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Please quote our reference: PFA/GA/7143/2006/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“The Act”): N MNYANDA (“complainant”) v SAGE GROUP PENSION FUND (“first respondent”) AND ABSA TRUST LIMITED (“second respondent”)**

1.0. Introduction

- 1.1 The complaint concerns the mode of payment of a death benefit that was allocated to the complainant’s son by the first respondent.
- 1.2 The complaint was received by this office on 1 February 2006. A letter acknowledging receipt of the complaint was sent on 7 February 2006. On the same date a letter was dispatched to the first respondent, giving it until 28 February 2006 to file a response to the complaint. A letter was also dispatched to the first respondent’s administrator, Momentum Group Limited (“Momentum”), but they advised that administration of the first respondent had moved to Lekana Employee Benefits (Pty) Limited (“the administrator”). Momentum sent a response on 28 February 2006. The administrator’s response was received on 28 November 2006. The second respondent was joined as a party to these proceedings in terms of section 30G(d) of the Act and they sent a response, which was forwarded to the complainant, on 21 August 2007. Replies from the complainant were received on 13 March 2006 and 28 April 2006.
- 1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

## 2.0 Factual Background

- 2.1 Mr. C.V.C. Mnyanda (“the deceased”) was employed by the erstwhile Sage Life Limited and by virtue of his employment was a member of the first respondent. The deceased passed away on 3 August 2004, whereafter the first respondent became liable to pay a death benefit to his dependants.
- 2.2 The trustees of the first respondent conducted an investigation and established that the deceased had two dependants, viz. his sons Neo Mnyanda (“Neo”), born on 26 June 1980, and Brian Mvunyiswa (“Brian”), born on 16 June 1988. Brian is the son of the complainant. The deceased had also completed a beneficiary nomination form on 28 August 2002 in which he nominated his two sons to receive 25% each of any death benefit payable by the first respondent.
- 2.3 The gross death benefit amounted to R365 332.01. The trustees decided to allocate 80% of the benefit to Brian and 20% to Neo. Brian’s benefit was placed in trust with the second respondent so that it would provide for his living and educational expenses for the rest of his life because he is mentally impaired. The complainant, as Brian’s guardian, receives monthly payments from the second respondent. Neo, who was a major when the deceased passed away, had his benefit placed in a call account in his name because he was in prison at the time the distribution was made.
- 2.4 The second respondent advised that, up to their response in August 2007, they paid Brian’s monthly maintenance amount of R900 to the complainant. Up to date they have also disbursed further amounts totaling R13 165 to the complainant in respect of Brian’s clothing, transport and tuition fees.

## 3.0 Complaint

- 3.1 The complainant does not dispute the allocation of the death benefit to the deceased’s two sons. She does however complain about the trustees’ decision to place Brian’s benefit in a trust with the second respondent rather than pay the money to her so that she, as Brian’s guardian, could use it as she sees fit. She alleges that the deceased still owed approximately R82 000 on the mortgage bond on their house, which she now has to service, but which could have been paid off using part of Brian’s benefit. Further, she required the cash to pay for Brian’s maintenance since she has been paying for his needs since the deceased passed away. The complainant submitted to the first respondent that she needs at least R133 000 to settle the mortgage bond and pay other debts incurred over the last sixteen months. Thereafter she requires R3 003 per month in respect of Brian’s living expenses.

