THE FINANCIAL SERVICES TRIBUNAL

Case №: **PFA57/2020**

In the matter between:

AFFORDABLE ADVENTURES & 35 OTHERS	1st – 36th Applicants

and

GAIL LE GRELLIER	First Respondent
RENIER BOTHA	Second Respondent
DAVID LEPAR	Third Respondent
JOHN ROLLASON	Fourth Respondent
FRANCISCO KHOZA	Fifth Respondent
RAY WELHAM	Sixth Respondent
DELOITTE & TOUCHE	Seventh Respondent
AON SA	Eighth Respondent
FRANCOIS ROSSLEE N.O.	Ninth Respondent
THE PENSION FUNDS ADJUDICATOR	Tenth Respondent

Tribunal: H Kooverjie (chair), NK Nxumalo, SM Maritz

Summary: Section 30 H(2) of the Pension Funds Act limits the Adjudicator from investigating a complaint if proceedings had been instituted in a civil court in respect of a matter, which constitutes the same subject of the investigation matter.

DECISION

A INTRODUCTION:

1. This application was instituted by the applicants, being the employers and the

member applicants of the Dynamic SA Umbrella Pension and Provident Fund and IF Umbrella Pension and Provident Funds ("the Funds").

2. The first to sixth respondents are the erstwhile trustees of the Funds. The seventh to ninth respondents are an independent audit firm (Deloitte & Touche) appointed to rebuild the records of the Funds, the Administrator of the Funds (AON SA), who commissioned the rebuild of the records of the Funds and the liquidator of the Funds, respectively.

3. The applicants seek a reconsideration of the Pension Funds Adjudicator's ("*PFA*") decision, dated 18 August 2020, who decided to investigate the complaint referred to her by the applicants.

B PFA'S REASONS:

4. The reasons the PFA's refusal to entertain the complaint was as follows:

   (a) The first reason was that prior to lodgement of its complaint, proceedings were instituted in a civil court based on the same subject matter. Such complaints are precluded in terms of section 30 H(2) of the Act. The PFA found the current complaint constituted the same subject matter as the previous determination of the PFA, which determination was overturned in the High Court on 28 May 2018.

   (b) The second reason was that the Financial Sector Conduct Authority ("*FSCA*") approved the liquidation of the IF Funds. Section 28 of the Act makes provision for FSCA to monitor the liquidator to achieve a fair

distribution of fund assets. Where such process is initiated, the liquidator and FSCA are best placed to protect the applicants' interest as well as the creditors. Moreover, any party unhappy with the directions given by FSCA may approach the High Court in terms of section 28(10) and may even appeal in terms of section 28(14) of the Act.

5. The issue for consideration therefore is whether the Adjudicator's decision in not entertaining the complaint based on the said grounds are justified.

C BACKGROUND:

6. In order to gain perspective of this matter, it is necessary to have regard to the chronology of events below, it is common cause that the matter concerning the R18.2 million spend on the rebuild exercise was before the PFA on at least 2 occasions and eventually in the High Court before a third determination was issued by the PFA (which is the subject matter before us):

6.1 On 3 May 2011, the first complaint was lodged;

6.2 On 3 July 2012, the PFA issued its first determination;

6.3 On 28 May 2018, the High Court found in favour of the first to third respondents and set aside the 3 July 2012 determination;

6.4 On 11 April 2019, the second complaint was lodged with the office of the PFA by the applicants and Mr Kamionsky, against the first to sixth respondents;

6.5 On 30 April 2019, the Adjudicator dismissed the 11 April 2019 complaint (second determination); and

6.6 On 31 August 2020, the applicants and Mr Kamionsky instituted this

application which is now before us.[1]

7. Prior to dealing with the second complaint lodged by the applicants on 11 April 2019, it is necessary to briefly set out the factual background of the applicants' first complaint as summarised in the following extract from the PFA's determination, dated 3 July 2012 (first determination), which is as follows:

