away the records and rebuilding everything from scratch. Botha, Lepar and Smith haven't done this, they haven't even come close to doing this. Their evidence of the alleged maladministration presented in The Appeal is vague and inferential and nothing more than unsubstantiated allegations.

Botha, Lepar and Smith's evidence of maladministration

In a nutshell Botha, Lepar and Smith's case for maladministration that they presented in The Appeal has four primary legs, which are as follows:

Leg 1) The audits of the funds were late and the administration reports needed improvement
Leg 2) There was a complaint by a broker Anthony Cohen
Leg 3) An Asset Liability Matching exercise was presented at a trustee meeting showing an asset liability mismatch
Leg 4) Deloitte supported the decision to do the rebuild.

All four of these legs are devoid of any merit, more specifically:

Leg 1) The bulk of Botha, Lepar and Smith's Founding Affidavit constitutes a regurgitating of minutes of trustee meetings where two issues are raised during Dynamique's tenure as administrator: the audits of the Funds were late and the administration reports needed improvement – and Botha, Lepar and Smith claim this proves maladministration. This is denied. The audits being late does not mean that the member records are wrong. Audits of a fund can be late for many reasons and in this instance, it was purely because Dynamique had taken the IF Umbrella Funds over from another administrator who had not been processing everything through the system as they should have been and so there was a lot of catch up work to be done. The audits were however always within the extended timeframes approved by the FSB and Dynamique never had to pay any late submission penalties.

In addition, the 2006 audits of the Dynamique SA Pension and Provident Funds had been done (see copies in Annexures TK4 and TK5) but yet Botha, Lepar and Smith rebuilt that period anyway.

Similarly, the fact that the presentation of the administration reports can be improved does not mean that there is any problem with the underlying records.

Leg 2) Not only does the complaint by Anthony Cohen not show maladministration but Anthony Cohen was one of the primary brokers behind bringing the Adjudicator complaint against Botha, Lepar and Smith. In addition, the fact that this was the only broker complaint to the trustees over a period of 3 years during which period Dynamique dealt with over 40 brokers and over 200 participating employers is testament to how few complaints there were and how good the service by Dynamique actually was.

Leg 3) The asset liability matching exercise which Botha, Lepar and Smith refer to was only a dirty (meaning approximate) asset liability match and only on some sample funds (how many they don't say) and it was as at 31 December 2009 [Item 7b p55] – that is some two years after Dynamique's tenure as administrator to the Funds. Hence it was fundamentally flawed for Botha, Lepar and Smith to conclude from that asset liability match that the records two years earlier as at 1 February 2008 were wrong as any problem may well have arisen after that date and any problems may have been isolated. In any case the most common reason for an asset liability mismatch is the unit pricing has gone wrong in which case rebuilding all the records is not the correct solution. What's more there was still an asset liability mismatch after the Rebuild so the Rebuild achieved nothing.

Leg 4) Deloitte were paid R18.2m to do the rebuild so of course they were going to support the decision to do the rebuild – you can't honestly expect them to turn around and say the rebuild was unnecessary and a waste of money. The fact of the matter is that no independent party has supported the decision to do the rebuild. In addition, as I explained above the Deloitte report was plagued by inaccurate and irrelevant findings and just showed that the Deloitte methodology was fundamentally flawed and that the Rebuilt values are wrong.

In any case the Deloitte report doesn't find that there was maladministration, their report doesn't even mention the word maladministration. Instead the Deloitte report contains bald conclusions without any support for such – for example they state that no other solution was possible other than rebuilding everything but they provide no supporting justification or evidence for such a conclusion.

In The Appeal the counsel for Botha and Lepar in their Heads of Argument (see Item Heads 1st to 3rd applicants) claimed that the Members, Dell and the Adjudicator accepted that maladministration necessitated the rebuild. This is denied. To the extent that either the Members or Dell or the Adjudicator stated that there was maladministration they were merely repeating what Botha, Lepar and Smith themselves had told these parties. The Adjudicator most certainly did not find that there had been maladministration – the Adjudicator merely stated that she had been informed that there was maladministration – there is a massive difference between finding something and being informed of something.

Records scrapped may have been correct

As I already previously demonstrated the records may have in fact been **correct** at the time Botha, Lepar and Smith scrapped them and a simple reading of Botha, Lepar and Smith's Founding Affidavit confirms that they made no effort whatsoever to establish whether the records were in fact wrong or what exactly the problems were – without knowing what, if any, the problems were I submit it is impossible to find that a rebuild was the correct solution.

What is worth mentioned here is that the 1 February 2008 member values that Botha, Lepar and Smith claimed were incorrect and which they scrapped in about June 2010 were not necessarily the 1 February 2008 values that Dynamique handed over to AON on 1 February 2008. How can that be you may ask? The reason is that the administration system run by Dynamique was called Everest and this was a unitised administration system. Now at any point in time the system did not hold a cast in stone value for a member but rather it held a number of units for a member and the members value at any point in time was calculated by multiplying the number of units by the then applicable unit price.

Now I explained previously the concept of an actual unit price and a notional unit price where the notional price takes into account reinvestments, fees, taxes, etc. Now the notional unit price is not cast in stone and the system recalculates the notional unit price from inception every time there is a movement on that asset. Hence if an administrator does not carefully monitor these notional unit prices it is very easy for them to retrospectively change or even go wrong causing retrospective changes in the Members' fund values.

So, for example, if Aon had messed up the historic notional unit prices then as at June 2010 the 1 February 2008 values on Everest may well have not been the same as the effective 1 February 2008 values that Dynamique handed over to AON. In fact, it is quite likely that this actually happened as at Dynamique some of my primary functions were the monitoring of these notional unit prices and the overseeing of the funding checks (checking assets against liabilities) but as far as I am aware AON did not replace me after taking over the business so who was performing these functions after 1 February 2008? Notwithstanding this point Botha, Lepar and Smith accused Dynamique of maladministration without first, on their own version of events, even doing a cursory check of whether the values they claimed were wrong were in fact the ones handed over by Dynamique.