#### 4.0 Responses

- 4.1 The first response was received from Momentum, the previous administrator of the first respondent. They confirmed the deceased's membership of the first respondent and the fact that the trustees resolved on 28 November 2005 to distribute the death benefit as described in paragraph 2.3 *supra*. Momentum further submitted that the complaint related to payment of amounts out of trusts rather than a pension fund. Since trusts are not pension funds as defined in the Act, this tribunal does not have jurisdiction to adjudicate the complaint.
- 4.2 Lekana, the present administrator of the first respondent, also submitted a response to the complaint. They advised that the trustees of the first respondent conducted a thorough investigation prior to deciding on payment of the death benefit in this case. Following therefrom, it was clear from the deceased's beneficiary nomination form that that he intended his two sons to share in the death benefit, even though the allocated percentages did not add up to 100%.
- 4.3 It is alleged that the trustees considered that their first duty was to protect the long-term interests of the minor child, Brian, who is disabled. At the relevant time Brian was living at the Hamlet Foundation Institution. The deceased's elder son, Neo, was in prison at the time.
- 4.4 The trustees were also concerned about the conflicting information they received. The deceased did not name a wife on his beneficiary nomination form, neither was there mention of a wife on his personnel record and information obtained from the Department of Home Affairs indicated that he was single. The complainant obtained a customary union marriage certificate more than eleven months after the deceased's death. The deceased's family disputed that the complainant was the deceased's spouse or that he lived with her. The trustees received an affidavit from the deceased's mother to the effect that he had been living with his parents until he moved to live with his girlfriend, Ms. T.P. Chibwe, who also confirmed this in an affidavit. The deceased apparently moved back to his parents' home when he became seriously ill. Considering the conflicting versions, it was difficult to determine where the deceased lived, and with whom, at the time of his death.
- 4.5 The trustees considered that Brian's interests would best be protected by providing him with 80% of the death benefit, which would be put into trust with the second respondent as it is managed by independent trustees. Neo, who is a major, was allocated 20% of the benefit, which was held in a call account in his name until his release from prison.

- 4.6 Lekana advised that the trust pays R900 per month to the complainant, who is Brian's mother and guardian. The trust is a lifetime trust due to Brian's disablement. Any capital payments have to be requested in writing for consideration by the trustees of the second respondent. The first respondent's resolution regarding the payment of the death benefit reads as follows:

"That the lump sum payment be paid as follows:-

Neo was 24 at the date of his father's death and Brian was 16. In addition Brian has learning difficulties which could make it difficult for him to get work in the future. In view of the ages of the two dependants, Brian's learning problems and their fathers (*sic*) wish for them both to benefit it is recommended that the benefit be paid as follows:

20% to Neo to be placed in a call account in his name until he comes out of prison.

80% to be paced (*sic*) in a trust for Brian for his living and educational expenses. For the meantime amounts from the trust will be paid to his mother as his guardian."

- 4.7 The second respondent also responded to the complaint. They advised that First National Bank Home Loans confirmed that the property will be transferred into the complainant's name, the current outstanding mortgage bond amount is R79 400.20 and the bond installments are paid up to date. The second respondent avers that although the complainant requires the trust monies to settle the bond, Brian will have no assurance that he will receive any benefit from this transaction. For example, the house could be sold in future, it could be rented out or it could be attached due to any unpaid debts. Further, the trustees are of the opinion that the complainant inherited the fixed property from the deceased's estate, therefore it is her responsibility to pay off the bond and maintain the property. The second respondent also found that the complainant has two other children from two other relationships who are also residing in the house.
- 4.8 The second respondent further avers that the trustees have a responsibility towards Brian due to his "ill/retarded condition." Therefore the monies in trust, which is Brian's only source of income for his survival, should be utilised wisely to make provision for his general wellbeing, support and maintenance because he will never be able to provide for himself. The second respondent confirms the payments made to date as contained in paragraph 2.4. *supra* and avers that the complainant can use the trust as a tool to assist her financially with Brian's schooling, medical and personal expenses, subject to her providing the necessary proof to the trustees.

## 5.0 Determination and reasons therefor

### *Point in limine*

- 5.1 Momentum averred in its response that the complaint relates to payments out of a trust, i.e. the second respondent. Since the second respondent is not a pension fund organisation as defined in section 1 of the Act, this tribunal does not have jurisdiction to adjudicate the complaint.
- 5.2 The complainant's complaint is that Brian's benefit from the first respondent should have been paid to her so that she could manage and control it as his mother and guardian. Therefore, the complaint relates to the decision of the first respondent's trustees in this regard rather than merely the subsequent payment of monies from the second respondent. Since the complaint relates to a decision of the trustees regarding the administration of the first respondent and the investment of its funds, and alleges that the complainant has suffered prejudice as a result of an improper exercise of powers or maladministration of the first respondent, it constitutes a valid complaint in terms of the definition in section 1 of the Act. Therefore, Momentum's preliminary point is dismissed.

