



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
(HELD IN JOHANNESBURG)**

**CASE NO: PFA/GA/5400/2005/ZC**

In the complaint between:

**MM MORALO**

**Complainant**

and

**HOLCIM SOUTH AFRICA PROVIDENT FUND  
(formerly known as ALPHA GROUP EMPLOYEES  
PROVIDENT FUND)**

**First Respondent**

**HOLCIM SOUTH AFRICA (PTY) LTD  
(formerly known as ALPHA (PTY) LTD)**

**Second Respondent**

**ALEXANDER FORBES TRUST**

**Third Respondent**

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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION  
FUNDS ACT, 24 OF 1956 (“the Act”)**

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Introduction

- [1] The complaint concerns the failure of the Holcim South Africa Provident Fund (formerly known as Alpha Group Employees Provident Fund) (“the fund”) to pay a portion of the death benefit that was due to the complainant in the form of a cash lump sum following the death of her husband, Mr S L Moralo (“the deceased”).
  
- [2] The complaint was received by this office on 2 September 2005. A letter acknowledging receipt thereof was sent to the complainant on 3 October 2005. On the same date letters were dispatched to the first, second and third respondents giving them until 24 October 2005 to submit their responses to the complaint. Responses were received from Alexander Forbes Financial Services on behalf of the third respondent on 17 October 2005 and from the first respondent on 4 November 2005. These responses were forwarded to the complainant on 13 April 2007. No reply was received from the complainant.
  
- [3] Despite seeking a response from the second respondent it failed to submit one. After considering the submissions before me, it has been found to be unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only repeat those facts that are pertinent to the issues raised herein shall be repeated. Both the determination and reasons therefor appear below.

### Factual Background

- [4] The complainant was the wife of the deceased who passed away on 8 February 2003. The deceased was employed by the employer from 1981 and was a member of the fund until he passed away. Upon his death, a lump sum death benefit of R242 822.22 became available for distribution to his dependants. An amount of R6 122.41 was added to the lump sum death benefit in respect of interest for late payment and a further amount of R30 096.25 was deducted from the lump sum death benefit for tax. The complainant received an amount of R20 000.00 from the lump sum death benefit in order to complete construction on a house that the deceased was in the process of building. The trustees of the first respondent also decided to pay the complainant an advance of R3000.00 for funeral expenses on 12 February 2003 and a further advance of R5000.00 on 16 April 2003. The trustees of the first respondent further decided to place the balance of the lump sum death benefit in the amount of R164 998.12 in a trust. The amount of R164 998.12 consisted of the complainant's 50% share (R82 499.06) and the children's share (R82 499.06 in respect of the 3 minor children) of the deceased's death benefit.

### Complaint

- [5] The complaint is that the first respondent erred in deciding to place the complainant's share, in the amount of R82 499.06, of the deceased's death benefit in a trust. The complainant contends that the second respondent told her that her share of the deceased's death benefit will be deposited into her bank account and

that the children's share will be placed in a trust. She submitted that she became aware that the trustees had decided to place the remaining amount of the death benefit, including her share, in a trust without consulting her. Further, she submitted that the amount of R1200.00 that she is receiving from the trust per month is not sufficient to buy food, clothes and other necessities. Therefore, she requests that this Tribunal reverses the decision of the trustees to place her share of the deceased's death benefit in a trust.

The First Respondent's response

- [6] This office received a response from Ms W Schnetler, the principal officer of the first respondent. She alleged that a full investigation had been undertaken to determine the status of the deceased's dependants. She submitted that after due consideration the board of trustees of the first respondent passed a resolution in terms of which an advance of R3000.00 was paid to the complainant for funeral expenses on 12 February 2003 and a further advance of R5000.00 was paid to the complainant on 16 April 2003 from an estimated death benefit of R248 352.00 before tax and a home plan loan of R32 650.14. She submitted further that an amount of R20 000.00 was paid to the complainant in order to assist her in completing a house that the deceased had been in the process of building. The balance was placed in a trust, including the complainant's 50% share of the deceased's death benefit.
- [7] The first respondent submitted that the complainant's share of the death benefit

was placed in a trust due to the fact that she is unemployed, that she has 25 years to reach her retirement age and that she has a minor child of the age of 5. The first respondent further submitted that the amount of R1200.00 per month will be paid to the complainant as the guardian of the deceased's minor children in order to cover monthly living expenses.

