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FAIRHEADS
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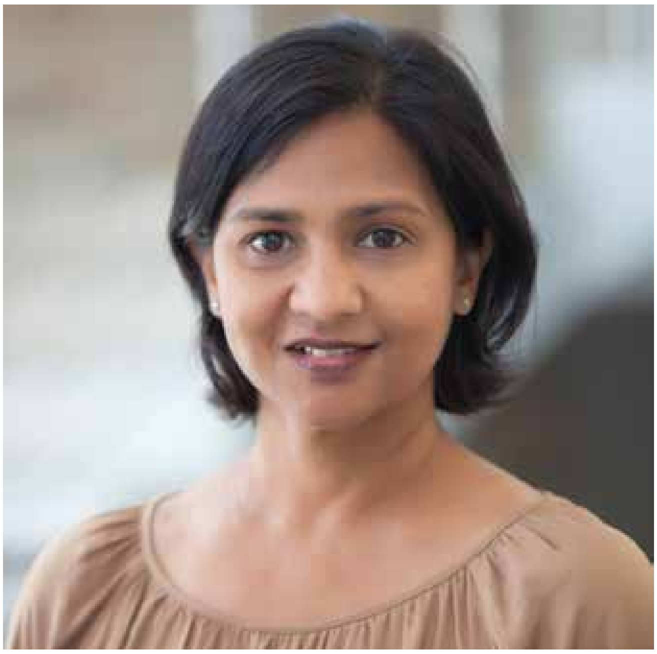
Southern Africa's leading independent service provider of beneficiary funds and umbrella trusts

Section 37C issues arising from the case law

By Tashia Jithoo, Independent Trustee and pensions lawyer

The distribution of death benefits in terms of section 37C of the Pension Funds Act is often tricky terrain for pension fund trustees. This article highlights some interesting issues arising from recent case law around s37C and is based on a presentation done by the writer at the 2019 Pension Lawyers Association conference.



Tashia Jithoo

INVESTIGATIONS AND PAYMENTS

Section 37C investigations can be lengthy and complex. The case of Dobie NO v National Technikon Retirement *Pension* Fund clarified that the 12-month period referred to in s37C does not refer to the general time period for payment, but rather to the period to trace beneficiaries. This is a practical approach, given how time-consuming investigations can be.

Usefully, the High Court has also now clarified in *Masindi v Chemical Industries National Provident Fund and others* that this 12-month period runs from when the fund learns of the death, not the date of death itself, because the obligation to act cannot be triggered if there is no knowledge of the member's death. However, the court also said that retirement funds need to be proactive in their processes and investigations and cannot simply wait to be informed of the death. Some mechanisms available to help funds in this regard include tracking and immediately following up if monthly contribution payments stop, and also checking to see if any members' deaths are indicated on the Home Affairs database. A proactive approach is encouraged because s37C investigations can be harder and less effective the longer the fund waits to commence investigations.

PARTIAL PAYMENTS

Circumstances sometimes require a fund to pay out to one or more beneficiaries while continuing the investigation into other potential beneficiaries. In *Sithole v NBC Umbrella Retirement Fund and another* the Adjudicator accepted that "partial payments" are permissible while investigations continue. Here, payments were made to four out of ten beneficiaries identified, but 12,5% of the benefit was withheld pending further investigation of the remaining six. The Adjudicator took no issue with this approach but reminded the fund that s7D(1)(c) requires that adequate and appropriate information is communicated to members and beneficiaries informing them of their rights, benefits and duties. Where partial payments are made, "adequate" information would require the reasons for partial payment, the process going forward and the expected timelines to complete payment. ►

In this issue

MESSAGE FROM THE FINANCIAL DIRECTOR

To celebrate Women's Month I have great pleasure in inviting you to enjoy the latest issue of Fairheads Times.

Tashia Jithoo, Independent Trustee of the Board of Trustees of the Fairheads Umbrella Beneficiary Fund, authors our lead story, addressing some of the questions trustees have around the payment of s37C death benefits through the lens of the case law. Mabatho Seeiso, also an Independent Trustee, writes for us on impact investing and Giselle Gould, Director: Business Development, gives a report-back on the prestigious OECD-FSCA conference. Other items include an overview by Yvonne Mahlatji, Consulting Manager, of Fairheads' walk-in centres.

