CASE NO. A 265/96

THE RoSSING PENSION FUND

versus

B.H. LYNERS
N. VAN VUUREN
P. ROOI

In the matter between

B.HH. LYNERS
N VAN VUUREN
P. ROOI

versus

THE RoSSING PENSION FUND
RoSSING URANIUM LTD

HANNAH. J.

1996/11/20

PENSIONS:

All assets of a pension fund vest in that fund. The ownership of, or a right to a surplus usually only becomes an issue when the fund is wound up. IN that eventuality it is extremely doubtful whether the member and beneficiaries have any legal right to any surplus. On the amalgamation in the instant cause the assets and surplus transferred to the amalgamated fund and the member have no claim on the surplus.

CASE NO. A 265/95

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE RoSSING PENSION FUND — **APPLICANT**

versus

B H LYNERS — **FIRST RESPONDENT**

N VAN VUUREN — **SECOND RESPONDENT**

P ROOI — **THIRD RESPONDENT**

In the matter between

B H LYNERS — **FIRST APPLICANT** in Counter Application

N VAN VUUREN — **SECOND APPLICANT** in Counter Application

P ROOI — **THIRD APPLICANT** in Counter Application

versus

THE RoSSING PENSION FUND — **FIRST RESPONDENT** in Counter Application

RoSSING URANIUM LTD — **SECOND RESPONDENT** in Counter Application

CORAM: HANNAH, J.

Heard on: **1996/10/28**

Delivered on: **1996/ll/20**

JUDGMENT

HANNAH, J.: The applicant is a pension fund registered in terms of the provisions of the Pension Funds Act, 24 of 1956. On 1st September, 1994 another pension fund, namely the Rossing External Pension Fund ("REPF") which was registered under the same Act in South Africa, amalgamated with the applicant. In this application the applicant seeks an order declaring that neither the respondents nor any erstwhile member of REPF:

(a) had any claim to any portion of the assets of or actuarial surplus in REPF prior to its amalgamation with the applicant; or

(b) has any claim against the applicant after the amalgamation and arising from the transfer of the assets and liabilities of REPF to the applicant. The respondents not only oppose the grant of such an order but they make a counter-application in which they seek the following relief:

(1) An order declaring a certain amendment to rule 42 of the rules of REPF and/or the amalgamation of REPF with the applicant to be an unfair labour practice.

(2) An order setting aside

(i) the amendment of rule 42 of the rules of REPF;

(ii) the amalgamation of REPF with the applicant.

(3) An order declaring that a certain dispute within the ambit of the rules of REPF existed at the time of the amalgamation of the two pension funds and that the existence of such dispute precluded the amalgamation until such time as the dispute had been resolved within the framework of REPF's rules and

(4) An order directing the applicant and Rossing Uranium Ltd, which company was joined as a respondent to the counter-application,

(i) to restore the status quo ante in respect of REPF as it was before the amalgamation; and to deal with the dispute in question within the framework of REPF's rules.

The background to the application and counter-application is as follows. The applicant was established with effect from 1st August, 1975 to provide pension and other benefits to permanent employees of Rossing Uranium Ltd (Rossing), a public liability company incorporated in Namibia. The applicant is a defined benefit pension fund. With effect from 1st September, 1984 a second pension fund known as Rossing South African Pension Fund was established in terms of an agreement concluded on 20th August, 1984 between Carveth Geach, Solon Trust (Pty) Ltd and Rossing. Its name was changed to Rossing External Pension Fund on 28th August,

1989. REPF was formed to provide pension and other benefits to employees of Rossing at a time when considerable uncertainty existed as to the political future of Namibia and when fears were expressed that after the independence of Namibia difficulties might be experienced in obtaining payment of pension benefits to members who had left Namibia to reside elsewhere. In order to ensure the continued employment of the many South African citizens employed by Rossing it was decided to register a pension fund controlled in the Republic of South Africa in which country benefits would be payable. REPF was registered in South Africa under the provisions of the Pension Funds Act, 24 of 1956, and had its registered office in Johannesburg. REPF was also a defined benefit pension fund and pension benefits accruing to members were in all respects identical to those accruing to members of the applicant.