> *"1.1 The complaint concerns alleged maladministration of the first and second respondents by their former board of trustees by using the members' fund credits to fund the cost of reconstructing the funds' data and records.*
>
> *2.1 The complaint involves a group of employers who participate in the first and second respondents ('herein after referred to as the IF Funds'). It also involves employees of the participating employers who are also members of the IF Funds. The IF Funds are pension fund organisations registered in terms of section 4 of the Act. The third respondents are former trustees of the IF Funds, namely, Tony Kamionsky, Gail le Grellier, Renier Botha, David Lapar, Brian Rosen, Lorraine Jager, and Claire Mol.*
>
> *2.2 The IF Funds were initially administered by Dynamique SA Consultants and Actuaries (Pty) Ltd ('Dynamique') until 31 January 2008 when Aon South Africa (Pty) Ltd ('Aon') took over the administration of the IF Funds. The transfer of the IF Funds' administration occurred after Aon purchased the administration books of Dynamique in 2008. During July 2010, the former board of trustees of the IF Funds appointed Deloitte and Touche to conduct a member level rebuild of the data and records of the funds from inception of the funds (1 January 2004) until 31 January 2008. This was necessitated by the fact that the data held in respect of the IF Funds was questionable and not accurate. The cost of the rebuild exercise amounted to approximately*

[1] The Tribunal makes reference to the chronology provided by the respondents

R20 million. This translated into an individual cost for each member of the IF Funds of 2.5% of their fund credits.

2.3 Upon receiving communication of the boards' decision to rebuild the fund" data in November 2010, the complainants indicated their dissatisfaction with the decision to use the members' fund credits in order to fund the rebuild exercise.

3.1 The complainants state that the decision to rebuild the IF Fund' data occurred as a result of maladministration of the funds.

3.2 The complainants assert that the former board of trustees also 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 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.

3.3 They contend that the third respondents have not accounted for the loss suffered by the members in that their fund credits were reduced by 2.5% to fund the rebuild exercise. There is a further potential loss in that the costs of the rebuild exercise may not be recovered. There is also no assurance that the cost of the rebuild exercise will be met from the professional indemnity insurance cover held in respect of the IF Funds."

8. In the PFA's first determination, dated 3 July 2012, the applicants' complaint was upheld and the following order was made:

"6.1 In the result, the order of this Tribunal is as follows:

6.1.1 It is declared that the previous trustees of the IF Funds, which include Gail le Gremer, Renier Botha, David Lepar, and Carel Smith, did not manage the IF Funds properly and as a result, caused financial loss to the funds and ultimately to the members;

6.1.2 The IF Funds are ordered to compute the amount of the financial loss to the funds and members occasioned by the rebuilding of the funds' data, having regard to the investment returns earned by the funds, within four weeks of this determination;

6.1.3 The members of the former board of trustees identified in paragraph 6.1.1 above are personally (jointly and severally) ordered to pay the IF Funds the amount of the financial loss as computed in paragraph 6.1.2 above, less the amount of R1 million rand already paid by Tony Kamionsky and Dynamique, within six weeks of this determination; and

6.1.4 The former trustees are further ordered to notify the IF Funds and this Tribunal of the payment as stated in paragraph 6.1.3 above, within seven weeks of the date of this determination."

9. On 9 July 2018, the PFA's determination of 3 July 2012 was set aside and her order was replaced with an order dismissing the applicants' complaint.

10. On or about October 2018 subsequent to the setting aside of the 3 July 2013 determination of the PFA, Mr Kamionsky initiated the so-called "*Dynam-ique Commission of Inquiry*" ("*the DCoE*"). On 6 December 2018 the DCoE issued its report. The report does not state who commissioned the DCoE nor does it state in terms of which legislation or what power was it so commissioned.

11. The report simply recorded that it was agreed that Mr Kamionsky will fund the costs of employing the sole commissioner, Adv M A Hawyes. Paragraph 11 of the report states that:

"The purpose of the commission of enquiry (as stated on the website) is to determine who is responsible for the members losing this money."

12. Although labelled a “Commission of Inquiry” it appears that this was nothing more than a private investigation commissioned and funded by Mr Kamionsky himself.