Yours sincerely
Marilyn Brown
Financial Director

Continued from page 1

While the mechanism of partial payments can be very useful if there are multiple beneficiaries or family units and lengthy, complex investigations, it can also be risky if information arises or additional beneficiaries are traced later, which may have changed the distribution. It should therefore be carefully considered.

NOMINATIONS

In *Makhubela v Rand Water Provident Fund and another* the member's beneficiary nomination form named three beneficiaries and the member specifically stated that he did not want two of his major children to get any share the benefit. They then challenged their exclusion from the distribution of the R1.7m benefit.

The Adjudicator ruled that "the litmus test … relating to the distribution of death benefits is whether or not a party was financially dependent on the deceased member and if by his death the party stands to suffer financial prejudice." The excluded beneficiaries here had <u>not</u> demonstrated dependence, and the member's express wishes indicated strained relationships with them – both being factors relevant to the distribution decision. The important point demonstrated by this case is that where the member specifically indicates that a person should not receive a share of the benefit, this can be taken as an indication of a bad relationship (which is relevant factor) but this cannot on its own, and without reference to other factors, exclude a beneficiary from consideration.

TESTAMENTARY DISPOSITION VERSUS NOMINATION

It's often tricky for trustees where the member's wishes were never communicated directly to the fund, but the Will or some other document states, for example, "I leave my benefit in XYZ fund to my son". This is not a valid testamentary disposition, but it is a valid nomination?

Section 37C(1)(bA) would suggest not because it states "If a member has a dependent and the member **has also designated in writing to the Fund** a nominee to receive the benefit…". Those words indicate that some notification to the fund of the member's wishes is required.

THE STATUS OF PERMANENT LIFE PARTNERS

The status of permanent life partners and the legal debate around the definition of "spouse" is often a tricky issue for funds to navigate. In terms of the Pension Funds Act, a "spouse" is *"a person which is the permanent life partner or souse or civil union partner of a member in accordance with the Marriages Act, the Recognition of Customary Marriages Act, the Civil Union Act or the tenets of a religion."*

There is legal debate around whether permanent life partners are a category of spouse on their own or whether, to be a permanent life partner, the relationship must be recognized by one of the above Acts or religion.