Impossible that the Dynamique records were in a mess

In so far as there is any onus on myself to prove that there was not maladministration, it is noted that Botha, Lepar and Smith have not provided any specifics whatsoever as to what this alleged maladministration entailed.

It is denied that the Dynamique records were in a mess. And how can I say this with such certainty? Well firstly Dynamique gave online access to their records to all parties (the members, employers and brokers). The online access showed contributions paid, chargers levied, investment portfolios, fund values, etc – everything that is needed to confirm whether the records are correct. And Dynamique issued annual benefit statements to all the members via the brokers and employers. And so the records were regularly checked by all these parties and explicitly or implicitly signed off by all these parties. Therefore by definition they were correct.

In addition to the online access, every month Dynamique would send out a prebilling statement to each employer who would implicitly or explicitly check and sign off the data before making payment. A pre-billing statement is a schedule showing the members on the fund, their salaries and what contributions are due for each member and in total.

In addition:

- the 2006 audits of the Dynamique SA Pension and Provident Funds had been completed by BDO and no material issues were found.
- There were many participating employers where no findings were listed by Deloitte, for example, ABC07, ABC08, ABC09, ABC10, ABC11, ABC12, etc. Now over a period of 3 years with individual investment choice to have participating employers where there are no findings is phenomenal. If there was maladministration you would have expected every participating employer to have had a fair number of material issues
- Dynamique used an administration system called Everest which is one of the leading administration systems in the country used by a number of big administration providers
- The practice at Dynamique for every withdrawal claim was for both the person processing the claim and the person checking the claim to check the detailed member transaction listing and had there been any problems with the records it would have been identified at that point
- The biggest risk in unitised pension administration is that the unit pricing goes wrong and I personally used to regularly check all the unit pricing on the system
- The directors of Dynamique were all also shareholders in the company so why would we have been reckless when our livelihood depended on our service and the quality of our work and when we personally carried the risk
- Dynamique dealt through employee benefit brokers and not directly with clients and while a layman client may have missed a problem with the records an experienced employee benefits broker would not have missed any such problems
- AON did a due diligence prior to buying the business and that would have picked up if there were any material problems
- At the time AON took over the administration of the Funds the administration wouldn’t have been able to continue had the records been in a mess
- AON as the buyer of the business never contacted me or took any action against me regarding any problems with the business or any misrepresentation or any false warranties
- the FSB Surveillance and Compliance department conducted a number of audits on Dynamique funds and no maladministration was ever found

- the auditor who did the S13B audits of Dynamique never found any maladministration
- I placed my own money and my staff's money into the Funds which I would never have done had there been maladministration going on
- A number of the brokers supporting Dynamique placed their own money and their staff's money into the Funds which they would never have done had there been maladministration going on.

Hence the allegation of maladministration is simply not true.

Some level of errors is expected

I am not saying Dynamique never made any mistakes. When it comes to pension fund administration the nature of that beast is that it involves manual processes and people can and do make mistakes which would invariably be corrected upon discovery.

Notwithstanding this, unitised administration with individual member investment choice and a huge range of underlying portfolios is the most complicated form of administration and the fact that the issues identified in the Rebuild were so minor is a testament to how good the administration was at Dynamique. Anyone who understands pension fund administration and who has worked directly in pension fund administration would appreciate just how flattering the Deloitte findings were to Dynamique - to go through an administrator's records with such a fine-tooth comb and find so few issues of any significance is a compliment to Dynamique and the individuals involved.

Also when mistakes do happen you can't just assume the administrator was at fault. For example, I remember a number of instances when the investment manager delayed in the investment of monies into their portfolios or placed money into an incorrect portfolio. Another classic example is that there were many instances where Dynamique could not invest a contribution payment as the supporting schedule either had not arrived yet or the total on the supporting schedule did not tie up to the amount paid and what commonly happens here is someone looks at the fact that the contribution was invested late and assumes that is the administrator's fault. In addition mistakes do not necessarily mean a member is worse off as, for example, it can happen that where the money actually is earns a higher return than where the money should have been.

I also remember a number of cases where I would receive a complaint that Dynamique had not invested the money correctly only to find that the Investment Selection Form had not been properly completed. The Dynamique Investment Selection Form had separate sections for 'Existing Money' and 'Future Cash Flow' and what would sometimes happen is that only one of these sections had been completed even though the member actually wanted all their money (existing and future) to be switched.

The bottom line is that the Rebuild uncovered no material errors and there is not a single participating employer where the Deloitte findings justifies the decision by Botha, Lepar and Smith to discard the records and redo everything.

Lastly on this issue, the Deloitte report mentions various types of findings (see Item 80b pg 15) but doesn't mention the frequency or error rate of each finding. Now an error rate of 1

in 1,000 is a very different thing to an error rate of 300 in 1,000 hence without stating error rates any finding is meaningless.

The civil lawsuit that was brought against me

Totally without merit

Botha and Lepar in their capacity as trustees instituted a civil lawsuit against me claiming that I was responsible for the full loss of R18,2 suffered by the members as a result of the Rebuild cost. A copy of the particulars of claim (hereinafter referred to as POC) in this lawsuit can be found in Item 75b pg31.

In the 8 years since instituting this claim against me Botha and Lepar, or any other party for that matter, have not presented any evidence to back up any of the claims made in this civil lawsuit. In this regard Botha and Lepar resigning as trustees did not relieve them of the onus to prove the allegations against myself and Dynamique nor did it relieve them of the onus to justify their actions in the Rebuild to the Members.

Notwithstanding this I have chosen to address below the key allegations made against me to refute any wrongdoing on my part.

It is worth mentioning that at the time this lawsuit against me was withdrawn, which was 2,5 years after it was initiated, it was still at the POC stage as the POC were excipiable due to the POC being vague and lacking the necessary averments to succeed.

