

IN THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(REPUBLIC OF SOUTH AFRICA)

CASE NUMBER:

In the matter between:

IF UMBRELLA PENSION FUND	First Applicant
IF UMBRELLA PROVIDENT FUND	Second Applicant
and	
LUKHAIMANE M.A. N.O.	First Respondent
AFFIRM MARKETING SERVICES (PTY) LTD	Second Respondent
BEEFMASTER (PTY) LTD	Third Respondent
H BIRKENMAYER (PTY) LTD	Fourth Respondent
DR GEBKA, HELLIG & KLUG INC	Fifth Respondent
DR RITZ INC	Sixth Respondent
ETERNAL FLAME INVESTMENTS (PTY) LTD	Seventh Respondent
EXPECTRA 89 (PTY) LTD	Eighth Respondent
HESTICO (PTY) LTD	Ninth Respondent
HETTAS CC	Tenth Respondent
CONVISTA CONSULTING (PTY) LTD	Eleventh Respondent
IDI TECHNOLOGY SOLUTIONS (PTY) LTD	Twelfth Respondent
PROGRESSIVE PACKAGING (PTY) LTD	Thirteenth Respondent
WORLD CARGO SERVICES (PTY) LTD	Fourteenth Respondent

CONDUIT RISK AND INSURANCE HOLDINGS (PTY) LTD	Fifteenth Respondent
DELL COMPUTER (PTY) LTD	Sixteenth Respondent
THE BRAND UNION (PTY) LTD	Seventeenth Respondent
ULTRA LITHO (PTY) LTD	Eighteenth Respondent
NEWSCLIP MEDIA MONITORING (PTY) LTD	Nineteenth Respondent
MIXTEC CC	Twentieth Respondent
PETROMARK (PTY) LTD	Twenty-first Respondent
DEHTEQ (PTY) LTD	Twenty-second Respondent
WAVELENGTHS 32 (PTY) LTD (T/A INZALO COMMUNICATIONS)	Twenty-third Respondent
PANORAMIC COMPONENTS (PTY) LTD	Twenty-fourth Respondent
CHICKEN MANAGEMENT SERVICES (PTY) LTD	Twenty-fifth Respondent
HANSEN TRANSMISSIONS (PTY) LTD	Twenty-sixth Respondent
SAINT ANDREWS BROKERS (PTY) LTD	Twenty-seventh Respondent
ENABLEMED (PTY) LTD	Twenty-eighth Respondent
PRIMESERV GROUP LTD	Twenty-ninth Respondent
THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS	Thirtieth Respondent
JO'BURG CHILD WELFARE AND HERITAGE MANAGEMENT SERVICES (PTY) LTD	Thirty-first Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

LINDY WINGROVE-GIBSON

do hereby state under oath that:

1. I am an adult female and the principal officer of the IF UMBRELLA PENSION FUND and the IF UMBRELLA PROVIDENT FUND, the Applicants herein. The Applicants' registered address is at The Place, 1 Sandton Drive, Sandhurst, Sandton, Johannesburg.
2. The facts contained herein are within my personal knowledge and unless the context indicates otherwise, are to the best of my belief both true and correct. The legal submissions made herein are made on the advice of the Applicants' legal representatives.
3. I am duly authorised to bring this application and to depose to this affidavit on behalf of the Applicants. The Applicants' legal representatives are duly authorised to institute this application.

THE PARTIES

4. The Applicants:

4.1 The **First Applicant** is the **IF Umbrella Pension Fund**, a pension fund organisation registered in terms of section 4 of the Pension Funds Act 24 of 1956 (“*the PFA*”) and consequently a body corporate capable of suing and being sued in its own name.

4.2 The **Second Applicant** is the **IF Umbrella Provident Fund**, a pension fund organisation registered in terms of section 4 of the PFA and consequently a body corporate capable of suing and being sued in its own name.

4.3 For convenience, The First and Second Applicant will hereinafter be referred to as “*the Funds*”. Due to the fact that the boards of the Applicants are the same people, the facts applicable to each of the Applicants are similar in all respects, and everything that is said in respect of one is equally applicable to the other, I consider it appropriate to depose to a single combined affidavit on behalf of both Applicants.

