



**PENSION LAWYERS**  
ASSOCIATION

# **REFLECTIONS & REPORT BACK**

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# **THE LAW IS NOT ENOUGH**

**And so it is still the case, even with the great expansion of corporate statutes and the codification internationally of rights and responsibilities and obligations in more detail than any of us have patience for, that the law is not enough.**

**The law is not enough, and we surely would not want to live in a world in which we relied only on the law for the protection of human worth and the integrity of social partnerships.**

**If the law is not enough, then compliance with the law is not enough, and we have to put the spotlight also on what we understand by fiduciary responsibility and corporate identity.**

**Mr TA Manuel, MP  
International Corporate Governance Network (04/07/2007)<sub>2</sub>**

## The Huffington Post

**Shari Cohen**

- *International development worker in the public health sector.*

Posted: June 15, 2010 11:35 AM

## South Africa Rolls Out the Ubuntu in Abundance

**The article ends with the following:**

- **When I think of *Ubuntu* and my recent experiences here, I think America has much to learn from Africa in general, in terms of living as a larger village; and as human beings who are all interconnected with each other, each of us having an affect on our brothers and sisters.**

# 'I SEE YOU'

- ***Sawu Bona*** – 'I see you';
- ***Sikhona*** – 'I am here';
- ***UBUNTU***;
- ***Umuntu ngumuntu ngabantu*** –  
'A person is a person because of other people'.

# HUMANISM AS A PARADIGM IN THE NEW WORLD ORDER FOR PEACE AND SECURITY

*‘Udar charitnam vasudev kutumba mum’*

‘the whole world is one family and all should share equally the peace and prosperity without any distinction’.

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# AN ASSOCIATION OF PERSONS OR AN INGENIOUS DEVICE?

## Professor Gower -

- **‘An association of a number of persons for a common object, the object (usually) being the economic gain of its members’**

Gower, L.C.B. Gower’s Principles of Modern Company Law, 5<sup>th</sup> Edition., p3’; (Sweet & Maxwell, London, 1992)

## Ambrose Bierce - ‘The Devil’s Dictionary’

- **‘An ingenious device for obtaining individual profit without individual responsibility’.**

# THE CORPORATION AN ASSOCIATION OF PERSONS OR AN INGENIOUS DEVICE?

Professor Joel Bachan – (Canadian Professor of Law)

- **‘As a psychotic creature, the corporation can neither recognize nor act upon moral reasons to refrain from harming others. Nothing in its legal makeup limits what it can do to others in pursuit of its selfish ends, and it is compelled to cause harm when the benefits of doing so outweigh the costs. Only pragmatic concern for its own interest and the law of the land constrain the corporation’s predatory instincts and often that is not enough to stop it from destroying lives, damaging communities and endangering the planet as a whole.’**

# WHAT THEN IS ETHICS?

- **‘Ethics is about making moral choices and the values behind the moral choices that are made’;** South African Financial Planning Handbook 2008, Botha, Bradley *et al*: quoting Deon Rossouw (Business Ethics in Africa) p.21
- **‘Ethics are a set of moral principles or laws of the universe that govern the behavior of a system –be it an individual, organisation or society’.**

Marko Sarvanja ‘ Secrets of Success’

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# RESPONSIBILITY FOR ETHICAL BEHAVIOUR

**‘Although a business may provide a framework for an ethical culture through its policies, procedures and training, the ultimate decision of whether to work according to ethical principles rests with the individual. In other words, businesses are not ethical, individuals are’!**

South African Financial Planning Handbook 2008,  
Botha, Bradley *et al*: p.25

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# FRAMES OF MIND

## HOWARD GARDNER

- The disciplined mind- what we gain through applying ourselves with diligence at school, or university and over time gain expertise in one or more fields;
- The synthesising mind- which can survey a wide range of sources, decide what is important and then weave this information in a coherent fashion for oneself and others;
- The creative mind- casts about for new ideas and practices, innovates, takes chances explores and discovers;
- The respectful mind- less cognitive than the others, tries to understand and form relationships with other human beings-enjoys being exposed to different types of people –is quite forgiving of fault.