In the POC claims were made against me in my capacity as a trustee and in my capacity as a director and I deal below separately with both these parts.

Claims made against me in my capacity as a trustee

No specifics whatsoever were provided

The claim contains vague allegations with no specifics whatsoever. So, as an example of the vague allegations:

1. They alleged I failed to ensure that Dynamique complied with its obligations in the administration agreements but they provided no specifics of how Dynamique did not comply with its obligations and they provided no specifics as to how I could, as a trustee, have ensured that this didn't happen
2. They alleged that I failed to implement proper registers, books, records of operations, and control systems, to prevent the maladministration but again they provided no specifics of what this alleged maladministration is that they are referring to or what registers, books or controls I should have put in place or how as a trustee I could have gotten Dynamique to address any such shortcomings in their operation.

The allegations were baseless

In addition the claim contained baseless allegations with the following being a couple of examples of this:

1. They alleged I failed to ensure that adequate professional indemnity insurance was in place during the tenure of Dynamique. As a trustee I had ensured that the Funds had adequate insurance from their inception however when a claim was lodged at the time of the Rebuild it turned out that Botha, Lepar and Smith had allowed the policies to lapse by not paying the premiums due on the policies (more about this later)
2. They alleged that I failed to obtain the appropriate expert advice to prevent Dynamique's maladministration. As already dealt with above there was never any maladministration by Dynamique so what expert advice was I meant to obtain?

They bring in the selling of the business

They alleged that as a trustee I was negligent in approving the sale of the business to AON. Firstly as a trustee I had no involvement with the sale of Dynamique's business to AON – any involvement I personally had in this sale was as a director of Dynamique and not as a trustee of the Funds.

Secondly the selling of the business is of no relevance to the Rebuild and the reason I say this is that they claimed that the Rebuild was required because of alleged maladministration during Dynamique's period of administration which ended on 31 January 2018. The business was then sold on 1 February 2018 and so whether the business was sold or not does not cause the need for the Rebuild nor does it impact the need for the Rebuild and hence the suggestion that the sale of the business caused the R18,2m loss is absurd.

They then went on to claim that after the sale of the business Dynamique was just a shell and hence the R18,2 could not be recovered. Again this is absurd as firstly it is not true that Dynamique was just a shell after the sale and secondly Dynamique has never been found liable to the Funds for any loss and hence the Funds have never had any money to be recovered from Dynamique.

As an aside I once heard the comment made that the reason I wanted to sell Dynamique to AON was that I was aware that there were problems with the administration. I actually didn't want to sell the business but in the end after much persuasion by my fellow director David Lepar I felt it was the right thing as Dynamique had grown big and needed the backing of a big financial services player to take it to the next level.

No valid argument is set out in the POC as to why the need for the Rebuild

The POC allege that the maladministration necessitated the records being rebuilt at a cost of R18,2m but, even forgetting about the fact that there was never any maladministration, they provide no specifics whatsoever to justify this conclusion. I have already dealt comprehensively earlier in this submission with the fact that you can't just assume a rebuild is the correct solution even if there had been maladministration.

The PFA imposes duties on the board and not on individual trustees

The POC set out in detail all the duties imposed on a trustee by the PFA and these duties form the basis for their claim against me in my capacity as a trustee. Now all these duties are imposed by the PFA on the Board of trustees and not on any individual trustee. So now even

if one had to assume for a moment that there was maladministration and then assume further that this maladministration did justify throwing away the records and redoing everything, then the question is why was I the only one sued when there were up to 8 trustees over that period of time on the Funds who would have been jointly and severally liable for this alleged maladministration?

Botha (i.e. one of the trustees who commissioned the Rebuild and who instituted the lawsuit against me) was my fellow trustees on the Funds at all material times over which they alleged the maladministration took place. And everything the lawsuit alleged that I failed to do as a trustee he was jointly and severally liable for. As a trustee I had no special duties different to him.

In fact, if any trustee had a greater responsibility in policing the administrator then it was Botha and I say this for the following two reasons:
Reason 1: Botha put himself forward as professional trustees and was paid a fee by the Funds to act as trustees – therefore he would need to be judged against a higher standard than what you would judge an ordinary trustee against
Reason 2: Given I was employed by the administrator I couldn't be expected to objectively police myself and that is precisely why there is the requirement to have independent trustees in place – Botha was well aware of this limitation and the greater burden that he carried as an independent trustee as they state in clause 62 of their Founding Affidavit (see Item 1 p29) "*On 24 May 2007, an email was sent to Kamionsky advising him, inter alia, that: "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…*".

The reality is that the PFA conveys responsibilities onto a board of trustees as a whole and there is nothing in the PFA which singles out individual trustees with more or less responsibilities than other trustees.

Can a trustee be held liable for maladministration

What is so ironic is that Botha and Lepar instituted this lawsuit against me claiming I was liable in my personal capacity as a trustee for the maladministration but then in The Appeal when they were the ones effectively being held liable they argued that a trustee can't be held liable for maladministration. So which is it?

Claims made against me in my capacity as a director

A number of the claims made against me in my capacity as a director were the same as the claims made against me in my capacity as a trustee and hence to the extent that I addressed some of these claims in the section above I will not address them again here. Instead I focus in this section on some of the additional claims made against me in my capacity as a director of Dynamique.

Claim brought in terms of s424 of the Companies Act

The claim against me in my capacity as director was essentially that I had been reckless and negligent in terms of s424 of the Companies Act. Now Section 424 (1) in its basic and general sense requires that:

- any business of the company must have been or is being carried recklessly or for fraudulent purpose; or
- any other person was knowingly a party to the carrying on of the business in the manner aforesaid; and
- the company **must have incurred debts and liabilities**.

But Dynamique hadn't incurred any debts or liabilities as the Funds were never a creditor of Dynamique i.e. no claim against Dynamique was ever established by the Funds and hence Dynamique never owed the Funds any money.