Subsequent to the independence of Namibia on 21st March, 1990 the Registrar of Pension Funds for Namibia assumed responsibility for the applicant as a Namibian pension fund whilst the Registrar of Pension Funds for the Republic of South Africa retained responsibility for REPF as a South African fund.

As it happened, the fears which had given rise to the creation of REPF were not realised and it became obvious to Rossing that there was no need to maintain two separate pension funds for its employees. Also the Registrar of Pension Funds for Namibia as well as the income tax authorities had indicated that various taxation benefits

available to employers and employees would not be extended to contributors to, or persons receiving benefits from, a South African pension fund. Rossing accordingly suggested to the committee of management of both the applicant and REPF that consideration be given to the amalgamation of the two pension funds and to transfer the business of REPF to the applicant.

At this point it is convenient to set out those parts of the rules of REPF which are material to this application. Rule 6 provided:

> "The Fund shall be administered by the Trustees, in accordance with these Rules."

Rule 7(a) provided:

> "There shall be appointed a Committee of Management whose function shall be:
>
> (i) to carry out such duties on behalf of the Trustees as the Trustees authorise the Committee to do.
>
> (ii) to make recommendations to the Trustees on any matter concerning the Fund: Provided however that the Trustees shall not be bound to act upon any such recommendation."

The remainder of rule 7 dealt with the constitution of the committee of management. It consisted of six members of whom three were appointed by Rossing and three were elected by the members of the fund. The trustees in fact delegated its powers of administration of the fund to the committee of management.

Turning now to rule 42(c) this provided:

> "Notwithstanding any provision to the contrary contained in these Rules and subject to the provisions of Section 14 of the Act, the Trustees shall, if the Company decides to replace this Fund by another pension scheme for its Employees, terminate the Fund and calculate the proportionate share of each Member in the Fund as set out in Rule 42(a) and then apply each Member's share to acquire benefits in such scheme; or, if this is not possible, to purchase from a registered insurance Company fully paid-up annuities on the lives of the Members concerned, which annuities shall become payable as from the dates the Members would have reached Retirement Age had the Fund not been terminated."

The rules, as is customary, provided for amendments t

made. Rule 45 provided:

> " (a) The Trustees may, on the recommendation of the Committee or for any other reason, and subject to Rule 45(b) hereunder, make such new Rules or alter or rescind any existing Rules as they may decide.
>
> (b) Notwithstanding anything to the contrary contained in these Rules any addition to or amendment of these Rules shall be submitted to the Registrar for approval in accordance with the Act. Copies of all amendments or additions to these Rules shall be sent to the Inland Revenue Authorities of the Republic of South Africa and of Namibia."

It is unnecessary to set out the remainder of Rule 45

Rule 46 is of some relevance. This provided:

> "Any dispute which may arise in regard to the interpretation or application of these Rules shall be decided by the Trustees after consultation with the Actuary and the Trustees' decision shall be final: Provided that if any party to such dispute is dissatisfied with the decision, the Trustees may by agreement with such party refer the dispute to arbitration by an independent Actuary."

The respondents contend that Rossing had an ulterior motive for suggesting the amalgamation of the two pension funds. There was an actuarial surplus in REPF of N$72 420 000.00 and the respondents contend that Rossing made the suggestion in order to get access to this surplus. There can, in fact, be no real substance in this contention because the surplus belonged to REPF itself and with an amalgamation would belong to the applicant. All Rossing could do was to continue a contribution holiday which had commenced for both Rossing and the members of the two funds on 1st January, 1993 but nothing much turns on that in this case.

Following the suggestion that the two funds be amalgamated various discussions took place and on 20th June, 1994 the committee of management of REPF met to consider the matter. Present at the meeting was a quorum of members and the settlor of Solon Trust (Pty) Ltd, Carveth Geach, in his capacity as trustee and representative of the trust. The committee resolved that the rules of REPF be amended subject to the approval of the Actuary, the Registrar of Pension Funds and the trustees so as to provide for the amalgamation of REPF with the applicant, the transfer to the applicant of certain interests in REPF and certain ancillary matters. The payment of the balance of the assets of REPF was then to be transferred to the applicant. The amalgamation was to take place on 1st September, 1994 and from the date of amalgamation REPF would cease to exist and the interests of all members, pensioners and beneficiaries of REPF would, on that date, be transferred to the applicant. Thereafter, all such persons would be entitled to benefits from the

applicant. The amendment was to be effected by adding a new subrule (f) to rule 42.