# THE ETHICAL MIND

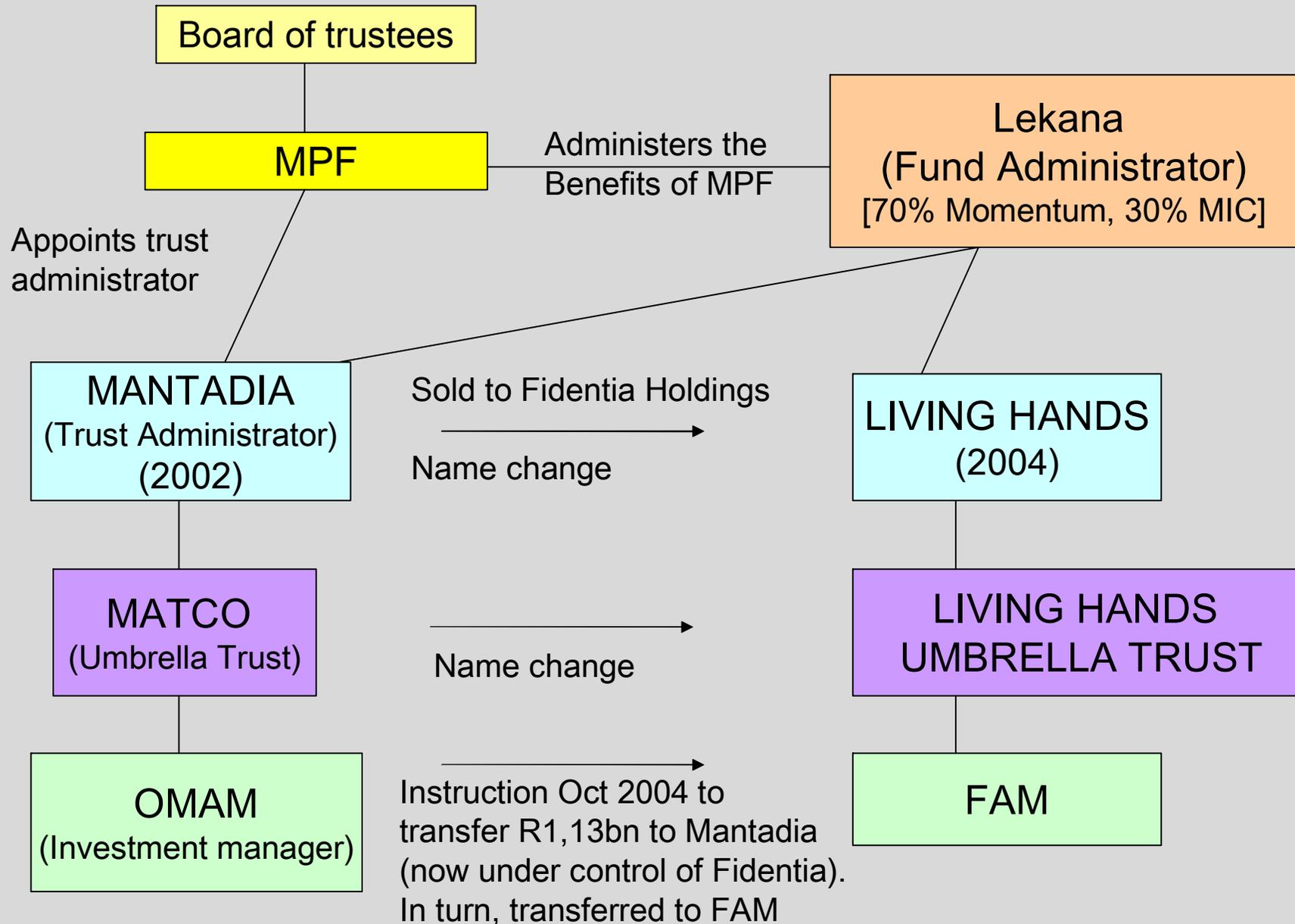
**‘What kind of a person, worker, and citizen do I want to be?’**

**‘If all workers in my profession adopted the mindset I have, or if everyone did what I do, what would the world be like?’**

**A whistle blower steps back from those concerns and considers the nature of work and the community in a larger way.**

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# FIDENTIA: REGULATORY GAPS



# **PROCESSES BY WHICH A COMPANY CAN BECOME MORE PUBLICLY ACCOUNTABLE**

- **These processes of corporate identity, fiduciary responsibility and the all important principles of Ubuntu and Humanism go beyond the often minimum, acceptable standards that are set by law makers;**
- **The behaviour of all business organisations is under ever increasing public scrutiny with the emphasis on how far they can be trusted to do in practice what they say they do.**

# **WHERE DOES THE PFA FIT INTO ALL OF THIS?**

- **Individuals have the right to challenge and seek redress when things go wrong;**
- **We make judgements about the way that companies behave on specific occasions and in specific circumstances;**
- **We may sometimes reveal issues upon which the regulator needs to act.**