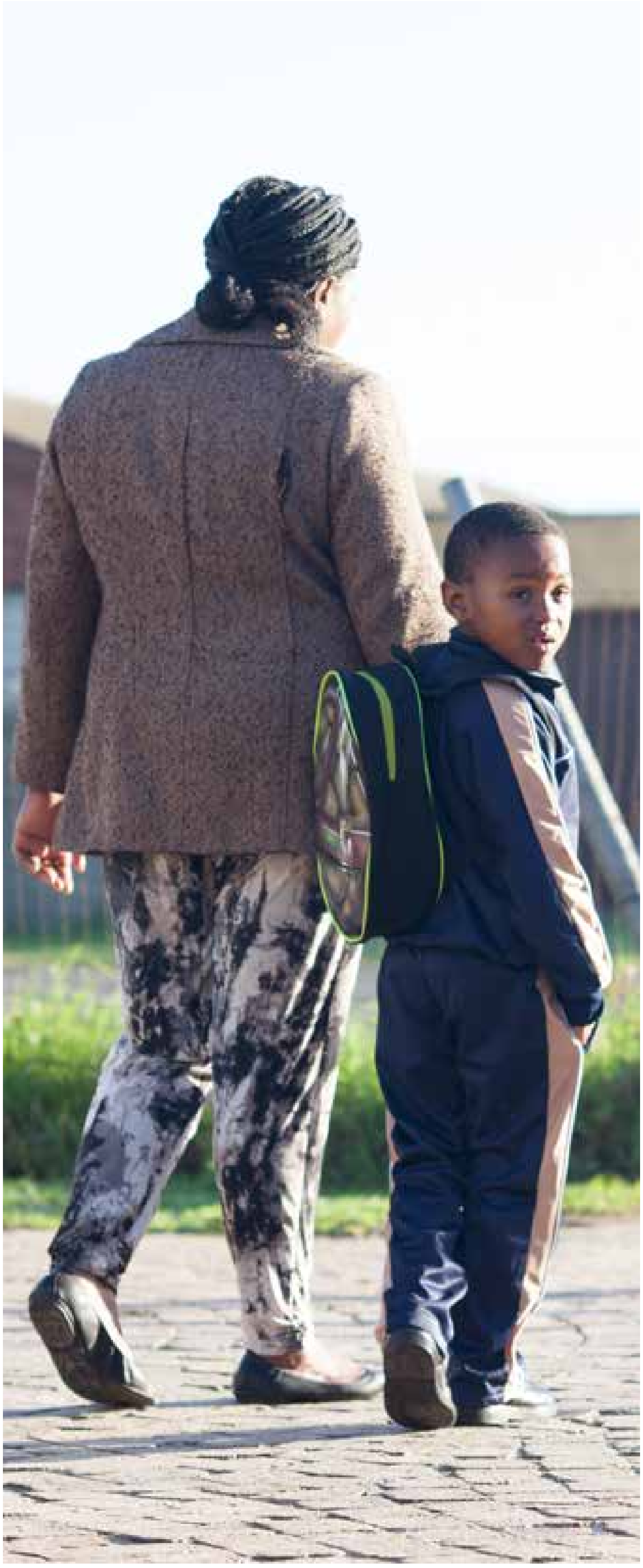
It is arguable that the words "*permanent life partner, spouse or civil union partner*" indicate that a permanent life partner is a category of spouse on its own (for the purposes of the Act) because persons married in terms of the Marriages Act, the Recognition of Customary Marriages Act, Civil Union Act or tenets of a religion already have legal recognition as “spouse”. Permanent life partners were included in the definition of spouse because without that, they would not be accorded that status and would not qualify for spouse’s pensions. Their inclusion in that definition therefore elevates their status to that of “spouses” for the purpose of pension-related benefits.

In Makgopa *v PPS Retirement Fund* Ms Makgopa was married to the member by customary rites but the marriage was annulled by the court. She was awarded a share of the death benefit, but this was challenged on the basis that she was not a spouse because the marriage had been annulled. After reassessing, the fund said that it regarded her as a permanent life partner, which fell within the definition of a spouse for the purposes of s37C. That decision was then challenged on the basis that due to annulment she could not be regarded as a “spouse” as defined.

The fund referred to *Hlati v Univ of Fort Hare Retirement Fund and others* which held that a permanent life partner, who had an inter-dependent relationship with a deceased member and who was then worse off because of the member’s death, would be considered a factual dependent. The fund said it regarded Ms Makgopa as a factual dependent because of a shared common household, joint liability in respect of moveable property, financial dependence and joint financial responsibility for their children. The Adjudicator held that despite a court order declaring the customary marriage to be null and void it was clear that they were in a permanent relationship since 1988, had raised their children together and shared business interests and she was also dependent on him. The Adjudicator also noted that even if Ms Makgopa was not a permanent life partner, she would still be a factual dependent because of the joint household, which indicated a financial dependency on each other.

In *Swanepoel v Eskom Pension & Provident Fund*, the issue at stake was the permanent life partner’s eligibility for a spouse’s pension. This case reinforced the interpretation that “spouse” in the rules is to be read with the definition in the Pension Funds Act, which recognizes permanent life partners as a category of “spouse” in their own right. The complainant was one of the member’s three sons nominated in the nomination form. Each received a share of the lump sum death benefit but no share of the monthly pension payable on the member’s death. The sons contested payment of that pension to the life partner, saying that she had not even been nominated as a beneficiary by the member.

In terms of the rules, the pension was only payable to an eligible child under 21 or if incapable of supporting him/herself due to a physical or mental infirmity, or to a widow(er). As the sons were all majors and financially able, they did not qualify. Regarding the partner, it was argued that the rules defined a widow as a spouse of a “marriage” so she was disqualified. But the Adjudicator



found that the rules also defined a spouse as including a permanent life partner – and so the same interpretation as in the *Makgopa* case (of a spouse including a permanent life partner) was reinforced in the Swanepoel case – that is, that is a permanent life partner in one's own right, and in terms of the Civil Union Act.