13. On 11 April 2019, the Applicants lodged a second complaint with the PFA complaining about the following:

> *“1. '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 complaint relates. These Funds have now been liquidated.*
>
> *2. 'Rebuild' hereinafter refers to the decision by the First Respondents to scrap the records of the Funds in about June 2010 and to employ the Third Respondent to recreate the Funds' records at a cost of approximately R18.2m, which events are the subject matter of this complaint. In addition to the Third Respondent's cost there were legal fees and trustee fees associated with the Rebuild which is why this complaint hereinafter refers to R20m as the cost of the Rebuild. […]*
>
> *8. The Employer Complainants refers to the abovementioned employers who were participating employers in the Funds and whose employees lost money in the Funds due to the Rebuild. This list of employers does not comprise all the participating employers whose employees were impacted by the Rebuild but rather it is just those who have opted to be part of this complaint.*
>
> *9. The Member Complainants refers to the employees of the Employer Complainants who were members of the Funds at the time of the Rebuild and whom lost 2,5% of their then fund values due to the cost of the Rebuild. […]*

12. *The First Respondents were trustees at the time of the Rebuild and are the trustees who commissioned the Rebuild. There was one other trustee also at the time, namely Caret Smith, however we have opted not to include him in this complaint as according to the submissions he made in The Appeal he abstained from voting for the Rebuild and the first Respondents did not dispute nor oppose his submissions in this regard.*

13. *The Second Respondents were trustees who took over as trustees of the Funds after the First Respondents resigned as trustees on 1 February 2011 and comprised John Rollason, Francisco Khoza and Ray Welham. There were at times up to two additional trustees however these other trustees changed from time to time and have hence not been included in this complaint.*

14. *The Third Respondent is the registered auditing company Deloitte & Touche being the entity that carried out the Rebuild. In relation to the Rebuild Deloitte & Touche did the work of a pension fund administration company and not the work of an auditing company.*

15. *The Fourth Respondent is AON South Africa and is 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.*

16. *The Fifth Respondent is Francois Rosslee who is the liquidator of the Funds, which liquidation process has now effectively been completed to the best of our knowledge. […]*

30. *Given it has been some 9 years since the loss due to the Rebuild was incurred we need to deal at the outset with the issue of prescription.*

33. *Yes we knew we had lost R20m however until 2018 we had been mislead by the First and Second Respondents to believe that there had been maladministration by Dynamique and that this maladministration was the cause of the loss suffered by us. Then in 2018 the Dynamique Commission of Enquiry (discussed further below) was held to independently determine*

what had caused the loss and who was responsible. It was only then that we became aware of the facts related to the Rebuild and that there was a debt due to us by the First to Third Respondents and it is these facts on which this complaint/cause of action is based."

14. The order sought in the second complaint is the payment of the proportionate share of the cost of rebuilding the records of the Funds paid to Deloitte and Touche that represents the proportion of the applicants to the whole body of participating employers and members.

15. The exact cost of rebuilding the records that was ultimately incurred was R18,162.480 ("R18.2m").

D **<u>CURRENT COMPLAINT:</u>**

16. Mr Kamionsky representing the applicants *inter alia* made the following submissions namely that:

16.1 It is necessary to distinguish between the first to third respondents and the fourth to ninth respondents. No claim ever made against the fourth to ninth respondents in the previous complaint. The claims against the fourth to ninth respondents differ from the claims made in the previous complaint.

16.2 The Adjudicator's decision is therefore flawed in that the current matter does not constitute the same subject matter as the previous determination.

16.3 In respect of interpreting and understanding section 30 H(2) of the Pension Funds Act ("*the Act*"), the intention was clearly to prevent a person from bringing the same complaint to a civil court and to the Adjudicator. In the current complaint, the cause of action is not the same and the claim is based on different set of facts and actions.

17. The dispute between the parties arose broadly on allegations levelled against the respondents. The applicants alleged that members lost approximately R18.2m of their retirement moneys in the rebuild exercise of the fund's records and which process was initiated by the first to third respondents and that it was subsequently established (subsequent to the DCoE) that it was in fact, the first to sixth respondents who misled the applicants in advising them to believe that it was maladministration of the previous fund administrator (Dynam-ique) that caused the loss of the R18.2m.

18. According to Mr Kamionsky it only later emerged that it was not the maladministration by the previous fund administrator that resulted in the applicants losing the R18.2m, but the negligence and misconduct of the first to seventh respondents which caused the said loss.