5. The Respondents:

5.1 The **First Respondent** is **M.A. LUKHAIMANE, N.O.**, an adult female, cited in her capacity as the Pension Funds Adjudicator, appointed as such in terms of section 30C of the PFA.

5.2 The Pension Fund Adjudicator's principal place of business is at Corporate Place, Cnr Fredman Drive, Sandown Valley Crescent, Sandton.

5.3 The First Respondent will hereinafter be referred to as "*the Adjudicator*".

5.4 The Applicants seek no relief against the Adjudicator (save in the event of her opposing the application, in which event a cost order will be sought) who is joined by virtue of any interest she may have in this application.

5.5 The **Second Respondent** is **Affirm Marketing Services (Pty) Ltd** (registration number M1998/003486/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 7 Pam Road, Morningside Extension 5, 2196.

- 5.6 The **Third Respondent** is **Beefmaster (Pty) Ltd** (registration number 1983/007547/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 86 Peter Mokaba Avenue, Potchefstroom, 2531.
- 5.7 The **Fourth Respondent** is **H Birkenmayer (Pty) Ltd** (registration number 1975/004367/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 1st Floor Willow Grove, Grove City, 196 Louis Botha Avenue, 2041.
- 5.8 The **Fifth Respondent** is **Drs Gebka Hellig and Klug Inc.** (registration number 1998/020738/21) a company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 20 Cestrum Avenue, Morningside Ext 40, Sandton, 2146.
- 5.9 The **Sixth Respondent** is **Dr Ritz Inc** (registration number M2001/020340/21) a company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Cedarwood Office Park,

Giuricich Bros Building, Mount Lebanon Road, 2128.

- 5.10 The **Seventh Respondent** is **Eternal Flame Investments (Pty) Ltd** (registration number M2004/014280/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 24A Taute Street, Ermelo, 2351.
- 5.11 The **Eighth Respondent** is **Expectra 89 (Pty) Ltd** (registration number M2001/003962/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 34 Boland Street, Sonnedal, Honeydew, 2040.
- 5.12 The **Ninth Respondent** is **Hestico (Pty) Ltd** (registration number 1962/001642/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 42 Lebombo Street, Ashley Gardens, 0081.
- 5.13 The **Tenth Respondent** is **Hettas CC**, a close corporation whose further details are unknown but was represented in the original complaint by Jonathan Mort Inc, which principal place of business is at 3A Sir George Grey Street, Oranjezicht, 8001.

5.14 The **Eleventh Respondent** is **ConVista Consulting (Pty) Ltd** (registration number M2005/004400/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Mazars House, Rialto Road, Grand Moorings Precinct, 7441.

5.15 The **Twelfth Respondent** is **IDI Technology Solutions (Pty) Ltd** (registration number M2002/012395/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 75 Malibongwe Drive, Linden Extension, 2194.

5.16 The **Thirteenth Respondent** is **Progressive Packaging (Pty) Ltd** (registration number 1951/003297/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Five Linkridge East, John Avenue, Bedford Park, 2007.

5.17 The **Fourteenth Respondent** is **World Cargo Services (Pty) Ltd** (registration number M1977/004155/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Suite 7, Denavo

House, 15 York Street, Kensington B, 2194.

5.18 The **Fifteenth Respondent** is **Conduit Risk and Insurance Holdings (Pty) Ltd** (registration number M1981/010851/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Unit 3 Tulbagh, 360 Oak Avenue, Randburg, 2194.

5.19 The **Sixteenth Respondent** is **Dell Computer (Pty) Ltd** (registration number M1995/007883/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at The Campus, Wembley Building, Cnr Main and Sloane Streets, 2021.

5.20 The **Seventeenth Respondent** is **The Brand Union (Pty) Ltd** (registration number M2000/025214/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 4th Floor Aloe Grove, 196 Louis Botha Avenue, Houghton Estate, 2198.

5.21 The **Eighteenth Respondent** is **Ultra Litho (Pty) Ltd** (registration number M1961/000582/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South

Africa with its registered address at 24 Stirrup Avenue, Woodmead Office Park, Woodmead, 2191.

