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Please quote our reference: PFA/GA/5229/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 1956 (“THE ACT”) – M E H SMITH (“the complainant”) v MM RETIREMENT ANNUITY FUND (“the first respondent”) AND MOMENTUM GROUP LIMITED (“the second respondent”)**

1. Introduction

- 1.1 The complaint concerns the distribution of a death benefit by the fund. It was submitted on 5 September 2005. On 27 September 2005 a letter was sent to the first respondent’s administrator, Momentum Group Limited (second respondent), giving it until 18 October 2005 to respond to the complaint. Responses, which were also forwarded to you, were received on 5 October 2005, 12 October 2006 and 13 November 2006. Your replies were received on 24 October 2005 and 14 May 2007.
- 1.2 After considering the submissions it is found to be unnecessary to hold a hearing in this matter. The facts are known to the parties so they will not be repeated here, save for those facts which have a bearing on the outcome of this determination.
- 1.3 The determination and reasons therefor appear below.

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M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrobbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

## 2. Factual background

2.1 The complainant is the ex-spouse of Mr. D.J. Smith (“the deceased”), whom he divorced in August 1980. On 1 October 1999 the deceased incepted a retirement annuity fund policy with the first respondent and he nominated the complainant as a beneficiary in the event of his passing away. At the time of his death the deceased was married to Mrs. M.C. Smith and they had a minor son, D.A. Smith, who was born on 24 February 1988. After the deceased passed away the first respondent became liable to pay a death benefit, in the sum of R31 614.35. The trustees decided to award the whole amount to the minor child, care of Mrs. M.C. Smith in her capacity as guardian of their minor child.

## 3. Complaint

3.1 The complainant alleges that she was nominated to receive the death benefit from the first respondent, but the trustees incorrectly decided to pay the entire benefit of R31 614.35 to the deceased’s wife for the benefit of their minor child.

## 4. Response

4.1 The administrator as well as the principal officer of the first respondent responded to the complaint. They confirmed that the deceased was a member of the first respondent and that a death benefit became payable to his beneficiaries after his death. They confirmed that there was a maintenance order in terms whereof the deceased had to pay the complainant R400 per month, but the complainant confirmed this was never paid because it was not maintenance *per se* but rather compensation for the fact that the complainant worked during the subsistence of the marriage to the deceased. The complainant and the deceased were divorced in August 1980.

4.2 The trustees established that there were 2 dependants, namely the deceased’s wife Mrs. M.C. Smith and their son, D.A. Smith. The child resides with and is cared for by his mother and she works as a waitress relying on tips for income. The complainant was not financially dependent on the deceased as at the date of his death even though there was a maintenance order in her favour emanating from the divorce, which the complainant confirmed had never been paid by the deceased and was in fact intended to be compensation for the 24 years that the complainant worked while married to him. The complainant however receives a monthly pension from Sanlam amounting to R5 919.51.

4.3 The trustees of the first respondent decided that the sum of R31 614.35

was insufficient to provide for the dependants as well as the complainant as the nominated beneficiary. Therefore, they exercised their discretion and awarded the entire benefit to D.A. Smith, who was 13 years old when the deceased passed away. The amount was paid to Mrs. M.C. Smith in her capacity as legal guardian of the minor. The first respondent avers that if any maintenance was due to the complainant this should be claimed from the deceased's estate rather than from the first respondent.

- 4.4 Following submission of your complaint the matter was again deliberated by the first respondent's trustees. The trustees decided to abide by their original decision.

## 5. Determination and reasons therefor

- 5.1 The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a "dependant" in section 1. The primary purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. It is the board's responsibility when dealing with payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit allocated.
- 5.2 In order for the board to ensure that it makes an equitable distribution of the benefit, they will normally undertake an investigation to determine potential dependants. It must then decide on a distribution of the death benefit after the deceased's dependants have been identified. In the present matter the deceased had nominated the complainant in his nomination form, but in terms of the definition of a "dependant" in section 1 of the Act the complainant is in fact a legal dependant of the deceased in terms of sub-paragraph (a), even though the complaint readily admits that the maintenance order the court had made was in fact compensation for the complainant having worked for the 24 years that your marriage subsisted rather than maintenance in the true sense of the word. Therefore, since you are a legal dependant in terms of paragraph (a) of the definition of "dependant" in section 1 of the Act rather than a nominee, sub-section 37C(1)(a), and not sub-section 37C(1)(bA), is applicable to the present distribution. I refer to the case of *Nieuwenhuizen v SAB Staff Provident Fund and Another* [2000] 12 BPLR 1413 (PFA) at paragraph 21, where it is stated that:

"Section 37C(1)(a) deals with the distribution amongst dependants and section 37C(1)(b) deals with the distribution in the event of there being a nominee and no dependants. This provision contemplates the designation of nominees by members, but such nominees are specifically required not to be a dependant of

the member. In the light of this clear distinction drawn by the legislature, it is not possible for any one person to qualify as a dependant and a nominee. The Complainant but virtue of qualifying as a dependant does not qualify as a nominee.”

5.3 Sub-section 37C(1)(a) reads as follows:

“If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants.”

5.4 In deciding on an equitable distribution among the dependants the board’s duty in this regard was cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent of dependency;
- the wishes of the deceased placed either in the nomination and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.5 The board conducted a proper investigation in this case and identified all the potential beneficiaries, i.e. the complainant, the minor child and the deceased’s wife. I am also of the view that it had at its disposal all the relevant facts pertaining to the potential beneficiaries, as discussed in paragraph 4.2 and 4.3 above, and it properly exercised its mind when considering them. Thus, it is evident from these paragraphs that the board considered each potential beneficiary’s financial position, the deceased’s election on his nomination form, the amount of the benefit, their respective relationships with the deceased, their ages and the extent of dependency on the deceased. The board is vested with a discretionary power to decide on an equitable distribution of the death benefit. It is trite law that only in instances where the functionary has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be reviewed.

5.6 After considering the information presented it is clear that the board has acted reasonably and properly in making the distribution, has taken into account all the relevant factors, and has not taken into consideration any

irrelevant factors, as is evident from paragraphs 4.2 and 4.3 above. Therefore, no legal grounds exist for me to alter its decision in regard to the distribution of the lump sum death benefit that was paid.

- 5.7 It should also be clear by now that the fact that the complainant was nominated to receive the deceased's death benefit is insufficient reason to overturn the board's decision to exclude the complainant from the final distribution (see *Koekemoer v Macsteel Group Retirement Plan and Others* [2004] 2 BPLR 5465 (PFA) at paragraph 22). In fact, the board considered a range of factors, as alluded to in the *Sithole* case quoted in paragraph 5.4 above. Section 37C places emphasis on the financial dependency of the deceased's dependants as opposed to only considering his wishes as stated in the beneficiary nomination form. This is confirmed in the High Court judgment of Hussain J in the case of *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706B where he states that:

"Section 37 of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support...[The] fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of a nomination form are there merely as a guide to the trustees in the exercise of their discretion."

- 5.8 The complainant confirms in her complaint that she never received any maintenance payments from the deceased and that, in any event, it was never meant to be maintenance but rather compensation for the 24 years she worked while she was married to him. The board considered these factors and concluded that there was a relatively small benefit to distribute and the deceased's minor child was financially dependant on the deceased when he was alive whereas the complainant was not, therefore, the child benefited from the final distribution. There appears to be no reason to interfere with their conclusion.
- 5.9 In the result, the complaint cannot succeed and as such the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2007

Yours faithfully

**MAMODUPI MOHLALA  
PENSION FUNDS ADJUDICATOR**