Hence there was no valid basis for them to have instituted this claim against me in my capacity as a director.

<u>The allegations were baseless</u>

In my capacity as a director the claim contained numerous baseless allegations with the following being a couple of examples of this:

1. They alleged that I didn't perform the required monthly and annual audits which prevented the identification and rectification of errors. My comments on this are as follows:
    a. There is no requirement for monthly audits. What the legislation provides is that in the FAIS Act there is a requirement for monthly audits however this applies to the Financial Service Provider's accounts (i.e. Dynamique's accounts) and not to the accounts of the pension funds – the pension funds are governed by the PFA and not the FAIS Act and the PFA only requires annual audits
    b. Audits do not identify errors – an audit is only required to be completed 6 months after the year end and hence if the financial year end of the fund is 1 March then the audit for transactions that happen in March 2018 is only completed by August 2019 i.e. one and half years later and hence the annual audit is not a tool that can be used to identify errors.
2. They alleged that no auditor conducted the relevant investigations and reviews set out in Section 5 of Board Notice 24. This is denied. These were all done as required and copies together with proof of submission have been attached as Annexures TK6 to TK9.
3. They alleged that deposits of fund monies were made later than a business day following the date of receipt thereof in contravention of Section 8 of Board Notice 24. This provision relates to premiums paid over to the Fund which are paid in the form of cash or cheque and in that case the administrator needs to deposit the money into the fund's bank account within one business day. However in the case of Dynamique this provision was irrelevant as all premiums were paid by the participating employers by EFT directly into the Funds bank accounts.
4. They alleged that adequate insurance was not maintained in contravention of section 13B(5)(f) of the PFA. Dynamique's S13b audits confirmed that we did have adequate indemnity insurance in place and Dynamique never had a valid claim that exceeded the amount of professional indemnity insurance that it had in place.
5. They alleged that the warranties that I gave to AON in the sale of business were false. They provide no specifics or evidence in support of this allegation but regardless of

that I never gave any false warranties and AON never once contacted me about any issue with the warranties that I gave them. In addition, any warranty I gave AON was for AON's benefit and not for the Funds' benefit.

Comments on the types of problems that they list

In clause 20.2 of the POC it lists 'types' of problems with the records but once again it provides no evidence or specifics for any of these alleged issues. For completeness sake however I wish to comment on the 'types' of problems that they list:

1. reinvestments (i.e. interest and dividends) were not credited to members' accounts. Although Dynamique didn't generally make explicit allocations to members for the reinvestments Dynamique would incorporate the reinvestments net of costs into the calculation of the notional unit prices (refer to my earlier explanation on the difference between actual unit prices and notional unit prices. Had Deloitte discussed the Rebuild with Dynamique then this could have been explained to them
2. redemptions were paid from monies owing to other members - correct in some cases – refer to my earlier explanation of how investments and disinvestments were offset against each other – again this was a standard and acceptable practice which had no impact on a member's value and again it could have been explained to Deloitte if they had just discussed the rebuild with Dynamique;
3. switches between investments were not correctly recorded in members' accounts – possibly correct but irrelevant in the bigger scheme of things as the number of such instances was so small which again, given unitised administration with individual investment choice is the most complicated form of administration, was actually a compliment of the work done by Dynamique;
4. inaccurate deposits of monies were deposited in the bank accounts of other funds which Dynamique also administered – correct but absolutely nothing to do with Dynamique as this was something done by the participating employers and the number of instances was so few and Dynamique had made the necessary corrections. The Deloittes report actually confirmed that monies paid into the incorrect bank accounts by employers had been transferred into the correct bank accounts by Dynamique.
5. monies were invested in, or disinvested from, incorrect investment portfolios – possibly correct but again the number of such occurrences was extremely small and as explained above one can't assume that this was Dynamique's error.

None of these items justify throwing away and 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.

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 could suggest good controls. Nowhere do they state the prevalence of the issues.

I was one of up to 8 directors

Dynamique had up to 8 directors but yet Botha and Lepar sued only me. In addition, in The Appeal Botha and Lepar don't mention any other director and instead repeatedly single me out when it comes to the alleged maladministration by Dynamique, for example:

- In clause 2.10 of their heads they state: "*Kamionsky … the sole director, shareholder and controlling mind of Dynamique*"
- In clause 17.1 of their heads they state: "*Dynamique's and Kamionsky's maladministration*"
- In clause 43 of their heads they state: *"Dynamique (or its alter ego, Kamionsky) would not perform the administration services in a professional or workmanlike manner"*
- In clause 48 of their heads they state: "*his actions (referring to Kamionsky) as the controlling mind and representative of the administrator responsible for the maladministration, Dynamique"*
- In clause 65 of their heads they state: *"Dynamique and Kamionsky's maladministration"*
- In clause 74 of their heads they state: *"Dynamique and Kamionsky's lack of proper administration"*
- In clause 75 of their heads they state: *"the maladministration by Dynamique and Kamionsky"*
- In clause 92.2 of their heads they state: "*Dynamique (controlled by Kamionsky) failed to keep proper records*"

Saying there was maladministration by Kamionsky is baseless as I was never the appointed administrator to the funds – that was Dynamique – and at all material times I was just one of up to 8 directors of Dynamique. One of these other directors was Lepar who was a director of Dynamique at all material times that the alleged maladministration occurred.

In The Appeal in Botha and Lepar's heads of argument their counsel claims that they cannot be held jointly liable for my negligence. This argument is however fundamentally flawed as firstly I have never been found guilty of any negligence whatsoever and secondly if you look at the negligence claim they instituted against me every item of the claim was something that they were jointly responsible for as my co-trustees and co-director.

I could never have been responsible for the full loss

The Rebuild for the IF Umbrella Funds started from their inception in April 2004 however myself and Dynamique only got involved with these Funds in December 2005. Hence there is no possible way that I could have been responsible for the Rebuild cost of the IF Umbrella Funds for the period from April 2004 to November 2005 but despite this the POC claimed that I was responsible for the full R18,2m loss.