5.22 The **Nineteenth Respondent** is **Newsclip Media Monitoring (Pty) Ltd** (registration number 1999/002288/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at JG Strydom and Springhaas Road, Weltevreden Park, 1709.

5.23 The **Twentieth Respondent** is **Mixtec CC** (registration number 1987/003637/23) a close corporation duly incorporated according to the company laws of the Republic of South Africa with its registered address at 59 Fleming Road, Meadowdale, 1401.

5.24 The **Twenty-First Respondent** is **Petromark (Pty) Ltd** a private company with limited liability according to the company laws of the Republic of South Africa with its principal place of business at 2 Foreman Road, Spartan Ext. 3, Edenvale, Johannesburg

5.25 The **Twenty-Second Respondent** is **Dehteq (Pty) Ltd** (registration number M1994/009498/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 1st Floor Block D, St Andrews

Office Park, Meadowbrook Lane, 2191.

5.26 The **Twenty-Third Respondent** is **Wavelengths 32 (Pty) Ltd t/a Inzalo Communications** (registration number M2001/023249/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Suite 3 Bracken City Cnr Hennie Alberts and Rae Frankel, Brackenhurst, 1449.

5.27 The **Twenty-Fourth Respondent** is **Panoramic Components (Pty) Ltd** (registration number 1972/011632/07)) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Unit 4, 27 Linksfield Road, Dunvegan, 1609.

5.28 The **Twenty-Fifth Respondent** is **Chicken Management Services (Pty) Ltd** (registration number M2002/012605/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 22 Eland Street, Koedoespoort, 0186.

5.29 The **Twenty-Sixth Respondent** is **Hansen Transmissions (Pty) Ltd** (registration number 1969/014945/07) a private company duly

incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at 14 Griffiths Road, Jet Park, Boksburg, 1459.

5.30 The **Twenty-Seventh Respondent** is **Saint Andrews Brokers (Pty) Ltd** (registration number M1998/024535/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Fredman Towers – Ground Floor, 13 Fredman Drive cnr. Bute Lane, 2196.

5.31 The **Twenty-Eighth Respondent** is **Enabledmed (Pty) Ltd** (registration number M2001/016845/07) a private company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at EOH Business Park, Gillooly's View, Osborne Lane, 2007.

5.32 The **Twenty-Ninth Respondent** is the **Primeserv Group Limited** (registration number 1997/013448/06) a public company duly incorporated with limited liability according to the company laws of the Republic of South Africa with its registered address at Ground Floor Venture House, Peter Place Park 54, Peter Place, 2021.

5.33 The **Thirtieth Respondent** is the **Corporation of the Presiding Bishop**

of the Church of Jesus Christ of Latter-Day-Saints (registration number (registration number 2002/017792/10), an external company duly registered in terms of the company laws of the Republic of South Africa with its registered address at 5a Jubilee Avenue, Parktown, 2193.

5.34 The **Thirty-First Respondent** is the **Joburg Child welfare and Heritage Management Services** a private company with its principal place of business at 1st Floor, Edura House, 41 Fox Street, Johannesburg.

5.35 The **Second to Thirty First Respondents** are current and past participating employers in the Applicants. They are employers and former employers of the members of the Funds. These Respondents shall hereinafter be referred to as "*the Respondents*".

5.36 No cost order is sought against any of the Respondents, save in the event of any of such Respondent opposing this application.

6. I am advised that this application is in essence an appeal, but which is not limited to a decision whether the adjudicator's determination was right or wrong, and neither is it confined to the evidence or grounds upon which the adjudicator's determination was based. Those respondents who have been the

complainants before the adjudicator, do however bear the onus where there is a dispute of fact.

7. I also respectfully submit that the above Honourable Court is a division of the High Court with jurisdiction in this matter for the following reasons:

7.1 The adjudicator's principal place of business is within the area of jurisdiction of the above Honourable Court.

7.2 The complaint which forms the subject matter of the adjudicator's determination was a complaint against decisions made by the Funds within the jurisdiction of the above Honourable Court.

