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Please quote our reference: **PFA/GA/9863/2012/CMS**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): M MALONGETE AND 175 OTHERS (“complainants”) v AUGUST LAPPLE RETIREMENT FUND (“first respondent”); NMG UMBRELLA PENSION FUND (“second respondent”); ABSA CONSULTANTS AND ACTUARIES (PTY) LTD (“third respondent”) AND NMG CONSULTANTS AND ACTUARIES ADMINISTRATORS (“fourth respondent”)**

[1] **INTRODUCTION**

- 1.1 The complaint concerns the constitution of the board of trustees of the first respondent when transferring the complainants’ fund values from the first respondent to the second respondent and the dissolution of the first respondent.
- 1.2 The complaint was received by this Tribunal on 24 January 2012. A letter acknowledging receipt thereof was sent to the complainants on 27 January 2012. On the same date, a letter was sent to the fourth respondent requesting a response by no later than 27 February 2012. A response was received from the fourth respondent on 9 February 2012. On 10 February 2012, a letter was sent to the

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complainants requesting a reply by no later than 24 February 2012. A reply was received from the complainants on 2 March 2012. Further submissions were received from the complainants on 6 June 2012 and 14 November 2012. On 13 September 2012, a letter was sent to the third respondent requesting a response by no later than 15 October 2012. A response dated 19 October 2012, was received from the third respondent. No further submissions were received from the parties.

- 1.3 This matter was referred to conciliation on 18 October 2012 in order to afford the parties an opportunity to settle it. Some of the issues which formed the complaint were resolved and the others remained unresolved. Therefore, some of the unresolved issues were referred to adjudication. These issues are addressed below.
- 1.4 After considering the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and its reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainants are the employees of MA Automative Rosslyn (Pty) Ltd ("the employer") and by virtue of their employment became members of the first respondent from various dates. On 31 August 2010, the Financial Services Board ("FSB") approved the registration of a special rule allowing the transfer of the members' fund values in the first respondent to the second respondent. The application for the transfer in terms of section 14 of the Act is yet to be finalised by the FSB. With effect from 1 December 2009, the complainants commenced contributing to the second respondent. The third respondent is the administrator of the first respondent. The fourth respondent is the administrator of the second respondent.

**[3] COMPLAINT**

3.1 The complainants are of the view that when the board of trustees of the first respondent resolved to transfer their fund values to the second respondent on 1 December 2009, the board of trustees was not properly constituted in terms of the rules of the first respondent and the Act. The complainants want the dissolution of the first respondent in terms of rule 12.12 and the payment of their fund values or transfer thereof to retirement funds of their choice.

**[4] RESPONSES***Third respondent's response*

4.1 The third respondent filed a response in its capacity as the administrator of the first respondent. It has failed to address the complainants' outstanding issues. It advised that the necessary section 14 application documents were lodged with the FSB in terms of section 15B of the Act on 2 August 2012, however, the application could not be processed due to the pending surplus apportionment scheme. On 1 October 2012, it received enquiries from the FSB pertaining to the surplus apportionment scheme and it is currently addressing the enquiries.

*Fourth respondent's response**Point in limine*

4.2 The fourth respondent filed a response in its capacity as the administrator of the second respondent and a consultant to the

employer. It raised a point *in limine* that the complainants have not been mandated or authorised to lodge the complaint. Therefore, the complaint is defective as the complainants have no *locus standi* and as such the matter is not properly before this Tribunal.

#### *Ad merits*

- 4.3 The fourth respondent submits that the first respondent's board of trustees is properly constituted in terms of the Act and its rules. The transfer documents of the first respondent were signed by the chairperson, principal officer, trustee and actuary of the first respondent. The date of the complainants' participation in the second respondent was 1 December 2009 when contributions to the first respondent ceased and then paid directly into the second respondent's bank account. The complainants' contributions are now being paid to the second respondent and the first respondent is to be deregistered once the transfer in terms of section 14 of the Act has been approved and completed.
- 4.4 The complainants were informed of the transfer decision by way of printed correspondence and presentations delivered at various employer locations. Annual presentations are also provided to the complainants in March each year during which investment feedback is provided and the structure of the second respondent is discussed. During the monthly surplus apportionment meetings, the duly appointed employee/member representatives are included in the decision making process. There was full member representation for the first respondent and for the management committee of the second respondent. The second respondent further states that pending the approval of the transfer, all assets in the first respondent remain invested according to the investment strategy adopted by the first respondent and all contributions paid to the second respondent are

invested in accordance with the investment strategy adopted by the second respondent.

## [5] **DETERMINATION AND REASONS THEREFOR**

### *Introduction*

5.1 The issues for determination are whether or not the board of trustees of the first respondent was properly constituted when it resolved to transfer the complainants' fund values to the second respondent with effect from 1 December 2009 and whether or not the first respondent should be dissolved and the complainants be paid their fund values. The fourth respondent raised a point *in limine* that the complainants have no mandate and authority to lodge the complaint. This Tribunal needs to establish whether or not the complainants have *locus standi* to lodge the complaint.