The important point here for funds is that if the marriage is not in terms of any Act (or religion or custom), the person can still be regarded as a spouse if there was evidence of a permanent life partnership. And if not, it is highly unlikely that someone claiming status as a permanent life partner would not also at least qualify as a factual dependent on the basis of the mutual dependency they carried in a shared household. This would qualify one as a dependent for the purposes of s37C but maybe not for a spouse's pension on death.

BLOEDIGE HAND PRINCIPLE

"Die bloedige hand erf nie", a common law principle, means that the person responsible for causing the death of another cannot benefit financially from that death. The High Court in the *Makanya* case made it directly applicable to the Government Employees Pension Fund and in *Danielz* made it applicable to insurance benefits. The two cases of *Nel v Netcare 1999 Pension Fund and another,* and *Rhyn vs UTI Flexi Retirement Fund (Pension Section) and another* now make it clear that the *bloedige hand* principle applies equally and directly to pension fund cases.

In practice, the criminal justice system moves slowly in South Africa and trustees need to adopt a practical approach by weighing up the risks, for example by obtaining information from the investigating officer about the likelihood of charges.

The *Nel* case also raised another interesting question. If the fund awarded a benefit to the deceased's child, but the child's parent was accused of the member's murder, does the "*bloedige hand*" principle preclude payment? In this case, the Adjudicator was persuaded to allow the payment because it was not going to be paid directly to the guardian but rather to a trust for the child's benefit. In these circumstances trusts and beneficiary funds can be a useful mechanism to administer the benefit in and to make direct payments where needed, such as for school, transport, clothing and the like.

DUTY OF SUPPORT TO ELDERLY PARENTS

The case of *T v University of KwaZulu Natal Pension Fund and Absa Consultants and Actuaries* dealt with the duty of support to elderly parents. The complainant was the sole nominee but the member also had an elderly mother and siblings. An issue that arose in this case was the status of the member's elderly mother. The fund had failed to prove her financial dependency on the member, and there was no evidence of her own finances then or into the future. There was also no evidence regarding the extent of the siblings' obligation and ability to support her – which they all carried. The fact that member had no children, and the siblings did, was not enough to shift the financial burden solely onto the member. Considering all the factors, the Adjudicator ordered the fund to reconsider its decision.

The Adjudicator ordered the fund to reconsider its decision

Some key points for trustees to note from this case are that a nominee does not have to prove financial dependency on the member to be considered; the s37C investigation should be around the overall picture generated not individual factors; and that when considering elderly parents trustees should consider their needs and other sources of income, including the fact that siblings of the member or other children of the parents also bear financial responsibility.