7.3 The adjudicator made a determination within the jurisdiction of the above Honourable Court.

7.4 The Funds are situated within the jurisdiction of the above Honourable Court.

7.5 The second, fourth to sixth, eighth, twelfth to twentieth, twenty-second, twenty-fourth, twenty-sixth, twenty-seventh, twenty-ninth and thirtieth respondents' registered business addresses are within the jurisdiction of the above Honourable Court.

NATURE, PURPOSE AND OVERVIEW OF THE APPLICATION

8. This is an application in terms of section 30P of the PFA. That section reads as follows:

“30P Access to court

- (1) *Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.*
- (2) *The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.*
- (3) *Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.”*

9. The Funds are aggrieved by the Adjudicator's determination and seek to have it set aside and substituted with an order dismissing the Respondents' complaint to the Adjudicator.
10. The Respondents, as complainants acting on behalf of their employees, lodged a complaint with the Adjudicator in terms of section 30A of the PFA, alleging maladministration by the boards of the Funds in allegedly debiting the "Fund Credits" of members employed by the Respondents with the cost of the reconstruction of the Funds' member data and records, hereinafter also referred to as the "reconstruction exercise".
11. The Adjudicator upheld the complaint, and made an order that:
 - 11.1 The Funds (the IF Funds) and their previous boards of trustees were not authorised by the funds' rules and the PFA to use 2.5% of the members' fund values to fund the costs of the rebuilding of the funds' data;
 - 11.2 The Funds (the IF Funds) are ordered to recalculate the members' fund values and credit them with the 2.5% fund values referred to above having regard to the investment returns earned by the Funds during the period that the unauthorised deduction was made and remains outstanding; and

- 11.3 The Funds (the IF Funds) are further directed to notify the Respondents and the Adjudicator of the recalculated value within three weeks of the date of the determination.
12. It is this determination and specifically the orders made therein which the Funds seek to have set aside. A copy of the determination is annexed hereto as annexure “**IF 1**”.
13. The Funds contends that the Adjudicator’s determination that they acted contrary to the rules is not legally sound and the orders made therein are not legally incompetent and/or capable of being implemented or enforced.
14. It will become evident from the facts I set out below that the Adjudicator did not apply her mind to the facts and evidence before her, and completely ignored the rules of the Funds and the provisions of the law relating to pension funds in South Africa in making her determination.

PERTINENT BACKGROUND FACTS

15. The Funds are defined contribution funds. They were established and registered with effect from 1 January 2004 and operate in terms of their registered rules, copies of which are annexed hereto as annexures “**IF 2**” and “**IF 3**”

respectively. In terms of section 13 of the PFA, the rules of the Funds are binding on the Funds, their boards of trustees and their members.

16. The Funds' operations are controlled by boards of trustees which took office with effect from 10 February 2011, replacing the previous boards of trustees whose term of office had come to an end.
17. Upon their registration in terms of section 4 of the PFA the Funds became *juristic personae* with separate legal entity from their members, their boards of trustees and employers participating in the Funds.
18. By virtue of the provisions of sections 4 and 5 of the PFA, the Funds own their assets in their own names, to the exclusion of their members, board of trustees, and employers participating in the Funds.
19. The Funds' assets are moneys contributed to the Funds in accordance with their rules and held in the Funds or invested in the Funds' names for the ultimate benefit of the Funds' members.
20. The exact Rand amount held in the Funds for the benefit of a member at any given moment is known as a member's "Fund Credit".

21. A member's Fund Credit is not an asset of a member or a claim that a member has against the Fund. The asset remains that of the Funds.

22. A member has no claim to any asset of the Fund or his or her Fund Credit while he or she remain a member of the Fund(s). It is only on the date when a member exits the Fund(s) due to the termination of his or her employment or retirement that a member becomes entitled to a share of the assets of the Fund(s). That share is a member's benefit, which is the equivalent of his or her Fund Credit on the date of his or her exit from the Fund(s), less any tax or other deductions permissible in terms of the rules.

23. For the Funds to be able to pay a member a correct benefit when he or she eventually exits the Funds, the Funds must have proper records detailing the exact amount to which a member is entitled upon exit, otherwise the benefit paid to the member will be incorrect. That state of affairs can never be said to be in the interests of the Funds or the members.