Suing me was premature

At the time Botha and Lepar instituted the civil lawsuit against me Dynamique hadn't been found guilty of any wrongdoing and there wasn't any prescription issue as they would have had 3 years to sue me from the time they became aware of the loss which was in 2010 when

they started getting quotations for the Rebuild. Further the arbitration proceedings against Dynamique would have in any case probably interrupted prescription.

In addition, the arbitration proceedings had only just begun at the time so it could have first been allowed to run its course and then if the arbitration proceedings found wrongdoing by Dynamique then to the extent that Dynamique was not able to settle any claim then legal proceedings could have been instituted against me at that point.

But notwithstanding this Botha and Lepar did not wait for the outcome of the arbitration but instead, in breach of the provisions of the arbitration clause which provided that all parties will be bound by the outcome, they unilaterally decided that there was maladministration by Dynamique and that I am personally liable for this maladministration and they instituted the civil lawsuit against me.

For completeness sake the reason I say that the arbitration would have probably interrupted prescription is that the Prescription Act 68 of 1969 explicitly deals with a case involving arbitration – it states in clause 13:
13. Completion of prescription delayed in certain circumstances
(1) If
(f) the debt is the object of a dispute subjected to arbitration
(i) the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph (a), (b), (c), (d), (e), (f), (g) or (h) has ceased to exist, the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (i)

Why I paid a settlement

In 2013 I entered into an out of court settlement of the lawsuit against me with the Funds. The settlement was entered into without prejudice and without any admission of any wrongdoing and the only reason I did it was for commercial reasons in order that I could get on with my life as I have a family to provide for and I had a job offer that was subject to the lawsuit against me being settled. However the amount I paid as a settlement was extremely small in relation to the amount I was being sued for and was most certainly not an admission of any guilt.

Why the Funds' insurance did not cover the loss

Non-payment of premiums

I now move onto the issue of why the Fund's insurance policies did not cover the cost of the Rebuild. This was due to the lapsing of the insurance as a result of the non-payment of the premiums by Botha, Lepar and Smith.

In The Appeal Botha, Lepar and Smith did not deny that they had not paid the insurance premiums but instead they attempted to escape liability on the following 3 grounds:

Their claim of an exclusion

Ground 1: Botha, Lepar and Smith claimed that the rebuild was excluded by the policies irrespective of whether they paid the premiums. This is not correct as the Funds had insurance cover from their inception and so no event could be excluded as any event would have occurred during the currency of the cover. This was reflected by the fact that up until the time of the rebuild the Funds policies had no exclusions, as I will demonstrate now.

If you look at Item 108 you will see the schedules for the Funds' insurance policies for the period running from 1 August 2009 to 31 July 2010 – here we can see that there are no exclusions as the exclusions get listed on the second page of the schedule. Now the Rebuild was commissioned in June 2010 which clearly falls within this period of insurance – so it is during this policy period that the Rebuild falls and Botha, Lepar and Smith should have notified the insurer in this period of this event that was going to give rise to a claim. There can be no dispute that in and around May 2010 which falls within this period that, as is evident from the trustee meeting minutes, Botha, Lepar and Smith knew there was this event that was going to cost some R20m and they knew there was going to be claims against former trustees to recover this money as there was already at that point discussions in the meetings about taking legal action to recover the costs. So the claim could have and should have been lodged at that point against these policies.

If you then go to Item 80b p51, you find the insurance policy and in the 3rd paragraph of clause 1 you find the requirement to notify the insurer of any instance which may give rise to a claim and then that becomes the claim date, more specifically there is a heading DEFINED EVENTS and below that Clause 1 Negligence and then the 3rd paragraph reads as follows: *"If, during the period of insurance, or during the discovery period (if applicable) the Insured shall become aware of any circumstances which may reasonably be expected to give rise to a claim being made against the Insured and shall give written notice to the insurers of the circumstances and the reasons for anticipating such claim, without full particulars as to dates and persons involved, then any claim which is subsequently made against the insured and reported to the insurers alleging, arising out of, based upon or attributable to such circumstances or alleging any wrongful act which is the same, related, continuous or repeated wrongful act alleged or contained in such circumstances, shall be considered made against the insured and reported to the insurers at the time such notice of such circumstances was given."*

But what happens is Botha, Lepar and Smith do not notify the insurer of this insured event as they are required to do but instead they only lodged the claim with the insurer more than 6 months later (see confirmation of this in Annexure TK10).

If you go to Item 29b p10 you will see that in clause 53 of the submission by Botha, Lepar and Smith, it is stated "*On 18 March 2011 the funds were advised by their underwriting managers that the policies had lapsed due to non-payment of premiums*" – and a copy of this letter from the insurer can be found in Item 88b p18. Hence the claim was only lodged with the insurer in 2011.

Then if you go to Item 107 we see the letter from the Funds' attorney to the insurer. The letter is confirming the adding of the exclusions to the policy – now look at the date of the letter which is 23 June 2011 and the letter refers to the meeting of 8 June 2011 where the exclusions were discussed. Therefore the exclusions were only added into the policy some one year after the Rebuild which was commissioned in June 2010.

If you then go to Item 88b p 15 you find the policy schedule for the period from 1 August 2010 to 31 July 2011 which you will see now contains the exclusions that were agreed to between the parties as part of the agreement to reinstate the policies.

So to summarise the sequence: the Rebuild is commissioned in June 2010 at which time there are no exclusions in the policy. Botha, Lepar and Smith however don't notify the insurer of the event at that point instead they only notify the insurer more than 6 months later at which time we are in the next policy period and it then emerges that the premiums were not paid for that period and the policy has lapsed. The Funds then agree with the insurer a reinstatement of cover for the period commencing 1 August 2010 however this is subject to the rebuild being excluded.