19. In summary, the basis upon which the first to seventh respondents were negligent in the current complaint, includes *inter alia* the following:

19.1 R18.2 million spent on the rebuild was fruitless and wasteful expenditure;

19.2 The first to third respondents:

- failed to follow proper procedure in commissioning the rebuild by not

seeking *inter alia* expert advice;

- spent an excessive amount on the rebuild;
- flouted the member's money on the rebuild exercise;
- failed to pay the insurance premiums on the fund's indemnity policy leaving the members with no insurance covered to pick up the loss.

19.3 The fourth to sixth respondents:

- failed to disclose a material conflict of interest of being colleagues with the first to third respondents;
- hindered and blocked the members' efforts to hold the first to third respondents to account;
- continued with the rebuild exercise;
- flouted standard practices laws and governance relating to pension fund administration;
- failed to interrupt possible prescription issues against the first to third respondents.

19.4 The seventh respondent *inter alia*:

- charged an excessive amount of money to carry up the rebuild;
- failed to deliver the correct set of member values that they were paid to deliver.

20. Consequently Mr Kamionsky argued that the current complaint was based on facts and new information that came to the applicants' knowledge only in 2018 and which facts emerged from the DCoE. The applicants argued that it could never have been the intention of section 30 H(2) of the Act to prevent legitimate complaints based on different causes of action.

E SAME SUBJECT MATTER:

21. Section 30 H(2) stipulates:

> "*(2) The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation."*

22. The meaning and effect of section 30H(2) was considered by the SCA in **City of Cape Town Municipality v South African Local Authorities Pension Fund and another**[2] as follows:

> *"[24] The proper approach to interpretation is that laid down in Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) [also reported at [2012] 2 All SA 262 (SCA) Ed] and this is not disputed. If one starts, as one must necessarily do, with the language there are two points that can be noted. The first is that section 30H(2) does not expressly require that the complainant should have been the plaintiff or the applicant in the proceedings instituted in the court. That is plain from the wording of the section. The second is that it does not require the proceedings in the civil court to be proceedings concerning 'the complaint'. The language used is rather wider in saying that the proceedings in a civil court are proceedings 'in respect of a matter which would constitute the subject matter of the investigation'. […]*
>
> *[29] Section 30H(2) must be seen against this background. Its purpose was and is to deal with the fact that civil courts, usually the High Court, and the adjudicator have concurrent jurisdiction over the same legal disputes. In*

[2] [2014] 1 All SA 526 (SCA).

those circumstances, where the dispute has first been lodged before a court, priority is given to the court by excluding the jurisdiction of the Adjudicator. No doubt this was because the court could in any event override the decision of the Adjudicator in proceedings under section 30P. In the reverse situation where the complaint has been lodged with the Adjudicator and civil proceedings are thereafter commenced before a court, the same problem would not arise.

[30] Once there is a proper appreciation of the structure of Chapter VA and the linkage between the various provisions, particularly the definition of complaint, the status of the Adjudicator's award as a civil judgment in terms of section 30O and the right of access to court under section 30P, the role of section 30H(2) is perfectly clear. It is to deal with concurrence of jurisdiction in circumstances where the matter to be investigated by the Adjudicator is a matter already before the civil court having jurisdiction. In determining what the matter is before the civil court and comparing it with the matter which would be the subject of an investigation by the Adjudicator it is appropriate to adopt the same approach as that in the case of a plea of lis alibi pendens as discussed by Wallis JA in Caesarstone SdotYam Ltd v World of Marble and Granite 2000 CC and others 2013 (6) SA 499 (SCA) [also reported at [2013] 4 All SA 509 (SCA) Ed]. Here the matter to be investigated by the Adjudicator would be the validity of the rule relied on by the fund in the civil action. That would also be the matter in issue before the High Court."

23. As stated in the *City of Cape Town* case above,[3] the High Court proceedings need not relate to the same complaint as that referred to the PFA, as long as the proceedings before the High Court are "*in respect of a matter which would constitute the subject matter of the investigation*" and as a result section 30H(2) would apply.

[3] At paragraph [24].