24. In this case, the previous boards of trustees of the Funds became aware that due to the breach of their contractual duties by the Fund's previous administrators in not administering the Funds properly, the records held by the Funds in respect of their members and their Fund Credits were probably not accurate.

25. It was possible that some Fund Credits were understated and others were overstated.
26. That state of affairs made it impossible for the boards of trustees of the Funds to comply with their statutory duties in terms of sections 7C and 7D and other provisions of the PFA to:
 - 26.1 protect the interests of the members by ensuring that they are paid the correct benefits when they exit the Funds;
 - 26.2 act with due care, diligence and good faith by making sure that no member is paid more than, or less than, what they are entitled to;
 - 26.3 providing the statutory authorities with accurate records and information about the assets and liabilities of the Funds; and
 - 26.4 providing the members with correct and accurate benefit statements setting out their illustrative values.
27. Mindful of their duties in terms of statute, the previous boards of trustees of the Funds were not prepared to allow the Funds to continue operating on the basis of incorrect and inaccurate data, and having considered all other alternatives, took a decision to appoint Deloitte to reconstruct the records of the Funds.

28. The amount charged by Deloitte to reconstruct the records of the Funds is approximately R 18 million, which is apportioned proportionally between the Funds and other funds affected by the same problem.
29. The boards of trustees decided to use the assets of the Funds to pay for this cost, something which I respectfully submit they were entitled to do in terms of the Funds' rules.
30. At the same time, the boards of trustees of the Funds took a decision to institute legal proceedings against the company that was responsible for the records of the Funds not being correct and accurate.
31. If any moneys are recovered against those persons, those moneys will form part of the assets of the Funds and be allocated to the members' Fund Credits. The decisions taken by the previous boards of trustees as stated above were endorsed by the current boards of trustees when they took office.
32. For reasons that are not entirely clear, the Adjudicator has found that using the assets of the Funds to pay for the costs of the reconstruction exercise is contrary to the rules of the Funds and the PFA, and therefore unlawful.

33. It is not clear what the basis for this finding is, but it would appear that it stems from the failure by the Adjudicator and the Respondents to appreciate that the rules of the Funds –which are identical in all material respects- specifically allow the boards of trustees to act in the manner that they did.

MAIN GROUNDS OF APPEAL

THE ADJUDICATOR’S FINDING THAT THE RULES OF THE FUNDS DO NOT ENTITLE THE FUNDS AND THEIR BOARDS OF TRUSTEES TO DEDUCT FUND EXPENSES FROM MEMBERS’ FUND CREDITS IS NOT CORRECT

34. As stated above, the rules of the Funds are binding on the Funds, their boards of trustees and their members.

35. A member’s Fund Credit is defined as follows in the respective rules of both Funds:

“2.6.19 “**FUND CREDIT**” means

2.6.19.1 *the MEMBER’S contributions in terms of Rules 4.1.1 and 4.1.2;*
plus

2.6.19.2 *the EMPLOYER’S contributions in terms of Rules 4.2.1 that are*

allocated for retirement funding in terms of Rule 4.2.2.2; plus

2.6.19.3 *amounts transferred to the Fund in terms of Rule 4.1.3; less*

2.6.19.4¹ *transfers to the Expense Reserve Account in respect of AD
HOC EXPENSES; plus*

2.6.19.5² *transfers from the Expense Reserve Account in terms of Rule
4.7.2.2; plus*

2.6.19.6³ *INVESTMENT RETURNS.”*

36. Throughout her determination, the Adjudicator clearly fails to appreciate that in terms of rule 2.6.19.4 of the Funds’ rules (incorrectly numbered 2.6.19.5), a member’s “Fund Credit” excludes or is debited with the amount deducted for ad-hoc expenses. The words “*less transfers to the EXPENSE RESERVE ACCOUNT in respect of AD HOC EXPENSES*” are very clear in this regard.

37. The significance of these words is that a member’s Fund Credit – what he or she is entitled to when he or she exits the Fund(s) – does not include the amounts deducted for *ad hoc expenses* and the member would accordingly not have a claim to these amounts.