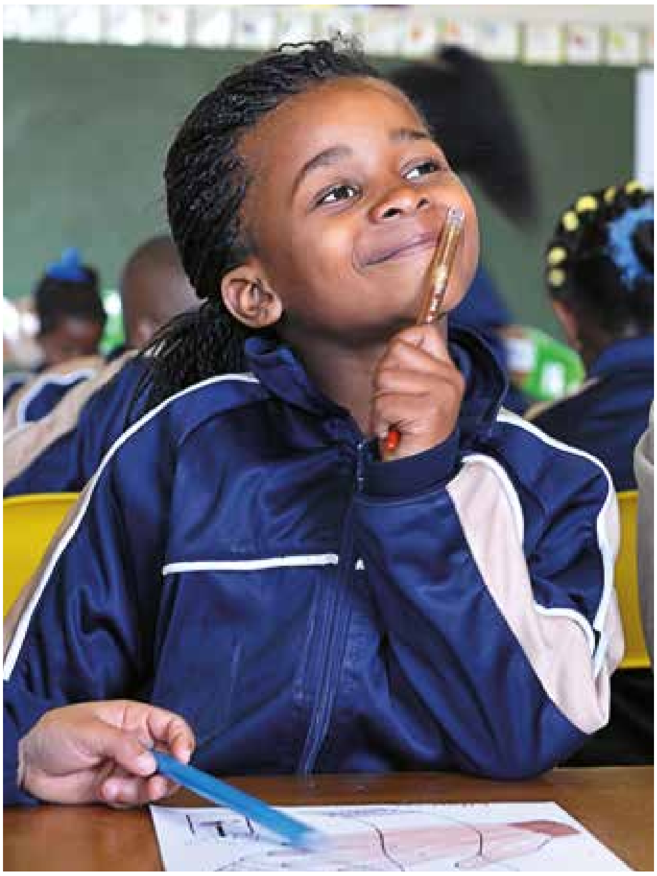
CASES CONSIDERED ABOVE

Dobie NO v National Technikon Retirement Pension Fund [1999] 9 BPLR 29 (PFA)
Masindi v Chemical Industries National Provident Fund and others (Case No 16/24267 decided 13/12/2016 – High Court)
Sithole v NBC Umbrella Retirement Fund and another [2018] 2 BPLR 504 (PFA)
Makhubela v Rand Water Provident Fund and another [2018] 1 BPLR 114 (PFA)
Makgopa v PPS Retirement Fund [2018] BPLR 102 (PFA)
Swanepoel v Eskom Pension & Provident Fund [2018] 2 BPLR 522 (PFA)
Hlati v Univ of Fort Hare Retirement Fund and others [2009] 1 BPLR 37 (PFA)
Nel v Netcare 1999 Pension Fund and another [2018] 3 BPLR 747 (PFA)
Van Rhyn vs UTI Flexi Retirement Fund (Pension Section) and another [2018] 3 BPLR
T v University of KwaZulu Natal Pension Fund and Absa Consultants and Actuaries

Bringing impact investing into a fund's investment strategy

Mabatho Seeiso (pictured right)**, Independent Trustee**

Funds need to think seriously about including impact investing into their investment strategies. As retirement funds we exist to safeguard and ensure that our members retire with meaningful retirement benefits. Our understanding of what "meaningful" means to members is increasingly being challenged. There are many members who are telling us that as part of having a meaningful retirement, it is important for them that when they retire, they have access to services such as medical care, good infrastructure, education and employment opportunities for their children. In order to meet the real needs of our members, we need to move to an investment approach that seeks to generate solid financial returns for members, within an acceptable level of risk whilst creating positive social and environmental returns. This is the right investment approach for funds in South Africa given the enormous socio-economic challenges.



Often when we talk about impact investing, people assume we are talking about doing something charitable at the expense of returns for members. As a result some fiduciaries on pension fund boards do not believe that this is their role, instead they believe it is the role of Government. Foregoing returns for socio-economic impact does not have to be part of your impact investing story. In fact it has been shown that impact investing can enhance returns for funds on account of long-term steady returns and non-correlation with other asset classes.

We are indeed finding that some funds are beginning to look at impact investing in South Africa, driven in part largely by the disappointing returns from listed markets. Most funds have been struggling to generate inflation-beating returns on a consistent basis and to meet their return targets just by investing in traditional asset classes. This is completely different from several years ago, when funds were able to generate returns of up 20% just by employing traditional investment strategies. Suddenly, because of the poor returns and the incredible volatility we are experiencing in our markets - driven by our own economic and political challenges and global shocks that include the volatility driven by President Trump's policy uncertainty and tweets - we are beginning to see the need to look elsewhere in order to find yield and enhance returns. We have caught up with what other international markets understand, that in order to mitigate risk and enhance returns, diversification is key and it is important to include asset classes that are uncorrelated to traditional asset classes in your portfolio. Pension funds in the US and Europe are allocating north of 20% to alternatives, which includes impact investments. In contrast, South African pension funds are investing only around 2% in alternatives.

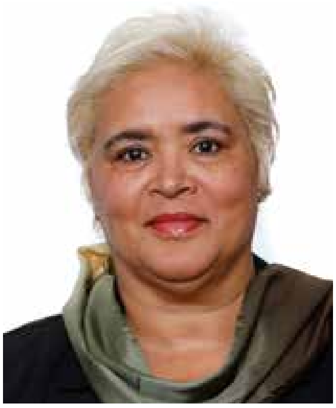
We need to invest to save ourselves! Trade & Industry Minister Ebrahim Patel made the point at the recent BATSETA conference that there is a direct correlation between how well pension funds perform and how well the South African economy is doing. The South African economy declined by 3,2% in the first quarter of 2019 compared with the last quarter of 2018. This is the largest quarterly drop in about 10 years. The South African Reserve Bank has also revised the South African economic growth forecast down to 1.3% for 2019. South African pension funds need to understand that they are part of the solution to the challenges facing this economy and their members. A significant portion of the R4 trillion controlled by pension funds needs to be invested into the real economy to stimulate growth and economic development.