On 21st June, 1994 the committee of management of the applicant also met and it was resolved that the rules of the applicant be likewise amended subject to the approval of the Actuary and the Registrar of Pension Funds with effect from 1st September, 1994 so as to permit the amalgamation of REPF with the applicant and to accept all members, pensioners and beneficiaries of REPF as members of the applicant.

All consents and approvals required to give effect to the resolutions were granted and the amendments to the respective rules were effected and registered with the Registrars of Pension Funds in South Africa and in Namibia. The amalgamation duly took place on 1st September, 1994 and the relevant certificate in terms of section 14(1) (e) of the Pension Funds Act, 1956 was issued by the Registrar of Pension Funds for Namibia on 7th September, 1994 and by the Registrar of Pension Funds for South Africa on 31st January, 1995. The actuarial surplus transferred to the applicant as at 1st September, 1994 in pursuance of the amalgamation was in the region of N$100 000 000.

Prior to the amendments to the rules being effected Rossing arranged for seminars to be held to enable members of REPF to be advised as to their rights and options arising from the amalgamation of the two funds and during one of these seminars certain members of REPF formed a committee of their own which became known as, and to which I shall refer as,

the ad hoc committee. The three members of this committee are the three respondents to this application. This committee organised a petition and by letter dated 27th July, 1994 addressed to the chairman of the committee of management of REPF raised certain objections to the proposed amalgamation. Various discussions then took place and then by letter dated 1st August, 1994 the ad hoc committee informed the chairman of the committee of management for REPF that in general everyone seen was happy with the options but required answers to a number of questions. Other correspondence emanated from the ad hoc committee and by letter dated 9th August, 1994 the secretary to REPF wrote a reply to the letter dated 1st August. Earlier in 1994 all members of REPF had been given an option form which they were requested to complete specifying how their actuarial interest in REPF should be dealt with on amalgamation. In the letter dated 9th August, 1994 the secretary to REPF stated, inter alia, that the date by which options were to be exercised had been extended by one week to 19th August, 1994 and the letter continued:

> "As was stated by the Chairman to you at the meeting, it is not the company's intention to ride rough shod over the rights of members, and we bona fide believed that the Committee's decision to amalgamate the REPF with the RPF met with the approval of the majority of the members of the REPF. If we were wrong in our assessment of the position we are quite prepared to revoke the decision, annul the rule change, and restore the status quo.
>
> Accordingly if the number of option forms not returned or returned with no option expressed as at 19 August exceeds 50% of the total active and disability membership, then the issue will be referred back to the Committee of Management with a view to determining whether or not to proceed with the amalgamation of the two funds."

Further correspondence ensued and on 24th August the ad hoc committee wrote as follows to the secretary to REPF:

> "During a communication meeting held with the petitioners and other members of the REPF on 23 August 1994 in the Swakopmund Town Hall the following resolution was unanimously adopted.
>
> The said members are not in agreement with your interpretation of Rule 42 with regard to surplus and herewith register a dispute under Rule 46 of the REPF rules."

The interpretation of Rule 42 to which reference is made is set out in the letter dated 9th August, 1994, namely that the Fund has a duty to protect the rights and reasonable benefit expectations of its members and that this duty is satisfied provided that the Fund offers alternative benefits at least equal to the previous benefits under the Fund's rules.

The secretary to REPF wrote to the ad hoc committee on the same day as the dispute was registered asking for their written submission to the trustees so that the dispute could be referred to the trustees in terms of rule 46. Then on 13th October, 1994, some six weeks after the amalgamation had taken place, the erstwhile chairman of REPF received a letter from attorneys acting for members of REPF stating that the dispute submission was being prepared by counsel and reserving the members' rights flowing from the dissolution of the previous fund. Following this letter there were requests by the ad hoc committee for certain financial statements and then by letter dated 10th April, 1995 the ad hoc committee again declared a dispute in terms

of the rules of REPF and made the following submissions:

> "1. That the proportioning of assets of the REPF should take place according to the provisions of Rule 42(a) as referred to in Rule 42(c).
>
> 2. We dispute the basis on which the Registrar of Pensions granted his approval.
>
> 3. We dispute the company's ability to use the contribution holiday approach.
>
> 4. We dispute the adherence to the Rules by the Committee of Management.
>
> 5. That we make a case for reimbursement of costs and expenses incurred, related to or directly flowing from efforts to resolve this dispute."