**BUT**

**Our role will always remain independent.**

# OUR AIM IS TO BE:

- **Trusted as a responsible organisation by members who complain to us and the pension funds industry alike.**

## **Committed to operating with integrity and efficiency as we try to:**

- **learn through getting to know our stakeholders, listen to their experience of dealing with us and respond and change appropriately- within the constraints of our statutory duties;**
- **We are proud of our achievements so far, we are not complacent in the face of escalating demand about the challenges of maintaining high standards of service or of continually developing the quality and consistency of judgement and decision-making. Remember we are also subject to review by the Auditor-General and our Board, to test our performance against our values and pre-determined goals.**

- **My mandate as contained in the Pension Funds Act is mainly twofold-firstly it is investigate and adjudicate complaints brought to the OPFA in terms of the Act and secondly it is also to act as the CEO and accounting authority of the OPFA.**
- **In so far as determinations are concerned, I am dealing with what can be considered mundane issues.**
- **To date I have checked and signed off five hundred and forty seven (547) determinations.**

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# DETERMINATIONS

- **Complaints around the quantum of withdrawal benefits;**
- **Complaints around death benefits assessments and allocations;**
- **Complaints around disability benefits; and**
- **Complaints where employers are not paying in their contributions;**
- **Of course, there are hundreds of complaints which are simply time-barred and where the adjudicator has no discretion to condone the late filing of the complaint.**

# **THERON VS SANLAM PRESERVATION PENSION FUNDS & SANLAM LIFE ASSURANCE**

- **The complainant, who divorced the member spouse on 13 November 2003, had requested the Sanlam Preservation Pension Fund and its administrator to pay her 50% share of pension interest in terms of an amended divorce order, but her request was refused;**
- **I ruled that even though the member spouse had made a partial cash withdrawal from the preservation fund in 2001, the complainant is entitled to payment of her pension interest in terms of section 37D of the Pension Funds Act, 1956;**
- **Further found that there was a valid endorsement of the first respondent's records reflecting the complainant's entitlement to 50% of the pension interest and that, in terms of section 37D (4) (c) of the Pension Funds Act;**

- **The prohibition against members making more than one cash withdrawal before reaching retirement age does not affect the complainant because she is not a member. Therefore, the complainant is entitled to payment of her pension interest;**
- **The fund did not have registered rules for payment of pension interest to non-member spouses, so it was ordered to submit a rule amendment to the Registrar of Pension Funds that will permit such payments. The complainant was directed to make her election of a cash payment or transfer of her pension interest once the rule amendment is approved by the Registrar.**

# **NAYAGER VS LIFESTYLE RETIREMENT ANNUITY FUND AND LIBERTY GROUP LIMITED**

- **The complainant was a member of the Lifestyle Retirement Annuity Fund, which is underwritten and administered by Liberty Life Limited. She made application for an ill-health early retirement benefit on 30 January 2008 at Liberty's branch office in Benoni;**
- **The initial application form was only forwarded to head office in July 2008 and the complainant was requested to complete another application in September 2008. The disability claim was assessed and admitted, where after the complainant was paid out on 31 October 2008;**

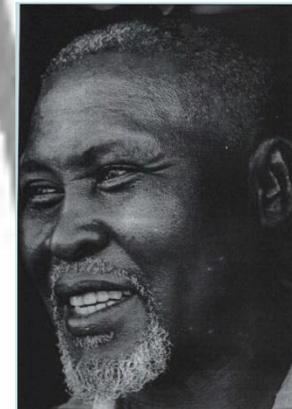
- **I found that the insurer was responsible for the delay in ensuring that the claim form was timeously transferred from its Benoni branch to its head office for assessment. This amounted to maladministration of the fund by its administrator. The complainant suffered loss as a result of the maladministration because her market-linked investment had decreased in value due to the delay.**
- **The second respondent was ordered to make good the loss of R25 571, 67 less the applicable deductions.**

# COMMUNICATION

- **Communication gap between the fund and the member;**
- **Principal officers and trustees need to step up to the plate in so far as how you communicate and what you communicate to your members;**
- **Language issue around communication;**
- **Communicate in plain language;**
- **No technical terms or investment jargon;**
- **Use language that the member can understand-his or her own first language.**

**Chief Albert Luthuli once said that:**

**"...you can only preserve human values by propagating them and creating a climate where these values will flourish."**



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**President Nelson Mandela at his inaugural speech in 1994 when he said:**

**"...The task at hand will not be easy. But you have mandated us to change South Africa from a country in which the majority lived with little hope, to one in which they can live and work with dignity, with a sense of self-esteem and confidence in the future."**





**THANK YOU!**

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