¹ Incorrectly numbered rule 2.6.19.5

² Incorrectly numbered rule 2.6.19.7

³ Incorrectly numbered rule 2.6.19.7

38. The Adjudicator has also failed to have regard to the definitions of “EXPENSES”, “AD HOC EXPENSES” and also how fund expenses were to be funded in accordance with the rules of the Funds.

39. These errors pervade her entire reasoning and explain why she came to the incorrect conclusion that the Funds acted contrary to their rules.

40. The reality is that the rules of the Funds permit the boards of trustees to act in the manner that they did and the Adjudicator failed to have regard to the rules of the Funds when she made her determination.

41. I respectfully submit that the cost of the reconstruction exercise is a fund expense as defined in the rules of the Funds.

42. The rules of the Funds define “expenses” as follows:

““EXPENSES” means the ongoing monthly costs that cover administration services, consulting services and premiums in respect of INSURED DEATH BENEFITS and INSURED DISABILITY BENEFITS”

43. The rules of the Funds define “ad-hoc expenses” as follows:

“AD-HOC EXPENSES” means costs and expenses, other than EXPENSES, that are not necessarily payable monthly and are not necessarily capable of being predetermined and will include, inter alia, fees, taxes and levies paid and accrued to service providers, the regulatory authorities, TRUSTEES, premiums in respect of professional indemnity and fidelity guarantee insurance, and audit fees.”

44. The rules of the Funds say the following about the funding of the fund expenses:

“4.6 EXPENSES

*4.6.1 EXPENSES and AD HOC EXPENSES will be borne by the FUND. EXPENSES will be funded for by the contributions made by the employers to the FUND. **The cost of AD HOC EXPENSES will be deducted from the MEMBERS’ FUND CREDITS** on such basis as may be determined by the TRUSTEES from time to time. AD HOC EXPENSES need not have accrued for an appropriate deduction to be made from the MEMBERS’ FUND CREDITS and the TRUSTEES may deduct in respect of provisions that they make to ensure impartiality among MEMBERS of the FUND. Should the amounts deducted from MEMBERS’ FUND CREDITS be in excess of the amounts required to fund AD HOC EXPENSES, an appropriate credit will be made to the MEMBERS’ FUND CREDITS. AD HOC EXPENSES may furthermore be funded by way of interest earned*

on contributions paid to the FUND prior to the investment of such contributions.

4.6.2 *The FUND will be entitled to make payments in respect of EXPENSES and AD HOC EXPENSES to service providers and other creditors.”*

45. The rules of the Funds were registered by the Registrar of Pension Funds, who by registering them, signified his satisfaction that the rules were not inconsistent with any law and were financially sound.
46. The Adjudicator’s determination is the complete opposite of that.
47. Since the boards of trustees of the Funds used the assets of the Funds to pay for legitimate and necessary fund expenses, as they were obliged to do in terms of the rules of the Funds, I respectfully submit that the Adjudicator’s decision that the Funds could not do so is not legally correct.
46. It is irrelevant that the effect of the Funds using their assets to pay for the costs of the reconstruction has had the effect that the members’ Fund Credits would be less than what they would have been. The consequence of the Funds using their assets to do what is in the interests of the Funds will always be that members’ Fund Credits are reduced.

48. The fact that members' Fund Credits would be less than what they would have been can never be a reason or a ground for finding that the Funds' decisions are unlawful.
49. Similarly, the fact that human error which may constitute negligence and breach of statutory duties was the cause of the state of affairs which resulted in the Funds' records not being accurate and correct can never be a ground for finding that the Funds' decisions are unlawful.
50. The Adjudicator's decision must therefore be set aside.

THE ADJUDICATOR'S DECISION IS NOT LEGALLY COMPETENT AND IS INCAPABLE OF IMPLEMENTATION OR ENFORCEMENT

51. Having declared the Funds' decisions unlawful, the Adjudicator then proceeded to order the Funds to "recalculate the members' "fund values" and credit the members with the 2.5% of the fund values referred to above having regard to the investment returns earned by the Funds during the period that the unauthorised deduction was made and remains outstanding".
52. This order is not capable of enforcement or implementation.
53. The effect of this order is that the Funds must compensate themselves.