Response from the Third Respondent

[8] Ms S Kosir, a trust officer of the third respondent, submitted a response. She confirmed that the deceased was employed by the second respondent from 1981 until he passed away. She submitted that the deceased was survived by the complainant, two adult children and three minor children. She also confirmed that the lump sum death benefit amounted to R242 822.22 and that a net amount of R218 848.38 was paid to the dependants of the deceased. She submitted that interest in respect of the late payment was added to the amount and further that tax was also deducted from the amount.

[9] Further, she submitted that the complainant's complaint lies against the trustees of the first respondent and not the third respondent as they made the decision to place her share of the death benefit in the third respondent. She submitted that the third respondent merely invested monies on the complainant's behalf and on behalf of the minor children in terms of the decision made by the trustees of the first respondent. Moreover, she submitted that the third respondent is assisting the beneficiaries financially with monthly support and making provision for their

educational costs.

[10] The third respondent submitted a synopsis of the it's activities, which *inter alia* shows the allocation to each beneficiary and it read as follows:

"a. Thibedi Thatayaone Moralo (minor child)	born 20/08/1997	R36 299.58
b. Thsiamoeng Malon Moralo (minor child)	born 09/05/1994	R26 399.70
c. Motshedisi Esther Moralo (minor child)	born 14/07/1986	R19 799.78
d. Maserame Margaret Moralo (widow)	born 30/05/1965	R82 499.06"

[11] The current monthly distribution made by the third respondent (which was stipulated by the first respondent's Trustees at the time of establishing the trust) is R1200.00 and is allocated as follows:

"a. Thibedi Thatayaone Moralo	R143.00
b. Thsiamoeng Malon Moralo	R104.00
c. Motshedisi Esther Moralo	R78.00
d. Maserame Margaret Moralo	R875.00"

Determination and reasons therefor

[12] Section 37C of the Act governs the disposition of death benefits. It places a duty on the board of management (trustees) to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any

discretionary power, in effecting an equitable distribution the board is required to give proper consideration to relevant factors and to exclude irrelevant ones from consideration. It may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

[13] Just as the determination of the proportions in which the benefit is to be paid involves the exercise of a discretion, so does the determination of an appropriate mode of payment. The discretion has to be exercised reasonably, in that the board has to consider relevant factors, disregard irrelevant ones and not unduly fetter its discretion.

[14] Subsections 37C (2) and (4) of the Act which regulate the different modes of payment, in the alternative to direct payment, reads:

“(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 dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.

(3) ...

(4)(a) Any benefit dealt with in terms of this section, payable to a major dependant 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 dependant or nominee in full.“

[15] There are three methods of payment of a major beneficiary's benefit, firstly, direct payment, which is governed by section 37C(1) and the four scenarios contained therein, secondly, payment into a trust in terms of section 37C(2) and, thirdly, payment in instalments from the fund in terms of section 37C(4).

[16] 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.

[17] *In casu*, the issue which falls for determination is whether the trustees exercised their discretion properly and reasonably in deciding to place the complainant's share of the deceased's death benefit in a trust. It is common cause that the decision of the trustees to place minor the children's share of the deceased's death benefit in a trust is not in dispute.

[18] The trustees of the first respondent effected payment of the complainant's (who is a major) portion of the deceased's death benefit, in the amount of R82 499.06, in terms of Section 37C(2) of the Act.