24. In the first complaint, the members and participating employers sought an order directing the trustees and former trustees to pay the amount paid to Deloitte & Touche in respect of rebuild of the records. In the second complaint, the applicants (some of the members and participating employers) seek an order directing the former trustees to reimburse a portion of the amount paid to Deloitte in respect of the rebuild of the records. Which is clearly the same subject matter. As the PFA's determination of the first complaint was set aside by the High Court, the PFA is now precluded by section 30H(2) from investigating the same matter again. The investigative report of Adv Hawyes did not give rise to a new cause of action.

25. We take cognisance of the fact that as early as 3 May 2011, the first complaint was lodged against the first to third applicants by the applicants with the Adjudicator in terms of section 30A of the PFA, alleging maladministration by the respondents in respect of the rebuild expenditure.

26. It was submitted that the first to third respondents (being the trustees) were responsible for the actions of the administrator at the time, as they had failed to exercise proper oversight functions over Dynam-ique. The Adjudicator upheld the complaint in its determination on 3 July 2012. The respondents then lodged the High Court proceedings to have this determination set aside. The High Court found in favour of the respondents.

27. In the current complaint, the respondents argued that Mr Kamionsky was precluded from persisting in litigation on the same subject which was already considered by the High Court.

28. The respondents pointed out that when a given matter becomes a subject of litigation, the court requires the parties to the litigation to bring forward the whole case and will not "*except under special circumstances"* permit the same parties to open the same subject of litigation in respect of matter, which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have from negligence, inadvertence or even accident omitted part of their case. This is commonly referred to as a **Henderson** principle, namely "*the once and for all rule"*.[4]

29. Their argument is aligned to the PFA's reasoning not entertaining the current complaint in that it constituted the same subject matter as those raised in the court proceedings.

30. The impact of the "*once and for all rule"* requires that a claimant must sue for all his damages accrued and prospective, arising from one cause of action, in one action and once that action has been pursued to final judgment, that is the end of the matter.[5] Furthermore, the phrase "*cause of action*" has been given a relaxed interpretation by our court namely that "*cause of action*" refers to the "*same matter in issue*."[6]

31. The applicants' argument that the current complaint is centred on a different

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4 *Jiyana & Another v Absa Bank Ltd & Others* (A18/2018) [2018] ZAWCHC 102 (21 August 2018) at paras 23 & 52. The *Henderson* principle has also been accepted in*Janse van Rensburg & others NNO v Steenkamp & another; Janse van Rensburg & others NNO v Myburgh & others* 2010 (1) SA 649 (SCA) at para 28 & *Consol Ltd t/a Consol Glass v Tweejongezellen* 2005 (6) SA 23 (C) at 46H.

5 Evins v Shield Insurance Co Ltd 1980 (2) SA 814 at 835 F - G

6 Tradax Ocean Transportation SA v MV MV Silvergate Property Described as MV Astyanax and Others 1999 (4) SA 405 SCA at page 417

cause of action cannot be sustained, ultimately it constitutes the same subject matter.

32. We note that in both the previous complaint and the current complaint, the applicants' case remains that the first to third respondents were accountable for the maladministration of the IF Funds in that they authorized the cost of the rebuild exercise. Both complaints concern the applicants' alleged loss of R18.2 million spent on the rebuild exercise.

33. Further the current complaint attributes the loss to the fourth to seventh respondents in that they were *inter alia* misleading the applicants together with the first to third respondents. It appears that the fourth and fifth respondents were also included in the complaint on the basis that they be ordered to provide information relating to the amount deducted from the members' funds.

34. Our courts have further rejected a compartmentalized approach, that is being one's case on different elements to various causes of action.[7] We therefore find no reason to interfere with the PFA's decision. At this juncture we deem it appropriate to state that the door is not shut for the applicants. Nothing prevents them from pursue their matter on appeal in court.

F **<u>PRESCRIPTION:</u>**

35. The respondents raised the issue of prescription. The complaint lodged by the applicants on 11 April 2019 in terms of section 30A of the PFA relates to an act

[7] AON South Africa Ltd v Van der Heever and Others 2018 (6) SA 38 SCA

(rebuild exercise by Deloitte) which occurred on or about 2010 and as such 9 years have lapsed since the loss due to the rebuild exercise was incurred and the lodging of the current complaint (11 April 2019) by the applicants.