We need to think about how we can use our 15% Regulation 28 allocation to invest in alternatives. I had an opportunity to listen to a presentation by CalPERS, the largest public pension fund in the US at around $300 billion, when they visited South Africa in 2017. When they report on their performance to their members, they also include reporting on socio-economic pillars such as the number of jobs they created and number of SME businesses supported. They acknowledged that the yield enhancement in their investment strategy came from their investment in alternatives such as infrastructure, real estate and private equity. We also need to be thinking about how our investments perform on the three pillars of risk, return and impact. Besides, sustainability reporting is going to become a requirement soon for pension funds in South Africa.

There are many success stories of pension funds who have undertaken impact investing and are returning double digit returns to their members in those portfolios. There are some with their own bespoke solutions, which has helped them in this tough investment environment. There are also many solutions provided by asset managers that include SME funding, renewable energy, affordable housing, education, healthcare etc. Obviously as in any investment, there are risks, however, you can put together an impact portfolio that is suitable to the risk profile of your members. The key is making sure there is diversification in your impact strategy and that you have the right advisor and asset managers who understand the specific assets you want to invest in. ■

Financial education of the future

Giselle Gould, Business Development Director, attended the FSCA-OECD International Conference on Financial Education in Cape Town in late May. Fairheads was the only beneficiary fund organisation represented.



Giselle Gould

The conference looked at how technological innovation, effective policy-making and better financial education can converge to improve the economic and social well-being of people around the world. Discussions included:

- How to design and implement effective financial education in times of change
- The financial education needs of different population age groups
- Lessons learnt to improve consumers' financial behaviour
- The implications of digitalisation for financial education

200 international experts from over 50 countries attended the event, including high-level officials from government, central banks, financial institutions and not-for-profit organisations, as well as representatives from the academic community, private and civil sectors.

Giselle said: "It was fascinating to hear views from countries with challenges similar to ours, including some South American and Asian countries.

"There was a large focus on educating the youth, with some innovative ideas around the use of social media in particular. It is clear that by educating the youth, you help to educate the public at large because children can share information with their peers and with adults - and indeed they are society's future leaders," she said.

An important part of Fairheads' overall communication strategy is talking to its younger members and beneficiaries. Our latest issue of Let's Talk, a member newsletter, has tips and ideas for those needing to choose school subjects in Grade 10 and thinking ahead to what career they might like to follow.

You can read the Let's Talk on our website. www.fairheads.com/member-newsletter-for-our-15-years-and-older/ ■

Success with RAF payouts to Fairheads Legacy Trust

Fairheads has an umbrella trust product which is gaining traction, particularly among lawyers, as a solution for the trusteeship and administration of lump sums paid out by various means including testamentary provision, medical malpractice claims or – in this case – the Road Accident Fund (RAF). You can read more about the Fairheads Legacy Trust on our website.

CASE STUDY ONE

Sibusiso Dlamini, key accounts consultant in Fairheads' Durban office, received a call from a lawyer in Richards Bay. Both parents of two minor children had tragically passed away in a road accident and the lawyer, on behalf of the guardian, was looking for flexible vehicle to administer the RAF benefit of around R2 million.