- [19] Section 37C(2) deems the payment by a registered fund to a trustee contemplated in the Trust Property Control Act No.57 of 1988 for the benefit of a dependant or nominee contemplated in the section to be payment to such dependant or nominee. No differentiation is made between major and minor dependants/beneficiaries.
- [20] However, the direct payment of a major beneficiary's benefit is the default position which should be adopted save for exceptional circumstances. It is needless to state that the facts of each case must be carefully evaluated in determining whether to depart from the default position. Circumstances which may warrant payment of a major beneficiary's benefit into trust may be in instances where the beneficiary is labouring under a legal disability such as (but not limited to) prodigality, insolvency or mental disability consistent with the Mental Health Act 18 of 1973. However, since the direct payment of the benefit to the major should be the norm, any deviation therefrom has to be justifiable on legal or factual grounds.
- [21] Our Courts are reluctant to interfere with the right of the major to control his/her own affairs. It does so only in circumstances where s/he is found to be incapable of managing his/her own affairs (See *Ex Parte Oppel and Another* 2002 (5) SA 125 (C)) and authorities cited therein. Compare and contrast the position with regard to minors and see *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) and the authorities cited therein).
- [22] To deviate from the norm of paying a benefit directly to a major, compelling or exceptional circumstances must exist for doing so. I have found no exceptional or

compelling circumstances to exist in this case, which warranted payment of the complainant's benefit to a trust. That the complainant had a 5 year old minor child at the time of the deceased's death was an irrelevant consideration taken into account for purposes of determining whether the complainant's (who is a major) benefit should be placed in trust or not. If the trustees of the first respondent had concerns about the provision for the young minor child (until such time as he attained majority or self-sufficiency) they could have allocated a greater portion of the deceased's death benefit to the young minor child. Further, the reasons advanced by the first respondent for placing the complainant's benefit into trust are further negated by virtue of their lump sum payments to the complainant in the amount of R20 000.00 for the completion of the house that the deceased was building, R3000.00 for funeral expenses and a further R5000.00 for reasons not disclosed. In the above instances of prior payments, the board of the first respondent had no reservations about paying the benefit in the form of lump sums.

[23] The first respondent's assertion that it paid the complainant's share of the benefit into trust due to the fact that she is unemployed, has 25 years to reach retirement age and has a minor child of 5 years of age is unacceptable in law. There is no evidence before me that the complainant is labouring under a legal disability such as prodigality, insolvency or mental disability. There is further no evidence that a curator has been appointed to the complainant or that she is incapable of managing her own affairs. Nor is there any other evidence justifying the deprivation of the complainant's right to manage and control the lump sum payment.

[24] By reason of the foregoing, I am of the view that the trustees of the first respondent failed to properly exercise their discretion in deciding to deprive the complainant of her right to administer her own benefit.

[25] As to the appropriate relief, I could send the matter back to the trustees to exercise their discretion appropriately. This is in accordance with the general principle of administrative law that a Court will be reluctant to substitute its own decision for another administrative authority, where the administrative action is found to be unreasonable or *ultra vires*. The norm is to refer the decision back to the administrative authority. However, exceptional or unique circumstances permit a judicial officer to substitute his or her decision for the administrative body. Baxter, *Administrative Law* (682–684) delineates four such circumstances, namely, where:

- further delay would cause unjustifiable prejudice to the applicant;
- the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again;
- the Court is in as good a position to make the decision itself; and
- the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter.

[26] On the facts of this matter the complainant has already been deprived of the right to manage and control her lump sum payment since July 2003. A further delay will cause unjustifiable prejudice to the complainant and it would be a waste of time.

Further, section 30D of the Act enjoins me to dispose of complaints in an expeditious manner. There is sufficient evidence adduced herein to finally dispose of this matter. It, moreover, seems clear from the arguments advanced by the first respondent that the trustees are unlikely to change their minds and that it would therefore be futile to send the matter back to them for reconsideration.

[27] In the circumstances, I herein substitute the decision of the trustees of the first respondent with my decision. Therefore having considered all the arguments put forth I find that the complainant is firstly entitled to her share of the deceased's death benefit and secondly to have her share of the benefit paid directly to her (less amounts already paid and deductions permitted by the Act). The first respondent may further recover such monies from the third respondent.

### Relief

[28] In the result, I make the following order:

[28.1] The first respondent's decision to place R82 499.06 of the complainant's portion of the death benefit into the third respondent Trust is hereby set aside;

[28.2] The third respondent is ordered to compute the remaining value held on behalf of the complainant in the Trust, and inform all parties and this office of the said amount, within 7 days of the days of the date of this determination;



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**Registered address of the fund**

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Section 30M Filing: Magistrate's Court

*Complainant unrepresented*  
*Respondents unrepresented*