Various meetings of the committee of management of the applicant took place after receipt of the letter dated 10th April, 1995 with a view to determining how the dispute should be resolved and the committee began preparing a submission to arbitration under rule 46 of the rules of the REPF. However, the chairman of the committee expressed reservations as to whether or not the matter could proceed as REPF had been amalgamated with the applicant and the trustees appeared to be functus officio. And in any event any arbitral award would be unenforceable as REPF was no longer possessed of any assets following their transfer to the applicant. Legal opinion was sought and on 17th July, 1995 the committee of management of the applicant resolved that the present application be brought.

Before considering the merits of the application and counter-application I will deal briefly with three points in limine raised on behalf of the respondents. It was

submitted that not only the erstwhile members of REPF should have been joined as parties to the application but so should the Registrar of Pension Funds for Namibia and the Registrar of Pension Funds for South Africa. The other point was that the applicant has no locus standi in that prior to amalgamation it was a separate legal entity from REPF with no interest in that fund.

Mr Loxton, on behalf of the applicant, complained that the point that erstwhile members of REPF were not joined had not been raised on the papers and, assuming there to be merit in the point, the applicant had therefore been deprived of the opportunity of rectifying the matter. In any event, said Mr Loxton, the respondents claim in their replying affidavit to represent 82.25% of the erstwhile members. However, as a practical solution Mr Loxton suggested that the prayer for relief be amended by limiting the reference to "any erstwhile member of the Rossing External Pension Fund" to "those members of the Rossing External Pension Fund who are represented by the respondents in this application" and Mr Pelser, for the respondents, conceded that such an amendment would not only meet the point raised but that it could not be objected to. The prayer will accordingly be amended.

As for the non-joinder of Registrar of Pension Funds for Namibia and the Registrar of Pension Funds for South Africa, Mr Loxton submitted that the relief sought does not affect either Registrar at all. Both are creatures of statute and the powers of both stem from the statute creating them. Once they have registered a change of rules and issued

certificates in terms of section 14 of the Pension Funds Act, 1956 they become functus officio. I agree with this submission and find no merit in the point advanced on behalf of the respondents. As the locus standae point was abandoned by Mr Pelser that disposes of the points in limine.

It is convenient to deal first with the counter-application and then with the merits of the main application. The relief sought in the first prayer of the counter-application, namely an order declaring the amendment to rule 42 of the REPF and/or the amalgamation of REPF with the applicant to be an unfair labour practice, was abandoned by Mr Pelser so it is unnecessary to say anything further about that. The relief sought in the remaining prayers was aptly described by Mr Loxton as an unscrambling of eggs. What the respondents seek is an order declaring that a dispute existed at the time of the amalgamation of the two funds firstly as to whether the amendment of rule 42 should be proceeded with and secondly as to whether rule 42(f) complied with section 14(1)(c)(i) of the Pension Funds Act, 1956. Then, assuming such an order is granted, the respondents seek a further order declaring that the existence of such a dispute precluded the amalgamation until such time as the dispute had been resolved. And on the basis of this order they seek to have the amendment which was affected to rule 42 and the amalgamation which followed thereupon set aside, the status quo ante restored and an order that the dispute be dealt with in accordance with the rules of REPF. The relief sought therefore depends

essentially on the existence of a dispute as to whether the amendment to rule 42 should be proceeded with and as to whether rule 42(f) complied with section 14(1)(c)(i) of the Act. I say essentially because there is a subsidiary question whether the dispute procedure set out in rule 46 even encompasses an amendment made to the rules.