54. For the Funds to credit the members with 2.5% as contemplated in the Adjudicator's order, the Funds will have to take money from the Funds' own assets, that is, make another deduction from the very same members' Fund Credits, in order to compensate the very same members.
55. The Funds do not have any other assets except the assets they hold which are equal to the members' Fund Credits.
56. It is clear that the Adjudicator did not apply her mind to the effect of her determination and I respectfully submit that the determination ought to be set aside for that reason.

THE ADJUDICATOR'S DETERMINATION IS PREMATURE AND THE FINDINGS MADE THEREIN WERE MADE IN HASTE

57. As foreshadowed above, the members' Fund Credits could either be understated or overstated as a result of the incorrect and inaccurate member data.
58. Until the reconstruction of the data has been finalised, the Funds are not in a position to determine which members' Fund Credits are understated and which members' Fund Credits are overstated.

59. The only exercise that can enable the Funds to reasonably determine the exact Fund Credit of each member is the reconstruction exercise.
60. Until that happens, no one, not even the Adjudicator, can come to the conclusion that any member has been prejudiced as a result of the boards' deciding to use 2.5% of the value of the Funds' assets (which constitute 2.5% of each member's then Fund Credit prior to the deduction) to fund the reconstruction exercise.
61. For all we know, the Fund Credits of the majority of the members could have been overstated by more than 2.5%, in which case they would not have suffered any prejudice at all.
62. The Adjudicator's determination is therefore premature and cannot be allowed to stand.
63. The effect of the Adjudicator's haste decision is that the Funds must continue operating on the basis of incorrect and inaccurate member records.
64. That is not only unlawful, but it also amounts to a breach by the boards of the Funds of their duties in terms of sections 7C and D of the PFA, as well as their duties to provide the members with accurate benefit statements.

65. In similar vein, the finding by the Adjudicator that the previous trustees of the Funds were negligent is premature since those trustees were not individually joined in the complaint and given the opportunity to be heard.
66. Whether any or all of those trustees were negligent or not, and the extent of their negligence, will be determined in legal proceedings instituted by the Funds against them.
67. It is important to emphasise that different trustees were members of the boards of the Funds at different times, and it is inappropriate to assume, without hearing any evidence, that all those trustees were negligent and are liable in equal measure for the Funds' loss.
68. For these reasons, the Adjudicator's determination is liable to be set aside.

ADDITIONAL GROUNDS OF APPEAL

THE "COMPLAINT" IS NOT A COMPLAINT AS DEFINED IN THE PFA

69. Section 30A of the PFA limits the adjudicator's jurisdiction to complaints that fall strictly within the definition of a "complaint" as lodged by a "complainant" as defined in the PFA and she may consequently only determine the issues

raised or contemplated in the complaint, failing which she will have acted *ultra vires*, or beyond her powers.

70. The term “complaint” is defined in section 1 of the PFA as follows:

“‘complaint’ means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging —

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.” [Emphasis added]

71. The term “complainant” is defined in section 1 of the PFA as follows:

“ ‘complainant’ means -

(a) any person who is, or who claims to be -

(i) a member or former member of a fund;

(ii) a beneficiary or former beneficiary of a fund;

(iii) an employer who participates in a fund;

(b) any group of persons referred to in paragraph (a) (i), (ii) or (iii);

(c) a board of a fund or member thereof; or

(d) any person who has an interest in a complaint.”

72. While it is clear that “*an employer who participates in a fund*” may be a complainant, it may only be one if it lodges a complaint in its capacity as employer or as “*a person who has an interest in [the] complaint*” and not as representatives of other unnamed complainants.

73. It cannot be said that the employers listed as “complainants” in the purported complaints have an “interest” in the complainant as alleged or at all.

74. In this regard, the employer complainants alleged at paragraph 4 that –

“[t]he retirement benefits of the Member Complainants are part of their employment promise, as Employers, to their employees, which benefits are delivered via the retirement funds in which [the employers] participate.”

and that

“any decision(s) taken by the Respondents which compromise the employment promise made to their employees potentially prejudices the Employer Complainants”.

75. These allegations are without substance and are simply incorrect for the following reasons in particular:

75.1 The Funds are legal entities separate from their participating employers. They are governed by their own boards of management which are also responsible for directing, controlling and overseeing the operations of the Funds. The members of those boards are required to exercise an independent discretion.

