REPORTABLE
CASE NO: 083/2001

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

In the matter between:

A L MOSTERT N.O. **APPELLANT**

and

OLD MUTUAL LIFE ASSURANCE CO (SA) LTD **RESPONDENT**

CORAM: SMALBERGER ADCJ, HOWIE, SCHUTZ JJA, NUGENT and CHETTY AJJA

DATE OF HEARING: 18 & 19 MAY 2001

DELIVERY DATE: 1 JUNE 2001

Summary: Pension fund - legal personality - party to policy underwriting fund - breach of policy by insurer - damages.

JUDGMENT

. . . SMALBERGER ADCJ

SMALBERGER ADCJ:

INTRODUCTION

[1] The appellant ("Mostert"), in his capacity as curator of the CAF Pension Fund ("the Fund") instituted action against the respondent ("Old Mutual") in the Cape of Good Hope Provincial Division for damages in the sum (as finally claimed) of R48 254 488,00. Mostert's claim arose from two payments, R32 350 847,60 on 7 December 1994 and R95 545,66 on 20 December 1994 ("the payments"), made by Old Mutual to Corporate Acceptances Finance (Pty) Limited ("CAF"). The payments were made pursuant to an insurance policy ("the Policy") in terms of which Old Mutual held the Fund's investment.

[2] Mostert's main claim was based on an alleged breach by Old Mutual, when making the payments, of its contractual obligations to the Fund under the Policy. In the alternative Mostert alleged that the circumstances in which the payments were made amounted to both a breach by Old Mutual of a statutory duty imposed upon it as well as a common law delict.

[3] The matter came before Blignault J. The learned judge handed down a written

judgment on 21 December 2000. He dismissed Mostert's claims and granted judgment in favour of Old Mutual, with costs. He assumed that the Fund had been a party to the Policy, but rejected the claim in contract on the basis that the Fund had acquiesced in the payments made to CAF in breach of the Policy. He further held that although in making the payments to CAF Old Mutual had acted in breach of a statutory duty as well as negligently, the required factual causation between Old Mutual's conduct and the loss suffered by the Fund was lacking. He subsequently, on 19 February 2001, granted Mostert leave to appeal to this Court. Because of considerations of urgency the appeal was given precedence on the roll and set down at the earliest opportunity.

THE PENSION FUNDS ACT

[4] As certain provisions of the Pension Funds Act 24 of 1956 ("the Act") play a significant role in the determination of the issues which arise on appeal it would be both convenient and appropriate to commence with a brief overview of those provisions of the Act (as at December 1994) that I consider relevant.

[5] The Act, as the long title proclaims, provides for "the registration, incorporation, regulation and dissolution of pension funds and for matters incidental thereto". In terms of s 4(1) every pension fund shall apply to the Registrar of Pension Funds ("the Registrar") for registration under the Act. If the Registrar is satisfied that the fund has complied with certain prescribed requirements and that its registration is desirable in the public interest, the Registrar is obliged to register the fund provisionally (s 4(3)). Once he is satisfied that the fund complies with the conditions prescribed by regulation he registers the fund and sends the applicant a certificate of registration (s 4(4)). Registration is therefore an essential requirement for the lawful operation of a pension fund.

[6] In s 1(1) of the Act a "pension fund" is defined as a "pension fund organization" which in turn bears the meaning

> "(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching their retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or
>
> (b) any business carried on under a scheme or arrangement established with the

object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons...."

Section 1(2) provides that in relation to a pension fund organization in terms of (b) above "any reference in this Act to a fund shall be construed as a reference to that fund or to the person or body in control of the affairs of that fund, as the circumstances may require".

[7] The effect of the registration of a pension fund is dealt with in s 5(1) of the Act. It reads:

"(1) Upon the registration under this Act-

(a) of a fund which is a pension fund organization in terms of paragraph (a) of the definition of 'pension fund organization' in sub-section (1) of section *one*, the fund shall, under the name by which it is so registered, and in so far as its activities are concerned with any of the objects set out in that definition, become a body corporate capable of suing and being sued in its corporate name and of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules;

(b) of a fund which is a pension fund organization in terms of paragraph (b) of

the said definition, all the assets, rights, liabilities and obligations pertaining to the business of the fund shall, notwithstanding anything contained in any law or in the memorandum, articles of association, constitution or rules of any body corporate or incorporate having control of the business of the fund, be deemed to be assets, rights, liabilities and obligations of the fund to the exclusion of any other person, and no person shall have any claim on the assets or rights or be responsible for any liabilities or obligations of the fund, except in so far as the claim has arisen or the responsibility has been incurred in connection with transactions relating to the business of the fund;

(c) of any fund, the assets, rights, liabilities and obligations of the fund (including any assets held by any person in trust for the fund), as existing immediately prior to its registration, shall vest in and devolve upon the registered fund without any formal transfer or cession."

[8] Section 5(2) further provides:

"(2) All moneys and assets belonging to a pension fund shall be kept by that fund and every fund shall maintain such books of account and other records as may be necessary for the purpose of such fund:

Provided that such money and assets may, subject to the conditions determined by the Minister by notice in the *Gazette*, also be kept in the name of the pension fund by one or more of the following institutions or persons, namely-

(a) a stock-broker as defined in section 1 of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985);

(b) an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943);

(c) a banking institution registered or provisionally registered under the Banks Act, 1965 (Act No. 23 of 1965);

(d) a nominee company; or

(e) a person approved by the registrar, or who is a member of a category of persons approved by the registrar."

A "nominee company" referred to in proviso(e) is restrictively defined in s 5(3).

[9] Every registered fund shall in the manner prescribed by its rules appoint an auditor (s 9(1)) and a valuator where one is required (s 9 A(1)). Provision is also made for the regular furnishing of accounts (s 15). The Registrar may in his discretion and subject to such conditions as may be prescribed by regulation exempt in writing any pension fund from the provisions of ss 5(2), 9 or 9A as well as any other provision of the Act which, in his opinion, is connected with any such exemption (s 2(3)(a)).

[10] Other relevant provisions are s 7(2), which allows for process in any legal proceedings against a registered fund to be served by leaving it at the fund's registered office; s 12 which deals with the registration of any amendment of the rules; s 13, which provides that the rules of a registered fund shall be binding on the fund and its members;

and s 28(1), which states that on dissolution of a fund in terms of its rules the "assets of the fund" shall be distributed in the manner provided by the rules.

[11] Regulation 1 of the regulations published in terms of the Act provides:

> "The Registrar may, in terms of section 2 (3) (a) of the Act, exempt a pension fund from the provisions of sections 9 and 15 (1) and (2) of the Act on the following conditions:
>
> (a) The assets of the fund shall consist only of claims against one or more insurers;
>
> (b) the payment of every benefit in terms of the rules of a pension fund shall be made solely by one or more insurers;
>
> (c) the contributions payable to the pension fund shall not be paid into a bank account of the pension fund, but shall be paid direct to one or more insurers; and
>
> (d) one insurer shall accept the responsibility to act as administering insurer for the purposes of these regulations."

[12] It is common cause that in practice pension funds fall into two broad categories - underwritten (or audit-exempt) funds on the one hand and privately administered funds on the other. Privately administered funds are subject to the regulatory process of the Act with regard to auditing, accounting and, where applicable, valuation. Underwritten funds are exempt from the auditing and accounting provisions of the Act subject to the

conditions referred to in regulation 1. The most significant distinguishing feature between the two is that an underwritten fund is operated exclusively by means of a policy of insurance issued by a registered insurer.

[13] The scheme of the Act is to permit privately administered pension funds subject to stringent regulatory requirements, or underwritten pension funds where an insurer, with its own statutory and internal regulatory mechanisms, takes over the administration and investments of the fund. Because pension moneys are perceived to be vulnerable there is a need to provide protective safeguards. The mischief which the Act seeks to prevent is the abuse or misuse of pension funds by unscrupulous employers and other persons dealing with pension funds. Consistently with the Act's policy of combating this mischief s 19(4) of the Act provides that no registered fund shall invest any of its assets in the business of an employer who participates in the scheme whereby the fund has been established subject to ministerial exemption (which power may be delegated to the Registrar (s 19(7)).

THE RELEVANT FACTS

[14] On 16 June 1958 the Pension and Life Assurance Plan of Moores SA (Pty) Ltd was provisionally registered in terms of the Act. The pension fund created as a consequence was provisionally and conditionally exempted, in terms of s 2(3)(a)(ii), from the provisions of the Act ("the exemption"). The registration and exemption became final on 26 October 1962. The exemption was granted on condition, *inter alia*:

(a) that the fund operates exclusively by means of an insurance policy (or policies);

(b) that the insurer underwriting the fund (Old Mutual) furnish the Registrar with any proposed amendments to the rules of the fund for registration in terms of s 12 of the Act;

(c) that Old Mutual advise the Registrar if the fund is discontinued.

[15] The fund so established underwent a change of name in approximately November 1960 and again in approximately December 1990, when it became known as the A M International South Africa Pension Fund. On 19 June 1995 it was renamed the CAF Pension Fund (i e the Fund) and merged with a smaller fund, the Corporate Acceptance

and Finance (Pty) Ltd Pension Fund. The Fund has therefore enjoyed legal existence as a pension fund since 1958.

[16] It is common cause that from its inception the Fund was an underwritten fund which operated exclusively by means of policies of insurance issued by Old Mutual, the last of which (the Policy) came into existence on 1 March 1993 and was current when the payments were made in December 1994. Old Mutual administered the Fund and paid benefits to its members in accordance with its obligations to the Fund. The rules of the Fund, and any amendments necessary from time to time, were prepared by Old Mutual as part of its administrative functions and submitted to the Registrar for his approval. These include the rules in force in December 1994 ("the Rules").

[17] It is also common cause that the Fund was eventually converted from an underwritten to a privately administered fund. The date on which this occurred, and the exemption ceased to be of effect, is in issue between the parties. Old Mutual contends that the conversion occurred prior to December 1994; Mostert's contention is that as a

matter of law it took place on 19 June 1995.

[18] I turn now to the relevant events which led to the conversion of the Fund from an underwritten to a privately administered one. It is common cause that towards the end of 1993 Mr Gert van der Linde ("Van der Linde"), an actuary practising under the name of Van der Linde De Villiers ("VDL"), was approached by Mr Jonathan Bulwer ("Bulwer"). He (Bulwer) was an associate of Mr Laurie Korsten ("Laurie Korsten"). The latter and his brother Jan were well-known figures in the business and financial world. I shall refer to them collectively as "the Korstens".

[19] Bulwer inquired from Van der Linde whether a pension fund could invest its money in the employer participating in such fund. Van der Linde made it clear to Bulwer, as well as to Laurie Korsten, that a pension fund could only make an investment in its participating employer with the consent of the Registrar; and then only to a maximum of approximately 10% of such fund's assets. At the time the Korstens were seeking to acquire control of A M International (Pty) Limited ("AMI"). It was a loss-making

company but happened to be the participating employer in the Fund, which was flush with cash at the time and had assets in excess of R26 million. AMI later became A M K Technologies ("AMK"). To avoid unnecessary confusion, any future reference to AMK will, where appropriate, include AMI.

[20] In March 1994 CAF effectively acquired the shares and loan accounts in AMK. CAF was a private company controlled by the Korstens. It was one of several companies within the Korsten Family Trust. Korfinans (Pty) Limited ("Korfinans"), a subsidiary of CAF, became the holding company of AMK. It is common cause that at all material times the Korstens *de facto* controlled CAF, Korfinans and AMK.

[21] On 26 April 1994 AMK purported to appoint VDL as "actuaries, consultants and administrators to the employee benefit schemes of [AMK]" with immediate effect. This included the Fund. On the same day AMK wrote to Old Mutual advising it of VDL's appointment and confirming VDL's authority to take over the management and administration of the schemes. Van der Linde testified that he wrote to Old Mutual on

24 May 1994 advising Old Mutual that the Fund's investments with it were going to be terminated. Old Mutual denied ever receiving the letter. Nothing turns on this as Old Mutual eventually waived the required period of notice for discontinuance in terms of the Policy.

[22] On 6 June 1994, following on a discussion with Mr Renier Botha ("Botha") of the Financial Services Board ("the FSB"), Van der Linde wrote to the Registrar applying for consent, in terms of s 19(6)(a) of the Act, for the Fund to invest in AMK and Korfinans. This in effect amounted to an application for exemption from the provisions of s 19(4) of the Act. On 20 June 1994 VDL sent a further letter to the Registrar purporting to confirm that the Fund had changed to a privately administered fund on 1 May 1994 and advising that new rules would be sent to the Registrar in the near future. Attached to his letter was a letter from AMK advising that certain appointments had been made, including that of Van der Linde as actuary.

[23] On 26 July 1994 Botha, on behalf of the FSB, addressed a letter to "the principal

officer" of the Fund in which he stated that his office would be prepared to grant temporary exemption from the provisions of s 19(4) of the Act "*once the exemption granted to the Fund in terms of section 2(3)(a)(ii) of the Act has been withdrawn*". (My emphasis) Certain additional information was requested. The letter in express terms cautioned that it could not be construed as an exemption under the provisions of s 19(4) of the Act. It also stated that such exemption would only be finally considered after receipt of the required information.

[24] Van der Linde, on behalf of VDL, responded to this letter on 11 October 1994. He provided some of the information requested. He further stated that it had been decided in principle to change the Fund to a privately administered fund. On 25 October 1994 the FSB wrote to the Fund confirming that temporary exemption from the provisions of s 19(4) of the Act would, subject to certain conditions, be granted once the s 2(3)(a)(ii) exemption had been withdrawn. The letter left no doubt that no investment could be made until the Fund had legally been converted to a privately administered fund.

[25] On 17 November 1994 Laurie Korsten sent a note to Van der Linde asking him to arrange the transfer of the Fund's monies from Old Mutual to CAF. Van der Linde drafted a letter for AMK which the latter sent to VDL on 28 November 1994. The letter advised VDL that AMK wished to change the investment managers of the Fund from Old Mutual to CAF. VDL was requested to transfer the Fund's monies to CAF as soon as possible and CAF's bank details were provided. A copy of the letter was sent to Old Mutual.

[26] On the strength of the letter Old Mutual on 7 and 20 December 1994 made the payments in excess of R32 million, referred to earlier, into CAF's banking account. It was admitted by Old Mutual that its employee who authorised the payments acted in the course and scope of his duties. It is also common cause that Old Mutual did not seek the approval of the Registrar to discontinue the Policy; did not advise the Registrar that the Policy had been discontinued; did not inform the Registrar that the payments had been made to CAF; and did not at any stage after receiving instructions from VDL furnish the

Registrar with any proposed amendments to the Rules for registration in terms of s 12 of the Act.

[27] It is interesting to note that, as appears from Old Mutual's discovered documents, a copy of a so-called "discontinuance book" in respect of the Policy was sent to Old Mutual's head office on 16 November 1994. It records that the discontinuance would be a "full discontinuance"; that it would be "in terms of the Rules"; and that "assets are to be transferred to investment only scheme". A note on the discontinuance book cautions that "no cash refund will be made to the Employer on discontinuance. Cash refunds on an enhanced basis can be made only if the rules/policy providing for this has been registered and approved by the Registrar of Pension Funds". These entries were never explained to the trial court by anyone on behalf of Old Mutual.

[28] At a meeting of the "management" of the Fund on 20 April 1995 it was resolved, *inter alia*, to adopt a set of revised rules with effect from 1 March 1995 (although according to Van der Linde it was meant to have been 1 May 1994). On 4 May 1995

VDL sent the Registrar a set of the revised rules. On 19 June 1995 the Registrar advised VDL that the revised rules had been registered. In the letter it was recorded "that due to the fact that the [F]und no longer operates exclusively by means of policies of insurance the exemption which was previously granted in terms of s 2(3)(a)(ii) is hereby withdrawn in terms of s 2(3)(b) of the Act." Very significantly, in the revised rules CAF, to whom it will be recalled the payments were made in December 1994, features as the principal employer. The effect of the registration of the revised rules was legally to convert the Fund from an underwritten fund to a privately administered one. (19 June 1995 was therefore the first date on which Old Mutual could legally have released the moneys of the Fund to CAF in compliance with the terms of the Policy, the provisions of the Rules and the relevant statutory requirements, as appears more fully below.)

[29] Evidence was led, and much documentation was produced, in an attempt to explain how the payments to CAF were appropriated and dealt with. The view I take of the matter renders it unnecessary to deal with such evidence and documentation and the

conclusions (many disputed) to be drawn therefrom. Suffice it to say that what is clear is that at all material times what was left of the payments (which had intermingled with CAF's own moneys) remained in the account of CAF and under its control. At no time was any money paid over to any account validly and legally belonging to the Fund.

THE RULES

[30] A pension fund, its legal status, and the rights and obligations of its members and the employer, are governed by the rules of the fund, relevant legislation and the common law (*TEK Corporation Provident Fund and Others v Lorentz* 1999(4) SA 884 (SCA) at 894 B - C). The Rules amount to the Fund's constitution (*Abrahamse v Connock's Pension Fund* 1963(2) SA 76 (W) at 78 D - E).

[31] The rules of the Fund's 1958 predecessor do not form part of the record. The Rules, i e those current at all material times, were effective as from 1 May 1993. The preamble to the Rules provides, *inter alia*:

> "(iii) LEGAL PERSONA
>
> The Fund shall, in its own name, be capable of suing and being sued.

(iv) PRINCIPAL OFFICER

The Employer shall appoint a Principal Officer on such terms and conditions as it may determine.

. . . .

The Fund will, for the purposes of (iii) above, at all times be represented by the Principal Officer."

[32] In terms of the definition provision (Rule 1) the "employer" is AMK and the Fund is designated by its then name. "Approved pension fund" is defined as "a fund approved as such by the Commissioner for Inland Revenue" (Rule 1.1). "Policy" means "the policy of insurance issued by the underwriter in terms of which the Fund is underwritten and in terms of which the underwriter maintains the accounts . . ." (Rule 1.20). The underwriter is the Old Mutual (Rule 1.22). Provision is made for contributions by members and the employer (Rule 3) and for retirement, death and withdrawal benefits (Rules 4, 5 and 6).

[33] Rule 7 contains a number of general provisions. Amongst these, Rule 7.4 provides, *inter alia*, that any benefit payable in respect of a member or a dependant on retirement or termination of membership is subject to deduction in respect of any amount owing to

the employer or the Fund in respect of a loan or any compensation payable by a member who has admitted liability for loss caused. Rule 7.6 contains the important provision that "*except as otherwise provided in Rule 7.4, no moneys of the Fund shall revert to or become the property of the employer*". (My emphasis)

[34] Rule 8 deals with the operation of the Fund and the underwriter's liability. Rule 9.1 deals with amendments of the Rule. It reads:

> "The Employer shall have the right to amend the Rules of the Fund . . . . or to close or discontinue the Fund at any time.
>
> No amendment to the Rules of the Fund may be made unless the amendment has been approved by the Commissioner for Inland Revenue and the Registrar . . ."

[35] Rule 9 covers discontinuance. It provides, *inter alia*, that on discontinuance of the Fund any credit balances in the accounts, where the employer so directs, shall be paid or transferred to an approved pension fund in such manner as may be agreed upon between the employer and the underwriter. Then come other provisions not relevant to the present appeal. These are followed by a blanket provision

"Alternatively, subject to the approval of the Commissioner for Inland Revenue the underwriter and the Employer may agree on some other basis of dealing with such balances."

[36] It is apparent from the Rules that while the Fund remained in existence (or until such time as its Rules were amended) its moneys were to be held only on investment with Old Mutual and were not to find their way to the employer.

THE POLICY

[37] The Policy is dated 3 September 1993. In the definition clause in Part 1 of the Policy the Fund is designated by its then name (1.5). AMK is the proposer (1.9). "Approved fund" means "any pension fund . . . approved as such by the Commissioner for Inland Revenue and, where appropriate, shall include

(i) the Fund, and
(ii) the underwriter of such fund" (1.1).

"Rules" mean "the Rules of the Fund underwritten by the underwriter in terms of this policy" (1.12). The underwriter is Old Mutual (1.13). Clause 1 then further provides:

"Any amendments to the Rules on or after 1 September 1993 shall not be effective

in respect of this policy unless and until such amendments have been agreed to by the underwriter."

[38] Part 2 of the Policy is concerned with eligibility, participation and contributions. Part 3 deals with the operation of the Fund. The preamble contains an undertaking by Old Mutual to provide administrative, actuarial and investment services. Old Mutual is also required to establish and maintain a Basic Guaranteed Account and a Capital Bonus Account "for the purposes of the Fund" (3.1). The moneys received by Old Mutual would be invested in their normal investment portfolio and were not required to be placed in separate bank accounts. There are provisions dealing with the accounts and the underwriter's liability. Clause 3.9 provides for the termination of services. It permits AMK to terminate Old Mutual's administrative and actuarial services on at least three months prior written notice, and its investment service on six months notice.

[39] Clause 3.10 provides for the discontinuance of the Policy on six months notice either way (subject to waiver) from a specified date (the date of discontinuance). Clause 3.10.(2) is of crucial importance to the appeal. It provides:

> "As at the date of discontinuance all amounts still to be credited or debited to the Basic Guaranteed Account and the Capital Bonus Account shall be so credited or debited, and the balances in such Accounts determined. Subject to clause 3.10.(3) and clause 3.10.(4), the aggregate credit balances shall be paid within one month of the date of discontinuance *for the benefit of members to such approved fund as the Proposer shall direct*." (My emphasis)

[40] The significance of clause 3.15 lies in the fact that it highlights the need for Old Mutual to be abreast of the relevant legislation and administrative rulings applying to pension funds in carrying out its obligations under the Policy. It reads:

> "Notwithstanding anything to the contrary, the underwriter shall have the right to do all things that in its opinion are necessary or appropriate to comply with the provisions or requirements of any legislation or of any rulings by Governmental Authorities such as the Registrar of Insurance and the Registrar of Pension Funds. The underwriter shall notify the Proposer of any such action."

[41] Part 4 of the Policy deals with pension benefits and provides that the benefits payable on retirement, withdrawal from service and death of members shall be as specified in the Rules.

[42] Finally, reference needs to be made to an endorsement to the Policy dated 26 July 1994, which added a clause 3.10.(6) to the Policy, not so much for its content but for its

phraseology. It speaks of "should the Fund give notice to the underwriter of its intention to terminate this policy. . . ." and "[t]he underwriter shall give notice to the Fund of its intention to exercise [the right of adjustment] . . . ." I shall advert to this later.

[43] It is noticeable that the Policy clearly distinguishes between the employer (not defined but in fact AMK), the proposer (AMK) and the Fund. It is made subject to the Rules in certain respects. It is implicit in the Policy that Old Mutual had knowledge of the Rules (which it was responsible for preparing) and that it bound itself to have regard and give effect to the Rules where appropriate. The Rules and the Policy furthermore make it clear that the Fund was predicated on an underwritten fund with all the legal consequences flowing from that. Old Mutual must also have been aware of the exemption under which the Fund operated when it made the payments in December 1994.

THE CONTRACTUAL CLAIM - LEGAL PERSONALITY

[44] The first issue which arises in relation to Mostert's contractual claim is whether the

Fund had legal personality and accordingly the capacity to contract. At the trial Old Mutual conceded that the Fund had legal personality. It now contends that the concession was incorrectly made. As the concession related to a point of law Old Mutual is not precluded, in the circumstances of the present matter, from raising the issue of legal personality on appeal (*Paddock Motors (Pty) Ltd v Igesund* 1976(3) SA 16 (A) at 23 D - H; *De Beers Holdings (Pty) Ltd v Commissioner for Inland Revenue* 1986(1) SA 8 (A) at 33 D - G). Mostert did not dispute Old Mutual's right to do so.

[45] In *TEK Corporation Provident Fund and Others v Lorentz*, *supra*, at 894 B - C, a number of propositions were stated by Marais JA as being "either axiomatic or not in dispute". One was, with reference to both s 5(1)(a) and (b) of the Act, that a pension fund "is a legal *persona* and owns its assets in the fullest sense of the word 'owns'". I agree that that is a correct exposition of the legal position.

[46] Section 5(1) of the Act (quoted in para **7** above) distinguishes between a fund which is an association of persons (5(1)(a)) and one which is a business carried on under a

scheme (5(1)(b)), as defined in "pension fund organization" (see para **6** above). Mr Van Riet, on behalf of Old Mutual, contended that the legislature only intended to confer legal personality on a s 5(1)(a) fund, which it has done in express terms, but not on a s 5(1)(b) fund, into which latter category the Fund falls. (I shall assume for the purposes of the appeal that it does so.)

[47] It is of course correct that a s 5(1)(a) fund is specifically said to "become a body corporate capable of suing and being sued in its corporate name" whereas the same is not said in relation to a s 5(1)(b) fund. At first blush this would seem to lend support to Old Mutual's argument. But that takes too narrow a view of the matter. Section 5(1)(b) must be seen within the context of s 5(1) as a whole. What s 5(1)(b) does is provide that upon registration all the assets, rights, liabilities and obligations of such a fund shall "be deemed" to be those of the fund to "the exclusion of any other person". The word "deemed" has more than one meaning. It can be used to convey that something is what in fact it is not; but it can also be used in the sense of "considered" or "regarded". And

it is in this latter sense that it, in my view, is used in s 5(1)(b). In other words, in the case of a scheme the assets, *inter alia*, pertaining to the business of the fund are to be regarded as its assets to the exclusion of any other person. It therefore owns, in the sense of beneficially owns, its assets, which distinguishes it from a non-legal *persona* such as a trust or a deceased estate, examples relied upon by Old Mutual to support its argument that the Fund lacks legal personality (see *Commissioner for Inland Revenue v Friedman and Others NNO* 1993(1) SA 353 (A) at 370 D - G; *Commissioner for Inland Revenue v Emary NO* 1961(2) SA 621 (A) at 624 D - G). There is no language in the Act which suggests that the assets of the fund vest in the person controlling it.

[48] That a fund beneficially owns its assets also follows from the wording of s 5(1)(c) which deals with "any fund" i e either (or both) of the funds alluded to in s 5(1)(a) and (b). It provides that in either instance the assets of the fund pre-existing registration shall vest in the registered fund. There is no deeming provision. On registration the fund acquires those assets as its own. If pre-existing assets vest in a s 5(1)(b) fund all assets

that vest on registration (those referred to in s 5(1)(b)) must logically and by necessary implication do so as well. Section 5(2) of the Act which speaks of "assets belonging to a pension fund" and s 28(1) which refers to "assets of the fund" further reinforce the conclusion of beneficial ownership.

[49] I therefore conclude that by virtue of the provisions of s 5(1)(b) and (c) the Fund owns its assets in the fullest sense of the word. Although the Fund has its origins in a scheme, it was established for the benefit of persons who have become its members. The Fund is clearly an entity separate from its members. It can hold its assets and acquire rights and incur obligations apart from them and has perpetual succession. It has the essential attributes of a universitas at common law with concomitant legal personality (*Webb & Co Ltd v Northern Rifles* 1908 TS 462 at 464/5; *Morrison v Standard Building Society* 1932 AD 229 at 238). The result is that if s 5(1)(b) does not in terms confer legal personality, on a proper interpretation it must be taken to do so.

[50] If beneficial ownership of the assets did not reside in the Fund it would inevitably

have to reside in AMK as employer - there is no suggestion that it could have resided in the Fund's members. The assets would, in other words, become the property of AMK. This is precisely what the Act and the Rules seek to avoid. They are designed to exclude an employer from any beneficial interest in the Fund (cf *Ex parte Trans-African Staff Pension Fund* 1959(2) SA 23 (W) at 27 G - H; *Mercedes Benz v Mdyogolo* 1997(2) SA 748 (E) at 752 I - 753 C).

[51] Coupled with the above is the fact that the Rules in the preamble designate the Fund as a legal *persona* capable of suing and being sued. They purport to create legal personality. Apart from the Rules, s 7(2) of the Act clearly envisages that any registered fund may be sued as a fund in its own right. The circumstances do not require that "fund" in that subsection be interpreted to mean the person in control of the affairs of the fund (see s 1(2)) as would be the case, for example, in s 4(1) and s 24 of the Act.

[52] In the result the Fund at all material times had legal personality and capacity to contract. There is no merit in the contention to the contrary. Significantly, late in 1994

Old Mutual had no difficulty drawing up a proposed investment contract with the Fund itself, by implication recognising the Fund as a legal *persona*.

WAS THE FUND A PARTY TO THE POLICY?

[53] The next issue which arises is whether the Fund was, or became, a party to the contract. The fact that the Fund was under the control of AMK does not mean that it was unable to contract. The particulars of claim alleged that the Fund became a party to the contract underlying the Policy by way of *stipulatio alteri*. Subsequent pleadings sought to broaden the issue by introducing the notion that the Fund was a direct party to the Policy. In Old Mutual's interrogatories dated 22 September 2000 the question was asked, *inter alia*, "where and in what manner did the Fund become a party to the Policy and who represented the Fund in doing so?" Mostert's response was that "the employer [AMK] in negotiating the Policy with [Old Mutual] was acting in a dual capacity. The employer acted both on behalf of itself and on behalf of the Fund". This presupposes that the Fund was a direct party to the contract. It laid a sufficient foundation for Mostert

to so contend, whether on the basis alleged or on some other legal basis. Even if Mostert's pleadings have not been as explicit on this point as they might have been, no prejudice can result to Old Mutual, in the circumstances of the present matter, by allowing the question whether the Fund was a direct party to the Policy to be considered (cf *Shill v Milner* 1937 AD 101 at 105).

[54] The Fund was registered as an underwritten fund. The exemption that applied to its registration required it to operate exclusively by means of an insurance policy. The assets that vested in it in terms of s 5(1)(b) and (c) were invested in terms of the Policy and comprised claims against Old Mutual. The Fund, being underwritten, could not itself hold any moneys in terms of the Rules. From this it would necessarily seem to follow, both in logic and in law, that the Fund, clothed as it was with legal personality and the capacity to contract, would inevitably be a party to any insurance policy underpinning its investment.

[55] Section 5(2) would appear to reinforce this conclusion. It has been quoted in para

8 above. It appears to deal only with privately administered funds. It provides that all moneys and assets of a pension fund shall be kept by that fund subject to the proviso that they may also be kept in the name of a pension fund by a limited category of persons and institutions, *inter alia*, a registered insurer. Where the moneys and assets are invested and managed by an insurer it is difficult to conceive how this could be achieved other than by way of a contractual nexus between the fund and the insurer concerned. The statutory provision in effect compels a contractual relationship. *A fortiori* the same applies in the case of an underwritten fund.

[56] The contractual relationship between the fund and the insurer will have to be forged by the employer as the directing mind and will of the fund. It is of course the participating employer and the insurer concerned who take the initiative in setting up an underwritten fund. In terms of the Policy the underlying contract is between the proposer (AMK) and Old Mutual. But in negotiating the Policy, AMK would have represented the Fund as well as itself. (Whatever the position may have been in 1958 when the first

policy came into existence, on 1 March 1993 (the date of the Policy) AMK was clearly acting on behalf on the Fund.) AMK thus negotiated the Policy in two conceptually different capacities - *qua* employer on the one hand and *qua* proposer on behalf of the Fund on the other. There can be no objection in principle to its doing so. In this way privity of contract between the Fund and Old Mutual would have come about. This is consistent with the terms of the Policy which identifies the Fund, the proposer and the employer (AMK) as separate entities. Once it is accepted that the Fund has legal personality it makes commercial sense for the Fund to be party to the Policy. Who else, one may ask, other than the Fund could legally compel the employer to make contributions it fails to make? (cf *Trustees African Explosives Pension Fund v New Hotel Properties (Pty) Ltd* 1961(3) SA 245 (W) at 246 H). (Rule 3.3 requires the underwriter to notify the Registrar immediately should employers and members contributions not be paid within the prescribed period but is silent as to the means of enforcing payment.)

[57] In the result I am satisfied that the Fund was a party to the Policy and therefore

entitled to enforce its rights under it, which would include a claim for damages arising out of its breach. The endorsement to which I have referred (see para **42** above) fortifies this conclusion. While its terms may be at variance with clause 3(9) and 3(10)(1) of the Policy, whatever its meaning it clearly acknowledges that the Fund is a party to the Policy.

DID OLD MUTUAL ACT IN BREACH OF THE POLICY?

[58] For as long as the Fund remained registered as an underwritten fund the terms of the exemption and the Rules required it to operate exclusively by means of an insurance policy. The Fund's moneys could not be invested in any other manner. Nor was the Fund entitled to hold the moneys.

[59] As previously mentioned, Old Mutual must be taken to have been aware of the requirements of the statutory provisions having a bearing on the Policy, as well as the provisions of the Rules. It would undoubtedly have been an implied term of the Policy that Old Mutual would be obliged to comply with all the applicable statutory

requirements. There could be no change to the underlying structure of the Fund i e from an underwritten to a privately administered one, without appropriate amendments to the Rules. And no such amendments could take place without Old Mutual's approval for as long as the Fund remained underwritten by it. Old Mutual was therefore fully aware of the situation which pertained, both legally and contractually, when the payments were made in December 1994.

[60] The Fund remained an underwritten one, subject to the exemptions imposed, until 19 June 1995 when the Korstens cause it to be registered as a privately administered fund with appropriate rule changes. Registration was an essential prerequisite for any change in the status of the Fund. Old Mutual's reliance upon a so-called practice in the Registrar's office which allowed rule changes to take effect before registration is misplaced. More will be said about this later. Apart from the fact that the evidence relating to this practice is far from convincing, there is simply no basis in law for subjugating the provisions of the Act and regulations to such practice. It is one thing to

give amended rules retrospective effect after registration; it is something entirely different to seek to give them binding effect before registration.

[61] It will be remembered that clause 3.10(2) of the Policy (see para **39**) provides that the aggregate credit balances shall be paid within one month of the date of discontinuance for the benefit of members "to such approved fund as the proposer shall direct". In the context of an underwritten fund which had no power to make any investment other than the investment in the Old Mutual policy, "to such approved fund" could only mean to some other pension fund that had been approved by the Registrar and that was capable in law of receiving and administering the moneys for the benefit of the Fund's members.

[62] AMK's instruction to Old Mutual in November 1994 to pay the credit balances to CAF was not a valid directive, and could not bring about a valid discontinuance of the Policy, because:

1) CAF was admittedly not an approved fund let alone the underwriter of such a fund;

2) CAF was not entitled to receive any moneys on behalf of the Fund because the Fund

was not entitled to hold any moneys for as long as it was underwritten;

3) CAF could not in law have become the "investment manager" of the Fund for so long as the Fund remained underwritten and its Rules remained unaltered. In November 1994 the Fund had no power to appoint CAF as such. As the Fund was still underwritten it was obliged by the conditions upon which the exemption was granted and the Rules to use only a registered and approved insurer as investment manager;

4) Payment to CAF took place without the permission of the Commissioner for Inland Revenue;

5) As matters stood, if the Fund's moneys were to be kept in an underwritten fund, Old Mutual could only have paid them to another insurer for investment in a policy, something of which Old Mutual was well aware judging from the unexplained entry in its discontinuance book (see para **27**).

6) What occurred was no more than an invalid purported compliance with an invalid directive.

[63] In making the payments in December 1994 pursuant to AMK's instruction Old Mutual breached the provisions of clause 3.10(2) of the Policy and its underlying contract with the Fund. Old Mutual should have refused to pay because the instruction given required it to act in breach of its contractual obligations. Old Mutual's defence was predicated on a valid discontinuance of the Policy following on a valid directive, which was simply not the case.

ACQUIESCENCE

[64] Blignault J dismissed Mostert's claim for breach of contract on the ground that the Fund had concurred in the payments made by Old Mutual to CAF. He arrived at this conclusion on the following basis. The payments were made on the instructions of AMK. According to the evidence the Korstens, and more particularly Laurie Korsten, owned and controlled AMK. At the same time Laurie Korsten was the directing mind and will of the Fund. His knowledge and conduct was that of the Fund. Through him the Fund was aware that the payments had been instructed, made and received. It had acquiesced

in this state of affairs and could consequently not rely upon the payments as constituting a breach. In holding as he did Blignault J applied the threefold test for the application of the "directing mind and will" doctrine laid down in para 66 of the Canadian Supreme Court decision of *Canadian Dredge & Dock Co v The Queen* [1985] 1 SCR 662, namely, whether "the action taken by the directing mind (a) was within the field of operation assigned to him; (b) was not totally in fraud of the corporation; and (c) was by design or result partly for the benefit of the company".

[65] In my view Blignault J's finding that the Fund acquiesced in the payments cannot stand for a number of reasons which I shall state briefly, this not having been a point pursued by Old Mutual with any vigour on appeal. The reasons are the following:

1) Acquiescence was never raised as an issue on the pleadings nor fully ventilated at the trial. Being akin to waiver it needed to be raised to be relied on.

2) The Fund could not lawfully have acquiesced in or be bound by what was an invalid directive because it had no power in terms of the Rules to do so.

3) The evidence suggests that in giving the purported discontinuance instruction to Old Mutual, Laurie Korsten acted, or intended to act, on behalf of AMK only. It was common cause at the trial that the Korstens were anxious to get hold of the Fund's moneys for the benefit of their companies.

4) Even applying the "directing mind and will" principle to the Fund, the evidence justifies the inference that Laurie Korsten was not acting in good faith for the benefit of the Fund and cannot be taken to have acquiesced on its behalf. His knowledge and conduct cannot be attributed to the Fund (cf *R v Kritzinger* 1971(2) SA 57 (A) at 59 H - 60 D). He devised a scheme which resulted in payments to CAF contrary to the conditions of the exemption, the Policy and the Rules, with no benefit to the Fund or its members. That being so, it cannot in my view be said that his action "was within the field of operation assigned to him", or was "by design or result partly for the benefit of [the Fund]", as found by Blignault J.

OLD MUTUAL'S APPROACH

[66] Having arrived at my conclusions something further needs to be said about Old Mutual's approach. Old Mutual emphasised that in 1994 an insurer's responsibilities to the members of a pension fund organised as a scheme could be terminated by the employer, after which the members might have to be content with whatever new dispensation the employer created. Old Mutual accordingly contends that its duties as underwriter have a term. Moreover, neither Old Mutual nor the Registrar would have any effective control over the moral standards of a successor administrator or investment manager. With this much I agree. But, continues Old Mutual, when Mostert seeks to hold it liable in the way that he does, he ignores these axioms and aspires to impose upon Old Mutual a continuing duty to protect the Fund and its members against predators. This complaint by Old Mutual is based upon two broad arguments.