### *Point in limine*

5.2 The Act defines a complainant as follows:

“(a) any person who is, or who claims to be –

(i) a member or former member of a fund;”

5.3 In terms of the Act, the complaint must relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules. The complainants are the members of the first respondent and their complaint relates to the administration of the first respondent and the interpretation and application of its rules. Therefore, the complaint is a complaint in terms of the Act and the complainants have *locus standi* to lodge the complaint. The fourth respondent's point *in limine* is dismissed.

### *Constitution of the board of trustees*

5.4 The fund or board of management can only do what is set forth in the registered rules (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph 30). Section 13 of the Act, reads as follows:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

5.5 Section 7A of the Act dealing with boards of trustees of pension funds reads as follows:

“(1) Notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.

(2) Subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment and terms of office of the members, the procedures at meetings, the voting rights of members, the quorum for a meeting, the breaking of deadlocks and the powers of the board shall be set out in the rules of the fund: Provided that if a board consists of four members or less, all the members shall constitute a quorum at a meeting.

5.6 Rule 3.1 of the first respondent dealing with the constitution of the board of trustees reads as follows:

“3.1.2 The TRUSTEES shall comprise six persons, of whom three shall be appointed by the PRINCIPAL EMPLOYER and three elected by the MEMBERS from their ranks in an election called for this purpose by the PRINCIPAL EMPLOYER. Thirty days prior to the date fixed for

the election, nominations bearing the consent of the nominee must be made; provided that the number of nominations received shall exceed the number of vacancies. Voting shall then take place by means of a ballot.

The PRINCIPAL OFFICER shall appoint one alternate for the TRUSTEES appointed by it.

The TRUSTEES elected by the MEMBERS shall be those nominees who receive the highest number of votes per vacancy in the election. The alternates for the TRUSTEES elected by the MEMBERS shall be those nominees from the plants not represented in the TRUSTEES, who receive the next highest number of votes per vacancy in the election.

The PRINCIPAL OFFICER and the MEMBERS shall have the right to replace a TRUSTEE or alternate respectively appointed or elected by them. In the case of a TRUSTEE or alternate elected by the MEMBERS, the TRUSTEE may be removed from office prior to the expiry of the term of office if a written request to this effect, supported by 75% of the MEMBERS, is presented to the TRUSTEES. The provisions of section 3.1.10 shall apply to a vacancy arising amongst the TRUSTEES in terms of this provision.

- 3.1.3 The TRUSTEES shall appoint the chairperson for the TRUSTEES from their own ranks.
- 3.1.4 A quorum of the TRUSTEES shall consist of four TRUSTEES; provided that at least two EMPLOYER appointed TRUSTEES and two EMPLOYEE elected TRUSTEES are present at such meeting. The quorum shall be authorised to perform all necessary actions on behalf of the FUND despite any vacancy amongst the TRUSTEES. At all meetings the decision of the majority shall be binding
- 3.1.5 Subject to sections 3.1.2 and 3.19, the TRUSTEES elected by the MEMBERS must be MEMBERS themselves and shall cease to be TRUSTEES when they cease to be MEMBER or when their term of office expires, whichever is the earlier

3.1.6 Subject to sections 3.1.2 and 3.1.9, the TRUSTEES elected by the MEMBERS and their alternates hold office for a term of three years. A TRUSTEE who ceases to hold office because of the expiry of such TRUSTEE'S term of office shall be eligible for re-election by the MEMBERS. Thirty days prior the date on which the said term of office is to expire, nominations bearing the consent of the nominee must be made. The provisions of section 3.1.2 shall then apply to the election of the new TRUSTEES.

3.1.7 The TRUSTEES appointed by the PRINCIPAL EMPLOYER shall hold office for a period of three years; provided that they shall be eligible for re-appointment upon the expiry of their term of office."

5.7 The fourth respondent contended that the board of trustees was properly constituted when it decided to transfer the complainants' fund values to the second respondent. The fourth respondent is not the administrator of the first respondent and therefore, not in a position to make submissions that the board of trustees was properly constituted. The second respondent which is the administrator of the first respondent and is privy to the internal dealings of the first respondent failed to address this issue in its response. The appropriate order in this instance would be to order the first respondent to provide the complainant and this Tribunal with the names of the trustees in service during the period when the first respondent resolved to transfer the complainants' membership to the second respondent, those present during the meeting to transfer the members' fund values, during their dates of appointment, their representative capacity and a copy of their resolution.