By way of analogy, this is equivalent to having an accident in your car but you don't notify your insurer, instead you go have your car fixed at one of the most expensive mechanics in the country. Then 6 months later you lodge the claim with your insurer. What is the insurer going to say? And to make matters worse it then turns out you didn't pay the premium on the policy leading the policy to lapse. The insurer then agrees to reinstate the policy but with an exclusion for that accident that you had.

Their claim of other reasons for repudiation

Botha, Lepar and Smith's second Ground for escaping liability on the insurance issue is that Botha, Lepar and Smith claim there were other reasons for the insurer repudiating the claim and so the insurer would have not paid out the claim even if they had paid the premium. Botha, Lepar and Smith supplied no evidence in The Appeal proving this claim.

Yes the insurers did at some point mention other reasons over and above the non-payment of the premium, however insurers always try get out of paying claims by coming up with all sorts of repudiation reasons but in most cases those reasons don't stand up to scrutiny. And the normal response from any insured is to challenge the insurer on these 'other' reasons. However neither Botha, Lepar and Smith nor Rollason ever challenged the insurer on any of these so called 'other' reasons.

So I had to take it upon myself to challenge the insurer on these other so called reasons for repudiation and it emerged that the insurer was not able to justify any of these other reasons. There were 5 letters between myself and the insurer's attorney a copy of which can be found in Items 101 to 105 and in fact where it ended off in the last letter from the insurer's attorney (Item 105) was that the insurer's attorney confirmed in paragraph 6 – and this is the last word from the insurer on this matter "*We may add that, whilst we take cognisance that certain of the grounds of repudiation are disputed by you, it is not in dispute that the premium for the policy was not paid. In consequence of the non-payment of premium the policy is of no force or effect and in these circumstances it seems to us that further correspondence will be an exercise in futility*".

Non-payment of premiums is the holy grail of repudiation reasons – it is the one reason that cannot be challenged. Any other reason can be challenged, and, in this case, it cannot be said with certainty that any other reason would have withstood scrutiny.

Attempt to blame Aon

Botha, Lepar and Smith's third Ground for escaping liability on the insurance issue is that in their affidavits and heads of argument in The Appeal they try pass blame onto the administrator AON for not paying the insurance premium. For example, in the Item Heads 1st to 3rd applicants on page 48 is states in clause 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"*. Other examples of them blaming AON can be found in Item 88b p2 clause 11 or Item 88b p81 clause 11.

Circular PF130 from the Financial Services Board states in clause 14 as follows: *"The board may, should the rules of the fund permit, delegate some of its functions to board sub-committees, employees of the fund and service providers; but such delegation does not relieve the board of accountability for such functions so delegated. The board may not abdicate from any of its functions and responsibilities."*

Further in Item 29b p19 in clause 3.2 of the Adjudicators determination the Adjudicator states the following: *"The board of trustees* ***(referring to Botha, Lepar and Smith)*** *failed to comply with its fiduciary duties provided in sections 7C and 7D of the Act. Although the board is entitled to delegate its functions to the administrators, it remains responsible for the actions of such service providers who act as agents of the funds. The delegation of duties does not amount to a transfer of oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board".*

Hence it is clear that whilst trustees are permitted to ask an administrator to pay the premiums the trustees remain responsible. In addition in this case it is evident from a simple reading of Botha, Lepar and Smith's Founding Affidavit and more specifically the minutes of the trustee meetings attached to the Founding Affidavit that Botha, Lepar and Smith don't even make enquiries with the administrator as to whether or not the premiums have been paid. Of course there was nothing stopping Botha, Lepar and Smith bringing their own claim against AON if they felt AON didn't do something that they should have.

They did not disclose this non-payment of premiums

Not only did Botha, Lepar and Smith not pay the insurance premiums but they did not disclose this to the members or to me. What happened was Rollason refused to give me any information on the trustee indemnity policies and instructed the insurer not to give me any information. I therefore had to bring an application in the High Court compelling the trustees and the insurer to give me information on the insurance policies, a copy of which application can be found in Item 99. My application was fortunately successful, and it was only then I uncovered this non-payment of premiums by Botha, Lepar and Smith.

Botha, Lepar and Smith in The Appeal stated that the Funds did disclose the non-payment of premiums. Now whilst this is technically true it is misleading as what actually transpired is that Botha, Lepar and Smith themselves did not disclose their non-payment of premiums to the Members. A simple reading of their 1 November 2011 communication (Item 71b p 12) shows there is no mention of the non-payment. In fact it was me who exposed the non-payment to the Members and only then did the Funds come clean and themselves disclose

the non-payment (which disclosure was after Botha, Lepar and Smith had resigned as trustees).

As if not disclosing their non-payment of premiums from the Members wasn't enough, Botha, Lepar and Smith went on to not disclosing their non-payment of the premiums to the High Court in The Appeal. A simple reading of Botha, Lepar and Smith's Founding Affidavit shows there is no mention of the non-payment of insurance premiums. It was myself who brought the non-payment of premiums to the attention of the High Court in The Appeal.

The bottom line is that the non-payment of premiums left the Members with no chance of the insurer picking up the cost of the Rebuild meaning that the Members had to pick up the R20m cost themselves.

The Pension Funds Adjudicator complaint

What transpired

Some brokers who had clients in the IF Umbrella Funds got their participating employers together and they hired a lawyer who assisted them in bringing an Adjudicator complaint against Botha, Lepar and Smith. The Complaint basically said that there had been maladministration (as this is what Botha, Lepar and Smith had told the Members at the time and hence it was all Members knew at the time) and that Botha, Lepar and Smith are liable for not having prevented this maladministration.

The Adjudicator issued a determination saying that it was wrong to have deducted the R20m cost from the Members and that the Funds must reimburse the Members. The Trustees then went to the High Court to appeal this determination on the basis that the Funds could not reimburse the Members due to the money having already been spent and the High Court set aside the determination and sent the matter back to the Adjudicator.