### *The merits*

- 5.3 The crisp issue for determination in this complaint is whether the first respondent ought reasonably to have paid the benefit allocated to Brian to the complainant rather than placing it in trust with the second respondent.
- 5.4 This complaint is distinguishable from the matter of *Moralo v Holcim South Africa Provident Fund and Another* (PFA/GA/5400/ 2005/ ZC) because it does not involve payment to a minor and it deals with the rights of a child with a disability. The options available to trustees with regard to payment of benefits to minors, such as Brian, was summarised in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) ("*Ramanyelo*") at paragraph [13] as follows:

"In summary, when paying a benefit to a minor child, the board essentially has three options. That is, it may effect payment to the guardian of the minor or it may establish a trust, wherefrom a monthly income is paid to the guardian (section 37C(2)) or it may hold the moneys in the fund's portfolios and effect an instalment payment to the guardian (section 37C(3))."

- 5.5 Further, in the *Ramanyelo* judgment this tribunal went on to summarise the factors to be considered by the trustees when determining whether a

guardian, such as the complainant, should administer monies on behalf of the minor child. The factors are as follows (*Ramanyelo* at paragraph [16]):

- The amount of the benefit;
- The ability of the guardian to administer the moneys;
- The qualifications (or lack thereof) of the guardian to administer the moneys; and
- The benefit should be utilised in such a manner that it can provide for the minor until he or she attains the age of majority.

5.6 It is common cause that the trustees of the first respondent allocated 80% of the death benefit, which totalled R365 332.01, to Brian as one of the dependants of the deceased. Thus, the benefit is not for the complainant's benefit and wellbeing, but rather for that of Brian. It is also common cause that Brian suffers from a mental disability, which means that his employment prospects are limited and he requires financial support for his entire life. Prior to the lodging of the complaint the complainant had made several requests to the first respondent for money. This included requests for approximately R82 000 so that the mortgage bond on the fixed property could be settled, R60 000 "cash relief" so that the complainant could pay off debts incurred over the past sixteen months, and R3 000 per month for Brian's monthly living expenses. The trustees refused these requests and resolved to place Brian's benefit in trust instead of paying it to the complainant.

5.7 The second respondent has averred, correctly in the view of this tribunal, that the fixed property does not belong to Brian but rather is that of the complainant's. There is no certainty that the complainant will not sell the house, or rent it out, or that it could be sold in execution if substantial debts are incurred by the complainant in future. Thus, there is grave danger that a substantial portion of Brian's benefit could be used for a property that does not even belong to him and his benefit could be used for the benefit of the complainant without her even paying for anything.

5.8 Further, the complainant, who is Brian's parent and natural guardian, owes a duty of care towards Brian which is entirely separate from any duty of support the first respondent may have. Therefore, the complainant cannot completely abrogate her responsibility to take care of Brian to the first respondent. It appears from the correspondence the complainant sent to the first respondent that she expects the first respondent to solely provide for Brian's needs, while her responsibility towards Brian is minimised. This cannot be the case.

5.9 The complainant also requested that the first respondent pay her R60 000 of Brian's benefit as "cash relief" for debts incurred over the past sixteen months. No proper substantiation for these debts was provided to

the trustees and there is no reason to believe that the entire debt was incurred solely in respect of Brian's maintenance. Again, the benefit was meant to be for Brian, not the complainant or anyone else for that matter. Brian's benefit amounts to 80% of R365 332.01, which is a gross amount of R292 265.60 before tax was deducted. If the complainant had paid the mortgage bond and used a further R60 000 to pay off debts, there would be a maximum of R150 265 remaining. The complainant stated in her correspondence to the first respondent that she needed a further R3 000 per month to ostensibly take care of Brian's needs. At this rate Brian's entire remaining benefit would be depleted within five years. As mentioned previously, Brian requires financial support for the rest of his life. It is evident from the requests the complainant made to the first respondent before lodging this complaint that if she controlled Brian's benefit it would be depleted within a few years.

5.10 Since the benefit must reasonably be utilised to provide for Brian's needs over as long a period as he will require support, it is clear from the foregoing that the complainant is not in the best position to ensure this and that the money could have been used for improper purposes. In the circumstances, the trustees were correct to place Brian's benefit in trust with the second respondent so that his reasonable maintenance needs can be provided for as long a period as possible.

#### 6.0. Relief

6.1 The complaint against the respondents cannot succeed and is therefore dismissed.

Dated at Johannesburg on this the                      day of                      2008

Yours faithfully

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**Mamodupi Mohlala**  
**Pension Funds Adjudicator**