75.2 As the employers were aware when they chose to require their employees to belong to the Funds, the Funds are “defined contribution” funds. In particular, the benefits payable to the members are determinable in terms of the rules of the Funds with particular reference to the amounts contributed to the Funds, the returns earned on the

investment of those amounts, and the amounts deductible from member fund credits or benefits in terms of the Funds' Rules. If the employers "promised" their employees benefits in specific amounts, they chose the wrong vehicles through which to provide those benefits because the Funds' Rules do not provide for the payment of benefits in specific amounts or even amounts which are determinable in terms of specific formulae. What an employer promises its employees in relation to the Funds is that it will procure their membership of the Funds and will make such contributions to the Funds as are required to be made in terms of the Funds' Rules.

75.3 It is thus the *contributions to* the Funds, not the benefits payable by the Funds, which constitute a part of the employees' remuneration or the so-called "employment promise".

76. In the circumstances it cannot be said that the employees had any "interest" in the complaint as envisioned by the definition of complainant and as such it cannot be said that the employers had validly brought a "complaint" as defined. The adjudicator thus did not have the jurisdiction to hear this "complaint".

**ORDERS WERE MADE AGAINST THE FUNDS WHEN THEY WERE NOT
PARTY TO THE ORIGINAL COMPLAINT**

77. A copy of the complaint was delivered to Aon for delivery by it to the IF Funds on or about 10 May 2011. The complaint was not directed at the Funds themselves, nor were the Funds even cited as parties to the complaint.

78. Instead the complaint was directed at:

“Gail le Grellier, Renier Botha, David Lepar and Clive Stuart – collectively the former Board of Trustees of the IF Umbrella Provident Fund and the IF Umbrella Pension Fund”

and

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

79. Section 30G provides that the parties to a complaint shall be -

- “(a) the complainant;*
- (b) the fund or person against whom the complaint is directed;*
- (c) any person who has applied to the Adjudicator to be made a*

party and who has a sufficient interest in the matter to be made a party to the complaint;

(d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.”

80. The Funds did not apply to be made parties to the complaint, but instead simply made submissions in regard to it in order to assist the adjudicator. The adjudicator has also not of her own accord made the Funds parties to the complaint. No formal relief was sought by the complainants against the Funds, the Funds were not cited as defendants and as such no relief could lawfully be granted against them. The adjudicator does not have an inherent equitable jurisdiction to disregard the evidence before her in favour of what she perceives as a more equitable outcome.

THE ORDERS MADE WERE NOT SOUGHT BY THE COMPLAINANTS

81. Section 30E of the PFA provides *inter alia* that the adjudicator may “make the order which any court of law may make”. As a “court” is defined in the PFA as a High Court, it follows that the adjudicator is empowered to make any order which the High Court is able to make. The adjudicator is, however, a “creature of statute” and has only those powers that are conferred on him or her in terms of Chapter VA of the PFA. It follows that he or she is empowered only make

such an order “in respect of a matter within his competence”. Differently put, the adjudicator’s ability to make any order which any high court can make is limited only to matters over which she has jurisdiction — that is, “complaints” as defined in the PFA.

82. The adjudicator does not have an inherent equitable jurisdiction to disregard the evidence before her in favour of what she perceives as a more equitable outcome. She is also not permitted to reformulate a complainant’s complaint in order to find a basis on which to grant relief if such basis was not apparent from the complainant’s written complaint.

CONCLUSION

83. For the reasons set out above, the Funds respectfully pray for an order granting the relief set out in the notice of motion to which this affidavit is attached.

Lindy Wingrove-Gibson

With the relevant provisions of Annexure “A” of the Regulations governing the administration of an oath or affirmation, No R1258 of 21 July 1972 (as amended) having been complied with, the deponent on this day _____ of SEPTEMBER 2012

stating that he understands the contents of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on his conscience and considers the content thereof to be true and correct and that he has uttered the words "So help me God".

COMMISSIONER OF OATHS

FULL NAMES:

BUSINESS ADDRESS:

CAPACITY:

AREA: