THE BOTTOM LINE

WHO PROFITS FROM UNPAID PENSIONS?

An Open Secrets Investigation
NUMBERS AT A GLANCE:

R42 b

44% of South Africans over 65 live in poverty
R8 BILLION+
IN DEDICATED UNCLAIMED BENEFITS FUNDS

16 million+
SOUTH AFRICANS
BELONG TO A PENSION FUND

4 million+
PEOPLE OWED UNPAID BENEFITS

6757
DORMANT PENSION FUNDS CANCELLED IN THE CANCELLATIONS PROJECT
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One of the major challenges for investigators and activists who work with complex financial and legal issues is the technical language that can seem intimidating and impenetrable. Here are some of the terms and abbreviations that come up regularly in this investigative report.

**Cancellations project**
A project of the Financial Services Board (FSB), which was the state regulator of the pension fund sector. This project, which ran from 2007 to 2013, cancelled the registrations of 6 757 dormant pension funds in terms of the Pension Funds Act, often at the behest of private fund administrators.

**Cancelled/deregistered fund**
A pension fund whose registration has been cancelled. While the fund still exists as a legal entity, it cannot lawfully conduct business as a pension fund for so long as it is not registered in terms of the Pension Funds Act. This means that it cannot make investment decisions or pay members.

**Dormant fund**
A pension fund with assets and liabilities (including liabilities for unpaid benefits), but without a properly constituted board of trustees.

**FSB and FSCA**
The FSB was the state regulator of the non-banking financial services sector until it was replaced on 1 April 2018 by the FSCA, in terms of the *Financial Sector Regulation (FSR)* Act 9 of 2017. The FSCA is now the market conduct regulator for all financial services sector corporations.

**Fund administrator**
A financial services firm (usually privately owned) that is paid to invest and manage the assets of pension funds, to keep funds’ accounts, to provide information to fund members, and to pay out benefits in accordance with regulations.

**Orphan fund**
A pension fund without a board of trustees. ‘Shell funds’ and ‘dormant funds’ are two kinds of orphan funds.

**Pension/provident fund**
A pension fund is an employment-related retirement benefits fund that pays a fixed sum of money to retired members of the fund in quarterly or monthly instalments, typically for the rest of their lives. Some pension funds pay pensions to the surviving spouse or surviving child of a pensioner who has died. A provident fund instead pays one lump sum to a member when they reach retirement age. In this report, ‘pension fund’ is used as a catch-all term for both pension and provident funds.¹

**PFA**
The legislation that governs employer-based pension plans in South Africa.

¹ [Pension Funds Act 24 of 1956](https://www.sagepub.com/fulltext/9780761952881.sagepub.com/supplements)
Pensioner
A person who has reached retirement age or is receiving a pension, generally a retirement pension. In this investigation into unpaid benefits, our use of ‘pensioner’ is often broader so as to include younger members of pension funds who have lost or changed employment and the dependants of pension fund members.

Secret profits
Proceeds made by a fund administrator in the course of administering a fund in addition to the administration fees that the fund’s trustees have agreed to pay. If the fund did not agree that the administrator could keep the additional money, this is a ‘secret profit’ and it is unlawful for the administrator to keep it. It must be paid back to the fund.

Shell fund
A pension fund with no members, assets or board.

Standalone fund
A pension fund whose members are the employees of one employer. By right, half of the board of trustees is elected by members.

Trustee
A member of a board that is given powers of administration over a pension fund, with a legal obligation to do so solely for the purposes specified. Trustees direct and control the operations of a fund and must do so in the interests of the members while acting with due care and in good faith.

Umbrella fund
Also known as ‘multi-employer funds’, where the members of the fund are the employees of a number of unrelated employers. The board is appointed by the fund’s sponsor or creator (usually a fund administrator, insurer, bargaining council or union).

Unclaimed benefits
The official legal term for pension fund benefits that are not paid to a member by a fund within two years of that payment becoming legally due.

UBF
(Unclaimed Benefits Fund)
A fund set up with the sole purpose of preserving unpaid benefits until those beneficiaries can be traced and paid. Most private fund administrators like Liberty and Alexander Forbes now have their own UBFs.

Underwritten fund
A pension fund whose only asset is an insurance policy. Employee contributions to the fund are paid as premiums to one or more insurers who undertake to pay benefits as and when they become payable by the fund. The insurer may pay out to the fund for onward payment to the member or beneficiary, or may pay directly to the member or beneficiary on behalf of the fund.

Unpaid benefits
This report uses the term ‘unpaid’ rather than ‘unclaimed’ benefits. This deliberate choice highlights the fact that the non-payment of so many benefits is not the fault of beneficiaries. Many people have tried unsuccessfully to claim their benefits, while others simply do not know that they are entitled to benefits. To speak of ‘unpaid’ benefits puts the responsibility on employers, fund administrators and trustees. This is the term used by the Unpaid Benefits Campaign (UBC).
In 2019, well over 16 million South Africans belong to a pension fund. Of these, around 90 percent are members of over 5 000 privately administered pension funds, most of which are run by some of South Africa’s largest financial institutions. Every month, these people give up a portion of their earnings in order to secure a retirement and old age with dignity, and to provide for themselves and their dependants when they can no longer work. These hopes have been dashed for the millions who have not been paid the pensions that they are owed.
This investigative report is the culmination of a year-long investigation by Open Secrets into the pension fund industry in South Africa. According to the Financial Services Board’s 2018 Annual Report, over R42 billion in benefits is owed to over 4 million pensioners and pension fund members. This number is growing. This represents a fundamental failure by state regulators and pension fund administrators, and it has serious socio-economic consequences. It is iniquitous that poor and vulnerable people should have money deducted from their wages for decades, and then not receive their pension when they retire, move or lose their jobs. It is also unacceptable that large corporations profit from the system that is failing to protect these people.

The harsh reality is that many South Africans endure a life of inequitable and insufficient access to resources and services and retire with little to show for years of hard work. There are multiple and structural reasons for poverty, but one way to improve older people’s constitutional rights to dignity and social security is through an adequate pension.

If retirement savings are so important for social justice and equity, then why do so many retirement benefits remain unpaid? Are the large financial corporations that administer pension funds and the state regulators that supervise them doing enough to address this problem?

Our investigation into unpaid pension benefits is a case study within an industry that, in many ways, has been structured to
benefit its dominant corporations while leaving pensioners and other fund members out in the cold. This report interrogates the multiple failures that led to the mass cancellation of pension funds when many still had assets and members to pay out. It also considers the conduct of private fund administrators in this as well as other scandals that have kept pensioners from their hard-earned benefits, and the effective failure of the state regulator to investigate and rectify these.

The legal duties of fund administrators and the regulators are clear and require them to act in the best interests of the people who entrust their savings with them.

The following key findings suggest that these legal duties have been systematically ignored for the sake of convenience and profit:

1. **Between 2007 and today, well over 6,000 pension funds have had their registrations cancelled on the basis that they were no longer functioning. It is also common cause that some of these still held assets and liabilities to fund members and should not have been cancelled.**

2. **Over 4,000 of these funds were cancelled at the request of people employed or contracted by the funds’ administrators, including Liberty and Alexander Forbes. These people had been appointed by the regulator to act as representatives or trustees of orphan funds, often unlawfully. In their capacity as trustees, they were obliged to make sure that the funds were indeed empty of assets and liabilities and that members were paid before submitting them to be deregistered, but this was often not the case.**

3. **The assets of cancelled and dormant funds were often moved into unclaimed benefits funds (UBFs) held by the fund administrator. Since 2008, the assets of these UBFs have increased from R450 million to over R8 billion.**

4. **The corporations operating in this sector derive considerable income and profit from fees related to managing assets. Where fees are tied to the extent of the assets, they go up as the pool of funds increases. This creates a potentially significant conflict of interest, as fund managers who benefit from unpaid benefits may be disincentivised from vigorously tracing and paying beneficiaries.**
Why has all of this occurred? We argue that this is not a typical story of corruption. Our investigation instead points to a systemic problem in the pension fund industry and the financial services sector. It reveals a system of perverse incentives and inadequate regulation. There is insufficient accountability where fund administrators and their employees do not keep good records, fail to do proper due diligence, or do not do enough to trace and pay pensioners and fund members. At the same time, fund administrators, asset managers and other industry players are able to generate generous fees, particularly from asset management. Often, their own administrative and accountability failures lead to an accumulation of assets under management from which fees can be drawn.

State regulators have failed to intervene effectively in the public interest. It has fallen to whistle-blowers and activists to demand accountability where it is lacking.

As the logic of financial inclusion pushes more and more poor and vulnerable South Africans to interact with the financial sector, we have to ask whether there is currently sufficiently robust regulation and accountability to protect those people and ensure that the corporates do not profit at their expense. This report is thus an account of the ways in which powerful corporations in the financial sector should be held responsible.

It is also filled with the stories of pensioners we interviewed during the course of the investigation. Some were mineworkers, others worked in factories. Some are claiming their own pension benefits while others are seeking benefits owed to them as dependants of a family member who has since died. No matter their journey, all of them have been struggling for years to access retirement savings that are owed to them, only to find the door shut in their face by a fund administrator, employer or the regulator – or all of them. Most live in poverty, and each one has their own needs that the pension could help meet: to rebuild a home or pay for children to go to school. They are a small number of the millions of people who have been let down by this industry, and indeed by the failure to create an equal South Africa that ‘belongs to all who live in it’.

While much needs to be done to address shortcomings in the financial sector, it is fundamental to bear in mind the harm that comes to ordinary people when unpaid pension benefits sit in the custody of giant corporations. Anna Poppy Mokwayi, a 76-year-old pensioner in KwaThema, Gauteng, charged us to "cry for" them so that the pension fund administrators will "listen to us at last". She could not understand why they never look up from the bottom line of the corporate balance sheet.

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"We are still here"

~ South African Destitute Ex-Miners Forum, 2018
INTRODUCTION

When a group of destitute pensioners and ex-miners living on the Cape Flats says, “We are still here,” they are rallying against being rendered invisible and written out of the country’s story. Yet it means more than that. “We are still here” also says that they are still waiting. They are still waiting to be paid the pension fund benefits that they are owed from decades of hard labour for South African mining conglomerates, and they are still determined to get what is rightfully theirs. This particular group of ex-miners represents only a small part of the more than 4 million southern Africans owed over R40 billion in ‘unpaid benefits’.

In 2019, well over 16 million South Africans belong to a pension fund. Of these, around 90 percent are members of over 5 000 privately administered pension funds, most of which are run by some of South Africa’s largest financial institutions. Every month, these people give up a portion of their earnings in order to secure a retirement and old age with dignity, and to provide for themselves and their dependants when they can no longer work. These hopes have been dashed for the millions who have not been paid the pensions that they are owed.

It is iniquitous that this should be the case in a country already beset by poverty and entrenched inequality. 44 percent of South Africans over 65 live in poverty, which is marginally higher than the poverty rate of those between the ages of 44 and 64. This indicates the risk that elderly people face of falling back into poverty after retirement. Many old-

44% of South Africans over 65 live in poverty
Many pensioners in South Africa and its neighbouring states may not even know that they belong to a fund in South Africa and are owed money, let alone understand the complex financial products in which their money has been invested and how administration fees can erode their benefits. On the other hand, the large companies that administer these funds have all the information and resources they need to profit from managing the money of others.

NOTE ON TERMINOLOGY:

Technically, pensioners refers only to those who have actually reached retirement age or are receiving a pension. Many unpaid benefits are owed not only to pensioners, but to younger members of pension funds who have lost their jobs, moved employment, or even the dependants of pension fund members. While we use the term ‘pensioners’ regularly for the sake of simplicity, it is often being used as a short-hand for both pensioners and fund members.
er South Africans also have financial responsibilities for the care of children. Children have the highest incidence of poverty of all the age groups: 66 percent of people under the age of 17 live in poverty in South Africa. These factors intersect with a continued lack of access to jobs and opportunity for poor South Africans.

We interviewed a pensioner, Benjamin Shongwe, who has been trying unsuccessfully to claim his pension benefits for many years. Benjamin and his wife have five children between 25 and 39 years old and four grandchildren. All of them live with him and his wife in their four-room house. Because none of their children were able to finish university and some did not finish high school due to financial constraints, they have struggled to find work. All are currently unemployed and the family depends entirely on social grants. This hardship is worsened because Benjamin was never paid his pension.

There are many reasons that pensioners like Benjamin have not been paid. We do not think that Benjamin’s pension fund was cancelled, but the FSB’s cancellations project will be the central focus of this investigative report. By unpacking how the private fund administrators and the public regulator collaborated to cancel thousands of dormant pension funds, often in error, it provides insight into the broader challenges in this sector.

It is remarkably difficult for fund members or beneficiaries to hold pension fund administrators to account. There is perhaps no starker disparity in power than that between a private financial-services company and a pensioner – not only in terms of wealth and influence but, crucially, in terms of information.

Many pensioners in South Africa and its neighbouring states may not even know that they belong to a fund in South Africa and are owed money, let alone understand the complex financial products in which their money has been invested and how administration fees can erode their benefits. On the other hand, the large companies that administer these funds have all the information and resources they need to profit from managing the money of others. As we will show, they have also not faced scrutiny from financial sector regulators or National Treasury.

Parallel to this investigation, Open Secrets engaged with fund administrators like Liberty and Alexander Forbes regarding the need to reinstate these funds and pay the beneficiaries urgently. The usual response is exemplified by this email from Liberty Corporate CEO Tiaan Kotze: “Liberty continues to invest significant resources…to ensure that members and their beneficiaries receive the benefits due to them as quickly as possible.”

In fact, most role-players in the pensions industry, from corporates to the state, claim to be very concerned about the problem of cancelled funds and unpaid benefits and that they are working to address them as quickly as possible. Despite such claims, our investigation shows that private administrators are reluctant to disclose their processes and slow to rectify the harm their mistakes have caused.

Liberty is at the centre of this story. Of over 6 500 funds cancelled during the FSB’s cancellations project, 80 percent – four out of every five – were on Liberty’s books.

A significant number of these still had assets and liabilities (payments owed to members), and so should never have been deregistered. The company’s public statements and responses to Open Secrets would have us believe that it is diligently addressing the problem of funds that were incorrectly deregistered at their own request. But is it? While Liberty’s efforts have improved under new leadership, its conduct since 2007 paints a different picture. It reveals an indifference to the possible harm done to pensioners who could not access their retirement savings. Liberty has not yet fully and openly accounted for this.

While Liberty is amongst the most important players in South Africa’s cancelled pensions debacle, the issue of unpaid pensions implicates all of the country’s private pension companies including Alexander Forbes, Momentum, NBC and Sanlam.

The foot-dragging extends to the regulators. In 2018, the FSB was replaced by a new financial-market-conduct regulator: the Financial Sector Conduct Authority (FSCA). In response to Open Secrets’ queries in December 2018, the FSCA intimated that the reinstatement of funds, although urgent, was still dependent on legal advice at that stage.

This was 12 years after the cancellations project began and more than five years since the
FSB first became aware of systemic irregularities in the process. The urgency of the matter for many pensioners can be contrasted with the lethargic response of the corporations and the regulator. This partly reflects a disparity in perception about what is at stake for each side. While R10 000 could be a life-changing windfall for a poor South African pensioner or dependant, it is small change in the world of the private fund administrator.

Consider for a moment that in June 2018, Liberty Holdings, the focus of much of this report, was managing assets totalling R719 billion and had made headline earnings of R1.5 billion in the first six months of 2018 alone. In this context, perhaps it is easy for corporate executives to overlook the significance of a R10 000 pay-out.

It is precisely because of these disparities that the law offers protection to pensioners and others who rely on financial institutions. Those who manage our money are required by law to display the utmost care, diligence and good faith in managing funds. Private administrators must not abuse their power to benefit themselves at the expense of ordinary people. If they do, they rely on state regulators and the courts to enforce the legal order and impose sanctions where appropriate.

Our investigation shows that, since 2007, this system of oversight has fundamentally failed in South Africa’s pensions industry and people have been prejudiced as a result. Up to 6 757 pension funds were deregistered by the pensions regulator at the behest of private fund administrators like Liberty and Alexander Forbes between 2007 and 2013. This occurred despite the fact that some of these funds still held assets and people were owed payments from them. A decade on, many beneficiaries remain unpaid while their assets can sit in unclaimed benefits funds and other investment portfolios, often generating asset management and other fees for the administrators and asset managers.

Instead of intervening to ensure compliance with the law, the FSB and the registrar of pension funds were primary facilitators of the process through the FSB’s cancellations project. The project cut corners and the registrar acted outside his powers to hasten the mass cancellation of pension funds. For their part, administrators like Liberty and Alexander Forbes used the project to rid themselves of responsibility for thousands of dormant funds, while sometimes holding on to their assets. The process was littered with errors on the part of both the regulator and fund administrators. It revealed little evidence of their commitment to due diligence and their duty of care.

This report is the culmination of a year-long investigation by Open Secrets into Liberty’s cancelled pension funds. Much of the information is in the public domain due to the courageous work of whistle-blowers and the civil-society activists of the Unpaid Benefits Campaign (UBC). We draw this information together with court records, whistle-blower affidavits and interviews with industry experts to understand why such gross mismanagement of pension funds occurred and why the companies involved have been so slow to rectify the problem. It also asks why the FSB and its successor, the FSCA, failed to compel the administrators to do so. The findings suggest that, rather than an isolated incidence of mismanagement, the story of these cancelled funds raises disturbing systemic questions about governance and regulation in the pensions industry.

Importantly, this report opens a window onto what might be happening elsewhere within South Africa’s financial services sector. Privately administered pension funds are rich pickings, cumulatively holding more than R2 trillion in assets. These and similar funds are a target for greedy corporate titans and fund managers who rely on a complex regulatory environment and lax regulatory control to skim off profits, usually in the form of many and varied fees. This happens to the disadvantage of thousands of people who may believe that they alone are affected. As this report shows, the issues are widespread and systemic, part of the fabric of economic crime that results in the widespread abuse of basic human rights.

The release of this investigative report comes at a time when financial sector regulation is undergoing a shake-up in South Africa. A new dedicated market conduct regulator, the FSCA, has come into existence to replace the FSB. It heralds a new era of legislation that regards the market conduct of corporations...
Why are private pension funds important in South Africa and what is the legal framework to ensure that pension fund members are protected from unscrupulous fund managers, administrators and trustees?

What was the role of the FSB and the registrar of pension funds in the cancellations project? Did these regulators fail in their legal duties and, if so, is this a case of ‘regulatory capture’?

Did private administrators like Liberty and Alexander Forbes, and their agents, put the interests of the corporation above those of fund members when it came to cancelling funds? Did any of these actors fail to comply with lawful duties and, if so, what steps have they taken to remedy this?

What can be done to address the still-urgent issue of reinstating the funds and paying the beneficiaries?

What has Open Secrets been doing in this regard and what resistance has it met?
Before diving into the details of how pension funds were cancelled, we begin with the stories of three pensioners and their long struggles to get their benefits.\textsuperscript{13} We speak to an ex-mineworker, a miner’s widow, and the widow of a factory worker. They represent the real consequences of a pension fund industry that is systemically failing to find and pay beneficiaries, leading to the explosive growth in unpaid benefits.

You will notice that these interviewees are not members of cancelled funds. The people whose benefits have been caught up by the cancellations process remain nameless. Fund administrators hold this information in their records, but it is nearly impossible to access. However difficult it can be to get information from the state, it is even harder to prise open the secrets of private companies.

**THUSO AMIGO MAHLANYANA**

Thuso Mahlanyana\textsuperscript{14} now lives in Philippi, a sprawling Cape Town township scattered with small farms, but he was born in Buffalo, Eastern Cape in 1956. He was raised by his grandmother, whose pension provided for the family, including him and his siblings. Like many South Africans, Thuso felt the pressure to work and provide at a young age and so, in 1975, 19-year-old Thuso became a mineworker. When he went to the mines, he left behind a wife and two sisters who were dependent on him.
Thuso begins his story with the harrowing tale of the selection and allocation of mineworkers to mines and specific tasks. Like many of the men who left the Bantustans – the so-called ‘tribal homelands’ of the apartheid era – to make a living, Thuso was first sent to TEBA Limited in Welkom, where he and other miners signed up to work using their ‘dompasses’ (the scornful term for passbooks). TEBA was established as a labour recruitment agency in 1902, after the South African War, to “support mines in meeting one of our countries’ key national priorities: to expand mineral production”. Initially, TEBA focused on the recruitment of mining personnel, but by the 1970s, when Thuso was seeking employment, its mission was to “stabilise a workforce for the mining industry”.

Ensuring a steady flow of black labour to the mines, TEBA was a linchpin of the apartheid migrant labour system. Those mining companies made extraordinary profits and are now amongst the wealthiest global corporations, while former mineworkers like Thuso struggle to get their compensation – whether pensions or for occupational diseases and injuries.

Thuso and other miners described the traumatic selection and allocation process in Welkom. In the first stage, prospective miners were told to strip naked, then sprayed with water and injected with an unknown drug (likely an inoculation, although it was not explained). The men were then forced to work naked in a very hot enclosed space, and given only the odd drink of water. Their temperature would be taken periodically to see how they were withstanding the brutal conditions. Thuso recalls many men collapsing from starvation, dehydration and strain. For him, this humiliating exercise was akin to an initiation process – a brutal physical examination – to see which men could work the longest in extreme conditions. Only after this ordeal would the men be selected for different mines and then allocated a job.

Between 1975 and 1988, Thuso worked in four of South Africa’s largest gold mines: Anglo-American’s President Brand and President Steyn mines in the Free State as well as Buffelsfontein mine and the Vaal Reefs in what was then the Transvaal (now North West province). We ask Thuso what he knew at the time about whether he belonged to a pension fund. He answers that he was aware of deductions every month but was never told

“It is difficult to be an ex-mineworker and not be able to trust the government. We voted for Cyril Ramaphosa, who is now president, yet we cannot trust the government to act in the interests of ex-mineworkers. If there was political will, ex-miners would receive their pensions.”

~ Thuso Amigo Mahlanyana
exactly what a pension fund was or what he might be owed. He stresses that joining the fund was not voluntary; there “was no choice in the matter”. He says he never received any formal communication from Anglo-American on his pension and the amount he could expect.

Thuso, like so many miners, was also injured at work. When he was sampling rocks at Buffelsfontein, a rock fell on his eye and he was paid a measly R3 000 in compensation. Thuso has never fully recovered and his eye still gives him difficulty, but he does not receive a disability grant.

More than thirty years after he last went down a mineshaft, Thuso has never been paid his pension nor fully compensated for his injury. His only income is a monthly state pension of R1 700. Meanwhile, his former employer reported revenue of USD27 billion in 2018. Other contradictions lie even closer to home. Thuso wryly comments that, when he was working at Buffelsfontein in 1988, Cyril Ramaphosa was general secretary of the National Union of Mineworkers (NUM). Today, he says:

“It is difficult to be an ex-mineworker and not be able to trust the government. We voted for Cyril Ramaphosa, who is now president, yet we cannot trust the government to act in the interests of ex-mineworkers. If there was political will, ex-miners would receive their pensions.

In his words, Thuso “got out of the mines and headed straight for the bus without receiving even a single cent”. He says that he has been trying to organise with fellow ex-mineworkers since 1988 in order to ensure that their benefits are paid. He is now deputy chair of a forum of ex-mineworkers. For two decades, they have pressed various actors in government and private fund-administrators to facilitate payment from a range of pension and provident funds, as well as compensation for occupational injury and illness.

Despite many promises, and despite the acknowledgement that billions of rands are owed to people like him, Thuso laments that the only pay-out so far has been a 2017 compensation payment of R3 000 from the department of labour. To claim the cash, ex-mineworkers had to present some form of documentation from the time that they worked at a mine. Thuso still has his ‘blue card’ (a work-issued identification badge), which has his birthdate, the date he joined the mine, and the code for the mine he joined. He has extensive documents from his working life, but Thuso is not sure of how much he is owed or from which pension funds. This is an inevitable condition for the millions of workers who contributed to funds but were not given the necessary information to follow up with the funds afterwards.

Speaking with other ex-miners in the group, Thuso agrees that the constant refrain of fund administrators and government – that people are trying to fraudulently claim pension benefits – is overstated. This appears to him as a tactic to avoid paying out quickly and efficiently. Thuso worries that many ex-miners and pensioners are dying without their pensions. In fact, he says, “they are dying every day” and most of them are parents. He reflects that their children might feel that their parents are leaving them with nothing.

We ask Thuso how his life would have been different if he had access to his full benefits. After a deep, pensive pause, he eventually responds:

“\textit{I would get back 16 years of my life...and [this] would allow me to finish building a comfortable home for my children... and provide for my grandchildren... I had started building a house when I lost my job on the mine in 1988...[It] is still unfinished today.”}
MAVIS MBANGWA-HANS

Although her ID indicates that she was born in 1956, Mavis Mbangwa-Hans says she was actually born in 1959 in the small town of Steynsburg in the interior of the Eastern Cape. She was born into a family with nine children. Before long, her family was forcibly removed, in terms of the Group Areas Act, to Whittlesea, a semi-rural area near Queenstown. The town was then part of the Ciskei, one of the Bantustans set up by the apartheid government in 1961.

Mavis is the widow of an ex-mineworker, Tloki Richard Mbangwa, who died in 2007. They met in 1976 when Richard was already a mineworker. Before the mines, he had worked in steel-manufacturing and railway-building in Bethuli in the Free State. His family was also forcibly removed from the Free State to the Eastern Cape. That was when he became a migrant labourer on the mines. Richard went to work at the Springfield Collieries, one of Anglo-American’s large coal mines in the Transvaal (now Mpumalanga), and he would continue working there until the early 1990s.

One of the most negative and lasting consequences of the migrant labour system is the way that it broke apart black families. Mavis and Richard married in 1977. Mavis says she worked in a factory making jerseys. After three years in the factories, only seeing Richard sporadically, Mavis moved nearer to the Springfield mine to be with her husband. Accommodations on the mines were heavily regulated by the company and women were not allowed into the male hostel. Women visiting their husbands (mostly from the rural areas) stayed in a 'skomplass', a fenced-off building or set of buildings near the compound. While she stayed there, Mavis was not formally employed. She and the other wives worked odd jobs, like housecleaning or laundry.

Mavis and Richard had five children and one grandchild. One of their children has passed away and two of them have moved out of the home, but Mavis says that the two adult children and her one grandchild continue to live with her and are completely dependent on her.

We ask Mavis about Richard’s pension. She remembers that her husband was contributing to a pension fund at Springfield...
mine and that he was told that he would receive a pension when he turned 55. She shows us two pay-slips from 1989 and 1990 that show Richard was contributing to the Mineworkers Provident Fund, which was set up in 1989. However, she is not certain where his deductions were going in the decade prior to this. Richard had also assured Mavis that, in the case of his death, she and their family would receive Richard’s pension. In 1991, Richard was retrenched.

From 1996, Mavis and her husband tried to claim their benefits. Despite their continued efforts, Richard never received his pension. Even after he passed away in 2007, the family did not receive his pension or any other benefits from the mine or any related pension fund. Mavis thinks that Richard’s pension was registered at Old Mutual, so she tried to collect the pension from them. She says that they briefly looked at her husband’s documents and then she was abruptly dismissed without any further investigation. Old Mutual told her they could find no record of Richard’s pension.

After moving to Cape Town in the 1990s, Richard found employment at various places, including Martin & East, a construction company where he worked the last three years before his death. Richard also contributed to a pension fund there. After his death, Mavis did receive a lump-sum benefit and some monthly payments. During this time, she and her family were dependent on these payments. Mavis says that, when there was R14 000 left in the account, she attempted to withdraw all of it. She needed to buy school supplies for her children, including a laptop for one who was heading to university. The administrator has not given her this money and she is still trying to retrieve it. Mavis and her family now depend entirely on her state pension and a child support grant for her nine-year-old grandchild. The pension is R1 780 per month and the child support grant is R420 per month.

We ask Mavis how her life could be changed if she and her family received the pension benefits owed to Richard for his 15 years of mining coal for Springfield Collieries. “My life would have changed completely,” she tells us. Firstly, her children would have been able to finish their school studies and go to university. Secondly, her family would be able to live in a place where they feel safe. In 1996, when they had started trying to claim the pension, she was a young woman and she could have done something worthwhile with her money. She feels much older now.

As we are wrapping up, Mavis wants to add something:

“The government is playing with us. The most painful thing is that, when it is time to vote, they get us in a room and make promises and say they will help us get our money.”

The latest promises came in late 2018, when officials in the department of mineral resources promised that the beneficiaries would get their money from the department of labour. “But, they are playing with us.”
Bellemina Masemula was born in 1952 in Springs, just a few kilometres away from the school in KwaThema where we met. She has worked in textile factories in and around Johannesburg and may well be owed retirement benefits herself. However, her main and ongoing struggle is to claim her husband’s benefits, accrued over decades of service at Sappi, the giant South African pulp-and-paper company.

Bellemina grew up as an only child. She describes her father as a machinist or seamster and says that he taught her how to sew at an early age. She would go on to use this skill as a seamstress in several factories. In 1964, she met and married her husband, Suhla Elias Masemula. He was already working at Sappi at the time. Though Bellemina and Elias were both very young, their families encouraged them to marry as both were already working. In Bellemina’s words, “We were knowledgeable about adulthood, so our parents decided, ‘no more school for you’.”

In the same year, when Bellemina was just 13, she began to work in a textile factory that specialised in making blouses. Throughout her life, Bellemina worked in three factories, all in what is now Gauteng. She experienced poor treatment at work. In the last factory, she recalls, her boss was “a very cruel white man”. He would never allow his workers time off during public holidays, or any other holidays. And although he was supposed to increase their pay, he never did. When the factory closed in 2008, Bellemina and the other workers received no notice. They arrived one day to find everything shut.

Bellemina is not sure whether she is owed any benefits from her time in these factories, and so has never attempted to claim. She says she does not yet have the knowledge to go about it. She also added that, unlike in KwaThema – where workers in certain industries are well organised and share information – most of the factory workers live in Johannesburg and they have had difficulties organising a group.

Bellemina is trying to claim her husband’s benefits. Elias started work at Sappi in the early 1960s and worked there for 45 years. Sappi was incorporated in 1936 and has grown into a vast conglomerate with a global presence. But its first paper mill was in Springs, and many of the local members of the Unpaid Benefits Campaign (UBC) say they are owed benefits from their time at Sappi. In 2008, Elias was encouraged to retire. When he did, the company recognised his long service with a certificate and a ceremony. Bellemina shows us a photograph of Elias and a fellow long-time employee along with Sappi’s general manager.

Despite these accolades, Bellemina says that Elias did not receive all of his retirement benefits before he passed away in 2017. The family relied on the state pension for an income instead. She emphasises that she and her husband were close: he would never have received his pension without telling her. She also has documents, including a benefits statement, which show that her husband contributed to a pension fund throughout his employment. The documents suggest that Elias was owed over R300 000 when he retired.

Bellemina and Elias had four children. One was a policeman but has passed away, as has another of her children. She still provides for her surviving children and two adult grandchildren. Unfortunately, even though her children have certificates and qualifications, they cannot find work. Her grandchildren are also unemployed. If Elias’s pension were to be paid out, Bellemina says, they would no longer have to rely on the state pension to support the whole family. She would be able to fix her house, which is old and falling apart, and she could divide the money between herself, her children and her grandchildren.
Part of Bellemina’s challenge is that she does not know which financial service provider administers the pension fund. She is also not certain what a fund administrator is, and asks us to explain. She is one of the group of UBC members that submitted their documents to Alexander Forbes, who replied that they could find no record of such a fund. Bellemina and the others continue to track down their benefits.
For investigators, researchers and journalists, obtaining information about complex economic crimes and the misconduct of companies and the state can prove incredibly difficult. Whistle-blowers provide essential access and insight at significant personal and professional cost. In this story, two women displayed such bravery. One was an employee of the Financial Services Board (FSB), the other an employee of Liberty. Both recognised the widespread problems in the cancellation of pension funds and their unpaid benefits, as well the detrimental consequences for the beneficiaries. Instead of complicity, they chose to bring these issues to public attention and to dedicate their time and resources to the ongoing struggle for accountability and justice. It is thanks to them that this investigation is rich in detail and facts.

ROSEMARY HUNTER

Rosemary Hunter is a pension and financial-services lawyer with 25 years’ experience in pension regulation. At heart, though, she remains an activist. In the late 1980s, she led anti-apartheid protests as a student leader at the University of the Witwatersrand. In 1988, she was detained under apartheid security laws that permitted indefinite incarceration without charge. In her professional life, she is a leading authority on pension law and teaches at Wits on this subject.

In August 2013, the minister of finance...
appointed Rosemary to the FSB as the deputy executive officer in charge of pension funds. As will be described in more detail below, she immediately identified significant problems and likely unlawfulness in the FSB’s cancellations project. She tried to slow the project down and called for a thorough investigation. She also called for the reinstatement of funds that were cancelled in error and for a review of all funds cancelled in the absence of proper due diligence by the regulator or the fund administrators.  

Rather than welcome Rosemary’s scrutiny and rigour, the FSB tried to push her out of the institution. Rosemary says that Dube Tshidi, the executive officer and registrar of pension funds, offered her a R6 million “settlement” to walk away. When she refused, the FSB hired investigators – not to investigate her allegations, but to dig up dirt on her. She sought the protection of the Board, but it was not forthcoming.  

Fearing that the regulators and their political principals were not interested in an independent and thorough investigation, Rosemary undertook four years of litigation to compel the FSB to investigate all the funds that were deregistered in the cancellations project. She did so at extensive personal cost, but it ended with a disappointing majority judgment in the Constitutional Court that seemed to misunderstand the importance of the issues and dismissed the complaint largely on a technicality. This is also discussed in greater depth below.  

Despite this setback, Rosemary’s tireless efforts led to a few (admittedly incomplete) investigations and legal opinions concerning the cancellations project and its systemic problems. Together with the court record of her lawsuit, these are a significant source of the material contained in this investigation. She has provided all of these facts and an affi-
davit to South Africa’s Directorate for Priority Crime Investigation, known as the Hawks. But, as with so many financial crimes in the last decade, South Africa’s institutions have failed to act and the criminal justice system has let the powerful off the hook.

In addition to her current work as a law partner at Fasken, Rosemary continues to put pressure on fund administrators and the regulator, including advocacy through the Pension Lawyers Association. She also dedicates time to the Unpaid Benefits Campaign, offering training programmes to assist the organisation and its members to claim unpaid benefits owed by various funds.

**MICHELLE MITCHELY**

When you ask Rosemary Hunter about her struggle to remedy the errors in the cancellations project, one of the first things she’ll mention is the bravery of Michelle Mitchley.

Michelle was employed by Liberty Corporate in 2007. She worked in the complaints department before being assigned more closely to Liberty’s ‘backlog project’, which procured the cancellation of pension funds administered by the company. By 2011, she was heading up a team whose job it was to check the financial statements of all pension funds before they were submitted for cancellation.

This was when Michelle and her colleagues realised that funds were being cancelled before proper due diligence, often when they still held assets and owed benefits to members. Despite alerting seniors at Liberty, no action was taken to address her concerns. Then she took the big step of phoning an anonymous whistle-blower hotline to alert the FSB about what she was seeing at Liberty. As they had with Rosemary, the FSB pursued the whistle-blower rather than an investigation. Following Michelle’s call, the FSB immediately informed Liberty of the presence of a whistle-blower in their midst. According to Michelle’s account, management was determined to find out who had made the tip-off. Under great pressure from her supervisors and the department, she admitted it was her, apologised and retracted some of her claims.

“The position of the whistle-blower is now becoming exceedingly difficult – the wrongdoers will often have significant financial support to assist them with legal advice, public relations concerns, and even possibly for intimidation. Conversely, the whistle-blower is now often isolated and discredited, probably unemployed and slowly losing social support as well...This can be a time of incredibly negative emotional consequences for the whistle-blowers, with some experiencing severe effects such as depression or even, tragically, suicide. At this stage, there are very few whistle-blowers who would have been well equipped enough to deal with the demands of any associated legal process.”

~ Open Democracy Advice Centre
Following this, Michelle says, her treatment in the company changed. She was moved out of the department dealing with the backlog project without explanation. In 2016, after several disciplinary hearings on an unrelated matter, she was fired. She is adamant that this was because she was perceived as a troublemaker after blowing the whistle. Describing the disciplinary process, she says, “They threw everything at me, and senior executives watched the process.” Eventually, Liberty and Michelle reached an out-of-court settlement on her dismissal.

For more than a year after this, Michelle was unable to find work anywhere in her sector. Firms that showed interest would cut contact after looking into her background. This is a problem for whistle-blowers everywhere, particularly those who disclose the dubious conduct of the world’s mega-corporations and financial institutions. This kind of ‘blacklisting’ guarantees that the cost of disclosing information, regardless of the motive, is incredibly high. Michelle is also sure that she was surveilled on at least a few occasions after she filed an affidavit in support of Rosemary Hunter’s lawsuit against the FSB.

In July 2018, Michelle has only recently found work, but her new employer is happy to allow her a couple of hours to speak to us about her experience. She says that the period of unemployment was the hardest emotional and psychological time in her life, not least because she could no longer support her husband and young child. Things got desperate and she felt increasingly isolated.

In their international investigation of whistle-blowers, the Open Democracy Advice Centre notes that “[t]he position of the whistle-blower is now becoming exceedingly difficult – the wrongdoers will often have significant financial support to assist them with legal advice, public relations concerns, and even possibly for intimidation. Conversely, the whistle-blower is now often isolated and discredited, probably unemployed and slowly losing social support as well...This can be a time of incredibly negative emotional consequences for the whistle-blowers, with some experiencing severe effects such as depression or even, tragically, suicide. At this stage, there are very few whistle-blowers who would have been well equipped enough to deal with the demands of any associated legal process.”

Despite facing these odds, it is largely thanks to Michelle that the public has unprecedented insight into what exactly transpired within Liberty during their backlog project and the FSB’s cancellations project. It is exceedingly rare for investigators to have direct access to the decisions, ignored warnings, and strategies of a large corporation engaged in questionable activities. These are also set out below in the section on Liberty.

As we get up to leave the interview, Michelle says one last thing. While she had been through “hell” since she made the decision to blow the whistle, if she was faced with the same choice today she “would do it again”.

She reminds us that, no matter the price she paid, the costs and consequences were even more dire for poor South Africans who did not receive their rightful pensions.

Let us repeat the statistic that over R40 billion in unpaid benefits are owed to over 4 million people. This is staggering, but it is easy to lose sight of what is really at stake and get lost in the legal details, in the failures to enforce regulations, and in the complexity of understanding exactly what happened to cancelled funds and to their assets. To keep on track, we need to keep in mind the experience of these individuals, the pensioners and the whistle-blowers.

Thuso, Mavis and Bellemina remind us of the people behind the numbers. At its core, the need to pay pensioners and the need for justice is deeply personal. Rosemary and Michelle are testaments to the fact that a brave individual can still shine a light onto the darkest recesses of powerful corporations and, with solidarity from others, hold the powerful to account.
As we get up to leave the interview, Michelle says one last thing. While she had been through “hell” since she made the decision to blow the whistle, if she was faced with the same choice today she “would do it again”. She reminds us that, no matter the price she paid, the costs and consequences were even more dire for poor South Africans who did not receive their rightful pensions.
As mentioned in the introduction, more than 16.6 million South Africans belong to some kind of pension fund. The Government Employees Pension Fund (GEPF) is the single largest, accounting for 10 percent of all members and 40 percent of all pension assets. However, the majority of all assets (in excess of R2 trillion) is held in over 5,000 ‘privately administered funds’ and ‘underwritten funds’. These two types of funds account for nearly 90 percent of the total membership of retirement funds in South Africa – around 15 million people. These are the funds that are governed by the Pension Funds Act (PFA) of 1956, which will be discussed further in the next section, and the focus of this report.

All South Africans enjoy a constitutional right to access social security, as enshrined in section 27(1)(c) of the Bill of Rights. Section 27 further enjoins the state to use reasonable measures to make sure that this right is progressively realised. In a doctoral thesis on the role of retirement savings in social security more broadly in South Africa, Manama-la argues that this right guarantees everyone access to some form of income protection during retirement.

To encourage saving and to help realise the right to social security, the state also subsidises pensions through tax breaks. Contributions to pension funds are deductible from income for tax purposes. In 2017, these tax deductions benefitted over 3 million pension fund members and cost the state approxi-
mately R73 billion in revenue. This makes retirement provision an important part of social security. Moreover, because the benefits from retirement savings serve as income replacement, it is imperative that retirement savings are able to protect the elderly from poverty and provide protection beyond mere survival. As a result, pensions and social security go to the heart of other fundamental human rights, including the right to dignity.

Nevertheless, the behaviour of private actors has a significant impact on the individual exercise of these constitutional rights. South Africa has no statutory retirement savings scheme (although this has been subject to discussion for nearly a decade). Instead, we have seen a proliferation of privately administered pension funds, and a concomitant increase in the role of private financial institutions. Given this context, the administration, governance and regulation of these funds are of utmost importance.

South Africa’s history has resulted in income and savings profiles that are highly racially skewed. Not only were wages of black workers suppressed during apartheid, but all aspects of pensions were determined by race. For example, black people had to queue to receive their pensions, while the pensions of white, coloured and Indian people were distributed by commercial banks. Many pension funds were for white people only. When one considers that black South Africans still on average earn five times less than white South Africans, it is no surprise that they are also less likely to have access to a pension fund.

A 2017 investigation commissioned by 10X Investments surveyed the savings and investment habits of 11.6 million economically active South Africans. The results showed that black people were more likely to have funeral policies (47%) or burial schemes (25%) than to belong to an occupational pension fund (35%) or a retirement annuity fund (20%). Indian and white South Africans were significantly more likely to belong to pension funds (50% and 46% respectively). 10X notes that this “preference of policies that cover for death rather than retirement is… also financial, as these are much more affordable, and pay out almost immediately.”

It remains true that millions of South Africans of all races belong to pension funds and rely on them for their retirement livelihood and to support their dependants should they die. In fact, the OECD’s Global Pension Statistics indicate that South Africa was the only reporting country in Africa with more than USD200 billion in pension assets in 2017, and one of only a handful of developing countries with this extent of assets in retirement funds. A large contributing factor has been the growth of private pension funds, which has been encouraged by both employers and trade unions. In many cases, pension membership is compulsory for employees or union members. This is because the tax-deductibility of contributions requires the membership of all employees.

Bargaining council agreements and labour law provide for the establishment of funds and for the compulsory participation of all workers in some sectors, including those with a workforce that is largely casualised or contracted. Examples include the contract cleaning, in which all contracted cleaners are required to join the Contract Cleaning National Provident Fund; the private security sector, in which all employees and employers are required to join the Private Security Sector Provident Fund; and the civil engineering sector, where employers have to establish retirement funds for their employees, to which employers and employees must contribute equally.

UNPAID BENEFITS

That 16 million South Africans are members of pension funds that together hold assets over R4 trillion sounds encouraging, particularly when one considers chronic and persistent levels of unemployment. Given the importance of pensions for social security, one would hope that those members were receiving what was due to them. This is not the case. The FSB’s 2018 annual report notes that 11 million are active and contributing members and 5 million are pensioners, deferred pensioners, dependants and – crucially – “unclaimed benefits members.”

The last decade has seen a surge in the rise of unclaimed benefits and unclaimed benefits funds (UBFs). Simply put, ‘unclaimed benefits’ are benefits for which pension funds are liable (i.e. they should have been paid to beneficiaries), but which have not been paid within two years. UBFs are established by fund administrators to hold the unclaimed benefits and to preserve them until they are paid to their beneficiaries.
THE MISSING MILLIONS

To be clear, the issue of unpaid benefits is the result of a confluence of factors. Many are historical, given the nature of apartheid’s migrant labour system and the fact that many pensioners, some of whom have limited financial literacy, would not know they were contributing to a fund at all. Add in poor record-keeping requirements, the financial and resource constraints of employers, and inadequate information for fund members, and it is not surprising that the problem is so severe.

We spoke to one pension fund administrator with more than thirty years’ experience about the challenges that administrators face. In the past, they were often given no more than a name and date of birth of fund members, making it difficult to trace them should that be required. Smaller employers often lack the human-resources capacity to provide employees with information about the status of their pension and who administers it. Other employers are simply negligent. Workers often do not know (and are not told) that the pension fund is completely independent of their employer. When they leave employment (whether resigned, retrenched or fired), they may believe that the final pay from their employer includes all that they are entitled to, and not even know there is a pension fund to pursue.

The issue of unpaid benefits falls under “significant industry issues” in the FSB’s annual reports. This is unsurprising. The last decade has seen a mass transfer of smaller funds’ assets into UBFs, often following their (sometimes wrongful) cancellation. Since 2009, the combined asset value of UBFs has increased dramatically from R450 million to R8 billion. Almost all of these funds have been set up and are administered by large private financial service providers like Liberty, who may derive significant financial benefits from both fund administration fees and also asset management fees levied by asset managers.

These asset managers are often related to the administrators through shareholding. For example, many of the UBF assets administered by Liberty have been invested in portfolios administered by StanLib, which was started in a collaboration between Liberty and Standard Bank. Standard Bank has been majority owner of Liberty since Donald Gordon’s retirement. Senior management personnel also move freely between the companies.

Today, Liberty manages around R1 billion in assets in UBFs that hold the unpaid benefits of just under 100 000 people.

Late in 2018, Alexander Forbes would not disclose the value of unpaid benefits on its books. While the growth in unpaid benefits is not solely the responsibility of fund administrators, we have to ask how they are profiting from this situation, and whether this is fair.

Dedicated UBFs are in turn only a small part of the issue of unpaid benefits. When including the unpaid benefits that still sitting in other pension funds, there are over R40

UNCLAIMED BENEFITS VS UNPAID BENEFITS

In our investigation, we choose to speak of unpaid rather than unclaimed benefits, drawing inspiration from the Unpaid Benefits Campaign (UBC). This non-profit coalition of civil society organisations and pensioners is at the forefront of challenging fund administrators to ensure that those who are owed their benefits get paid. UBC notes that the term ‘unclaimed benefits’ suggests that pensioners and their dependants have passively ‘failed to claim’ and are themselves to blame. In many cases, this is untrue. Many fund members, already at a disadvantage in terms of information, influence and power, have been trying to claim their benefits for many years. The term ‘unpaid benefits’ intends to shift this burden of responsibility onto trustees, employers and fund administrators. Those who profit from managing funds should play a more active role in tracing and identifying beneficiaries.
billion in unpaid benefits owed to more than 4 million people in South Africa. While this represents a huge cost to those who are owed their benefits, these assets also present an appealing source of revenue to fund administrators and asset managers that can charge asset-based fees on these funds while expending almost no costs on managing them. Even tracing costs are not borne by fund administrators, but are deducted from the amounts of the benefits paid to the beneficiary (should a tracing agent be successful in finding them).

CANCELLED PENSION FUNDS

Unpacking all of the issues related to the unpaid pensions would require many volumes. Our main focus is the cancellation or deregistration of over 6000 pension funds between 2007 and 2013, and the evidence that this was often done unlawfully or incorrectly and without due regard for the interests of pension fund members. This is an important story that opens a perspective on systemic problems within the industry.

This mass cancellation of funds interacts with the broader issue of unpaid benefits in several important ways. Firstly, many of the funds in question should not have been cancelled precisely because they still had assets meant to provide for the payment of unpaid benefits. If they were deregistered anyway, this suggests that no one was trying to find and pay beneficiaries. Secondly, beneficiaries who attempted to claim their unpaid benefits would not have known if they could still be claimed and, if so, from whom. Thirdly, when administrators like Liberty and Alexander Forbes submitted the pension funds to the FSB to be cancelled, they often transferred (or at least attempted to transfer) them into their own UBFs, from which they could draw fees.

Further, we argue that the cancellations point to a deep systemic failure in the rule of law: the interests of large corporations have trumped the interests of vulnerable pensioners. This is the crux of the matter. As the assets in question grow, the stakes grow ever higher for those who manage them. Any effort to address the issue of unpaid benefits must privilege the interests of beneficiaries, and the ones who benefit from this injustice will not change the rules of the game. The state has also failed in its ability to enforce its own regulations and thereby became complicit in this system.

THE LAW PROTECTS PENSIONERS

The legal framework for the regulation of almost all pension funds is set by the Pension Funds Act (PFA) of 1956. Outside of its technical stipulations, the core purpose of the PFA is to protect vulnerable pension fund members from “unscrupulous employers and other people dealing with pension funds”. This is not an abstract worry. Some of corporate South Africa’s greatest frauds are associated with the looting of pension moneys.

Recall notorious Cape Town-based lawn-mower-salesman-turned-‘asset-manager’ J Arthur Brown, infamous for using his investment firm Fidentia to defraud trust and pensions funds of over R1 billion. In 2014, after a seven-year battle, Brown was eventually sentenced to 15 years in prison. This after he had funded his lavish lifestyle with the savings of 47 000 widows and orphans. A more recent example, from 2018, is linked to the scandal-ridden VBS Bank. When VBS went bankrupt, following its looting by its own management to pay for parties, sports cars and bribes, many small account-holders could not access what little money they had deposited with the bank. This included the Bophelo Beneficiary Fund (BBF), whose curator unlawfully placed R300 million of the fund’s assets in VBS Bank just months before it folded. In both cases, it was the widows and orphans of mineworkers who lost out.

Yet even in the absence of criminal theft and fraud, the PFA clearly circumscribes the conduct of those in charge of pension funds, and anyone managing other people’s money, in order to protect people from abuse. [See infobox on the right].

The law also requires administrators to report to the regulator any risks to funds or their members. The Financial Institutions (Protection of Funds) Act of 2001 requires any person or company that holds, invests or controls the money of others to “observe the utmost good faith and exercise care and diligence”. In short, lawmakers have recognised the opportunity for abuse and their own responsibility and power to temper this.
THE MISSING MILLIONS

bly, failed to sufficiently implement rigorous compliance processes, failed to keep proper records, and been slow to act on errors when they arose. It may be argued that they also failed to guard against conflicts of interest.

Before looking at the evidence, we need to understand the context in which this conduct has occurred. To do so, we turn to the state regulators who are supposed to enforce the legal framework: the registrar of pension funds and the Financial Services Board (FSB).

The obligations for pension fund administrators under the Pension Funds Act (PFA) of 1956, are extensive and unambiguous. They must, amongst other responsibilities:

1. Avoid conflict between the interests of the administrator and the duties owed to the fund and disclose any such possible conflict;
2. Administer the fund in a responsible manner;
3. Employ adequately trained staff and ensure that they are properly supervised;
4. Have well-defined compliance procedures;
5. Maintain the prescribed financial resources to meet its commitments and to manage the risks to which the fund is exposed; and
6. Keep proper records.

In theory, then, pension funds and their members are well guarded against misconduct or negligence on the part of fund administrators and trustees. In practice, this is not borne out. As we show in this investigation, fund administrators like Liberty and Alexander Forbes, along with their employees and agents, have systematically failed to fulfil their legal duties. Despite being well-resourced international corporations, they have not administered the funds responsibly, failed to sufficiently implement rigorous compliance processes, failed to keep proper records, and been slow to act on errors when they arose. It may be argued that they also failed to guard against conflicts of interest.

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The Registrar of Pension Funds

From the creation of the FSB in 1990 until it was replaced by the Financial Sector Conduct Authority (FSCA) in 2018, the registrar of pension funds was charged with the task of enforcing the provisions of the PFA and exercising regulatory powers to ensure that pension fund administrators and related parties conducted themselves honestly and transparently. The PFA also stipulated that the executive officer of the FSB would be the registrar of pension funds.

The importance of the oversight role played by the registrar in the public interest cannot be overstated. In a 2002 case regarding the irregular transfer of members out of the Pepkor Pension Fund, the Western Cape High Court considered the registrar’s role as the “guardian of the interests of the members of pension funds”:

“[The registrar has very wide powers of supervision and control over pension funds. I have little doubt that it was thought by the legislature to be in the public interest that such supervisory powers and duties should be conferred on the registrar. Many members of the public would belong at some stage or another to pension funds, and the security
of their pensions would be of vital importance to most of them. It is in the public interest that the administration of funds should ensure that members are fairly dealt with and that the receipt of their pensions should not be placed in jeopardy.”

Once again, this recognition acknowledges that pensioners are very likely to lack the knowledge and resources to guard themselves against misconduct by fund administrators, trustees and others. It is because the registrar is presumed to be the guardian of the interests of the members of pension funds that the powers granted to the office are extensive.

The registrar must approve all cancellations of funds as well as the transfer of any assets out of a fund. This must be done in line with a just and equitable outcome for the funds and their members. It is against these powers and obligations that the conduct of the registrar should be judged.

From 2008 to 2018, this position was held by Advocate Dube Tshidi. Tshidi has walked the corridors of the FSB, and now the FSCA, for a quarter-century.

As executive officer of the FSB and the registrar of pension funds, he oversaw the cancellations project that Constitutional Court Justice Johan Froneman would later find “problematic” and “infected by some unlawfulness.”

THE CANCELLATIONS PROJECT

The origins of the FSB’s cancellations project can be found in a series of changes that the pension funds industry went through in the 1980s and 1990s. The 1980s saw vast growth in the number of single-employer pension funds, which are known as ‘standalone’ funds. This meant that even small businesses could establish a pension fund. Because the number of employees contributing to these funds was limited, so were their asset values, which made it difficult to invest them prudently.

As a result, many standalone funds used their assets to buy an insurance policy from a large company like Liberty, which would administer the fund and pay out pensions in terms of the insurance policy. These were called ‘wholly underwritten funds’ and were exempt from certain financial reporting requirements in terms of the PFA. By the late 1990s, most of the 15,000 registered funds were wholly underwritten funds. Around 80% of all funds ultimately cancelled during the cancellations project were wholly underwritten funds administered by Liberty.

Another change that began in the 1980s and gained pace in the 1990s was the growth of multi-employer ‘umbrella funds’, largely fuelled by bargaining agreements with trade unions whose members were employed by different employers. Employers and insurance brokers also preferred the shift to umbrella funds as the pooled assets made for more effective investment.

This was further boosted by two important changes in pension fund regulation. A new amendment to the PFA required all retirement funds (including wholly underwritten funds) to have a board of trustees, and also gave employees the right to elect at least 50 percent of the trustees on their fund’s board. This was intended to vest more control and oversight in the pension fund members themselves.

These changes had an unintended effect. When standalone funds were moved into umbrella funds, their assets – which provided for payments to the funds’ ‘in-service members’, those still employed and making contributions – were transferred to the umbrella funds, too. In many cases, however, some assets were left in the standalone funds. These included:

1. Unclaimed benefits, which were payable but the beneficiaries had not been identified or located;
2. Surplus assets, which are created by the difference between what a fund owes its beneficiaries (its ‘actuarial liability’) and the market value of the assets it holds;
3. Assets held in investment funds;
4. Unclaimed proceeds of investments in insurance policies.
Despite these assets being left behind, and despite the fact that the funds were not formally liquidated or deregistered in terms of the PFA, many of the principal officers and trustees assumed that their standalone funds were concluded and they simply stopped functioning. A pension fund without a functioning board of trustees is called an ‘orphan fund’, and so the registrar of pension funds was left with thousands of unresponsive ‘orphans’ on its books. Orphan funds may be ‘shell funds’, which are also without members and assets, or ‘dormant funds’, which still have assets and members. Our investigation is concerned with dormant funds.

By 2006, of the 13 132 pension funds registered with the FSB, only 3 500 were ‘active’, that is, with a functioning board and assets and members. The registrar was determined to get rid of the orphan funds, and reasonably so, since they tie up assets and accrue regulatory costs without providing any benefit. In Tshidi’s view, the “funds floated around aimlessly”. They all the same, he should have been guided by the law to exercise great care in the protection of pension fund members and to apply the powers granted by the PFA accordingly.

The law offers the registrar two avenues to clear up the dormant funds. The preferred way is to engage with employers, unions, members and other stakeholders to establish properly constituted boards that could wind down the funds in question. If this is not possible – for example, where there were no active members to elect 50 percent of the board, as is required – the registrar may apply to the High Court to appoint a curator to manage the affairs of the funds.

In order to wind down the dormant fund for it be deregistered, the board or curator should then review the fund’s financial statements, account for all assets and unpaid benefits, trace beneficiaries and make the necessary payments or transfers. This was the lawful and correct approach, as confirmed by Advocate AM Breitenbach in a 2013 opinion that was submitted to the registrar at the latter’s request. At the time, the registrar chose instead to consult with major fund administrators and industry players for solutions. This is important, as the roles of the regulator and the large pension fund administrators become blurred.

In a 2014 submission to former Constitutional Court Justice Kate O’Regan, the then former deputy registrar of pension funds, Jurgen Boyd, confirmed that the timeframe for cancellations was arranged with fund administrators. Boyd also noted that Liberty was concerned about the possible reputational risk involved for them if funds were cancelled incorrectly. In 2012, Liberty had in fact complained to the FSB when the latter gazetted Liberty-administered funds for cancellation without first informing Liberty, thus putting the company at risk should they be cancelled erroneously. The FSB agreed to share the list of any funds with Liberty before they were gazetted. Unfortunately, as we illustrate in the next section, Liberty actively participated in the cancellation of funds without adequate due diligence, making many errors in the process.

The consultations with fund administrators were followed by a series of actions that seemed designed to deregister orphan funds as quickly as possible – all of which were manifestly deficient, while some were unlawful. The first was to give notice in the government gazette that certain funds would be deregistered unless the registrar received an objection within 30 days. In later instances, the notice period was even shorter. The funds were listed in batches of hundreds at a time, starting with 290 funds in 2008. Between 2008 and 2010, 577 funds were cancelled in this manner.

This exploit captures much of what was so flawed in the cancellations project. For one, ask yourself how many people are likely to study the government gazette. Secondly, the issue of unclaimed benefits stems partly from the reality that employers who established a fund may no longer exist and that beneficiaries who are owed a pension may not know that they are. In this context, the registrar should have been far more insistent that funds and administrators take appropriate measures to identify, trace and pay their beneficiaries. He failed to do so.

In addition, this approach clearly fails to meet the lawful requirements of the PFA. Again for the protection of those who are owed pensions, section 27 dictates that the registrar cannot deregister any fund without “proof to his satisfaction that the fund has ceased to exist”. In other words, according to the opinion of Advocate Breitenbach, that it has no board, members, assets or liabilities. A 30-day notice in the government gazette, without actively inquiring as to the
status of the fund, clearly fails to meet the threshold of satisfying the registrar of anything regarding that fund.

The registrar adopted two other strategies to aid the deregistration of dormant funds that were equally problematic. One was the appointment of ‘authorised representatives’. In 2007, the FSB issued two circulars dealing with orphan funds. Administrators were invited to apply to the registrar to have a fund classified as ‘orphan’. Following this, the registrar would appoint an ‘authorised representative’ who could, amongst other things, act as the ‘directing mind’ of the fund, appoint a liquidator, and apply to the registrar to deregister that fund.

Where were these authorised representatives found? In almost all cases, the chosen appointee was an employee of the administrator, who was then in a position to apply to the registrar to deregister the fund. Both Justice O’Regan and Advocate Breitenbach argue that there was no lawful basis for the registrar to appoint such authorised representatives.

The other strategy – and the most important, given that it led to over 3 500 funds being cancelled – was the appointment of so-called ‘section 26 trustees’ to fulfil all of the functions of fund boards. In 2007, section 26 was inserted into the PFA to enable the registrar to appoint a temporary board of trustees for the ‘bridging purpose’ of creating a proper board that complied with all requirements, including that 50 percent should be elected by the fund members. Instead of using the section for its proper purpose, the registrar used it to appoint trustees, again usually employees of fund administrators, who then submitted requests to the registrar to deregister the fund. Breitenbach’s legal opinion suggests that this was not lawful and that the registrar was thus exercising powers that he did not have.

The obvious additional concern is conflicts of interest, which trustees and board members “must avoid”, according to section 7C of the PFA. Yet appointing the employees of fund administrators as trustees seems to create this risk, as employees have a duty of loyalty to their employer and trustees should consider only the interests of the funds and their members. Justice O’Regan held that, if there were evidence of material prejudice (harm or detriment) to any fund members, conflicts of interest would be a crucial issue and require further investigation.

Another conflict arises in terms of the management of assets. The trustees of a pension fund are responsible for protecting members’ best interests. A fund’s administrator may have an interest in the way a fund’s assets are managed that does not align with the interests of the fund’s members. For example, an administrator might have an interest in keeping assets under management, attracting fees in perpetuity if the beneficiaries are not located. Administrators generally charge fees on a per-member basis while the fees of asset managers are linked to total asset value, but either way can disincentivise the careful tracking and disbursement of unpaid benefits. In the event, section 26 trustees seldom, if ever, tried to find and pay members of funds to which the registrar had appointed them. Instead, the assets of cancelled funds either remained in existing investment funds, or were transferred to the unclaimed benefits funds (UBFs) established and controlled by their employers.

Finally, putting aside for a moment the technical issues of legality and conflicts of interest, there is the serious practical question of whether the appointed authorised representatives or trustees could possibly have fulfilled their lawful duties.

In one case, Liberty employee Chantal Hugo was appointed as the sole trustee for 923 funds, while still occupying a senior position in the company. In two years, every single one of those 923 was cancelled. Could one person, even with assistance, exercise the necessary care and diligence and ensure no mistakes were made?

In total, just over 4 500 orphan funds were deregistered through these processes. Section 26 trustees like Hugo submitted 3 516 funds to the FSB for cancellation while 999 applications came via authorised representatives. In the same period, 2 242 were cancelled at the behest of properly constituted boards of trustees.
The FSB procured the services of KPMG, who submitted their report in October 2015. After examining a sample of 510 cancelled funds, they found that the cancellations process was strewn with errors and that R2.5 billion worth of assets were unaccounted for, raising a significant possibility that fund members had been harmed.

<table>
<thead>
<tr>
<th>Total number of funds cancelled</th>
<th>6 757</th>
</tr>
</thead>
<tbody>
<tr>
<td>S26 trustees</td>
<td>3 516</td>
</tr>
<tr>
<td>Authorised representatives</td>
<td>999</td>
</tr>
<tr>
<td>Properly constituted boards (s7A of PFA)</td>
<td>2 242</td>
</tr>
</tbody>
</table>

WHERE WAS THE REGULATOR?

The FSB and the registrar have at various points defended themselves by suggesting that no one has been materially prejudiced or harmed by the mistakes and unlawful conduct described above. The report that is used to support this claim was authored in 2016 by Jonathan Mort, a pension lawyer hired by the FSB to investigate the cancellations project and review earlier investigations. Mort’s investigation was only commissioned only after whistle-blower Rosemary Hunter launched her court application to compel the FSB to investigate all cancellations.

In 2014, the registrar requested Justice Kate O’Regan to conduct a preliminary enquiry into the cancellations project. Her report recommended that auditors be appointed to investigate a sample of the deregistered funds to determine the likelihood that prejudice had been suffered by any of the funds and their members.

The KPMG investigation was based on FSB records, and their report urged that the records of fund administrators also be investigated to determine more clearly what harm had occurred.

Mort was called in seven months later. If Rosemary Hunter had not initiated litigation at the beginning of 2016, we cannot be sure that the FSB would have acted on the KPMG report at all. After all, its findings were damning and provided evidence of possible negligence in the execution of the project.

Mort produced three inspection reports, only two of which are publicly available. The FSB and FSCA used the third report to justify their claim that no material prejudice befell any pensioners, but they have thus far steadfastly refused to release it. Access has been denied to several civil society organisations, including the Right2Know Campaign and the South African History Archive. In 2018, Open Secrets used the Promotion of Access to Information Act (PAIA) to request the FSCA to release of the third report. This was also denied. Given the significance of the issue and the constitutional requirement that public bodies be transparent and accountable, this continued commitment to secrecy and their refusal to open the report to public scrutiny is troubling.

We do however have access to the KPMG report. It was based on a sample, as O’Regan had recommended. After consulting with
both Hunter and Jurgen Boyd, KPMG selected 510 cancelled orphan funds, around 11 percent of the total, which represented a range of different risk factors associated with how they were cancelled. The investigators considered all the associated documentation – deregistration (and sometimes reinstatement) and the reasons given, valuation reports, available financial documents – and conducted interviews with 17 members of the FSB, including technical staff and executives.

The KPMG report supposed that prejudice had been experienced by funds and their members, but acknowledged that only detailed investigation into individual funds could confirm whether there were assets in those funds at the time they were cancelled and what impact this may have had on the funds and those who were owed their benefits. This issue was part of Jonathan Mort’s assignment when the FSCA appointed him.

Of the 510 deregistered funds, they found only 10 that could have provided the registrar enough information to allow a “reasonable person to conclude that these funds had ceased to exist” at the time they were cancelled. This implies that, in the other 500 funds, the registrar had failed to fulfil the requirements of the PFA. That’s 98 percent.

The findings further suggested that the registrar did not have sufficient information to conclude that the section 26 trustees had protected the interests of the funds’ members as the law requires.

KPMG concluded that the registrar should not have cancelled the funds’ registrations without first finding out what had happened to the assets and whether the rights of members and other stakeholders had been protected as the law requires. The report also found a “high likelihood” of material financial prejudice in the form of assets and liabilities existing at the time the funds were deregistered. Their high-level estimate was that this could have been as much as R2.5 billion. The report did not find that it was likely that these assets had been stolen.

We cannot say how accurate KPMG’s estimate is because the requisite information is split between the FSCA and the fund administrators and is not publicly available. We do have some figures though. In 2017, Liberty approached the High Court to reinstate 25 funds that had been incorrectly cancelled during the cancellations project, and later announced it would apply to reinstate another 105. Liberty essentially admitted that it had erroneously cancelled 130 funds that owed R100 million to 3 000 people.

The first two of Mort’s three inspection reports have come to light, but his conclusions don’t always match the evidence. Mort clearly found evidence that multiple funds were cancelled incorrectly when they still had assets in the fund and liabilities to be paid. The numbers were not trivial:

The Nashua Voluntary Fund had over R14 million in an investment account that had not been taken into account before it was cancelled;

The Robinson Fund was owed over R12 million from an investment when it was cancelled;

The Bivec Fund had over R26 million not transferred to a new fund before the fund was deregistered, due to an error by Liberty. Mort concluded that, if it were not for his investigation, “these missing assets may not have been unearthed”.

In addition to these individual examples, this report discusses the systemic errors that occurred at various administrators. Liberty has its 130 funds (to date). Numerous funds administered by Alexander Forbes were submitted for cancellation at the time that Alexander Forbes owed them money, which they had been ordered to repay after having been caught in a ‘secret profits’ scandal a decade earlier. These cases will be discussed in greater detail below.
There is thus ample evidence that systemic errors in the cancellations project resulted in numerous funds being incorrectly cancelled when still holding assets and needed to pay members. And yet, Mort still concluded that he could find no evidence that material prejudice had resulted. This conclusion appears to rest on two ideas. The first was that the assets still existed somewhere, usually in UBFs, and could be paid out if beneficiaries were traced. The second was that surplus assets that were owed to the fund in question were not claimable by individual members.\(^9\)

Both these arguments seem to miss the point by taking a very narrow idea of what would constitute harm and prejudice. The central point, as Advocate Geoff Budlender argued before the Constitutional Court in 2018, is this: funds that were cancelled when they still had assets and members would not be able to make any payments or transfers to fulfil its fundamental objectives.\(^9\) While deregistration does not affect the legal status of a pension fund, it does prevent it from doing any business – including making payments to members – and its claims become unenforceable.\(^9\) So long as the fund’s registration remains cancelled, its ability to protect the interests of its members and beneficiaries is also compromised. This is inevitable because it cannot carry out its functions. Fund members who were owed benefits also would have been prejudiced because they could not know who had the money that was owed to them, if they were even aware that it was owed to them.\(^9\)

Towards the end of Rosemary Hunter’s litigation, Mort adjusted his language from ‘no material prejudice’ to ‘no permanent material prejudice’. He appeared to concede that some fund members may have been harmed but claimed it wasn’t necessarily permanent. Once the errors in the cancellations were brought to the attention of the regulator, he argued, steps would be taken to remedy any prejudice.\(^9\)

This again does not match up with the facts. The FSB and FSCA have made it clear that they have no intention of investigating the remaining funds. Therefore, many errors will never be identified and so will remain unaddressed. Perhaps more importantly, many fund members need their benefits immediately, whether for a medical procedure or to send a child to school, fix their house, look for a job, or start a business. These harms will not be remedied by the reinstatement of the funds’ registration sometime in the future (should they be investigated and reinstated at all).

In sum, the investigative reports that we do have capture the inherent problems in how the cancellations project was carried out and the likely harm to pensioners as a result. Many funds were subjected to defective governance and incorrectly deregistered, and their many beneficiaries were likely placed in a position where they could not receive their benefits. Given the age of these beneficiaries, it is also highly likely that many have died in the period since the project commenced.

It is therefore reasonable to believe that a substantial but as yet indeterminable number of unpaid beneficiaries remain nameless. But thousands of others who believe they are owed benefits from registered funds still strive unsuccessfully to find and claim them. Dependents who are due money from a deceased beneficiary are often already in vulnerable situations and face inevitable delays in receiving what they are owed.
THE LIVED REALITY

To understand how this can affect individuals and families, we spoke with Tshidiso Matebese and his aunt Puleng Matebese, who have been trying to access the benefits that they believe Tshidiso’s grandmother, Anastasia, was owed before her death.\textsuperscript{111} Anastasia worked for twenty years as a cleaner for Telephone Manufacturers of South Africa in Springs and was a member of a fund that paid out a surplus in 2008. However, she had died the year before that, and the fund administrator claims that, according to the fund’s rules, she did not qualify. The UBC is assisting them to determine whether this is indeed the case.

We ask Tshidiso and Puleng what it would mean to them should they be paid what they believe they are owed. Tshidiso says that it would help the family on multiple fronts. Because of a lack of funds, he was unable to finish his degree at the University of Johannesburg. Since then, he has struggled to find work, though he continues to try. His five-year-old son is supported by the child support grant that Tshidiso’s mother receives for him. She has had two strokes and also receives a disability grant but cannot access good quality treatment. His Aunt Puleng cannot work because of a severe speech impediment. Tshidiso concludes that accessing his grandmother’s surplus benefits would make a huge difference for his family. Puleng and his mother would be able to get better medical treatment and he could finish his studies.\textsuperscript{112}
The story of the FSB’s cancellations project raises crucial questions about financial-sector regulation in South Africa. Why did the FSB and the registrar make or allow so many mistakes? Could it be that the regulators deferred to the very corporate interests they are supposed to rein in? In other words, were they ‘captured’?

‘Regulatory capture’ is the term describing a state of affairs in which a regulatory agency that exists to serve the public interest instead promotes the commercial or political interests of private concerns in the sector under their regulation. Regulatory capture is often referred to as an anomaly and a hindrance to effective regulation, but academic George Stigler, writing on industry in the United States, argues that, “as a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.” In other words, capture is the rule and not the exception.

There are multiple reasons for this, mostly to do with the immense resources and power of large corporate interests. For example, they are well equipped to lobby government for favourable treatment and legislation or to fund political parties and individuals in exchange for favourable decisions. In addition, the natural movement of skilled career professionals between the public regulator and the private corporations in the sector can give rise to mixed loyalties, consciously or not.

“\textit{If I am honest, I do think we have probably neglected market conduct}”

\textbf{~ Francois Groepe}  
Prior to his resignation as Deputy Governor South African Reserve Bank (SARB) in January 2019

Prior to his resignation from the South African Reserve Bank (SARB) in January 2019, Deputy Governor Francois Groepe spoke candidly about what has been missing from the regulation of the financial sector in South Africa. “Prudential supervision” promotes the stability of the financial system as a whole, such as regulating bank liquidity. “Market conduct” monitors the ongoing behaviour of the players. “If I am honest,” he said, “I do think we have probably neglected market conduct”. He was quick to add that he believed that the new ‘twin peaks’ model of regulation, introduced in April 2018, would make this a thing of the past. Groepe was on the board of the FSB when it pushed back against demands for a full investigation into the cancellations project. He has since moved into the private sector as deputy CEO at Discovery Bank.

The twin-peaks model creates separate prudential and market-conduct regulators in the financial sector. The idea originated in Britain and has been notably taken up in Australia, Belgium, the Netherlands and New Zealand. South Africa, the first developing country to implement twin peaks, has located the Prudential Authority within the SARB, while the Financial Sector Conduct Authority (FSCA), which replaced the FSB, now acts as the dedicated market-conduct regulator. Its explicit aim is to protect consumers and ensure their fair treatment.

Both Cabinet and the Treasury called for the FSCA to have significant powers to provide “a more intensive and intrusive approach to regulation and supervision” that goes beyond generic customer-protection laws to prevent abuse by financial sector firms. This is in line with international thinking since the global financial crisis. But South Africa has an additional deeply normative argument for market conduct regulation, given that the majority of South Africans are historically marked by poverty, financial exclusion and low financial literacy, making them easy targets for unscrupulous financial-services providers. And the consequences can be catastrophic. For example, the hyper-indebtedness of mineworkers following the extension of micro-credit with punitive repayment terms has been implicated in the conflict that led to the Marikana massacre.

In the case of the FSB’s cancellations project, it seems evident that the regulator turned to private fund administrators like

WHERE WAS THE REGULATOR? - 49
Liberty to help shape their approach. While there is nothing wrong with consultation, it would a problem if the voices and concerns of industry players began to overshadow the voices and concerns of pensioners. The registrar submitted to the High Court that he was entitled to assume that fund administrators’ representatives were “people of integrity and skill” on whose information he may rely, and that, if they “fail to discharge their duties honestly and properly, the institutions by whom they are employed ordinarily take responsibility for their conduct”. 120

This does not sound like ‘intrusive and intensive’ regulation, but rather a view that the financial institutions will regulate themselves. This flies in the face of the facts. Liberty has admitted that they provided inaccurate information to the FSB throughout the cancellations project. Taking a broader view, the global financial institutions that have been caught in a range of multi-billion-dollar money laundering and other scandals offer growing evidence of the significant lack of internal regulation and little commitment to the rule of law. 121

Part of the problem is that regulators who have a double mandate for both market prudence and good corporate conduct may be convinced that pushing financial corporations to greater transparency and accountability will put the sector’s stability at risk. This is not surprising, as the corporations will always be whispering this into the regulator’s ear.

Recall that much of the information contained in this investigation was unearthed by the litigation started by lawyer and whistle-blower Rosemary Hunter, the deputy registrar of pension funds who had immediately raised concerns about the cancellations project in 2013. When she tried to slow it down and start an investigation, she was offered – and refused – a ‘golden handshake’ to leave her position early. This was followed by disciplinary proceedings and then the non-renewal of her contract in 2016. Nonetheless, she continued her attempts to force the FSB to conduct proper investigations. Recall as well that she was an expert in pension law, with decades of experience.

The financial services companies in turn expressed their concern about Hunter’s approach to the FSB. In his personal answering affidavit, Registrar Dube Tshidi bemoaned the fact that Hunter’s strong criticism had “caused serious disquiet in the financial services industry”. 122 He added that both Liberty and the financial sector’s Association for Savings and Investment South Africa (ASISA) had stated their concern that the statutory information submitted by entities to the regulator would remain confidential. The registrar noted that “ASISA is a large industry association representing the interests of the major financial institutions supervised by the FSB. It is highly respected by the industry and the FSB, and its concerns must be taken seriously.” 123

Here we witness a regulator – the registrar of pension funds – who is facing a mountain of information that suggests that systemic errors by fund administrators and the FSB may have resulted in thousands of pension funds being incorrectly cancelled, which would leave thousands of fund members unable to claim millions of rands in benefits owed to them. Yet Tshidi’s first concern was to reassure the industry giants who were concerned about confidentiality and their own interests.

The general deference of Tshidi and the FSB to the financial firms, particularly Liberty, that is apparent in their court papers indicates a tendency to privilege the concerns of the financial industry over all others. It is also an expression of innate trust in the good intentions of these corporations, which combine into a willingness to accept those companies’ submissions on good faith. Time and again, around the world, this type of ‘soft touch’ regulation has been shown to create space for abuse.

The FSB did not cancel the registrations of orphan pension funds all on its own accord. Fund administrators played a central role, and there is evidence that Liberty pushed cancellations through without the due diligence required to protect funds and their members.
The general deference of Tshidi and the FSB to the financial firms, particularly Liberty, that is apparent in their court papers indicates a tendency to privilege the concerns of the financial industry over all others. It is also an expression of innate trust in the good intentions of these corporations, which combine into a willingness to accept those companies’ submissions on good faith. Time and again, around the world, this type of ‘soft touch’ regulation has been shown to create space for abuse.
CANCELLED PENSION FUNDS: A TIMELINE

This timeline provides a guide to key events in the story of the cancellations project, all of which are discussed in this report.

2000 - 2010

The FSB’s cancellations project starts

Section 26 is inserted into the Pension Funds Act. The registrar uses Section 26 to appoint single trustees to orphan funds.

2003

Liberty purchases part of the fund administration business of Investec.

2006

Alexander Forbes is publicly exposed for unlawfully drawing ‘secret profits’ from funds that it administered. Alexander Forbes eventually agrees with the FSB to repay R380 million to 1,825 funds.

Alexander Forbes is implicated in a breaking scandal on a fraudulent scheme to strip ‘surplus assets’ from pension funds.

2008

Alexander Forbes knowingly cancels 29 funds which are owed repayments from the ‘secret profits’ scandal.

Adv. Dube Tshidi becomes the chief executive of the FSB and the registrar of pension funds.

2008 - 2010

577 pension funds are cancelled by the FSB after publishing their names in the government gazette and giving 30 days for objections.

2007

Michelle Mitchley starts employment at Liberty and begins work on Liberty’s ‘backlog project’ to deregister dormant funds.

2001

Liberty purchases part of the fund administration business of Investec.

2002

Rosemary Hunter is appointed as deputy executive officer in charge of pension funds at the FSB.

The FSB’s cancellations project slows after Rosemary Hunter blows the whistle on its shortcomings.

2003

Michelle Mitchley contacts the FSB whistle-blower hotline to report concerns with Liberty’s approach to cancelling funds.

2006

Court hears that Alexander Forbes misled the FSB as part of the 2006 ‘surplus stripping’ fraud.

2008

Liberty purchases part of the fund administration business of Investec.

2009

KPMG submits report to Liberty on their ‘backlog project’.

2010

Liberty renews K2B’s contract.

K2B stops its work at Liberty.

2012

Liberty contracts K2B to assist with the backlog project.

2013

Liberty contracts K2B to assist with the backlog project.

577 pension funds are cancelled by the FSB after publishing their names in the government gazette and giving 30 days for objections.

2014

Adv. Dube Tshidi becomes the chief executive of the FSB and the registrar of pension funds.
This timeline provides a guide to key events in the story of the cancellations project, all of which are discussed in this report.

**SEPT 2013**

- **Funds cancelled** since the cancellations project began in 2007.
- **6757** Alexander Forbes is publicly exposed for unlawfully drawing 'secret profits' from funds that it administered. Alexander Forbes eventually agrees with the FSB to repay R380 million to 1,825 funds.
- Alexander Forbes is implicated in a breaking scandal on a fraudulent scheme to strip 'surplus assets' from pension funds.

**2006**

- Alexander Forbes knowingly cancels 29 funds which are owed repayments from the 'secret profits' scandal.

**2008**

- Adv. Breitenbach submits opinion on orphan funds to the registrar of pension funds.
- Justice Kate O'Regan submits report on cancellations to the FSB.

**2007**

- Michelle Mitchley starts employment at Liberty and begins work on Liberty’s 'backlog project' to deregister dormant funds.
- Rosemary Hunter is appointed as deputy executive officer in charge of pension funds at the FSB.

**2008 /case 2010**

- The FSB's cancellations project slows after Rosemary Hunter blows the whistle on its shortcomings.
- 577 pension funds are cancelled by the FSB after publishing their names in the government gazette and giving 30 days for objections.

**2011**

- Court hears that Alexander Forbes misled the FSB as part of the 2006 'surplus stripping' fraud.
- Liberty contracts K2B to assist with the backlog project.

**2012**

- Liberty renews K2B’s contract.

**2013**

- Feb 2012
  - KMPG submits report to Liberty on their 'backlog project'.
- Aug 2013
  - K2B stop their work at Liberty.
- Sept 2011
  - Adv. Dube Tshidi becomes the chief executive of the FSB and the registrar of pension funds.
- Section 26 is inserted into the Pension Funds Act.
- The registrar uses Section 26 to appoint single trustees to orphan funds.

**2014**

- FEB 2012
  - KMPG submits report to Liberty on their 'backlog project'.
- Aug 2013
  - K2B stop their work at Liberty.

**2015**

KPMG submit damming report on cancelled funds to the FSB.

Jonathan Mort submits first of three ‘inspection reports’ to the FSB. The ‘third inspection report’ is still not available to the public.

The FSB instructs pension lawyer Jonathan Mort to conduct an investigation as recommended by the KPMG report.

Liberty approaches the High Court to have 25 erroneously cancelled funds reinstated.

The FSB instructs pension lawyer Jonathan Mort to conduct an investigation as recommended by the KPMG report.

The FSB is replaced by the FSCA in terms of the Financial Sector Regulation Act.

Liberty indicates to Open Secrets that it is engaging the FSCA and will not be going to court.

Open Secrets writes to the Minister of Finance regarding the appointment of a permanent chairperson of the FSCA or responded to our letter about the issue.

Liberty approaches the High Court to have 25 erroneously cancelled funds reinstated.

Open Secrets writes to Liberty asking whether they still intend to reinstate 105 funds through the courts.

Constitutional Court majority decision rules against Hunter’s appeal.

Minority judgment argues for a full investigation.

Total unpaid benefits owed to over 4 million people are over R42 billion. R8 billion is in dedicated unclaimed benefits funds.
AUG 2018
Liberty announces it has discovered another 105 pension funds that it cancelled in error. The 130 funds in total owe R100 million to 3000 people.

18 OCT 2018
Liberty indicates to Open Secrets that it is engaging the FSCA and will not be going to court.

JUNE 2019
Liberty confirms they are preparing to approach the courts to reinstate 105 funds.

SEPT 2019
17 months after its creation, the Minister of Finance has not yet appointed a permanent chairperson of the FSCA or responded to our letter about the issue.

20 SEPTEMBER 2018
Constitutional Court majority decision rules against Hunter’s appeal. Minority judgment argues for a full investigation.

10 OCT 2018
Open Secrets writes to Liberty asking whether they still intend to reinstate 105 funds through the courts.

5 MAR 2019
FSCA issues a circular directing pension fund administrators to approach courts to set aside the cancellation of all funds cancelled in error before 1 April 2018.

23 JAN 2019
FSCA confirms it has not investigated Liberty’s conduct in relation to the cancellations project.

20 SEPT 2018
Open Secrets writes to the FSCA to ask why it has not issued a directive to fund administrators to approach courts to have funds cancellations set aside when they were cancelled in error.

27 JUNE 2019
Open Secrets meet with Alexander Forbes who maintain that they did not cancel any funds in error.

MAY 2019
Open Secrets writes to Alexander Forbes to suggest they are required to apply to court to reinstate funds in terms of the FSCA’s circular.

APRIL 2019
Open Secrets writes to the Minister of Finance regarding the appointment of a Commissioner of the FSCA.

F S B  / F S C A
ALE X A N D E R  F O R B E S
L I B E R T Y
O P E N  S E C R E T S
W H I S T L E  / hyphen.case B L O W E R S
Liberty and its founder, Sir Donald Gordon, are proudly held up as examples of homegrown corporate success. The company was founded as Liberty Life Association on 10 September 1957, when Gordon was a 27-year-old chartered accountant. By the end of the century, Gordon would be named the “achiever of the century in South African financial services” by the South African Financial Mail. In 2015, Gordon appeared on the UK Sunday Times’ rich list at number 123, with a net worth of over R16 billion. Most profiles of Gordon also praise his generous philanthropy to the arts and medical facilities in South Africa. The University of Pretoria’s Gordon Institute of Business Science, founded in 2000, bears his name due to his significant investment in the school. In 2005, he received a British knighthood for his “service to business and the arts”.

According to Liberty’s own account, the company’s name and the flame of its logo are inspired by the Statue of Liberty and “imbued with the same meaning of freedom and opportunity”. This should be considered in the context of the times. Between 1958, when Liberty sold its first insurance policy, and the 1990s, when it grew to be one of the largest and most powerful corporations in South Africa, it did so in a country where freedom and opportunity were deliberately eliminated for 85 percent of the population. In Liberty’s
history of rapid growth and accumulation, the violent and turbulent years of the 1970s and 1980s, as the apartheid state desperately sought to enforce its rule, are presented as background noise. By 1976, the year of the Soweto Uprising, Liberty's total assets reached R100 million (R3 billion in today's terms). By 1992, Liberty was the fifth-largest company in South Africa in terms of market capitalisation. 

Liberty Life was a pioneer in South Africa's insurance industry. In 1960, it offered the country's first retirement annuity products and, in 1962, became the first life assurance company to be listed on the JSE. Liberty was also the first in South Africa to introduce unit trusts and life insurance benefits linked to unit trusts. Today, although it has been through some ups and downs in its share price, Liberty remains a giant on the financial stage. It has a presence in 30 African countries and manages R720 billion of assets for over 3 million customers.

A significant part of this business is in pension funds. In the surge of wholly underwritten single-employer pension funds in the 1970s and 1980s, the insurer was also the fund's administrator. Liberty actively sought to increase their share in the market, including the acquisition of fund-administration business from competitors such as Investec, Rentmeester, Capital Alliance, Fedsure and Norwich.

It is safe to say that Liberty's eagerness was at least partly based on the opportunity to increase their assets under management, as asset management is considerably more lucrative than fund administration. When it purchased a range of Investec's business in 2003, one condition was that Liberty would only buy 'full service' funds, meaning that Liberty could provide these funds with the full range of financial services: administration, asset management and risk cover. The latter two can be very lucrative. In the Competition Tribunal hearing that considered (and approved) the deal, Liberty's rationale for the purchase was to “benefit from economies of scale” in the administration of pension funds. The company also indicated its desire to grow in this area.

Many of the pension funds purchased by Liberty at this time, more than 15 years ago, were already dormant (that is, had no board of trustees) and their paper-based records were inaccurate and incomplete. There is, however, no evidence that Liberty tried to recuperate the records or to trace and pay members who were entitled to benefits from those funds. Despite this, the company still points to the deficiencies in the records as a central cause of unpaid benefits today.

As will be discussed in more detail below, the growth in unpaid benefits linked to the cancellation of thousands of funds provided a new dimension in profitability. When profit is largely generated from asset-related fees, the exponential growth in assets set aside in unpaid benefits funds provides a significant potential for gain with little or no related administrative costs.

It is due to Liberty's pursuit of this market that, when the FSB first undertook its investigation for the cancellations project, it was administering around 80 percent of dormant funds. This is the reason the FSB consulted Liberty regarding the project. According to former Deputy Registrar Jurgen Boyd, the FSB discovered immediately that Liberty “was unable to provide the FSB with information about many of these dormant funds, in particular those funds that they had responsibility for administering after acquiring the businesses of other administrators”. For its part, Liberty acknowledged that these legacy funds required administrative clean-up after their purchase. The cancellations project provided the perfect opportunity to put the records of dormant funds in order, but an account from inside Liberty shows that the company chose to act in its own interests rather than fulfil its statutory duties to the funds and any possible members.

**LIBERTY’S ROLE IN THE CANCELLATIONS PROJECT**

Huge corporations like Liberty are usually wedded to secrecy, disclosing only what is statutorily required in their glossy annual reports, with the most critical information buried deep in the footnotes. Nevertheless, South Africa’s Promotion of Access to Information Act 2 of 2000 (PAIA) provides a mechanism that “gives effect to the constitutional right of access to any information...that is required for the exercise or protection of any rights”. In December 2018, the South African History Archive (SAHA) and Open Secrets submitted a PAIA request to Liberty for records...
related to their participation in the FSB’s cancellations project, including any directives or policies that would help explain how the process was carried out. We based our request on the right to social security and the public interest in why these cancellations, which affected thousands of pensioners, were carried out. Liberty’s refusal was swift and clear: they saw no obligation to release any information to SAHA or any other party that did not have a contractual relationship with Liberty.

Thankfully, we have two sources that do provide remarkable insight into Liberty’s conduct. The first is from Liberty itself. In 2017, it submitted an affidavit to the North Gauteng High Court requesting the court to reinstate 25 funds incorrectly deregistered by the FSB. The affidavit was given under oath by Chantal Hugo, Liberty’s head of terminations. The second source is the sworn affidavit made to the Directorate for Priority Crimes Investigation (the Hawks) by whistle-blower Michelle Mitchley in July 2016. Combining these statements gives us an insight into Liberty’s role in the mass cancellations.

Both accounts agree that Liberty had identified dormant pension funds as a problem they wanted to address as soon as possible. When Mitchley started at Liberty in 2007, Liberty had already established what they called their ‘backlog project’, which was designed to accelerate the transfer of members and assets from standalone to umbrella funds and then dispose of the remaining assets left in the standalone funds. Mitchley was immediately put to work handling complaints from funds and employers about delays in these transfers and liquidations. She was assigned to a special team that was tasked to help wrap up these transfers by linking them to ‘special brokers’. The brokers, identified by Liberty, were “responsible for directing to Liberty the most lucrative business, determined by reference to the annual rates of contribution to retirement funds under Liberty’s administration by employers to which those brokers had been appointed”.

All of this should be understood in the context of the FSB’s ongoing cancellations project, in which administrators like Liberty were to apply to the registrar to have dormant funds deregistered. As described above, the registrar had chosen two simple (but likely unlawful) means to do so: by appointing ‘authorised representatives’ or ‘sole trustees’ to dispose of the funds’ assets and have them deregistered. Those appointed were usually employees of fund administrators. As mentioned above, Chantal Hugo, who prepared Liberty’s 2017 affidavit, was herself appointed as the sole trustee for 923 pension funds that were cancelled over a two-year period.

Liberty’s interest in deregistering thousands of dormant funds flowed from two factors: they considered themselves liable for the costs of failing to submit financial reports and other related penalties, which would add up to millions of rands; and they saw that keeping thousands of inactive funds on their books risked reputational damage to the company. This latter echoed the FSB’s concerns about these funds that “floated around aimlessly.”

Liberty’s fund governance department established a ‘legacy project’ to deal with these funds. Two special teams were set up. One was tasked with the effective and lawful transfer of assets to umbrella funds, in terms of section 14 of the PFA, while making sure that beneficiaries would receive all the benefits they had accumulated over time, and which they were owed. The second team was dedicated to ensuring the efficient liquidation of funds, in terms of section 28 of the PFA, and the deregistration of funds, in terms of section 27 of the PFA, ostensibly after all necessary transfers had taken place.

The teams had to prepare financial statements and do the crucial work of identifying which funds still had beneficiaries and assets and thus should not be cancelled. There are two primary issues here. The first is that the required due diligence and duty of care to the fund would require painstaking checking of records. The second is the possible conflict of interest. For example, Hugo – sole trustee of 923 pension funds and a senior manager at Liberty – had a fiduciary duty to the funds and their members while simultaneously owing loyalty to her employer.

In 2011, Michelle Mitchley supervised one of the teams preparing financial statements for Liberty’s backlog project. The job was incredibly difficult. Given the poor state of records, the large gaps in information, and what was at stake in getting it right before funds were deregistered, Liberty should have dedicated sufficient time and resources to make sure that mistakes were minimised.

This was not Mitchley’s experience, which she described in her affidavit to the Hawks in 2016:
“I was able to check for discrepancies by comparing them with the financial statements prepared in respect of the previous financial years. In this way, I could see how the assets and liabilities of the funds were accounted for. If I found a discrepancy, I would instruct the members of my team to conduct a proper investigation in order to resolve it. As the work on the Backlog Project progressed, I became increasingly disturbed by how it was being handled. For example, on several occasions, my team and I worked late into the evening and on weekends to prepare financial statements for orphan funds only to find, when we accessed the FSB’s website, that the registrations of some of the funds had already been cancelled. Furthermore, some of these funds had still had assets.”

~ Michelle Mitchley
Description in her affidavit to the Hawks in 2016 about her time supervising financial statements for Liberty’s backlog project in 2011

When Mitchley ordered further investigation into discrepancies, she was chastised by her seniors, who claimed this was “unduly slowing down the process.” She was also ignored when she pointed out that funds with assets and members had their registrations cancelled at Liberty’s request.

This would come to define Liberty’s approach to deregistration: they chose haste over accuracy. This points us back to a finding of the KPMG report: in 98 percent of the funds in their sample, the registrar did not have sufficient information to be satisfied that the funds had ceased to exist and that the interests of their members and beneficiaries had been sufficiently protected. Why not? One important reason would be that the staff at Liberty were pressed to get funds deregistered as quickly as possible, rather than to exercise the absolute care that their fiduciary duty demanded.

LIBERTY’S CONSULTANTS:
K2B

By 2012, Liberty had engaged a small bespoke consultancy called K2B to assist in their backlog project. With K2B working in the Liberty offices and liaising directly with the FSB to deregister funds in bulk, the rate of cancellations picked up pace. Through Mitchley’s account and access to Liberty’s contract with K2B, we see how speed was prioritised and rewarded over due diligence. This relegated the interests of thousands of pension fund members. Everyone concentrated on their own bottom line and no one seemed to care about the pensioners.

K2B, also known as Biggs Kleingeld and Bekker, is a private consultancy company registered in 2006. The active directors are
Liberty signed two contracts with K2B, one in 2011 and the other in 2012. Both contracts set very ambitious targets to deregister as many funds with the FSB as quickly as possible and provided significant financial incentives to ensure this. In addition to the basic remuneration of around R1 million per month, performance milestones promised further bonuses of between one and two million rands. In 2012, for example, five such milestones meant that – if enough pension funds were cancelled speedily – K2B could bag a handsome bonus of well over R10 million for their services that year.

Employees at Liberty were the first to raise alarm bells. Email correspondence from 2011 shows that at least three members of Liberty’s internal terminations team raised serious concerns with senior Liberty management about the way K2B was conducting business. Apart from allegations that Liberty employees were being bullied by Biggs and Kleingeld, their major concern was that funds were being deregistered while they still had assets in them, and that the Liberty personnel who were responsible for liquidations were not being invited to meetings with the FSB. Liberty staff tasked with doing the required due diligence of tracking financial records and identifying any anomalies claim that they were sidelined by K2B, who in turn had their own direct line to the FSB.

Michelle Mitchley, who worked alongside the Liberty accounts staff, was one of the most vocal to raise the alarm. The team would work late into the night to finalise information and financial statements about dormant funds, only to find in the morning that the FSB had deregistered the funds at Liberty’s request without waiting for their information. As this included funds that still had assets, it was apparent to Mitchley that this was improper conduct.

Email records show that she repeatedly asked for assurances from Liberty’s management that it agreed with K2B’s instructions that cut due diligence requirements. This included an instruction in late 2011 that the FSB would now accept
and simply ‘validate’ annual financial statements that were unsigned and had no valuator's report attached.\textsuperscript{166}

By September 2011, Mitchley was so troubled that she submitted an anonymous tip-off to the FSB whistle-blower system. She expressed concerns about the relationship between Biggs and certain employees at Liberty and the FSB and, crucially, the closing of funds that still had assets in them. She also raised these issues with an internal audit team at Liberty. These complaints and the continued unhappiness of certain Liberty employees prompted Liberty to engage KPMG to investigate the allegations.

Note that this investigation into Liberty’s internal processes is completely separate from the larger KPMG investigation into cancelled pension funds that was commissioned by the FSB in 2015 and was discussed above in our report. This earlier report is not publicly available and Liberty refused Open Secrets’ PAIA request for its release in 2018. However, Jonathan Mort does refer to it in his work for the FSB. Mort’s first inspection report indicates that Liberty gave him their KPMG report and that, while there was no evidence of corruption, a number of concerns were raised. One was the particularly close relationship between K2B and Lorraine de Swardt, one of the senior FSB employees responsible for processing cancellations on the receipt of requests from K2B. Another was a blanket exemption from the FSB that was not in compliance with requirements related to financial statements. KPMG’s Liberty report ultimately concluded that the company had “insufficient oversight of their contractors (K2B)” and that this should have been strengthened.\textsuperscript{167}

**LIBERTY ADMITS ERRORS**

When the FSB appointed Rosemary Hunter as the deputy executive officer in charge of pension funds in 2013, she immediately identified irregularities in the conduct of the cancellations project. In March the following year, she announced that it would no longer continue in the same way and that past cancellations would be investigated.

At that point, K2B disappeared from the scene and has not, to our knowledge, been subject to any further investigation or scrutiny. Another look at their 2012 contract with Liberty reveals built-in protection for K2B. It states that, while K2B would be responsible for managing and reporting on all the resources performing functions related to ensuring that fund-governance requirements were met, “such responsibility shall not include or in any way be interpreted to mean that K2B shall bear any liability in terms of the provisions of Section 13B of the [Pension Funds] Act.”\textsuperscript{168} Section 13B contains many of the key legal duties of fund administrators, including to exercise utmost care, keep proper records and avoid any and all conflicts of interest.\textsuperscript{169}

It appears that Liberty passed many of the day-to-day functions of an administrator to K2B in order to have funds deregistered, while indemnifying K2B from any legal responsibility to meet the requirements of the law in relation to the governance of pension funds. K2B was effectively insulated from accountability for potentially unlawful work they did for Liberty.

In November 2017, Liberty made an unexpected about-turn. It approached the Pretoria High Court to set aside the deregistration of 25 pension funds that Liberty had now identified as errors. Its application admitted to several errors and potential liability for mistakes made during the cancellations project. At the time, Rosemary Hunter was still calling for a thorough investigation of the cancellations project and a hearing by the Constitutional Court was imminent.

Liberty’s application was brought against the FSB in terms of the Promotion of Administrative Justice Act (PAJA) and with prior consultation with the FSB, which did not oppose the application.

Liberty argued that, “when the registrar exercised his power to make those decisions and deregistered the retirement funds referred to in this application, he was not acting on the basis of true facts material to the decision”.\textsuperscript{170}

The material mistake was that Liberty (with the help of K2B) informed the registrar that the funds in question no longer had assets or liabilities (and therefore had ceased to exist), when in fact Liberty was, and remains, in possession of assets belonging to those funds.\textsuperscript{171} The affidavit thus substantiates our outline of Liberty’s behaviour.
The registrar was not acting on the basis of true facts because Liberty had submitted incorrect information to the registrar.

The affidavit states that, between 2007 and 2013, the registrar "encouraged administrators of retirement funds, including the Applicant [Liberty], to procure the cancellation of the registration of so-called 'dormant funds' under their administration." It does not, however, describe the form of this encouragement or the form of consultation that took place between the registrar and various key fund-administrators.

Liberty confirmed that the registrar appointed authorised representatives and sole trustees to administer funds. Many of these were Liberty employees. As discussed above, the weight of legal opinion holds that the appointment of authorised representatives was clearly unlawful. The affidavit does not mention whether Liberty ever sought legal advice on these measures, apparently having taken the registrar’s approach at face value.

In 2016, Business Day submitted questions to both Liberty and Alexander Forbes, asking whether they had sought any independent legal advice as to whether the FSB’s process complied with the law and whether their efforts to trace beneficiaries had been legally sufficient. Neither company provided an answer. Liberty has never offered an explanation as to why they – the administrator of thousands of funds – did not enquire carefully into the available legal remedies before proceeding as it did.

When Liberty approached the court to reinstate the 25 mistakenly cancelled funds, it also conceded that it might be liable to members who may have been harmed in the process. The company was facing a range of public pressures at the time. The Constitutional Court was about to hear argument in favour of a full investigation into the cancellations project. The prospect of public scrutiny may have raised warning flags regarding the firm’s public image and its ability to maintain the trust of its customers. Remember that this approach to the court in late 2017 came nearly five years after Hunter first raised her concerns and nearly seven years after Liberty’s own employees informed management that funds were being cancelled when they still held assets.

Nonetheless, Liberty’s court papers declared that it sought to have the funds reinstated because of its legal obligation to administer funds “in a responsible manner” and to “keep proper records.” It acknowledged that, as an administrator, Liberty was required to “observe the utmost good faith and exercise proper care and diligence.” Liberty wanted to make sure it was “conducting its affairs in accordance with applicable laws.”

The admission that they had provided incorrect information to the registrar for a period of at least six years would seem to suggest that Liberty consistently failed to meet these legal obligations. It misled the registrar about the status of these funds, and whether they still held members, assets or liabilities. Its own account of ‘errors’ suggests a systemic and sustained failure to be responsible, keep proper records, and to exercise proper care and diligence in the funds’ administration. This indicates possible breaches of both the Pension Funds Act and the Financial Institutions (Protection of Funds) Act, not to mention various fiduciary duties contained in South Africa’s common law. Yet, the FSB – the regulators who should have grabbed the opportunity to effect accountability – effectively displayed indifference.
Liberty may well have worried that it would face claims for damages if it did not act to reinstate the funds. The affidavit indicated that the company could “leave itself exposed to potential legal action by regulatory authorities and former members/beneficiaries of the retirement funds…who may feel they would have benefited from the assets of these retirement funds if they had not been erroneously deregistered”. 178 Still, it is not clear that reinstatement would eliminate liability for the period in which the fund was deregistered. We will return this question in the final section.

There are also significant gaps where Liberty’s affidavit does not match up with the detailed account provided by Michelle Mitchley and confirmed by documentary and email evidence in Open Secrets’ possession. One example is Liberty’s assertion that a fund had to be formally declared to hold no assets, liabilities or members by the sole trustee, and then again by a valuator or auditor. 179 However, as outlined above, K2B had instructed other Liberty staff that the FSB would now validate statements even if they have not been signed and considered by a valuator. 180 This would again seem to break the rules by which all fund administrators and the regulator should be bound.

The affidavit made another important claim in its account of how Liberty discovered that the funds in question had been incorrectly deregistered. It submits that Chantal Hugo became aware of ‘anomalies’ in late 2013 or early 2014, when she discovered that other departments in Liberty continued to administer funds that had been deregistered. 181 This included regular functions such as managing claims, allocating contributions and paying benefits. This prompted her to do an internal audit, in which she realised that the affected funds had not ceased to exist because they still had assets and liabilities. Therefore, they had been erroneously deregistered.

There appear to be several errors and unexplained issues in this account. ‘Late 2013 or early 2014’ does not match up with Mitchley’s whistle-blow in September 2011. Her tip-off alleged that funds with assets and members were being erroneously deregistered. Similar reports were made to Liberty management in late 2011 and 2012 by several administrators and accountants. Even the KPMG report that Liberty itself commissioned raised concerns about possible errors in the financial statements being submitted. The question is obvious: why did Liberty wait years before doing an internal audit? Further, it seems misleading to suggest it was motivated by Hugo’s discovery of ‘anomalies’ when these concerns had been raised earlier.

This timeline creates the central tension in Liberty’s claim that it first became aware of the possibility that funds were incorrectly deregistered in 2013. Even so, it brought its application for the reinstatements only in 2017 – four years later. Perhaps this delay was due to the difficulty of determining all of the financial and beneficiary details of those 25 funds. Yet Liberty had procured the cancellations of thousands of pension funds after mere months of investigation.

Liberty’s affidavit raises yet another question. By its own account, Liberty departments were doing the day-to-day administration of pension funds at the same time that the cancellations team declared them to be without assets and liabilities and recommended them for cancellation. How could Liberty fail to discover this if it were, in fact, acting with the required care and due diligence?

The 25 funds that Liberty applied to reinstate are divided into three categories of errors made. Serious questions emerge from each. But every case shows signs that, over a period of several years, Liberty consistently failed to fulfil their fiduciary duties to the funds, failed to fulfil the requirement of the Pension Funds Act to keep proper records and administer funds in a responsible manner, and failed to exercise proper care and diligence as per the Financial Institutions (Protection of Funds) Act.

The 2017 high court application to reinstate the 25 unlawfully cancelled funds was successful. Liberty then announced in August 2018 that it had uncovered another 105 funds that needed to be reinstated. According to Liberty, its total discovery at that point amounted to 130 funds with around R100 million in assets that were owed to 3000 beneficiaries that needed to be reinstated in order that payments could be made. Liberty publicly committed to reinstate these funds. 182

But after the Constitutional Court delivered its judgment in September 2018, Liberty went quiet.
THE CONSTITUTIONAL COURT LETS PENSIONERS DOWN

Ever since Rosemary Hunter first raised her concerns about the cancellations project when she joined the Financial Services Board in 2013, she followed legal channels to force the FSB to undertake a thorough investigation into all of the cancelled funds in order to work out which had been cancelled incorrectly and to rectify the situation. This eventually brought her before the Constitutional Court, in a case referred to as ‘Hunter v Financial Sector Conduct Authority and Others’. The court record ran to thousands of pages and the legal issues were complex. On 20 September 2018, the Constitutional Court delivered its judgment.

The disappointing judgment by the majority of six justices, written by Justice Sisi Khampepe, rejected Hunter’s appeal and found that the Financial Services Conduct Authority (FSCA) did not need to undertake further investigation into the unlawful cancellation of thousands of pension funds. The majority judgment posited that the investigations that had taken place were sufficient.

The majority decision also rested on two assumptions that we believe are shown to be incorrect by the facts of this case. The first was that ordering additional investigations would be irreconcilable with “an assumption or acceptance that the FSCA is run by responsible and competent people”.

The problem here is that evidence of the FSB’s conduct during the cancellations project raises serious doubt about the responsibility and competence of those in charge of this process. A thorough investigation is necessary precisely because the regulator failed to diligently and responsibly address the issue of ascertaining the true status of the dormant funds to be cancelled from the outset.

Secondly, the Court assumed that, because the FSB had commissioned “not one, not two, but at least three investigations”, the matter must already have been dealt with. In this view, the FSCA, which “self-evidently always recognised” its duty to investigate any “alleged or potential irregularity” that could potentially prejudice pensioners, had consequently “generously deployed” its resources for the investigations by Justice O’Regan, KPMG and Jonathan Mort. They “have done what is reasonably necessary”.

However, the reports themselves indicated the need for further inquiry. The O’Regan report drew attention to unlawful conduct by the FSB, while the KPMG report expressed concern about the likely material prejudice suffered by fund members as a result of incorrect cancellations. Both strongly recommended further investigation. The reports by Jonathan Mort – not all of which have been publicly released by the FSB – further identified crucial errors in the cancellations process, including the mistaken cancellation.

On the procedural issue, the majority decision of the court held that Hunter “chose to ride the wrong horse” in that she should have used review proceedings in terms of the Promotion of Administrative Justice Act (PAJA) to demand further investigations. This is a curious decision, given that the same court has previously decided that a decision to investigate alleged irregularities does not constitute administrative action, and thus was not appropriate for a PAJA review.

The minority judgment in Hunter’s case held that, while the PAJA review is the appropriate remedy for any pensioner or other party seeking to set aside cancellations, this was not the remedy that Hunter sought.

The majority decision also rested on two assumptions that we believe are shown to be incorrect by the facts of this case. The first was that ordering additional investigations would be irreconcilable with “an assumption or acceptance that the FSCA is run by responsible and competent people”. The problem here is that evidence of the FSB’s conduct during the cancellations project raises serious doubt about the responsibility and competence of those in charge of this process. A thorough investigation is necessary precisely because the regulator failed to diligently and responsibly address the issue of ascertaining the true status of the dormant funds to be cancelled from the outset.

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of funds when they owed millions to their pensioners. In one case, Mort reported that Liberty had secured the deregistration of the Bivec pension fund when it still held R26.5 million in assets, and then held onto the assets despite protest by Bidvest. Mort pointed out that this problem might never have been addressed but for his investigation. These investigations cannot be said to have yielded a “credible, transparent, inclusive and unbiased outcome”, given that they considered fewer than 25 percent of the affected funds.

The minority Constitutional Court judgment, penned by Justice Froneman with Justices Madlanga and Dlodlo concurring, was also taken up with these concerns. This judgment held that “it was common ground that the cancellations project was infected with some unlawfulness” and that “the possibility of mistakes in the cancellations that have not yet been examined is obvious. Those mistakes are a proxy for unlawfulness. And the duty to investigate potential irregularities is clear”. More importantly:

The minority judgment highlighted the central issue of this case, the issue to which our investigation always returns: the potential consequences for vulnerable fund members and the heightened vigilance that this required of administrators and regulators. The three justices maintained “that many potential irregularities cannot simply be ignored. The number is not trivial and the effect of the mistakes is not inconsequential... Moreover, the prejudiced members are likely to be pensioners – some of the most vulnerable people in our society”.

After all, they reasoned, Hunter had approached the court “to compel the FSCA to fulfil its constitutional duty to supervise and enforce the laws that protect the interests of pension beneficiaries and pension funds”, that is, to investigate and rectify the mistakes made in the cancellations process. In this regard, the minority decision noted that, apart from any question of corruption in the regulator, “the issue is whether they have been diligent enough. Complacency may be as great a danger as malice”. This is central to the case. At the very least, the FSB’s complacency has put many of the most vulnerable South Africans at risk of harm. This, if anything, is why a further thorough investigation is imperative.

The dissenting judgment also made clear that PAJA remains the appropriate route for any party that believes they were harmed by the cancellations.
LIBERTY’S REDIRECTION

Liberty announced at the beginning of August 2018 that it had discovered another 105 pension funds that had been mistakenly cancelled, and that it would approach the courts again unless the FSCA could provide an alternate processes to reinstate them. Yet after the judgment by the Constitutional Court, Liberty went quiet and no court applications were forthcoming.

On 10 October 2018, Open Secrets wrote to Liberty asking it to explain this apparent change of heart. After all, the earlier high court process had been straightforward, swift, and successful. We also wanted to know what the new plan was. With these funds having been deregistered for a decade, and with the risk of elderly pensioners dying in the interim, when would the funds be reinstated?

Below is a transcript of the questions and Liberty’s responses with regard to reinstatement. All of Liberty’s emailed responses were attributed to Tiaan Kotze, the CEO of Liberty Corporate.

**OS:** [A] recent article quoted Chief Executive David Munro as indicating that Liberty will be approaching the court to reinstate a further 105 funds. Is this still the intention and what is the status of that plan?

**Liberty:** Our intention is to appropriately address all the remaining funds some of which require re-instatement. Our primary focus remains on paying valid benefits to members as soon as possible. The Promotion of Administrative Justice Act requires Liberty to first pursue any internal remedies available before applying to the courts. Therefore, with the new Financial Sector Regulation Act (FSR Act) that recently came into effect, we are obliged to, and are in the process of, applying to the FSCA to re-instate the funds.

The response was unsatisfactory for several reasons. For one, the FSR Act had been signed in August 2017 and the FSCA had operated from 1 April 2018. Why then had Liberty still signalled an intention to use the courts to reinstate funds after these dates? More concerning, our analysis of the new FSR Act indicated that it had no provision that would allow a fund administrator to ask the FSCA to reinstate funds deregistered between 2007 and 2013. The Act had not changed the legal position taken by the FSB and Liberty in 2017, when both agreed that review proceedings in the court was the only way to reinstate erroneously cancelled funds.

In brief, our reading of the Act suggested that there were no ‘internal remedies’ available for Liberty to pursue. Most importantly, while sections in the new FSR Act do allow for a decision of a financial sector regulator to be reconsidered or revoked, section 299 holds that the old FSB Act still applies to any decisions made before 1 April 2018. As a result, the old rules – including that an appeal must be lodged within 30 days of a decision – would still apply. Obviously, since the deregistration of funds took place mostly between 2007 and 2013, this deadline has long passed. We subsequently shared our research with Liberty and asked them to advise where we were mistaken. (See conversation on the following page).

Liberty’s increasingly brief replies made it clear that they would not be sharing anything more specific. Was Liberty unwilling to admit which legal provision they were pursuing because they knew it was incorrect?

We wrote to the FSCA in December 2018 to get their position and included the legal arguments we had shared with Liberty. Six weeks later, the FSCA wrote back: “These are complex issues and require careful consideration. For that reason, the FSCA has sought and is awaiting legal advice on the available legal remedies for the reinstatement of cancelled funds.”

This lack of clarity was confusing given that Liberty had efficiently had 25 funds reinstated by the High Court in 2017, enabling those funds to perform their functions and protect members again. It also suggested that neither Liberty nor the FSCA had a clear legal basis on which to pursue an alternative remedy.

Neither the FSCA nor Liberty had provided any further correspondence to Open
OS: Following the above reasoning, internal remedies are not available, and judicial review in terms of the Promotion of Administrative Justice Act (PAJA) is the only lawful means of reinstating any funds cancelled between January 2008 to September 2013. This is our assessment of the internal remedies and their inapplicability to funds deregistered during the 'Cancellation Project'. Are we missing any other internal remedies? If any of the above internal remedies are being pursued by Liberty, we would appreciate an explanation which directly responds to the reasons we have provided for why they are not available.  

Liberty: Your legal opinion is noted, thank you. We are committed to act in the best interests of members of the deregistered funds. We are working with the FSCA to ensure these funds are duly re-instated and that any assets in these funds are paid out to members timeously.  

OS: We just have one follow-up clarifying question with regard to the issue of the reinstatement of funds. Could Liberty confirm which internal remedy/procedure at the FSCA it is relying on for the reinstatement of the funds in question?  

Liberty: We have been engaging constructively with the FSCA, and we suggest you contact them directly in this regard.

Secrets on the subject. However, the FSCA released a circular on 5 March 2019 that confirms our arguments. According to the circular, fund administrators who had found funds cancelled in error because they still had members, assets or liabilities, and those cancellations had taken place before 1 April 2018, must "make an application to a competent court...in order for the cancellation of the registration of the fund to be reviewed and set aside". Further, the administrator must "disclose...full particularity of the error and provide an explanation for why the error occurred".

In a letter to Open Secrets on 16 April 2019, Liberty finally indicated that it intends to comply with the FSCA's directive and approach the courts to reinstate over 100 pension funds. This is a welcome development. It could ensure that the public has full access to the explanations from the administrators in question as to why so many errors were made. It is the beginning of accountability, but not nearly enough.

It also comes after unacceptable delays. Many funds were deregistered more than ten years ago, and many unpaid beneficiaries will have died in the interim. It also has required years of effort from whistle-blowers, the UBC and Open Secrets to pressure the FSCA and Liberty into complying with the law. The resulting delay means that Liberty remains in possession of billions of rands of assets in unpaid benefits, at least some of which come from funds that were incorrectly deregistered. This raises an question: who benefits? Who has benefited from the cancellations of so many funds and the endless delays in properly rectifying the situation? It brings us to the question that underpins our investigation into potential economic crime: who profits from the misery it has caused?
FEES, FEES, FEES: WHO PROFITS?

Given this account of the evidence of the FSB’s cancellations project and Liberty’s behaviour in the past ten years, the obvious question arises: what was in it for Liberty and the other fund administrators? Specifically, did they stand to benefit from the cancelled funds and, if so, how? Was this simply a matter of taking advantage of the FSB’s eagerness to clean up a cluttered and inefficient governance system, or was there an additional profit motive driving these financial behemoths?

In 2019, Open Secrets met with a source in the pension funds industry to discuss a range of issues related to pension fund administration, unpaid benefits and the new FSR Act. We will call them ‘Nura’. Fearing repercussions from their employer and a tight-knit industry, they agreed to an interview only if their identity was not revealed. Nura has decades of experience in the pensions industry, most of which has been spent as a pension fund administrator at some of the industry’s biggest players, including Liberty.

Speaking to our source in the pension fund industry about unclaimed benefits, it quickly became clear that this was a multi-faceted problem of which the public has little inkling. We still wanted to understand why a company like Liberty had been so determined to increase its role in the pensions market, going so far as to buy up funds from other financial institutions. When we pressed the point, ask-
ing how financial service companies make money from administering pension funds, Nura conceded. “Well, that’s where I think the problem is.” 216

The potential of fee income was arguably part of Liberty’s motivation to aggressively expand its share of the pension market. It insisted on buying only ‘full service’ funds that gave them control of administration services, asset management and risk cover. 217 All of those services generate fee income as well. Incidentally, it was also these purchases that put Liberty in the position of administering funds with poor records, which they give as a reason for many of their mistakes in the cancellations process.

This means that Liberty and other fund administrators profit from fees that are directly linked to the extent of assets under their management. As a result, their employees have an interest, if not a duty, to increase or at least maintain their employer’s assets and profits. For these purposes, what could be better than billions of rands sitting in pension funds that are unlikely to be paid out to beneficiaries but could remain a source of income to the company in perpetuity?

Those who downplay the effects of the cancellations project often say that the money never disappeared and is available to pay beneficiaries but could remain a source of income to the company in perpetuity?

While fund administrators cannot deduct fees from a pension that no longer receives contributions unless the rules explicitly say so, once the unclaimed monies are placed in an unclaimed benefits fund, fees can be deducted. Administrators can also benefit from commissions earned from the asset managers with whom they place the funds.” 220

**ASSET BASED FEES**

Pension-administrators’ fee structures are crucial for profit margins. There are three types of relevant fees: basic administration fees, asset-based administration fees (ABAF), and asset management fees. In theory, the first two accrue to the administrator (like Liberty) while the third goes to the asset manager. However, as one might expect, companies like to invest assets into their own in-house investment products. For example, the assets in Liberty’s unclaimed benefits funds (UBFs) – over R1 billion – are all invested in StanLib investment portfolios, and StanLib is a subsidiary of Liberty. 218 ABAFs are deducted from investment earnings before those earnings go to the funds or members’ accounts. Asset management thus has a direct and potentially significant impact on the value of a members’ benefit, while providing a source of revenue for the management firms.

"While fund administrators cannot deduct fees from a pension that no longer receives contributions unless the rules explicitly say so, once the unclaimed monies are placed in an unclaimed benefits fund, fees can be deducted. Administrators can also benefit from commissions earned from the asset managers with whom they place the funds.” 220
This is how the system is rigged in favour of corporate profit at the expense of indigent pensioners and their human rights. Nor is the problem limited to the pensions sector. Speaking to industry bigwigs at the 2019 Raging Bull Awards, economist Iraj Abedian had this to say about the predatory affairs of asset management:

“The fees are too high, their administration costs are exorbitant and ultimately the net return to the investors is not only low, but also negligible in relation to the fees extracted by the industry. In most cases, when all is said and done, more than 40 percent of cumulative returns over the life of the investment is taken away from the investor.”

It may also be possible for a fund administrator to effectively cross-subsidise its administration fees, keeping them flat while setting asset-linked fees higher. In this way, a fund administrator can pass on the costs of administration to beneficiaries who may not even be aware that they are owed a pension from the fund in question. In the case of dormant pension funds, unpaid beneficiaries are unlikely to be in a position to complain when asset-linked fees have eroded their benefits.

There are other angles to the fees game. Consider that a flat administration fee is charged for the actual administrative work done for active members, employers and funds. This is the daily work of fund administrators. However, unpaid benefits and cancelled funds require very little, if any, day-to-day administration. The essential work of tracing beneficiaries is done by tracing agents; when they are successful, their fee is deducted from their benefits owed to the beneficiary. In other words, the administrator does not bear the costs of tracing, the beneficiary does. Yet the administrator continues to draw asset-based fees from unpaid benefits funds.

In addition, the actual fee often “bears very little resemblance to the amount of work done” Even industry players admit that their fees have often been too high and shadowy. Soon after his appointment as CEO of Alexander Forbes in 2018, after 25 years at Sanlam, Dawie de Villiers stated that more transparent and lower fees were essential to ensure that people got fair value from their pension funds. As will be shown in the following section, Alexander Forbes’ conduct in the cancellations project has not yet reflected this commitment to fairness.

Jonathan Mort is the lawyer whose report defended elements of the cancellations project and denied that anyone suffered material prejudice. Yet, speaking to the Pension Lawyers Association (PLA) in 2018 on the increasing use of umbrella funds under the administration of large asset managers, Mort raised concerns about these funds’ fiduciary duties and governance. These had to do with the fact that more than half the trustees of these funds are usually employees of the administrator, which compromises their independence and the independence of the board. The administration and management services paid for by the funds are not purchased “at arms’ length” and trustees’ oversight of costs might be compromised.

Referring to cross-subsidies and the limited number of dominant fund administration and asset management corporations, Mort also called for “complete transparency around the costs of the fund” and “a proper benchmarking of fees” to ensure that they are “competitive” with fees that could be assessed by independent parties, as well as a greater proportion of independent trustees on the boards of increasingly popular umbrella funds.

A year later, at the same conference, Naheem Essop of the FSCA’s retirement funds department criticised financial-service providers, from fund administrators to lawyers to investment managers, for charging exorbitant fees. He reminded them who ultimately paid the cost of these:

“One has to wonder, if we were more diligent about the fees we have to pay to providers, what effect would that have on our members? What effect would it have on your pensioners’ standard of living and the right to live with dignity?”

Essop’s complaint referred to the range of financial products charged to currently registered and active funds. As with many aspects of the cancellations project, the deregistered orphan funds do not feature prominently in
this discussion. It is a dirty little secret in a sector that is hooked on fees.

As the pressure ramped up, Liberty announced in February 2019 that it would waive administration fees for members with values under R800 to ensure their preservation.229 This was a tacit admission that, for years, these benefits had been eroded by fees. Nura, our source in the industry, had witnessed the tragic sight of pensioners whose benefits had been completely depleted by the fees charged to their pension funds. While the fee structure throughout the financial services sector was highly problematic, Nura added, there is something especially unfair about taking income from unpaid benefits: “You cannot justify taking this money.”230

**THE ABSENT REGULATOR**

As the registrar of pension funds and FSCA executive, Dube Tshidi has been rewarded handsomely from the public purse. In 2017/18, he had the highest base salary of any executive at a public body: R5.6 million a year. With further bonuses of R1.7 million, he was paid a total package of R7.3 million.231 This is the equivalent of R20 000 per day. A South African earning the new national minimum wage would have to work for 174 years to earn what Tshidi earned in one. Given the failure of the FSCA and Tshidi to act in the interest of indigent pensioners, it is hard to understand how parliament or the National Treasury could allow such a reward.

Since it has been confirmed that the value of assets identified as belonging to cancelled funds runs to hundreds of millions of rands, with some estimates being much higher, one would expect the regulator to insist on a full accounting of these assets. In addition, given Liberty’s admission that it provided the registrar with incorrect information that formed the basis for improper cancellations, it is reasonable to expect the FSCA to instigate some inquiry into how this occurred and whether any actor should be sanctioned.

In our PAIA submission to the FSCA in October 2018,232 Open Secrets and the South African History Archive (SAHA) asked for various reports, including the third inspection report authored by Jonathan Mort and any records related to their investigations or to sanctions imposed on administrators for their role in the cancellations project. The FS-CA’s response confirmed that there have been no internal investigations undertaken by the FSCA into the conduct of Liberty Corporate in relation to the Financial Services Board’s pensions cancellation project. The FSCA has engaged with Liberty Corporate and continues to engage with them with a view to processing the reinstatement of the retirement funds.233

Moreover, it reiterated “that the FSB/ FSCA did not undertake any investigations into the treatment of assets of funds that were deregistered; hence this information is not available.”234 Given that holding increased assets under management provides income to fund administrators in the form of asset-related fees, it appears a serious oversight that the FSCA has not thought it worthwhile to fully investigate the treatment of assets that belonged to funds cancelled incorrectly.

Thus, despite the poor conduct of companies like Liberty, the regulator has not held them to account, and particularly to their legal and court-mandated obligations to pension funds and their members. In 1999, the Labour Court explicitly upheld the dismissal of an asset manager who was dismissed for having previously used his role to personally profit from managing pension-fund investments, declaring that “a pension fund…is a financial institution upon which the financial security of thousands of people with no other resources entirely depends.”235

It is thus shameful that the conduct of corporate administrators during the cancellations project has not been subject to a thorough investigation into what was done, how it was done, and who is liable where laws have been violated. From the available evidence, it certainly seems unlikely for fund administrators to argue that the systemic errors in the cancellations project – errors that were made on the basis of their applications to the FSB – demonstrate the requisite care and diligence.
“There have been no internal investigations undertaken by the FSCA into the conduct of Liberty Corporate in relation to the Financial Services Board’s pensions cancellation project.

The FSCA has engaged with Liberty Corporate and continues to engage with them with a view to processing the reinstatement of the retirement funds.”
Alexander Forbes, like Liberty, is a powerful player in the world of South African finance, with a history dating back to 1935. Headquartered in Johannesburg, the business was listed for the first time on the Johannesburg Stock Exchange in the 1990s at a time of regional and global expansion. This included the purchase of insurance broker Nelson Hurst in the UK and new operations elsewhere in southern Africa and East Africa. South African business still accounts for 93 percent of its operating profit.

In 2018, Alexander Forbes paid R829 million in dividends to its shareholders and reported an annual operating profit of just under R1 billion. This profit comes from a wide range of financial services that includes retirement consulting, asset management, insurance and wealth management for individual and corporate clients. Like Liberty, it has a significant presence in the pension sector and is the largest retirement funds administrator in South Africa, managing over R350 billion in assets for around 1.4 million members.

Alexander Forbes has also been at the centre of several scandals associated with twenty years of fleecing pension funds and fund members.
SECRET PROFITS AND SURPLUS STRIPPING

In 2006, Alexander Forbes was exposed in the press for unlawfully scooping up ‘secret profits’ for at least a decade. The practice is a relatively simple one and involves a process known as ‘bulking’. Alexander Forbes ‘bulked’ the bank accounts of more than 1 700 retirement funds that it administered in return for higher interest rates from the bank. In theory, this should benefit the funds and their members, but Alexander Forbes took a portion of the additional interest for itself, without disclosing this to the funds. This was not lawful as it contravened the administrator’s duties of full disclosure to the funds.

Alexander Forbes first tried to rubbish the claims made by Independent Media’s Personal Finance and to browbeat the journalists who had done much of the investigation. However, the company eventually admitted fault and, after negotiations with the FSB, agreed to repay R380 million to the 1 825 funds eligible for compensation. An additional – and paltry – penalty of R12 million was paid into the FSB’s consumer education fund.

In terms of accountability, this seems a particularly light touch, since the company had carried on the practice for a full two years after their own legal advisors warned that the practice was unlawful.

Moreover, although they initially denied any wrongdoing when the scandal broke, they had already paid secret settlements to at least two pension funds that had caught them out earlier. Finally, as many funds later argued, Alexander Forbes should in fact have been required to compensate the funds for the loss of returns they would have enjoyed from investing the additional interest that they should have received.

This was not the only scandal that broke open in 2006. Peter Ghavalas of Finansbank had set up a scheme in the 1990s to strip ‘surplus assets’ from pension funds. Put simply, the surplus of a fund is the difference between what a fund owes its beneficiaries (its ‘actuarial liability’) and the actuarial value of the assets it holds. Even before the 2002 amendments to the Pension Fund Act laid down strict rules on managing surpluses, employers could not access these surpluses lawfully. It was discovered in 2006 that Ghavalas and the employers of seven pension funds conspired to help themselves to their surpluses under the cover of amalgamating the funds.

Ghavalas was eventually convicted of fraud and theft, but many other individuals and corporations were implicated, including Alexander Forbes and fellow insurance giant Sanlam. In 2008, the curator of the funds laid a R1.1 billion claim against Alexander Forbes and several senior executives faced criminal charges. Alexander Forbes’ legal strategy of trying to avoid accountability for the claims was described by the High Court as “vexatious”. In February 2010, the curator of the funds accepted a settlement of “hundreds of millions of rands” from newly appointed Alexander Forbes CEO Edward Kieswetter. The settlement did not include any admission of liability.

According to Ghavalas’ affidavit, Alexander Forbes’ role in the fraud was misleading the FSB about where the assets were going:

“Alexander Forbes actively managed, controlled and orchestrated the implementation of the bogus simulated sale of share agreement, which only served as a mechanism to remove certain cash assets from the fund.”

When the case went to the Johannesburg High Court in 2011, FSB chief executive Dube Tshidi testified that the regulator had been knowingly and fraudulently misled by the fraudsters and their facilitators, including Alexander Forbes. Alexander Forbes’ behaviour indicates a cavalier approach to compliance with the legal framework and its willingness to put profit before its duty of care to clients and pension fund members.

SECRET PROFITS AND CANCELLED FUNDS

Alexander Forbes’ ‘secret profit’ scheme also intersects with our investigation into the improper cancellation of funds. At the time of the settlement agreement in 2006, 297 of the pension funds that Alexander Forbes administered had already been cancelled. This means that the funds, and their thousands of members, were not in a position to receive...
the reimbursement of the secret profits. It is worth repeating this point. Reports about the unlawful behaviour of fund administrators speak of the funds as the parties that have been harmed. This is true – but it is always individual fund members and their families and dependants who ultimately suffer the harm.

More disturbing is that in 2008 after the settlement agreement had been reached with the FSB, and Alexander Forbes knew exactly which funds it owed, another 29 of those funds had their registrations cancelled. Alexander Forbes claim that the funds had no assets despite the fact they were still owed secret profit refunds, and so were not cancelled in error. Some of these funds were cancelled at the request of ‘authorised representatives’ and section 26 trustees.

In effect, Alexander Forbes was knowingly putting those funds into a legal position where they could not receive the pay-back of the “secret profits”. This is for the same reasons discussed above in relation to funds cancelled erroneously by Liberty. The deregistration of those funds made it impossible for those funds to carry out their lawful business.

The conduct of Alexander Forbes with regard to the mass cancellation of funds raises questions about potential violation of their legal duties. All fund administrators carry the obligations discussed previously that arise from the Pension Funds Act and the Financial Institutions (Protection of Funds) Act. Section 2 of the latter requires any “director, member, partner, official, employee or agent of a financial institution…that invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property” to always “observe the utmost good faith and exercise proper care and diligence with regard to such funds”. In 2014, violation of section 2 became a criminal offence, though this was not the case at the time of the cancellations scheme between 2007 and 2013.

The refunds that Alexander Forbes owed to individual funds range from a few hundred rands to large sums over R750 000. The total, including the hundreds of funds cancelled prior to 2007, was nearly R400 million.

These should then have been appropriately distributed to the rightful beneficiaries of those funds. In many instances, funds and fund members are still waiting.

Both Alexander Forbes and the FSB claim that they are busy working out the best way to make the repayment of secret profits. This is the same story told by Liberty and others involved in the improper cancellation of funds. It gets harder and harder to believe. Despite these alleged efforts and despite the 2006 settlement, many of the funds and beneficiaries harmed by the unlawful actions of Alexander Forbes and others have still not been paid in 2019. There is no reasonable explanation for this delay.

It still appears that the appropriate channel is to approach the courts to set aside the wrongful cancellations and thus to reinstate the funds’ registrations. Proper boards of trustees or, failing this, competent curators can then be appointed. This would allow for payments to be made, including the ‘secret profits’ refunds, and the funds can be properly and diligently wound up. Liberty did at least begin the process of reinstating funds erroneously cancelled, but Alexander Forbes publicly indicated in 2018 that it did not intend to reinstate the funds that were owed refunds, again despite its repayment being ten years late.

Even so, case law upholds the duty ‘to make good’, an even more stringent standard: where a pension fund administrator has “breached a position of trust and failed to observe the utmost good faith in administering the monies of the fund, the administrator must place the fund in the position it would have been had the breach not been committed.”
The FSCA circular in March 2019 advised that any administrator who discovers that a fund had been cancelled in error before 1 April 2018 must not only disclose fully why the error occurred but must also apply to a competent court to have the fund’s cancellation set aside. Open Secrets hoped that this would close down the wriggle room utilised by administrators. But when we followed this up with Alexander Forbes in April 2019, the company reiterated that it had no intention of reinstating these funds through the courts.

When we challenged their interpretation, they argued that none of their funds were cancelled in error because none of them had assets at the time they were cancelled. We maintained that many of the funds submitted for cancellation had claims against Alexander Forbes for repayment of secret profits and that these claims could only be considered assets.

Instead of a substantive response, we received an invitation to meet at their Sandton offices. At the meeting, senior executives told representatives of UBC and Open Secrets that Alexander Forbes’s position was firm: they had made no errors in the cancellations process. They stated that had not reached settlement agreements with the individual funds that were owed refunds until the settlement was accepted by a proper board of trustees. Thus, the funds had no assets at the time they were cancelled and so were not cancelled incorrectly.

In addition, they were seeking a more advantageous way to pay beneficiaries directly without the cost of reinstating the funds. The law does not currently allow this and so they had been lobbying Treasury to amend the law. But they could not explain how a delay of over ten years could be ‘more advantageous’ to fund members than going to court to have the funds reinstated so that they could receive their refunds and go about tracing and paying their members.

We also raised the precedent set by the FSB’s Appeal Board. In 2015, the Board considered the deregistration of the Ove Arup Pension and Provident Funds. Both were administered by Alexander Forbes and cancelled by section 26 trustees in early 2012, when they were owed repayments from the secret-profits scandal. Their cancellations were immediately set aside and their registrations reinstated. This was done explicitly to allow for repayments of secret profits to the funds so that their members could be paid out. For us, this remains the clear and lawful way to address the issue.

The Alexander Forbes representatives insisted that this is not the case.

Clearly frustrated by our questions, they tried to turn the meeting’s focus to our conduct, which they said risked “reopening closed wounds” and, by undermining trust in the pensions industry, could cause people to withdraw their savings early. There was no hint of irony in this gambit. These were representatives of one of the largest private fund administrators in the country. It has been implicated in successive scandals related to improper and unlawful conduct in their management of retirement savings. Yet the burden of lost trust fell on the shoulders of researchers and activists seeking to uncover and redress the shortcomings in the pension industry.

The way in which Alexander Forbes continues to delay the process of repaying their ‘secret profits’ shows that, while the FSCA’s circular is a step in the right direction, it is not enough to ensure that all of the issues around cancelled funds and unpaid benefits are expeditiously addressed.

Given both the importance of the financial services sector in South Africa and the history of administrative wrongdoing, what kind of regulation, supervision and enforcement do we need? And what role can citizens and civil society play to fix a broken system?
Both Alexander Forbes and the FSB claim that they are busy working out the best way to make the repayment of secret profits. This is the same story told by Liberty and others involved in the improper cancellation of funds. It gets harder and harder to believe. Despite these alleged efforts and despite the 2006 settlement, many of the funds and beneficiaries harmed by the unlawful actions of Alexander Forbes and others have still not been paid in 2019. There is no reasonable explanation for this delay.
DEALING WITH CANCELLED PENSIONS AND UNPAID BENEFITS

Following the rich vein of information provided by litigation, investigations and legal opinions, this investigation took up the problem of funds that were deregistered during the 2007–2013 cancellations project.

Yet our source in the industry has disabused us of any notion that the problem is in the past. According to Nura, most fund administrators are “continuing as ever with cancellations”. Since there has been little change in strategy and many of the staff responsible for the work “don’t understand the Pension Funds Act properly”, the same problems and errors were also likely to be continuing as ever.287 This means that pension funds with assets, liabilities, and members will continue to be incorrectly cancelled. With many fund administrators having yet to put right their mistakes from the past, it is business as usual.

The 2019 FSCA circular that directs administrators of incorrectly cancelled funds to approach the courts for their reinstatement is one important victory for accountability and a welcome and long overdue move by the regulator. This is an essential first step. Even more importantly, it requires disclosure from the administrators and an explanation of how the mistakes were made,288 which will subject their actions to public scrutiny. It is also a tacit admission that the FSCA is aware...
that administrators are making ongoing submissions to cancel funds.

However, two critical questions remain. First: who is responsible to find the errors? Every previous investigation has identified numerous cases of funds being improperly cancelled when they still had assets, liabilities and members, and many more funds have not been investigated fully. Yet the Constitutional Court concluded that there was no need for the FSCA to investigate further because “reasonably satisfactory investigations have now been conducted.”

Judging by the evidence, it seems inevitable that people will have suffered material prejudice because of the cancellations project. Without further exhaustive and independent investigation of all cancelled funds, that will remain undetected and unremedied.

Hence, the FSCA should take additional steps. It should use the extensive new powers granted in the Financial Sector Regulation Act to order fund administrators to thoroughly investigate every fund that they sent to the registrar to cancel. This should include the provision of a full financial accounting to the FSCA to show how those orphan funds and their assets have been administered. It would also be appropriate for the FSCA to have the administrators’ work audited by a fully independent and well-resourced auditor.

The second question raised by the FSCA circular is that justice requires that no one should profit from a process that has put at risk the pensions of thousands. Yet – as the Unpaid Benefits Campaign has always maintained and as discussed at length in this report – fund administrators benefit from charging a range of administration and asset-management fees to cancelled funds.

Therefore, disclosure is just part of the solution: there is no full accountability without accounting for these benefits. Any process to investigate and reinstate wrongfully cancelled funds must include investigating the profits that fund administrators and asset managers were able to derive from them. Any profits identified should be paid back, either to benefit pensioners who were prejudiced by the cancellations or to some initiative to support stronger systems of financial regulation. In fact...

There is increasing precedent for this kind of scrutiny of private companies. In the infamous case of Net1 and its subsidiary Cash Paymaster Services, which profited from an unlawful contract to distribute social grants, the Constitutional Court held that companies had “no right to benefit from an unlawful contract, and any benefit that it may derive should not be beyond public scrutiny.” Those who celebrate this judgment must also consider how these principles can be harnessed to force greater accountability from private financial-services corporations whose conduct has significant impacts on so many South African lives.
Finally, extending our view beyond the cancellations project, some common-sense changes in the world of pensions would go some way to address the problems identified in this report and introduce greater transparency and fairness. With total unpaid benefits amounting to over R40 billion owed to over 4 million people, this remains essential and urgent.

Such changes would include new regulations and tighter enforcement concerning the information that employers must submit to pension funds and administrators about their employees when they join a fund. Tracing beneficiaries would be far easier and cheaper if it was mandatory for them to supply ID numbers, addresses and contact details. As long as the costs of tracing fall on the beneficiaries rather than the administrators, this will remain a central grievance of the UBC.

Finally, asset-based fees must be eliminated for UBFs. This would ensure that the fund administrators do not profit from ever-increasing unpaid benefits accumulating under their control and management. Fees should only be charged on actual work done. Fund administrators will likely balk at this. We might therefore need to think about a national not-for-profit UBF that is effectively and transparently governed. Since it is unlikely that all beneficiaries can be traced, surplus assets will accumulate, which could be used to fund new and more effective financial-sector regulation.271

REGULATING THE FINANCIAL SECTOR - MAKING TWIN PEAKS WORK

The issues raised in this report speak to a multitude of problems in national and global financial sectors which, despite efforts to the contrary, remains opaque and difficult to understand. Banks, insurers and other financial-service companies often rely on the complexity of their world to evade public scrutiny. Those who do get caught for misconduct offer lukewarm apologies and avoid full accountability and consequences. After Denmark’s Danske Bank was identified as facilitating a multi-trillion-rand money-laundering racket in Eastern Europe, the bank decided that its staff would receive their bonuses.272 It’s hard to explain the systemic errors in the mass cancellation of pension funds, and the failure by corporations to meet their legal duties, without concluding that financial-service institutions thrive on inflated fees and the elevation of profit over people. It’s the same story the world over.

We should also remember that regulatory capture and a lack of effective oversight were significant contributors to the global financial crisis, which was precipitated by the reckless and unchecked conduct of financial institutions in advanced economies. In response to these global regulatory failures, governments have adopted a ‘twin peaks’ model that supervises corporate conduct as well as market stability. While South Africa is rightly optimistic about the establishment of the FSCA here as a dedicated market-conduct regulator, it is not yet clear that it will operate with sufficient independence and political will to rein in powerful private financial institutions.

There is no guarantee of this, as can be seen in Australia, one of the pioneers of twin-peaks regulation. Its market-conduct regulator, the Australian Securities and Investments Commission (ASIC), has been accused of failing to intervene in obvious malfeasance at several of Australia’s largest banks, including the National Australian Bank (NAB).273 At the end of 2017, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry was set up in response to widespread complaints about banking practices, in particular of charging “fees for no services”. It released its final report in February 2019.

The findings were a damning indictment of a financial sector that had blithely hauled in millions of Australian dollars in fraudulent fees since 2009. Financial advisors at Commonwealth Bank were found to have charged fees to dead clients for up to a decade.274 The NAB admitted that its employees had engaged in systematic fraud to register home and car loans in order to hit revenue targets. AMP, a financial services corporation, admitted that it had “lost count of the number of times” it had lied to the regulator about charging “fees for services that “it had no intention of providing”.275

A recurring theme in the Australian case, which echoes the concerns about the cancellations of pension funds in South Africa, is the financial corporations’ disregard both for
the interests of clients and for the regulator. An ASIC investigation of corporate financial advisors found that advisors “did not comply with the duty to act in the best interests of their clients” in 75 percent of the files reviewed – and in 10 percent, the advice given was likely to leave the customer in a “significantly worse financial position”.276

Given the evidence that financial firms will violate the boundaries of law and regulation to profit where they can, the second important theme is the influence that the corporations had on the Australian regulator. In some cases, lawyers working for the NAB would work with and advise ASIC and even examine ASIC’s public statements before they went out.277 ASIC has also been accused of not following through with prosecutions. During the royal banking commission, ASIC revealed that it was investigating 110 cases of the NAB’s failure to report breaches of conduct. Former Competition and Consumer Commissioner Allan Fels responded: “Let’s see how many translate into real action”.278 These are clear indications of ‘regulatory capture’.

These issues should be of grave concern to South Africans because of our increasing reliance on the FSCA. To ensure that the financial sector is treating customers fairly and to protect us from its rash behaviour, the FSCA must be an effective regulator of corporate conduct in the market.

Unlike the old FSB, the FSCA’s increased muscle includes a dedicated investigation and enforcement division.279 This division can proactively instigate investigations and it has doubled the number of investigators in the office. Brandon Topham, its new head, has committed to better collaboration with the National Prosecuting Authority to ensure that investigations result in prosecutions and hard accountability.280 This ambition can be seen throughout the FSCA’s strategy documents and communications and has been endorsed by senior members of Treasury.281

The compliance division has undertaken dozens of cases of market manipulation and insider trading. These include investigations into insider trading and fraud at Steinhoff under Marcus Jooste and market manipulation by Iqbal Survé’s Ayo Technologies.282 The state-owned Public Investment Corporation (PIC), which manages R2 trillion worth of investments of the Government Employees Pension Fund and is the largest institutional
investor in the country, was heavily invested in both Steinhoff and Ayo. A presidential commission of inquiry was appointed in 2018 to look into corrupt activities at the PIC and to make recommendations. Its report is due by 31 October 2019. There must be serious consequences for these individuals and firms, and the FSCA should play an important part in this process.

The FSCA is certainly signalling its intention to be more proactive, including in the pension-fund industry. In March 2019, Naheem Essop, a specialist analyst in the FSCA’s retirement funds supervision division, warned corporations that the FSCA would use its mandate to be more “proactive, pre-emptive and intrusive” in clamping down on bad conduct that denies people dignity in retirement. He also criticised trustees who did not interrogate the fees being charged by administrators, noting that this was “a total dereliction of their fiduciary duty.”

Yet these public commitments jar with what we know about the cancellations project. The FSB was clearly neither proactive nor pre-emptive in its relations with industry players and response to their errors. It was still taking legal advice and “engaged with Liberty…with a view to processing the re-announced project in 2019, ten years too late.

Further, many of the old FSB’s senior leadership remain entrenched in the transitional management structure of the FSCA. During the cancellations project, the FSB and executive members like Dube Tshidi took the corporations’ submissions at face value without further scrutiny – and have maintained that they were correct to do so. This kind of passive cooperation is a large reason for the mistakes that were made and why they continued for so long. In the same vein:

It is disturbing that the FSCA is still under a transitional management team. Although the minister of finance should have appointed a permanent commissioner in April 2018, the post is still vacant. In April 2019, Open Secrets wrote to the minister to express our concern at this delay, and to emphasise that public interest demands an urgent and transparent appointment process. Despite assurances from his office, the minister has not responded to this letter or to the three subsequent follow-up letters. We are concerned that the Treasury is not sufficiently attentive to the integral role of market conduct regulation in the financial sector.

South Africans will believe the FSCA’s commitment to intrusive regulation when we see corporate executives in court and their companies forced to return the proceeds of their unlawful activity. Its performance in the first few years will indicate whether the twinpeaks approach will work. Whistle-blowers and civil society activists must keep up the pressure on companies to act fairly and lawfully – and on the FSCA to make sure they do.
As readers will no doubt have noticed, this report draws extensively on documents that are in the public domain only because of the courage of whistle-blowers. From the moment of discovery, Rosemary Hunter did all she could to slow the cancellations project so that mistakes could be identified and rectified. Her legal battle to make the FSB thoroughly investigate exactly what happened in the project took her to the highest court in the land. This not only generated an extensive court record, but it also forced the regulator and fund administrators to put their documents and justifications on the public record. It is largely due to Hunter’s continued pressure that Liberty finally approached the courts to reinstate funds in 2017, which has also shed new light on the cancellations project.

Nonetheless, when Hunter’s three-year contract as the deputy registrar of pension funds was due to expire, the FSB board declined to recommend its renewal to the minister of finance. For his part, the minister was content to leave the position of vacant for more than a year rather than keep Hunter in place. Someone demonstrates deep integrity and determination to hold powerful corporations, the regulatory institution and her seniors to account, and is pushed out of her job. This is the experience of many seasoned and principled public employees who attempt to hold the line at key institutions of accountability.

Within the private sector, Michelle Mitchley blew the whistle about Liberty’s serious mistakes in the cancellations project, also at great personal cost. After she was dismissed by Liberty, she struggled to find employment in the financial services industry. For financial corporations, apparently, employees who expose wrongdoing are risks rather than assets. Despite several years of hardship, Mitchley says, “I would still do it again if I faced the same choice.”

The struggles of Rosemary and Michelle and the Unpaid Benefits Campaign (UBC) have become intertwined. The UBC, a coalition of organisations and pension fund members, is at the forefront of challenging fund administrators to pay beneficiaries and working for reform in the pensions industry to ensure greater justice for pensioners. Where the regulator has been silent, the UBC has demanded action. For example, the FSB failed to put pressure on Alexander Forbes for ten years but, in October 2018, UBC activists and pensioners went to their Sandton headquarters to demand a formal commitment that they would trace pensioners and pay them their due. The UBC’s presence was definitely felt.

Open Secrets has also undertaken this investigation and related advocacy work in order to expose the scandal within the cancellations project and to ground a movement for greater accountability from the corporations and the regulator.

While the state lags behind, it falls increasingly to courageous individuals and civil society organisations to demand accountability. Civil society needs to redouble its efforts to support and protect these whistle-blowers. Without them, the erosion of capacity and will within the state continues, crippling any effort to supervise and regulate the actions of powerful private individuals and corporations. Yet, as we work to empower the state to fulfil its obligations, the discrepancy of our resources and power cannot be ignored. Ongoing popular and material support are necessary.
South Africans will believe the FSCA’s commitment to intrusive regulation when we see corporate executives in court and their companies forced to return the proceeds of their unlawful activity. Its performance in the first few years will indicate whether the twinpeaks approach will work. Whistle-blowers and civil society activists must keep up the pressure on companies to act fairly and lawfully – and on the FSCA to make sure they do.
CONCLUSION

This report opened with portraits of a few individual families who are living in poverty and struggling to access the pension benefits that are owed to them. We then investigated the complex story of dormant ‘orphan’ pension funds and the mass cancellations project that improperly shut down funds that still contained assets, liabilities and members. This included the stories of the whistle-blowers who tried to intervene; the unresponsive regulator and its connections to private fund administrators; the role of two of these companies; and the malfeasance of various financial-services providers and compromised regulators elsewhere in the world. After what has been a largely technical and legalistic exercise, we return to the raw social issues facing South African pensioners and their families.

The issue of pensions in South Africa is first and foremost about dignity and giving substance to the right to dignity that is enshrined in the Constitution. The individual stories of pensioners and their long struggles to access benefits illuminate the dire human consequences of unpaid benefits. As is true for many poor South Africans, they have been used, abused and discarded by corporate employers. In the past, this was done with the direct assistance of the apartheid regime. Now many also feel abandoned by the democratic government.
Bennet Vavi, one of the ex-mineworkers we spoke to, compares their neglect to the relatively better benefits received by military veterans of the struggle. But former mineworkers, he says, are the veterans of the South African economy: “We built this country with our hands.” He added they should be “shareholders” in this country, not cast out to the margins. Given the pivotal role of mining in the modern South African economy, Bennet’s words ring true. The elderly poor who built this country should be justly compensated and afforded a dignified retirement.

This is not only true for ex-mineworkers but all South African workers. This is the meaning of the struggle for unpaid benefits. After whatever injuries they sustained as workers, the final injustice is to then be denied the benefits that are due to them from the pension schemes they were required to pay into throughout their working lives.

There is no single simple explanation for this failure. The private fund administrators, the employers and the regulators have apparently failed collectively to build transparent and accountable structures for the management of pension funds. Instead, a system of perverse incentives flourishes. The enormous profit generated by and for financial-services corporations seems to weight the balance in their favour and against the interests of pension fund members and the protection they are owed by the state regulator. The need for sweeping reform is obvious and urgent.

We end this report with one more story of a family’s struggle to claim benefits.
MOSALA THOMAS MALOKOTSA

Born in 1962 in Brakpan, an old gold-and-uranium mining town on the East Rand, Mosala Thomas Malokotsa has doggedly tried to track the benefits owed to his uncle and father. His struggle has turned him into a leader in the collective struggle of the UBC. Thomas now lives with his wife and three children in KwaThema, a township southwest of Springs. We met Thomas as a member of the UBC steering committee but asked him to tell us his story, too.

Thomas’s family is originally from Lesotho. His father, Edwin Khanyapa Malokotsa, and his paternal uncle, Clement Lesole Malokotsa, were among the many migrant labourers who came to South Africa to work on the gold mines. Much of Thomas’s struggle has been to track down and access the benefits owed to his father and uncle.

Thomas grew up in a family of seven children: four girls and three boys. The family was happy and united. He describes his parents as strict, mentioning that they all attended church every Sunday. They ate lunch and dinner together every day and travelled together to spend their December holidays with his grandparents in Lesotho.

After matriculating in 1982, Thomas started work as a packer at Carlton Paper. The company, which later became Kimberly Clark South Africa after it was bought by a US corporation, manufactures and distributes a range of consumer products. It has a large facility in Springs. Through the company’s educational reimbursement scheme, Thomas earned a supervisory management-studies certificate. He moved up the organisation quickly, being promoted first to a machine-operator before becoming become a shift supervisor and then an employee-development officer after completing a diploma in production and operations management. He left Carlton Paper in 1996.

Thomas’s father Edwin was born on 1 October 1924 in Lesotho. He worked in the mining industry for 27 years. From 1948, he was a clerical supervisor and sports coordinator, first at the Simmer and Jack Gold Mine in Germiston, and then, from 1961 to 1975, at the Vlakfontein Gold Mine. According to Thomas, his father contributed to the Mines Bantu Provident Fund. Edwin tried to secure pension benefits after he left the mines, but he was sent from the Chamber of Mines (now the South African Mining Council) to TEBA and back again. TEBA has expanded since its early days as a labour recruiter for the mines and is now involved in broader health and financial services in the mining sector. It retains a huge amount of data on individuals that is essential to address the issues of unpaid benefits.
When Edwin passed away in 1985, he had received nothing. His family, led by Thomas, has taken up the fight. Although they do not have his payslips, they have his ID, passport and death certificate and were able to obtain other work records - for a fee - from TEBA. Thomas believes that the question of payment is not a simple matter of belonging to a pension fund. His father not only contributed to the pension fund, Thomas argues, he also contributed to the creation of wealth in the South African economy and should therefore be compensated for his service.

Thomas’s uncle Clement was born in Lesotho on 2 August 1941. He became a mineworker in 1961, starting at the Simmer and Jack gold mine where his brother Edwin worked. Clement went on to work at the Venterpost and West Driefontein gold mines and then at Northam Platinum. He was at Northam from 1989 until his retirement in 2005. In total, he gave 44 years of service to the South African mining industry. Clement kept more complete records of his pension fund contributions. These show that he was at various stages paying into the Mines Officials Pension Fund and the Mines Bantu Provident Fund. Through his work for Northam Platinum, he was a member of the Gold Fields Provident Fund, which included a death benefit scheme. This is confirmed in a letter to Clement from a Northam Platinum manager in 1989. Despite all of this, Thomas says, Clement has never received any benefits in terms of a pension fund, provident fund or long-service scheme.

Clement and Thomas have engaged with the employers, pension fund administrators and the FSB for more than ten years to attain their benefits, with no success. Thomas has put a lot of time into his correspondence corresponding with Alexander Forbes, TEBA and Gold Fields Limited Pension/ Provident Fund. Clement corresponded with the Gold Fields Ltd Pension/Provident Fund, the Sentinel Retirement Fund and the GFG Provident Fund and all of them denied having his records.

Since Clement moved back to Lesotho in 2005, Thomas has taken up the cause of trying to get his uncle’s benefits paid. In 2014, Thomas wrote to the FSB’s unclaimed benefits manager, Takalani Lukhaimane, about unclaimed pension/provident fund benefits. Thomas believes that his father and his uncle are among the people owed these benefits.

To date, neither Edwin nor Clement has received any pension fund benefits for their decades of service to the mines. The failure to pay benefits has prevented Thomas from finishing his education and brought other unnecessary hardships to his family. As he wrote in a letter to the FSB, “It is the battle we have experienced as the family for decades on behalf of our father.”

Thomas knows how common his family’s experience is. This is what keeps him on the steering committee of the Ekurhuleni branch of the UBC, organising and encouraging others to fight for their unpaid benefits. He says that the UBC’s work is so important because it raises awareness of the whole range of issues in the pensions industry – from the cancellations project to impriopriety by the fund administrators to the role of the FSCA and their relations with powerful industry players, and beyond. His central concern is how their conduct contributes to the hardship of vulnerable pensioners and beneficiaries.

Thomas is encouraged by the growing support in civil society. Collective organising gives the UBC the capacity to share information and intensify the call for payment of unpaid benefits. He says this will only come when the FSCA is pressed to stop rubber-stamping what the industry wants and become a true watchdog in the public interest.

Whistle-blowers and activists still have to demand accountability where it is lacking. And those who have benefitted for years from these unpaid benefits funds and cancelled pensions will have to pay back their ill-gotten profits...
That is the bottom line
NOTES:

1. In the Pension Funds Act, the definition of ‘pension fund’ includes pension funds, provident funds, retirement annuity funds, preservation funds, unclaimed benefits funds and beneficiary funds (funds holding and paying out shares of benefits allocated to minor children of deceased pension fund members).


5. The history of migrant labour in Southern Africa, particularly during apartheid, means that many beneficiaries no longer live in South Africa.


8. Email from Tienie Kotze - CEO of Liberty Corporate – to Open Secrets, 18 October 2018.

9. For example, since David Munro took over as Liberty Holdings CEO in 2017, and under significant public pressure from civil society groups including UBC and Open Secrets, Liberty has accelerated tracing and paying members of its Unclaimed Benefits Fund in 2018/2019.

10. Email correspondence from the FSCA to Open Secrets, 28 January 2019.

11. Headline earnings are only those profits or losses stemming from operations or investments, and don’t include factors such as the sale or purchase of assets, write-downs or changes in number of employees.


13. The first two profiles here are derived from interviews with members of the ex-mineworkers forum in the Western Cape, by three researchers working at Open Secrets. These took place over several days in May 2019.

14. For example, since David Munro took over as Liberty Holdings CEO in 2017, and under significant public pressure from civil society groups including UBC and Open Secrets, Liberty has accelerated tracing and paying members of its Unclaimed Benefits Fund in 2018/2019.

15. In the Pension Funds Act, the definition of ‘pension fund’ includes pension funds, provident funds, retirement annuity funds, preservation funds, unclaimed benefits funds and beneficiary funds (funds holding and paying out shares of benefits allocated to minor children of deceased pension fund members).


17. ‘TEBA plans new labour empire’, City Press, 7 September 2014.


20. Sakhele Buhlungu and Andries Bezuidenhout, ‘Decline of miners’ compounds: what does this mean?’, In the Workplace, Volume 33, No. 1, April/May 2009.

21. The interview with Bellemina was conducted as part of a second series of interviews with members of the Unpaid Benefits Campaign in Gauteng. The interviews were conducted at a high school in KwaThema, Springs, where members of UBC from the area meet weekly. Thomas Malokotsa and Peter Maleka had helped arrange for more than 15 members of UBC to speak with Open Secrets. The interview with Bellemina was undertaken with a translator.


25. Ibid.

26. For Hunter’s account of her experiences after blowing the whistle: see Rosemary Hunter, ‘There are two sides to the pension cancellation story’, Business Day, 3 October 2018.


30. Interview with Michelle Mitchley, 24 July 2018, Sandton.

31. Ibid.

32. Ibid.


34. The GEPP, which is created by statute and not governed in the same way as private funds, will not be discussed in detail in this report.


63: Manamela, Tukishi Elias (2015), ‘South Africa’s Occupa-


67: Ibid.

68: ‘Pension Markets in Focus’ (2018), Organisation for Eco-
nomic Co-operation and Development (OECD), pp 7-8.

69: ‘Comprehensive Social Security in South Africa, Inter-De-
partmental Task Team on Social Security and Retirement Reform, Discussion Document, March 2012.

70: Or at least compulsory for all within a certain category of employees.

71: Manamela, Tukishi Elias (2015), ‘South Africa’s Occupa-


78: 2017 Annual Report, Registrar of Pension Funds Annual Report, pg. 11.


84: Excluding the Government Employees Pension Fund, the Transnet funds, the Telkom Pension Fund, the Post Office Retirement Fund and a few others.

85: Mostert NO v Old Mutual Life Assurance Co (SA) Ltd 2001 (4) SA 159 (SCA).

86: Rebecca Davis, ’J. Arthur Brown: Fraudster reaches cell-by-
date’, Daily Maverick, 2 December 2014.


88: Section 2 of The Financial Institutions (Protection of Funds Act).

89: Section 13B(5) of the Pension Funds Act 24 of 1956.

90: This legislative requirement reflects the ‘duty of loyalty’ that is also found in South Africa’s common law: a fiduciary must act in good faith and not put themselves in a position where their duty to the principal conflicts with his or her own interests. A fiduciary relationship is any relationship where one party (the principal) confers on another (the fiduciary) the power to act and make decisions that affect the former’s interests. This power is usually conferred on the fiduciary because the principal does not have the necessary skill, expertise or knowledge to exercise it itself. The relationship between a pension fund and its administrator is typical of a fiduciary relationship. In the case at hand, fund administrators like Liberty, as well as board members and trustees of pension funds, have a clear fiduciary duty to the pension fund to always act in good faith and take the utmost care to act in the interests of the fund.

91: Section 3 of the Pension Funds Act 24 of 1956. The Registrar is appointed by the Minister of Finance.

92: Section 3 of the Pension Funds Act 24 of 1956.

93: Financial Services Board & another v De Wet (in his ca-
pacity as liquidator of the Pepkor Pension Fund) & others (2002) 4 BPLR 3259 (C).

94: Ibid.

95: These requirements are found in various sections of the Pension Funds Act of 1956 and will be discussed in greater detail below.

96: ‘Dube Tshidi to head FSB’, Fin24, 04 April 2008. Tshidi started as a junior analyst and later held the positions of Deputy Executive Officer (DEO): Retirement Funds and Deputy Registrar of Pension Funds and then, from 2006 to 2008, DEO: Investment Institutions and Deputy Registrar of Capital Markets and Collective Investment Schemes. In 2008 he was appointed Executive Officer of the FSB and thus automatically became Registrar of Capital Markets, Collective Investment Schemes, Financial Services, Friendly Societies, Insurance and Pension Funds.


98: Jonathan Mort, First Inspection Report, Submitted to FSB, 7 June 2016.


100: Section 7A of the Pension Funds Act 24 of 1956.

101: Hunter v Financial Services Board and Others (3725/16)


105: Submission from Jurgen Boyd to Justice O’Regan, 30 October 2014.

106: Ibid.

107: Rosemary Hunter Founding Affidavit in Hunter v FSB and Others, 17 January 2016, North Gauteng High Court, at para 8.35.3.

108: Section 27 of the Pension Funds Act 24 of 1956.


110: Circulars P126 and P127.


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[2018] ZACC 31, para 42.

[2018] ZACC 31, para 47.

Hunter v Financial Sector Conduct Authority and Others [2018] ZACC 31, para 125.

Hunter v Financial Sector Conduct Authority and Others [2018] ZACC 31, para 68.

Hunter v Financial Sector Conduct Authority and Others [2018] ZACC 31, para 89.

Laura du Preez, ‘Liberty trying to trace members of funds closed in error’, Times Live, 4 August 2018.

Email from Open Secrets to Liberty, 10 October 2018.

Email from Liberty to Open Secrets, 18 October 2018.

Laura du Preez, ‘Liberty trying to trace members of funds closed in error’, Times Live, 4 August 2018.

Legal opinion of Rosemary Hunter, Whether the Financial Sector Conduct Authority or the Financial Services Tribunal has the power to reinstate the registration of a fund after its unlawful cancellation during the course of the FSB’s pension funds cancellations project, 19 October 2018.

Section 299 of the Financial Sector Regulation Act 9 of 2017.

Email from Olano Makhubela, Divisional Executive of Retirement Funds Supervision at the FSCA, to Open Secrets, 28 January 2019.

Email from Open Secrets to Liberty, 13 November 2018.

Email from Liberty to Open Secrets, 20 November 2018.

Email from Open Secrets to Liberty, 27 November 2016.

Email from Liberty to Open Secrets, 29 November 2018.

PFA Circular No.1 of 2019, ‘Applications Already Submitted to the Authority for the Cancellation of Registration Funds in terms of Section 27(1) And the Reinstatement of Deregistered Funds’, Financial Sector Conduct Authority, 5 March 2019.

[2018] ZACC 31, para 89.

[2018] ZACC 31, para 125.


[2018] ZACC 31, para 68.

[2018] ZACC 31, para 89.

[2018] ZACC 31, para 45.
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