Mr Pelser argued that when the whole background to the matter is considered it becomes clear that what concerned the respondents and those they represented was not just the interpretation of rule 42 and the interest of the members of REPF in the actuarial surplus but the loss of that interest as a result of the amendment to rule 42 which brought about the amalgamation. When determining this matter counsel invited the Court to look behind the words actually used when the dispute was declared. With all due respect I can see no justification for doing so. The only dispute declared prior to the amalgamation was expressed to be a dispute concerning the interpretation of rule 42 with regard to the surplus and that dispute clearly did not extend to the amendment of rule 42 by the insertion of rule 42(f) . It was viewed in that way by the secretary to REPF who wrote in his letter dated 24th August, 1994 to the ad hoc committee:

> "I acknowledge receipt of your memorandum of 24th August, 1994 declaring a dispute in respect of the interpretation of the Committee of Management as to the vesting of the actuarial surplus of the Rossing Pension Fund."

and the ad hoc committee, if in fact it saw the ambit of the dispute differently, did not seek to correct him as it

should have done. It was only much later on 10th April, 1995 that the ad hoc committee sought to enlarge the scope of the dispute. By that time it was much too late. The amendment had been effected and the amalgamation had taken place. The non-determination of the dispute declared by the ad hoc committee prior to the amalgamation did not preclude the amalgamation taking place.

Although it is not strictly necessary to decide the matter I entertain, in any event, strong doubts whether the dispute procedure set out in rule 46 encompassed a dispute as to whether an amendment to the rules should be made. The rule was expressed to apply to any dispute:

> ". . . . which may arise in regard to the interpretation or application of. . . ."

the rules. The meaning which I consider should be given to "application" in this context is "put into practical operation" (Shorter Oxford Dictionary 3rd Ed.) and that, in my view, does not embrace an amendment to the rules. I am reinforced in this view by the fact that rule 46 provided for the trustees to decide the dispute. As it was the trustees who were empowered to make amendments to the rules they would be judges in their own cause if they were required to decide a dispute as to whether an amendment should be made or not.

As already indicated, the further relief sought by the respondents is dependent on a favourable finding with regard to prayer 2. In amending rule 42 so as to effect the

amalgamation with the applicant REPF followed all proper procedures and obtained all requisite authorisation. The members of the fund had elected representatives on the committee of management and if they were dissatisfied with the conduct of those representatives and the decisions and recommendations they were party to they could have had them removed from office and replaced with representatives in whom they had more confidence. They took no such step and in the event were bound by the conduct of their elected representatives. In my view, it is not now open to the respondents to challenge the decision of the committee of management to approve the amendment of rule 42.

A further point taken by Mr Loxton, and a point which in my view has substance, concerns the question of jurisdiction. The amendment of rule 42 was approved by the Registrar of Pension Funds in South Africa, as it had to be in terms of section 12(2) of the Pension Funds Act, 1956, and was registered by the Registrar pursuant to section 12(4) of that Act. In order for the amendment to be set aside the decision of the Registrar in South Africa to approve it and to register it would also have to be set aside and this Court, of course, has no jurisdiction over the Registrar in South Africa.

The same goes for the actual amalgamation of REPF which the respondents seek to have set aside. REPF was registered in South Africa and section 14 of the Pension Funds Act, 1956 provides that no transaction involving the amalgamation of any business carried on by a registered fund with any

business carried on by any other person shall be of any force or effect unless the Registrar has certified that various requirements have been satisfied. The Registrar in South Africa did so certify and in attacking the regularity of the amalgamation the respondents are attacking the decision of the Registrar.

In my judgment the respondents are not entitled to the relief sought in the counter-application and that application must be dismissed with costs.

Coming now to the main application, that application has been brought in order to resolve the dispute whether the respondents, and other erstwhile members of REPF represented by the respondents, had any claim to any portion of the assets of, or actuarial surplus in, REPF prior to its amalgamation with the applicant or have any claim against the applicant after the amalgamation and arising from the transfer of the assets and liabilities of REPF to the applicant. The matter can, in my view, be disposed of quite briefly.

In terms of the rules of REPF its members were entitled to defined benefits upon the happening of defined events. They had no rights to benefits other than those described by the rules or conferred by the Pension Funds Act, 1956. Section 5(1)(b) of the Act provides:

> "(1) Upon the registration under this Act -
>
> (b) of a fund which is a pension fund organisation in terms of paragraph (b)

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

It is clear from this section that all assets of a pension fund vest in that fund.