The Adjudicator then issued a second determination finding that Botha, Lepar and Smith were liable and should reimburse the Funds/Members for the loss they suffered. This second determination then gave rise to The Appeal by Botha, Lepar and Smith.

Now when Botha, Lepar and Smith lodged The Appeal they left me out as a respondent eventhough I was party to the determination being appealed. People can draw their own conclusions as to why they left me out but be that as it may I therefore had to bring an application for leave to intervene and my reason for intervening was that the Members did not know what had really transpired and so I was the only person who could provide meaningful input to the High Court on what had actually transpired. My application for leave to intervene was successful and so I was then a party to The Appeal.

The Appeal eventually came before a judge in May 2018. None of the Complainants (i.e. the Members/participating employers who lodged the Adjudicator complaint) were at that point still opposing the Appeal. The only Complainant who had actually opposed The Appeal was the participating employer Dell Computers however they had unfortunately withdrawn their opposition prior to the hearing.

On the day of the hearing Botha, Lepar and Smith arrived with their legal representatives comprising of 3 advocates and a number of attorneys. Right at the outset the counsel for Botha and Lepar made a submission to the judge that due to no Complainant being there to oppose The Appeal the complaint had effectively been withdrawn and the judge accepted this argument. Although I was in court at the time trying to fight for the Members the judge stated that I was not one of the Complainants who brought the complaint and hence notwithstanding my presence the Complaint had still been effectively withdrawn.

The matter was disposed of without any arguments whatsoever having been heard regarding the actions of Botha, Lepar and Smith.

The actions of Rollason in The Appeal

Now let us look at the actions of Rollason in relation to The Appeal.

The Members were given no support to bring the Adjudicator complaint
The Members had to get their own lawyer at their own expense to bring the Adjudicator complaint that they wanted to bring against Botha, Lepar and Smith. The trustees are there to represent the members and a fund can bring (and pay the costs of) claims on behalf of the members. This is what was happening with the lawsuit against myself but yet when it came to Botha, Lepar and Smith the Members were given no assistance by Rollason.

Rollason was assisting Botha, Lepar and Smith
It is evident form a simple reading of the submissions made by Rollason in The Appeal (see Item 41b pg 38 and Item 80b pg 70) that Rollason was arguing that Botha, Lepar and Smith should be excused from liability i.e. his intervention was to assist Botha, Lepar and Smith and he was effectively opposing the Members who were seeking to hold Botha, Lepar and Smith liable. And this was despite Rollason being legally and morally bound to look after the interests of the Members and being paid by the Members. Rollason had no legal obligations to Botha, Lepar and Smith nor was obligated to make any submissions in The Appeal. In addition it was the Members who would have picked up the trustee and/or lawyer costs associated with preparing these submissions that Rollason made in The Appeal.

A material conflict of interest existed
Rollason was a fellow trustee of one of the former trustees on at least one other set of funds called the Abacus Funds (I have attached as Annexure TK11 evidence of this). In other words Rollason and this other trustee were ‘colleagues’. And they were colleagues up to at least 29/04/2016 (see Annexure TK11 confirming this date) and from as early as 04/11/2009 (being the earliest date I have seen them mentioned as co trustees of the Abacus fund) which covers the entire period from when the rebuild was first commissioned to the time Rollason joined the Funds as a Trustee to the time Members were wanting and taking legal action against this former trustee to the time Rollason was intervening in The Appeal to assist this former trustee.

That is a material conflict of interest and this conflict of interest was never disclosed to the Members. In addition this is a breach of the PFA given the PFA provides as follows:
7C Object of board
(1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
(2) In pursuing its object the board shall-

….
(c) avoid conflicts of interest;
….

In addition Financial Services Board Circular PF130 provides as follows:
CONFLICTS OF INTEREST
19. The fiduciary duty owed by the board and the principal officer requires that they avoid conflicts of interest
…
19.5 potential or perceived conflicts of interest are as serious as actual conflicts of interest
…
20. Members of the board should be able to demonstrate their independence. Such independence is essential also for the credibility of the governance arrangements, and is demonstrated by any discretion of the board being exercised in a manner which is impartial, fully informed and not influenced by inappropriate considerations. In particular the board should always consider what is in the best interest of the members …

Not only was the conflict of interest not disclosed to Members but Rollason also did not disclose to Members that he had intervened in The Appeal to block Members and assist Botha, Lepar and Smith.

Why am I raising this issue
I am not saying that Rollason caused the Members' R20m loss – he couldn't have as he only became a trustee after this money had been effectively spent. My reason for raising this issue here is to give context as to how Botha, Lepar and Smith were able to resign and leave without any actions being taken against them by the trustees that took over from them.

Did any trustee personally benefit from the rebuild

Botha as an independent professional trustee was paid a fee per meeting – and in the absence of a rebuild there would be a meeting every 4 months or so, so call it three to four meetings a year and so assuming an average fee of R3,000 per meeting you are looking at about R10,000 income as an independent trustee for a year from the Funds. However, with the Rebuild there were numerous meetings that Botha attended, including scoping meetings, inception meetings, steercom meetings, progress meetings, etc. Assuming this results in say 20 meetings per year this results in a fee of approximately R60,000 for the year i.e. an extra R50,000 per year in income.

Now assuming a rebuild can carry on for 5 years you are looking at 5 times R50,000 – in other words a quarter of a million Rand extra in earnings if there is a rebuild.

Some of the other independent trustees from amongst Lepar and Smith and Rollason may have similarly personally benefited from the Rebuild.

Miscellaneous issues

Anomalies in their version of events in The Appeal

Botha, Lepar and Smith's version of events as set out in their Founding Affidavit does not stand up to scrutiny and in this regard I would like to point out some glaring anomalies in their Founding Affidavit. These are by no means the only anomalies but just glaring ones that stood out for me.