[67] The first is that s 5(1)(b) of the Act does not create a separate legal *persona* where a fund is organised as a scheme and not an association, with the consequences that the fund does not beneficially own any assets and is not a party to any contract with the

underwriter, resulting in the underwriter owing it no obligations. The second argument is that there existed a practice, which had superseded the law, in terms of which the rules and registered status of a fund could be altered by an employer (again in the case of a scheme) without any formal amendment of the rules and without registration of any amendment.

[68] The first of these arguments has been shown to be incorrect. Having said that, it must be emphasised that the argument is somewhat breathtaking in its challenge to the manifest intention of the legislature to create an entity apart from the employer (however much ultimate control the employer may have) and its members, which holds its own assets to the exclusion of the employer and its members, and which in the case of an underwritten fund is itself empowered to conclude a contract with an insurer. The way in which Old Mutual employs this argument is simple. When it was instructed to pay out and did so, its duty was to accede to AMK's wish. It was the other contracting party. AMK held the only asset, the policy with Old Mutual, in trust. The Fund neither owned

anything nor contracted with Old Mutual. That was so because it did not exist as a legal person. As far as the members were concerned, so much for the Act, the Policy and the Rules. If the employer (AMK) directs that it or someone else should be paid you have no choice but to do so. That is what the first argument reduces itself to. It completely ignores Old Mutual's contractual obligations to the Fund.

[69] The second argument is also designed to get awkward provisions out of the way. The gist of it is as follows. The office of the Registrar, as the evidence indicates, is understaffed. It is required to deal with a great number of funds. If it were to operate according to the prescribed statutory requirements there would be inordinate delays. They provide that amendments to the rules do not take effect until they are registered (although they may be registered with retrospective effect). As a change of status from a wholly underwritten to a privately administered fund requires changes to the rules, such a change can only occur once the appropriate rule change has been registered. In order to cope with the inconveniences which an adherence to the statutory requirements would

involve, a practice has evolved, so the argument runs, to which the Registrar's office is a party, in terms of which informal amendments effected by the employer, are treated as having full legal effect, without submission to the Registrar, and without registration by him. Thus the fact that during December 1994 the Fund continued to be a wholly underwritten fund is sought to be annulled.

[70] Earlier that year AMK had decided, and informed the Registrar of its decision, that it was taking the administration of the Fund out of the hands of Old Mutual and placing it in the hands of Van der Linde, was appointing an auditor and valuator and would be submitting annual accounts. This had the effect under the practice, so it was contended, that the Fund was converted "automatically" (even though an examination of the rules at the Registrar's office would not reveal this). Mr Van Riet claimed that there could be no complaint about this, as all that was happening was that AMK was assuming additional obligations by surrendering its exempt status. This ignores that its action, if effective, would also shed it of the obligation to hold only one asset, a policy with an underwriter.

What the second argument amounts to is that a breach of a rule of law frees the transgressor from the obligation to comply with it.

[71] A further implication of the argument was that the Registrar's consent to not more than 10% of the moneys being invested in AMK, was anticipated. The fact was that when Botha, who was in charge of the privately administered funds section of the Registrar's office, was approached, although he indicated that in principle he would be prepared to consent to such an investment, he made it quite clear on two occasions that no consent could be given until the Rules were amended and the exemption was withdrawn. Despite this, it was a refrain of Mr Van Riet's argument that the Registrar had consented (sometimes, it was said, "conditionally"). Although Old Mutual was not directly involved in this 10% investment issue, it nonetheless relied on this anticipation argument in relation to *quantum*. It contended that prior to 19 June 1995 (when the Fund was converted) the only amounts that had been invested in the Korstens' companies came to less than the 10% referred to, and that the Registrar had "consented" to this level of

investment (which, of course, he had not). So Old Mutual relied on this part of the "practice" as well. The provisions of the Act regarding the filing, registration and effect of rules are perfectly clear, as is also their purpose. There is no basis whatever for contending that these provisions have been repealed or were entitled to be ignored because of some "practice".

[72] Once these two arguments, as to the Fund lacking legal personality and the abrogation of the statutory regime, are rejected, then it seems clear that if Old Mutual had complied with the conditions of exemption, the Rules of the Fund and the Policy, the payments to CAF in December 1994 would not have been made. However, if its thinking at the time accorded with that reflected in the argument presented to us on its behalf (we do not know whether it did, as no evidence was given), then it is unsurprising that events took the course they did. Mr Gauntlett, for Mostert, has typified these arguments on behalf of Old Mutual as cynical. There is much to be said for that.

DAMAGES

[73] In paragraph 9 of his particulars of claim Mostert pleaded a breach of the Policy by Old Mutual arising from the payments to CAF. In paragraph 11 he alleged that the Fund had suffered damages as a result of such breach. The loss claimed (in addition to the capital sums) is calculated in the alternative on two different bases - the estimated return the amounts paid out would have earned had they remained invested with Old Mutual on the one hand, and interest from the dates on which the payments were made on the other.

[74] Mostert did not seek to claim damages as a surrogate for performance. Any reliance thereon was specifically disavowed by Mr Gauntlett during the course of argument. The directive from AMK to Old Mutual in November 1994 to pay over the moneys of the Fund invested in it was invalid. There was no legal obligation on Old Mutual in terms of the Policy to pay the moneys to either CAF or the Fund - in fact it was contractually and in terms of the exemption precluded from doing so. Old Mutual's response to the invalid directive was to make the payments to CAF. The legal effect of that was that Old Mutual paid its own moneys to CAF, not those of the Fund. If that was so Old Mutual still owed

the Fund whatever was due to it before the payments to CAF and the Fund could claim that amount as a surrogate for performance, unless the majority decision in *ISEP Structural Engineering and Plating (Pty) Ltd v Inland Exploration Co (Pty) Ltd* 1981(4) SA 1 (A) precludes such a course. Even if that decision was correct it is probably distinguishable. Apart from that potentiality it should be noted that the decision has been subjected to severe criticism (see De Wet and Van Wyk, *Die Suid-Afrikaanse Kontraktereg en Handelsreg*, 5de uitgawe, 212; LAWSA, First Reissue, Vol 7, para 45; Oelofse, 1982 *Tydskrif vir die Suid-Afrikaanse Reg*, 61 esp at 63 - 65; *Van Immerzeel and Pohl v Samancor Ltd* 2001 CLR 32 (SCA) at 45 - 46 - the relevant part has been left out of the report at 2001(2) SA 90 (SCA) at 96 F - G) and its correctness is open to doubt. Reconsideration of the majority decision is called for. This, however, is not the appropriate matter in which to do so, in view of Mr Gauntlett's stance, which may flow from the form that Mostert's pleadings took because of the decision in *ISEP*'s case. As pointed out, Mostert elected to treat Old Mutual's payments to CAF as a payment of the

Fund's moneys in breach of the Policy. Old Mutual also sees it as a payment of the Fund's moneys, but pursuant to a valid discontinuance of the Policy. The parties have therefore chosen to treat the case as if what was paid out was the Fund's moneys, and the matter should be approached on that basis.