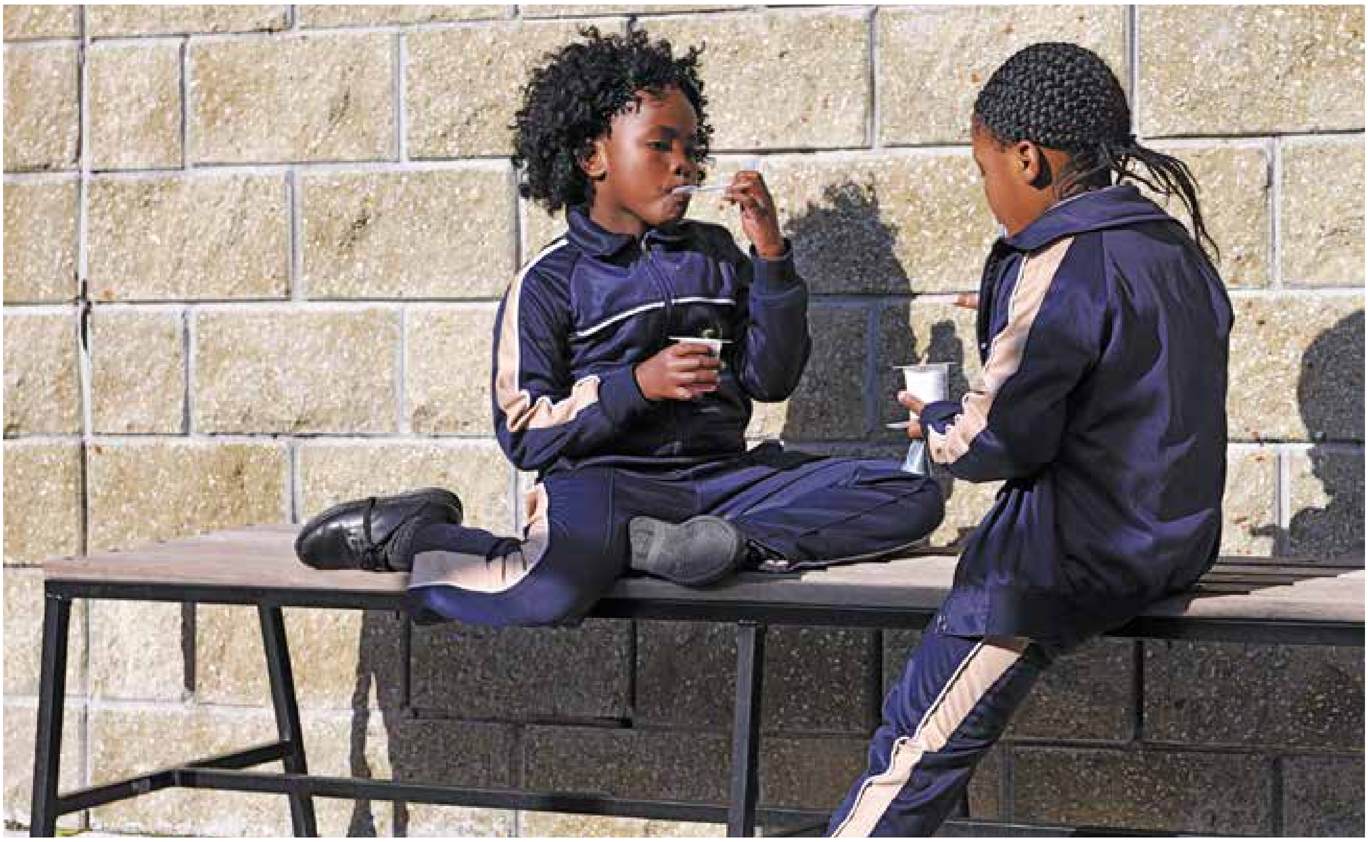
Nothing in the market seemed suitable until he did an internet search and came across the Fairheads Legacy Trust. The guardian did not want the funds to be locked in, rather requiring a monthly income and occasional capital payments for the likes of school fees. She also wanted about 15% of the total to be kept aside in cash for immediate use.

The RAF payout was made in August 2018 and the sub-trust on the platform was set up swiftly. It is going well and the guardian is happy. We are pleased we were able to help ease such a painful scenario for the children.

