



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/NP/4855/05/NS

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SM KGAGARA (Late MF KGAGARA) v SACWU NATIONAL PROVIDENT FUND (“the fund”) / OLD MUTUAL TRUST LIMITED (Formerly known as “SYFRETS TRUST LIMITED”) (“the trust”)

Introduction

- [1] Your complaint concerns the payment of a death benefit in terms of section 37C of the Act. You challenge the mode of payment selected by the fund, which entailed paying your minor children’s benefits into trust.
- [2] The complaint was received by this office on 12 August 2005, and a letter acknowledging receipt thereof was sent to you on 19 August 2005. On 18 August 2005 a letter was dispatched to the respondents requesting them to submit a response to the complaint by no later than 8 September 2005. The response of the trust dated 16 September 2005 was received on the same day. No response was received from the fund. A copy of the trust’s response was sent to you on 19 October 2005 for a reply by 16 December 2006. No reply was received from you.
- [3] After considering all the written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor are set out below.

The complaint

- [4] You are aggrieved by the decision of the fund to place the benefits of your

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (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 Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

minor children into trust. You allege that the trust does not generate sufficient monthly interest to cover their daily needs. Furthermore, you contend that the placing of the benefits into trust was done without your knowledge and therefore without your consent. You accordingly request an order directing the fund to effect direct payment to you of the minor children's respective portions in your capacity of natural guardian.

The response

- [5] The trust states that the benefits were paid over to it by the fund to administer the trust for the benefit of the minor children until the youngest child attained the age of 21 years. At such time the capital remaining would be paid to you.
- [6] The trust states further that it did not interact with you with regard to the allocation of the pension fund benefits into trust. It contends that these functions were performed by the fund and consequently it is not in a position to respond to the allegations made by you.

Determination and reasons therefor

- [7] Section 37C of the Act imposes three important duties on the board of management of any pension fund organization. First, it needs to identify the nominees and the dependants (with reference to section 1 of the Act) of the deceased member. Hereafter, it needs to effect a distribution of the benefit amongst the beneficiaries with reference to the four subsections outlined in section 37C(1). The final task of the board is to determine an appropriate mode of payment.
- [8] Subsections 37C(2), (3) and (4) of the Act regulate the different modes of payment and read:

“(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act No 57 of 1988), for the benefit of a dependent or nominee contemplated in this section shall be deemed to be a payment to such dependent or nominee.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such accounts as the board may from time to time consider appropriate and in the best interests of such dependent or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine. Provided further that any balance owing to such a dependent or nominee at the date on which he or she attains majority or dies,

whichever occurs first, shall be paid in full.

- (4) (a) Any benefit dealt with in terms this section, payable to a major dependent or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that –
- (i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and
 - (ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.
- (b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependent or nominee in full.”

- [9] Section 37C (Act 24 of 1956) essentially provides for four methods of payment. The first, direct payment to the beneficiary, is governed by section 37C(1) and the four scenarios contained therein. Sections 37C(2), (3) and (4), in turn, provide an alternative to direct payment to a beneficiary.
- [10] When paying a benefit to a minor, the benefit is normally paid to the guardian of the minor. However, section 37C(2) provides that such a benefit may be paid to a trustee contemplated in the Trust Property Control Act 57 of 1988, and payment into trust shall constitute payment to a dependent or nominee.
- [11] When paying a benefit to a minor child, the board essentially has three options. 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 installment payment to the guardian (section 37C(3)). On a plain reading of the relevant subsections, it is apparent that, before the board considers an alternative mode of payment, there must be good reason in law and fact as to why the option of direct payment should not be followed.
- [12] There have been very few reported cases dealing with the circumstances under which a guardian should be deprived of the right to administer moneys on behalf of his or her minor child. However, in *Van Rij NO v Employers’ Liability Assurance Corporation Ltd 1964 (4) SA 737 (W)*, the mother of a minor child had been appointed as *curator ad litem* as the whereabouts of the father were unknown. The then Supreme Court made a damages award in favour of the minor child but the Court was not satisfied that the guardian was competent to handle the moneys on behalf of the minor. Accordingly, it appointed a trust company to handle the proceeds on behalf of the minor child, until he attained the age of 21

years. Trollip J made the following remarks (at 738):

“As Clark is still a minor the proceeds of the award presumably would ordinarily be paid to his guardian for administration on his behalf, but the whereabouts of his father are unknown, and apparently his mother, who was appointed and acted as his *curator-ad-litem* in these proceedings, has not been appointed his guardian. In any event, it is quite clear that for various reasons neither she nor Clark is qualified or competent to administer the proceeds of this litigation, and that if legally possible the Court should make some other order for the proper care and administration thereof, at least during his minority.”

- [13] Thus the approach of the Court was that, since the guardian was not competent or qualified to administer the proceeds of the award, the benefit was placed with a trust company. This approach of determining when to deprive a guardian of the right to administer monies on behalf of a minor child was approved by the Appellate Division in *Woji v Santam Insurance Co Ltd 1981 (1) SA 1020 (A)* where Diemont JA on behalf of the full bench commented as follows (at 1031A) :

“It is probable that the mother (guardian) is neither competent nor qualified to administer the proceeds of this litigation and, as the sum awarded is considerable, it is desirable that an order be made for the proper care and administration of this money, at least during the minority of the child (see *Van Rij NO v Employers' Liability Assurance Corporation Ltd 1964 (4) SA 737 (W)*.”

See also *Southern Insurance Association Ltd v Bailey NO 1984 (1) SA 98 (A)* at 120.

- [14] From the above cases it appears as if the factors to be considered by the board in determining whether a guardian should administer moneys on behalf of his or her minor child may be summarised as follows:

- [14.1] the amount of the benefit;
- [14.2] the ability of the guardian to administer the moneys;
- [14.3] the qualification (or lack thereof) of the guardian to administer the moneys; and
- [14.4] the benefit should be utilized in such a manner that it can provide for the minor until he or she attains the age of majority.

- [15] In the instant case, the board has failed to advance any valid reasons for its decision to deprive you of your right to administer monies on behalf of your children. It appears from the undisputed evidence in your complaint that no investigation was made by the fund into your circumstances or suitability for administering the monies. There seems, instead, to be a default position that any benefit payable to a minor is simply placed into trust without further ado. The board appears to have fettered its discretion by following a rigid policy that takes no account of your personal circumstances or of the prevailing situation. The interests of justice are best served by remitting the matter to the board of management for a