In the case of REPF there was in 1994 a substantial actuarial surplus. This, of course, could be used to improve benefits to members or, as in fact happened, to provide a contribution holiday. The ownership of, or a right to, a surplus usually only becomes an issue when the employer ceases to carry on business. And so one finds rule 42(a) providing that in such an eventuality the liquidator of the fund must realise the assets and apportion the proceeds amongst the members, pensioners and beneficiaries on an equitable basis recommended by the actuary and approved by the trustees and by Rossing and use the amount available for each member to purchase an annuity. However, whether the members and beneficiaries have any legal right to a surplus in the fund in such circumstances is extremely doubtful. As was said by Jones, J. in Sauls v Ford South Africa Pension Fund and Others. Case no. 1878/87 SECLD

(Unreported):

> "I would add that I am by no means satisfied that, even where the Fund is to be liquidated on one of the grounds mentioned in rule 45(a), the applicant could require the liquidator to distribute to its members any surplus which might become available on liquidation. There is no provision in the rule for this. Apart, once again, from being a violation of the liquidator's discretion, it seems to me that members and beneficiaries have no legal right to such a surplus in this sort of fund, which is established and underwritten by the employer, and which confers defined benefits upon its beneficiaries. See In re Imperial Foods Limited's Pension Scheme (1986) 2 All ER 802 and Re Courage Group's Pension Schemes, Ryan & Others v Imperial Brewing and Leisure Limited and Others (1987) 1 All ER 528."

In the present case, of course, the respondents cannot even rely on any claim they may have had under rule 42(a) or (c) because the amalgamation of REPF with the applicant took place in accordance with the new rule 42(f) and in terms of section 14 of the Pension Funds Act, 1956 which applied both in South Africa and in Namibia. The requirements of the Act were met and, as already pointed out, both the South African and Namibian Registers registered the amendment and duly approved the amalgamation and transfer. Section 14(2) of the Act provides:

> "(2) Whenever a scheme for any transaction referred to in sub-section (1) [and this includes an amalgamation] has come into force in accordance with the provisions of this section, the relevant assets and liabilities of the bodies so amalgamated shall respectively vest in and become binding upon the resultant body, or as the case may be, the relevant assets and liabilities of the body transferring its assets and liabilities or any portion thereof shall respectively vest in and become binding upon the body to which they are to be transferred."

It is clear, therefore, that unless and until the amalgamation of REPF with the applicant and the transfer by REPF of its assets and liabilities to the applicant pursuant to the provisions of section 14 is set aside only REPF had any claim on its assets, including any surplus, prior to the amalgamation and transfer and only the applicant has any claim on the combined assets, including any surplus, after the amalgamation and transfer. It must follow that the respondents and any other erstwhile members of REPF had no claim to the assets of, or surplus in, REPF prior to the amalgamation nor do they have any claim to such assets or surplus after the amalgamation. The order prayed for in the main application will therefore be granted but as the applicant does not seek an order for costs in the main application there will be no order as to costs.

In the result the following orders are made:

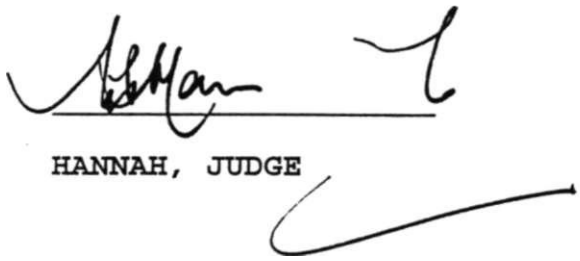
1) It is declared that neither the respondents nor those former members of the Rossing External Pension Fund (in liquidation) who are represented by the respondents in this application:

   (a) had any claim to any portion of the assets of or actuarial surplus in the said Fund prior to its amalgamation with the applicant;

   (b) has any claim against the applicant after the aforesaid amalgamation and arising from the transfer of the assets and liabilities of the

Rossing External Pension Fund to the applicant;

(c) The counter-application is dismissed with costs including the costs of two counsel.



HANNAH, JUDGE

ON BEHALF OF THE APPLICANT:	MR LOXTON
Instructed by:	Lorentz & Bone
ON BEHALF OF THE RESPONDENTS:	MR PELSER
Instructed by:	P F Koep & Co