CASE STUDY TWO

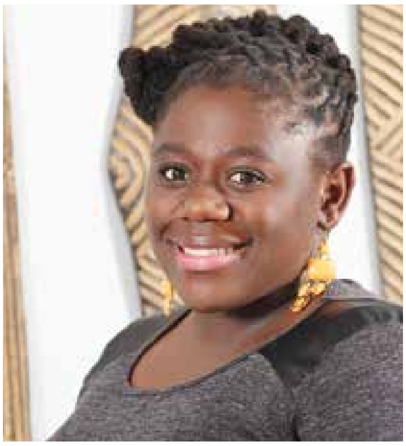
In another example, a client, now aged 23, had been a member of the Fairheads Umbrella Trust for 8 years and on turning 21 the account had been terminated and he was paid out the remaining lump sum. When he had a car accident about a year later, the RAF paid out the claim of approximately R500,000 to the client's bank account. Both the bank and various other parties tried to persuade him to invest the lump sum with them, but our client insisted on using Fairheads, saying that he knew and trusted us. Accordingly, a sub-trust was set up for him on the Fairheads Legacy Trust platform and the payment made from the bank.

We are naturally delighted to have received such an endorsement and will do our very best to ensure we live up to the expectations of this young man.



WALK-IN CENTRES FULFIL A VITAL NEED

Fairheads Benefit Services has four walk-in centres, located in Sandton, Braamfontein, Durban and Cape Town. These centres, which are staffed by knowledgeable and caring people, form an integral part of Fairheads' broader communication strategy.



Yvonne Mahlatji

Yvonne Mahlatji, Consulting Manager, says: "Accessibility is a priority for us and in certain circumstances nothing can beat face-to-face communication. The walk-in centres complement and back up our other face-to-face distribution channels such as the annual guardian roadshows and our field agent programme."

Yvonne says the walk-in centres are strategically placed for members' convenience. For example, the Braamfontein office is not only close to the Mineworker's Provident Fund but it is also within reach of many students from tertiary institutions in the area. The Sandton office caters for both corporate clients as well as members/ guardians and caregivers. The Durban office feeds the wider KwaZulu-Natal area and tends to experience the highest volume with up to 50 visitors per day during traditionally busy periods, such as back-to-school. Similarly, Cape Town feeds into a vast urban and rural network and it is not uncommon for visitors from the Eastern Cape to pop into the Cape Town office with their queries or to gather information while they are visiting family.

Leetoane Janefeke, a walk-in centre agent in Cape Town, says that empathy and good listening skills are a must, in addition to detailed knowledge of systems and procedures. "We see the full range of human emotions. Sometimes the thing guardians need most is the human touch, for someone simply to listen to the challenges they face – be they psychological or financial - in bringing up teenagers or young children who have lost a loved one."

It is not only guardians and caregivers who visit the walk-in centres but increasingly major members themselves. Leetoane relates the example of one member who had chosen to leave his funds in the beneficiary fund when he turned 18. He was living with his uncle but unable to get along and requested funds to help with accommodation for himself.

Olefile Moea, Fairheads Executive Director in charge of communication, says that walk-in centre staff need to have a grasp of as many languages as possible and – vitally – to be culturally aware. "If for example a guardian asks for funds for a coming-of-age ceremony, we need to know what this means in the culture of the family and advise the trustees accordingly," he says.

Sometimes staff need to go beyond what is expected of them. In one instance, a beneficiary from Mozambique had no place to stay and no money to return home. The walk-in centre staff went out of their way to help, funding the beneficiary's needs from their own pocket upfront and only claiming back from the trust later.

Olefile says that feedback from clients – corporate and non-corporate has been very positive. "It is clear that our walk-in centres fulfil an important need and I would like to thank all the staff for their incredible support of our clients."

CONTACT A FAIRHEADS CONSULTANT if you would like to discuss any of our products or services. Email: consulting@fairheads.com

SANDTON Tel: 011 883 9755 • Address: Ground Floor, Block C, Vunani Office Park, 151 Katherine St.

CAPE TOWN Tel: 021 410 7500 • Address: 15th Floor, 2 Long St.

BRAAMFONTEIN Tel: 010 005 5290/1/2/3 • Address: 26 Ameshoff St. (Cnr Ameshoff & Melle St.)

DURBAN Tel: 031 368 9260 • Address: 22nd Floor, Office no. 2217, Embassy Building 199 Anton Lembede (formerly Smith St.)

FAIRHEADS CLIENT CONTACT CENTRE

0860 102 919 (Share call) or 021 410 7800 • Fax +021 410 7998 or 086 219 0778 • Email: queries@fairheads.com • www.fairheads.com

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