36. Section 30I of the PFA is instructive on this point and reads as follows:

> "*(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.*
>
> *(2) The provisions of the Prescription Act, 68 of 1969, relating to a debt apply in respect of the calculation of the three-year period referred to in subsection (1).*"

37. The meaning and effect of section 30I(2) was considered by the SCA in *Roestorf and another v Johannesburg Municipal Pension Fund and others*[8] as follows:

> *"[22] Section 30I(2) is in substance the equivalent of section 12(3) of the Prescription Act.*
>
> *[23] The application of both sections turns on the proven facts. The limitation does not begin to run until a creditor has full knowledge of his rights or can, by the exercise of reasonable care acquire such knowledge."*

38. Section 12(3) of the Prescription Act provides that a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor, and of the facts

[8] [2012] 3 All SA 68 (SCA).

from which the debt arises. A creditor will be deemed to have this knowledge if it could have acquired it by exercising reasonable care.[9]

39. Section 11(d) of the Prescription Act provides that the periods of prescription of debts shall be the following – save where an Act of Parliament provides otherwise, three years in respect of any other debt.

40. If we apply these legal principles to the facts of this case the following transpires:

- According to the applicants they only became aware of the fact that the loss of the R18.2 million in respect of the rebuild arose due to the wrongful conduct of the first to the seventh respondents after the DCoE enquiry in 2018 and as such prescription only commenced running from 2018.

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[9] In *Truter and Another v Deysel [2006] ZASCA,* the SCA held that "*'debt due' means a debt, which is owing and payable. A debt is due in this sense when the creditor acquires a complete cause of action for the recovery of the debt, that is, when the entire set of facts which the creditor must prove in order to succeed with his or her claim against the debtor is in place or, in other words, when everything has happened which would entitle the creditors to institute action and to pursue his or her claim*."
In *McKenzie v Farmers' Co-Operative Meat Industries Ltd 1922 AD 16 at 23* '*cause of action'* was defined for the purposes of prescription to mean "*every fact would be necessary for the plaintiffs to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to be proved*."
In *Minister of Finance and Others v Gore NO [2006] ZA SCA 98*, the court emphasised that "time begins to run against the creditor when it has the minimum facts that are necessary to institute action"- knowledge is required to trigger the running of prescriptive time.
In *Mtokonya v Minister of Police [2017] ZACC 33* the Constitutional Court had to determine whether, in terms of section 12(3) of the Prescription Act, a creditor is required to have knowledge that the conduct of the debtor, giving rise to the debt, is wrongful and actionable, before prescription can commence running. The majority held that the claimant need not know that the respondents conduct is wrongful but merely needs to have knowledge of the debtor and the facts giving rise to the debt in order for the prescription to start running.

- The claim which forms the subject matter of the complaint constitutes a debt within the meaning of the Prescription Act. In our view from inception of this matter after the lodging of the first complaint on 3 May 2011, Kamionsky and the employer complainants were aware of the claim and the underlying facts. The applicants further had knowledge of the July 2013 determination, and knew of the High Court proceedings and the judgement. Even if it is contested that they did not have such knowledge, they could have acquired knowledge of such facts by exercising reasonable care as these were all matters of public record.

- The DCoE was only initiated some 8 years after the act (2010) to which the present complaint and application occurred. To initiate an enquiry some 8 years after the act occurred, does not constitute the exercising of reasonable care as provided for in section 12(3) of the Prescription Act and as such we are of the opinion that it is deemed that the applicants had knowledge of the identity of the debtor and of the facts from with the debt arose as far back as 2011.

- At all relevant times the applicants had knowledge of the respondents(debtors) and the facts giving rise to the debt and it is not required that they should have knowledge of any wrongfulness on the part of the respondents(debtors) in order for prescription to start running.

- We find that the applicants had full knowledge of the complete set of facts to institute a complaint against the applicants as far back as 2011 (First complaint). The fact that the applicants now alleged that they had only after the DCoE enquiry became aware of the fact that the loss arose due

to the conduct of the first to the seventh respondents and not as a result of the maladministration by Dynam-ique, is without merit. This only amounts to further evidence.