Anomaly 1: in clause 60.3 of their Founding Affidavit (see Item 1 pg28) it states "*Although the minutes do not record this, I recall a much more robust discussion taking place … "*. So what we have here is Botha confirming that the minutes do not accurately reflect what was discussed at the meeting. Hence Botha, Lepar and Smith's Founding Affidavit should be read in the context that all the minutes cannot be relied on.

Anomaly2: in clause 65 of their Founding Affidavit (see Item 1 pg31) it states – "*A further trustees meeting was held in August 2007, but I do not have a copy of the minutes in my possession*' – end quote. Fortunately I had a copy of these minutes from the meeting on 16 August 2007 which can be found in Item 106 and these minutes don't support Botha, Lepar and Smith's version of events as there were no administration problems and no concerns whatsoever raised at that meeting.

Anomaly 3: if you look at the minutes of the meetings held in 2009 up to and especially on the 2 October 2009 (Item 7b p49) there are no material problems noted but then all of a sudden at the next meeting held on 26 May 2010 (Item 7b p52) the trustees are getting presentations for a rebuild of the records. This doesn't follow and is a glaring anomaly and it strongly suggests the problem with the records happened between the meetings of 2 October 2009 and 26 May 2010 and not prior to 1 Feb 2008 as suggested by Botha, Lepar and Smith. In actual fact there was actually two further trustee meetings held in this period which Botha, Lepar and Smith didn't include copies of or refer to, namely the meetings of 23 October 2009 and 15 February 2010 (the evidence that these two meetings took place can be found in Item 7b p59 where the minutes of the meeting held on 1 June 2010 talk of signing off the minutes from these two meetings). Hence their Founding affidavit is just not the complete picture.

Anomaly 4: Botha, Lepar and Smith in their Founding Affidavit in The Appeal paint this picture of Botha having serious concerns that there was maladministration at the time Dynamique was administering the funds but yet when AON takes over from Dynamique they don't do anything that would be expected of someone who harboured such concerns - they don't call for a funding check or for a review of the values or for a hold to be put on payment of withdrawals or for anything for that matter – hence their own actions at the time of the changing of administrator don't support their version of events.

Does abstaining from voting excuse a trustee from liability

In The Appeal Smith, of Botha, Lepar and Smith, asked to be excused from liability for the Rebuild on the basis that he abstained from voting on the Rebuild.

Abstaining from voting is different to voting against something – when you abstain you are saying that I will support and go along with whatever decision is taken by the majority of trustees and in this case Smith supported the decision taken and participated in the implementation thereof.

In addition Honore's South African law of trusts 4th edition states the law thus (at 308): "*Those persons who were trustees at the time of the breach of trust* **(the breach of trust in this instance is the decision to throw away the records and spend R20m redoing everything)** *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.*" (the bold is my own words added into the quotation).

Either Smith supported the decision to throw away the records and spend R20m redoing everything or he did not. If Smith supported the decision to do the rebuild then he must stand or fall with Botha and Lepar and it is then irrelevant whether or not he cast a vote. If on the other hand Smith did not support the decision to do the Rebuild then his actions at the time of the Rebuild must be judged in relation to this view – why did he not try stop the Rebuild, why did he not suggest alternative solutions, etc.

Conclusion

In concluding I would like to summarise the facts in this matter:

1. **Fact number 1:** Botha, Lepar and Smith, or any other party for that matter, have not proven that there was maladministration by Dynamique
2. **Fact number 2:** Botha, Lepar and Smith, or any other party for that matter, have not proven that there was any wrongdoing on my part
3. **Fact number 3:** It is not a certainty that the records were even wrong at the time Botha, Lepar and Smith scrapped them
4. **Fact number 4:** Botha, Lepar and Smith never made any attempt to find out exactly what the problems, if any, with the records were
5. **Fact number 5:** Botha, Lepar and Smith never called in any independent experts as they were required to do
6. **Fact number 6:** Botha, Lepar and Smith never approached the previous administrator to give them a chance to correct any problems
7. **Fact number 7:** Botha, Lepar and Smith never explored any cheaper solutions before jumping into a full scale rebuild of all the records
8. **Fact number 8:** Botha, Lepar and Smith only sourced 2 quotes for the rebuild
9. **Fact number 9:** Botha, Lepar and Smith refused to answer valid queries from the members regarding the rebuild in breach of the duties imposed on them by the PFA
10. **Fact number 10:** Botha, Lepar and Smith are unable to produce any evidence whatsoever that the rebuilt records are correct or any more accurate than the original records
11. **Fact number 11:** The rebuild records are wrong and the rebuild never achieved its objectives – it was a fundamentally flawed decision to begin with
12. **Fact number 12:** The rebuild flouted the law and practices governing pension fund administration
13. **Fact number 13:** Even if a full scale rebuild was required Botha, Lepar and Smith spent an excessive amount of money on it
14. **Fact number 14:** Botha, Lepar and Smith never notified the insurer before proceeding with the rebuild as they were required to do in terms of the policies
15. **Fact number 15:** Botha, Lepar and Smith never paid the premiums on the insurance policies leading the policies to lapse and leaving the members with no cover

16. **Fact number 16:** Botha, Lepar and Smith did not disclose this non-payment of premiums to the Members or to the High Court
17. **Fact number 17:** Botha, Lepar and Smith's case in The Appeal is built on selective trustee minutes and where even on Botha, Lepar and Smith version these minutes do not accurately reflect the discussions at the meetings

The Rebuild was therefore fruitless and wasteful expenditure and further there was no possibility of recovering the loss from the Funds' insurance as the policies had lapsed due to non-payment of premium.

I recall it being stated somewhere that no person will accept the job of a trustee if Botha, Lepar and Smith are held personally liable. This is denied. All a person has to do to avoid liability as a trustee is to manage members' money with the same duty of care that they would manage their own money. And similarly all trustees should know that if they squander members' money on fruitless and wasteful expenditure or if they don't fulfil key duties like ensuring the premiums are paid on the fund's indemnity insurance then they will be held personally liable.

_____

DEPONENT