#### *Dissolution of the first respondent*

5.8 It is the complainants' contention that the first respondent must be dissolved due to its maladministration. Section 28 of the Act dealing with the voluntary dissolution of funds reads as follows;

- “(1) Subject to the provisions of this section, a registered fund may be terminated or dissolved, whether wholly or in part, in the circumstances (if any) specified for that purpose in its rules, and in the manner provided by those rules. In such an event, the assets of the fund, or, in the case of the partial termination of the fund, those assets of the fund attributable to the members connected to the participating employer whose withdrawal from the fund has caused its partial termination (as the case may be), shall, subject to the provisions of this section, be distributed in the manner provided by those rules.
- (2) A liquidator shall be appointed in the manner directed by the rules, or, if the rules do not contain directions as to such appointment, by the board, but such appointment shall be subject to the approval of the registrar, and the period of liquidation shall be deemed to commence as from the date of such approval.
- (3) During such liquidation the provisions of this Act shall continue to apply to such fund as if the liquidator were the board.”

5.9 Rule 12.12.2 of the first respondent dealing with the total dissolution of the first respondent in turn reads as follows;

- “(a) The FUND shall be dissolved if all the EMPLOYERS jointly decide or the sole remaining EMPLOYER decides to terminate the payment of contributions to the FUND or such EMPLOYER(S) discontinue business operations, provided that should such EMPLOYER(S) be liquidated and reconstituted in a similar or altered form, the FUND shall not be dissolved, unless the reconstituted EMPLOYER decides not to become a participating EMPLOYER in the FUND.
- (b) Upon dissolution of the FUND, the TRUSTEES shall retain their duties and powers for the purpose of attending to matters relating to the dissolution of the FUND. THE TRUSTEES shall appoint a liquidator whose appointment shall be subject to the approval of the REGISTRAR. Once the appointment of the liquidator has been approved by the REGISTRAR, the TRUSTEES shall cease to hold office and

the powers, duties and functions conferred upon them in terms of these rules shall devolve upon the liquidator.”

- 5.10 The submissions indicate that the employer ceased participating in the first respondent with effect from 1 December 2009. The investigation conducted by this Tribunal indicates that the third respondent is currently responding to the enquiries by the Registrar regarding the finalisation of the surplus apportionment scheme before the application for the transfer can be approved. The delay in the transfer is caused by the requirements in terms of the Act that must be met before the transfer could take place. The first respondent should monitor the progress of the transfer to ensure that the delays are not protracted to the prejudice of the complainants. Once the approval of the transfer of the complainants’ fund values to the second respondent is approved, a liquidator will be appointed and the first respondent will be dissolved in terms of section 28 of the Act and rule 12.12.2 of the first respondent.

*Transfer or payment of fund values*

- 5.11 It is the complainants’ contention that they must be paid their fund values in the first respondent or to transfer their fund values to retirement funds of their choice given the delay of the transfer to the second respondent. Rule 12.3 of the first respondent dealing with the transfer of members to or from other funds reads as follows:

“The FUND is empowered to receive transfers of monies and business from other APPROVED FUNDS or to effect transfers of monies and business to other APPROVED FUNDS subject to the relevant provisions of the INCOME TAX ACT and section 14 of the ACT and on such terms and conditions as the TRUSTEES in consultation with the ACTUARY may decide; provided that any such transfer to or from an APPROVED FUND that has been approved by the COMMISSIONER as a preservation fund shall be conducted in compliance with the requirements of South African Revenue Service’s Practice Note RF 1/98 and any succeeding legislation or statutory practice.”

5.12 'Approved fund' is defined in the rules of the first respondent as follows:

"A fund that is recognised or has been approved by the COMMISSIONER in terms of the INCOME TAX ACT as a pension fund, a provident fund or a retirement annuity fund and in respect of which a MEMBER meets the eligibility requirements for admission to membership thereof; provided that, if such fund has been approved by the COMMISSIONER as a preservation pension fund in accordance with the requirements of South African Revenue Service's Practice Note RF 1/98 and any succeeding legislation or statutory practice, the EMPLOYER must have been admitted as a participating employer in such preservation fund;"

5.13 The complainants' fund values are being transferred to the second respondent in terms of section 14 of the Act and rule 1.3 of the first respondent. The employer is currently participating in the second respondent and therefore, the complainants have no choice but to be the members of the second respondent. The complainants cannot transfer their fund values to other retirement funds of their choice other than the second respondent. In addition, the complainants cannot be paid their equitable share of fund at present because they are only entitled to the payment thereof when they go on retirement in terms of rule 6 of the first respondent or when they leave service before retirement in terms of rule 9 of the first respondent.

5.14 In case some of the members' service has been terminated prior or after the lodging of this complaint, they are at liberty to claim their benefits from the funds.

[6] **ORDER**

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is directed to provide the complainants and this Tribunal with a list of the trustees in service during the

period when the first respondent resolved to transfer the complainants' fund values to the second respondent, those present during the meeting to transfer the members' fund values, their dates of appointment, their representative capacity and a copy of the resolution of their decision, within two weeks of this determination.

**DATED AT JOHANNESBURG ON THIS 15<sup>TH</sup> DAY OF FEBRUARY 2013**

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**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M filing: High Court**

*Parties unrepresented*