41. As a result thereof the current complaint (11 April 2019) was instituted more than 3 years from the date of the act (rebuild) to which the current complaint relates occurred and as such we find that it has prescribed in terms of section 11(d) of the Prescription Act reads with section 30I of the PFA.

G **COSTS:**

42. On the costs issue the respondents sought a costs order against Mr Kamionsky personally, *alternatively* against the applicants jointly and severally. This Tribunal is not entitled to grant costs orders except in exceptional circumstances. Section 234(2) allows the Tribunal "*in exceptional circumstances to make an order that a party to the proceedings, on an application for reconsideration of a decision, pay same or all of the costs, reasonably and properly incurred by the other party in connection with the proceedings.*"

43. It was submitted on behalf of the respondents that Mr Kamionsky be ordered to pay the costs incurred by the respondents in these proceedings personally due to their abusive and vexatious conduct in this matter. Mr Kamionsky should be halted from being allowed to persist with his continual abusive conduct and harassment.

44. The applicants maintained that the lodgement of the complaint was justified and warranted. It had been demonstrated that the first to seventh respondents were

negligent, thereby responsible for the members' loss and this fact has not been proved otherwise.

45. It is trite that this Tribunal in exercising its discretion in respect on the said costs issue is required to do so upon the consideration of the facts in this matter and bearing in mind the principle of fairness to both parties.

46. The Financial Sector Regulatory Act ("FSRA") does not define the term "*exceptional circumstances."* However, it is trite that the term refers to circumstances which are "*something different*", "*out of the ordinary*", and/or "*unusual*".

47. Our authorities have given some guidance on this issue. The court in the **Incubeta Holdings**[10] matter, examined the definition to be ascribed to "*exceptional circumstances"* and referred to various authorities. The ultimate conclusion it reached is that the term is not definable and may be difficult to articulate. Furthermore, it is established that whether or not such circumstances exist in a given case is not a product of the exercise of a court's discretion but rather a finding of fact.

48. Moreover, determining whether the circumstances may or may not be exceptional – this should be derived from the actual predicament in which litigants find themselves in. The respondents submitted that Mr Kamionsky's persistence in this matter was not only abusive, vexatious and frivolous.

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10 Incubeta Holdings and Another v Ellis and Another 2014 (3) SA 189 GSJ at para 17 – 18, the court made reference to the summation of Thing J in MV Ais Mamas Seatrans Maritime and Others v Mv Ais Mamas 2002 (6) SA/50C at 56C

49. It is trite that in circumstances where the conduct was intentional, reckless and conscious, it warrants punitive costs orders.

50. We note the applicants' persistence in this application despite the PFA's determination that it does not have the authority to entertain same.

51. Mr Kamionsky persisted with the argument that members lost R18.2 million of their hard earned retirement monies and the new complaint is their last attempt to recover their monies. The respondents on the other hand, claimed that they have been prejudiced and were forced to defend this application, which they did in their personal capacities and from their own resources. This unnecessary litigation has caused them hardship and economic loss.

52. In this matter, we note that both parties had legal representation and therefore should have been advised appropriately.

53. Section 30 H(2) of the Act precludes the PFA from entertaining a matter which has been pronounced by a High Court previously and which matter constitutes the same subject matter. The authorities aforesaid do not favour the applicants' reasoning. The applicants were required to pursue its case in one action. In our view the subject matter is the same. From the applicant's submissions and the current complaint, it is evident that this was an attempt to include the remaining respondents. There were thus no special circumstances existed for the PFA to have considered the matter.

54. We find that the circumstances in which this litigation was pursued constitutes

exceptional circumstances. We take further cognisance of the fact that even though Mr Kamionsky represented the applicants, they nevertheless are persisted with this application. From Mr Kamiosnky's submissions, we noted further that the applicants were aware of these proceedings.

55. It is therefore appropriate that the applicants, jointly and severally be ordered to pay the costs of this application.

56. The following order is therefore made:

(1) That the application is dismissed;

(2) That the applicants be ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

SIGNED at **PRETORIA** on this **9th** day of **APRIL 2021** on behalf of the Panel.

ADV H KOOVERJIE SC

With the Panel consisting also of:

NK Nxumalo

SM Maritz