[75] From a practical point of view it would have made no difference in the present matter had Mostert claimed damages as a surrogate for performance, and the claim had been recognised on the basis that *ISEP*'s case was wrongly decided. As De Wet and Van Wyk, *supra*, comment at 222:

> "Of skadevergoeding nou as surrogaat van die prestasie geëis word, dan wel na terugtrede of naas daadwerklike vervulling, bly die beginsels, wat op die berekening en toekenning van skadevergoeding weens kontrakbreuk van toepassing is, dieselfde vir die groot verskeidenheid van situasies, wat kan ontstaan."

The approach to the quantification of the Fund's loss would therefore have basically been the same had the claim been one for damages as a surrogate for performance rather than damages for breach.

[76] The nature of damages for breach of contract was stated by Innes CJ in a well-known *dictum* in *Victoria Falls & Transvaal Power Co Ltd v Consolidated Langlaagte Mines Ltd* 1915 AD 1 at 22 as follows:

> "The sufferer by . . . a breach [of contract] should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money, and without undue hardship to the defaulting party."

See also *Rens v Coltman* 1996(1) SA 452 (A) where it was said, in relation to this rule (at 458 E - H):

> "The application of this rule will ordinarily require in many cases, and typically the case of a breach of a contract of sale by the purchaser, that the date for the assessment of damages be the date of performance, or as it has often been expressed, the date of the breach. But even in contracts of this nature, there is no hard and fast rule (cf *Culverwell and Another v Brown* 1990 (1) SA 7 (A) at 30G-31H) and in each case the appropriate date may vary depending upon the circumstances and the proper application of the fundamental rule that the injured party is to be placed in the position he would have occupied had the agreement been fulfilled. The position is the same in England. In *Miliangos v George Frank (Textiles) Ltd* [1975] 3 All ER 801 (HL) Lord Wilberforce (at 813) recognised that 'as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach' but in the same passage emphasised that the general rule did not preclude the Courts in particular cases from determining

damages as at some later date."

[77] The dates of breach in the present instance were the dates on which the payments were made. The Fund's damages must be assessed on those dates, there being no good reason to depart from the ordinary or general rule in this regard referred to in *Rens v Coltman*, *supra*. This would involve, in the first instance, payment of an amount equivalent to that paid to CAF by Old Mutual. The position of Old Mutual in this regard is akin to that of someone owing a money debt due on a particular date and logically the same principles should apply. The upshot of this is that an appropriate award of damages would be an amount equivalent to the payments, plus interest from the date of each payment (De Wet en Van Wyk, *supra*, at 230; LAWSA, *supra*, paras 28 and 49; Visser and Potgieter, *Law of Damages*, at 277). In other words, damages should be awarded on the alternative basis claimed by Mostert. I am not persuaded that the Fund should be compensated on the basis of an investment loss. There is nothing to suggest that an investment loss was in the contemplation of the parties when the contract underlying the

Policy was entered into. Once the Fund's loss falls to be assessed at the date of the breach, the subsequent events, and the movement of the moneys paid over to CAF, become irrelevant in relation to *quantum*. Old Mutual never sought to make out a case that the Fund could and should have mitigated its damages.

[78] From the amount due to the Fund must be deducted the amounts which Mostert has recovered for the Fund, less expenses, interest to be adjusted accordingly. Mostert clearly acted to protect the Fund's interests even though, as matters have turned out, he would have been entitled to look only to Old Mutual to recompense the Fund. He cannot be faulted for taking what were wise precautionary steps. It could be added that he took such steps pursuant to perceived rights of action against the Korstens and their companies but it is unnecessary for present purposes to deal with that. The assurance has also been given by Mostert that any future amounts recovered by the Fund, less expenses, will be paid over to Old Mutual.

CONCLUSION

[79] In the result the appeal must succeed in relation to Mostert's claim in contract. This renders it unnecessary to deal with the other claims and to traverse any further evidence relevant to them.

[80] The parties are agreed that the matter merits the costs of two counsel being awarded. A special costs order was sought in respect of the travelling expenses of Mostert's junior counsel from Canada where he now practises and from where he had to come both for the trial and the appeal. The request is somewhat unusual. Mr Van Riet raised no specific opposition to such an order and was content to leave the matter in our hands. Junior counsel, Mr Kruger, has been in the matter since its inception, initially alone. It was he who drafted the pleadings and had the initial conduct of the proceedings in a matter of some complexity. It would have been both difficult and costly to replace him later. In the circumstances it would not be unreasonable to include his travelling expenses from Canada in the costs awarded.

ORDER

1. The appeal is allowed with costs, including the costs of two counsel and junior counsel's reasonable travelling costs from Canada to attend the hearing of the appeal.

2. The order of the court *a quo* is set aside and the following order is substituted in its stead:

2.1 Payment of the sum of R32 350 847,60 together with interest at the legal rate on the said sum from 7 December 1994 until date of payment;

2.2 Payment of the sum of R95 545,66 together with interest at the legal rate on the said sum from 20 December 1994 until date of payment;

2.3 From the amounts referred to in 2.1 and 2.2 are to be deducted all amounts recovered to date by the plaintiff on behalf of the CAF Pension Fund, interest to be adjusted accordingly from the date of each such recovery;

2.4 Payment of the plaintiff's agreed or taxed attorney and client costs in respect of the recoveries made by him to date;

2.5 Costs of suit including

2.5.1 the costs of two counsel and junior counsel's reasonable travelling costs from Canada in respect of attendance at the trial;

2.5.2 The qualifying fees of Mr Cameron-Ellis and Professor Wainer.

3. In the event of the appellant (plaintiff) having recovered any amounts on behalf of the CAF Pension Fund between the date of judgment of the court *a quo* (21 December 2000) and the date of this judgment, he shall pay such recoveries (net of expenses as agreed or

taxed), together with interest at the legal rate, forthwith to the respondent (defendant); and in the event of the appellant (plaintiff) recovering further dividends from the estate of Corporate Acceptances Finance (Pty) Limited (in liquidation), he shall pay such recoveries (net of expenses as agreed or taxed) forthwith to the respondent (defendant).

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J W SMALBERGER
ACTING DEPUTY CHIEF JUSTICE

HOWIE JA)Concur
SCHUTZ JA)
NUGENT AJA)
CHETTY AJA)