

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/EC/1726/02/KM

In the complaint between:

**ANDRÉ LEON DE WILZEM
DANIEL LAMBERTUS DE WILZEM**

**First Complainant
Second Complainant**

and

SOUTH AFRICAN RETIREMENT ANNUITY FUND

Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24
OF 1956**

- [1] This complaint concerns the allocation of a benefit payable on the death of the late Ms P. L. Marais ("the deceased") in terms of section 37C of the Pension Funds Act 24 of 1956 ("the Act"). In determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation as I considered it unnecessary, on the facts of this case, to hold a formal hearing.

The facts

- [2] The first and second complainants are the brothers of the deceased. The respondent is the pension fund ("the fund") of which the deceased was formerly a member, and from which the death benefit is payable.
- [3] The deceased passed away on 28 June 2000, and as a consequence an amount of R150 500,71 became payable in accordance with the provisions of section 37C of the Act. There were no nominated beneficiaries, and the fund identified a Ms V. O.

Lang, the same sex life partner of the deceased, as well as a Mr G. Visser, a friend of the deceased, as factual dependants. The board of the fund accordingly distributed the benefit between the two dependants, 80% to Ms Lang and 20% to Mr Visser ("the beneficiaries"). The complainants allege that neither party was dependant on the deceased, and that the benefit ought therefore to be paid into her estate for distribution to the testate or intestate heirs.

- [4] In reaching its decision the fund relied on information supplied by Ms Lang and Mr Visser. In this regard, it must be noted that the fund was approached by the two complainants, through their attorney, prior to making its decision. Neither of the complainants claimed that they were dependants of the deceased, but placed the dependence of both beneficiaries in issue. The fund therefore scrutinized the claims made by both beneficiaries carefully. The picture that emerges from all the evidence is that the deceased and Ms Lang were in a same-sex life partnership of twelve years' duration, and lived in a situation of mutual financial dependence. This is apparent from Ms Lang's testimony under oath to that effect, as well as the fact that they set up a common home and shared expenses. The relationship is further confirmed by an affidavit filed by the complainants, which characterizes the relationship as "common-law" and also makes reference to the deceased and Ms Lang living together. Mr Visser appears to have been a friend of both the deceased and Ms Lang. He lived with them, and, according to the dependency form he submitted, was financially dependent on the deceased for everyday expenses such as food and clothing. According to the fund, Ms Lang did not contradict his claim, despite the fact that she would have become entitled to the entire benefit in the event that he was not found to be factually dependent.

Determination and reasons therefor

- [5] I am satisfied that the facts set out above reflect the probabilities of the situation on

the available information. I turn now to the question of whether Ms Lang and Mr Visser qualified as dependants for purposes of section 37C.

- [6] Mr Visser, as a person who was financially dependant on the deceased although there was no legal duty on her to support him, clearly falls within the scope of the definition of “dependant” in section 1(b)(i) of the Act.
- [7] The position with Ms Lang raises an important constitutional issue, that of the entitlement of same-sex life partners to be considered as dependants for purposes of distribution of death benefits in terms of section 37C. Although the question of same-sex partners in relation to death benefits has been dealt with in previous determinations of this office, the basis of the finding has been different to that which I adopt. I therefore want to take the opportunity of clarifying the position.
- [8] In *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA) the previous adjudicator dealt with a matter similar to the present. The question for decision was whether the second respondent, who had lived in a monogamous same-sex relationship with the deceased qualified as a dependant. The adjudicator, having regard to section 39(2) of the Constitution Act 108 of 1996, as well as to the decision in *Langemaat v Minister of Safety and Security and others* 1998 (3) SA 312 (T), held that same-sex spouses should not be discriminated against in respect of pension benefits. He was accordingly of the view that the respondent was a dependant. However, although he found that the respondent “lived in a relationship of *mutual dependence* with the deceased” (my emphasis), he did not make the finding that the respondent was a “spouse” within the meaning of sub-section 1(b)(ii). Instead he broadened the application of sub-section 1(b)(i) (so-called “factual dependence”) in order to arrive at a finding that the respondent was factually dependent on the deceased. Whilst this finding cannot be faulted on the equities and result, it is questionable from the point of view of interpretation of sub-section 1(b)(i), as it is not consistent with the language used.

- [9] In fairness, the ruling was made prior to the famous *Satchwell, Robinson and Fourie* cases (*Satchwell v President of the Republic of SA and Another* [2002] 1 BPLR 2901 (T), *Satchwell v President of the Republic of South Africa and Another* [2004] 1 BPLR 5333 (CC), *Robinson and Another v Volks N.O. and Others* [2004] 4 BPLR 5599 (C), and *Fourie and Another v Minister of Home Affairs and Another*, (SCA case no 232/2003, judgment handed down on 30 November 2004)). These cases have forged a path for a more direct finding that parties in permanent same-sex life partnerships are to be considered “spouses”.
- [10] The distinction is more than merely academic. The unwarranted extension of the “factual dependence” contained within subsection 1(b)(i) to incorporate circumstances of mutual dependence does violence to the plain meaning of the text. In my view, “financial dependence” must comprise a financially dominant/subservient relationship. If this were not the case, casual relationships, same-sex or heterosexual, would fall within this subsection, provided the parties were pooling financial resources. So, for that matter, would flat-mates or members of a commune, if they could show mutual financial dependence. This is clearly not what was contemplated by the legislature.
- [11] The applicant In the *Satchwell* case, a High Court judge, challenged the constitutionality of sections 8 and 9 of the Judge’s Remuneration and Conditions of Employment Act (88 of 1989). In terms of that Act, death benefits accrued to the spouses of judges, but not to permanent same-sex life partners of judges where reciprocal duties of support had been undertaken. The Constitutional Court ordered that “spouse” as it appears in sections 8 and 9 of the aforesaid Act is to be read as if the following words appear after the word spouse – “or partner in a permanent same-sex partnership in which the partners have undertaken reciprocal duties of support.”
- [12] This approach was further endorsed in the recent *Fourie* case in which judgment was handed down on 30 November 2004 (*Fourie and Another v Minister of Home*

Affairs and Another, as yet unreported judgment of the Supreme Court of Appeal). This also concerned a same-sex life partnership where the parties wished to register their intended “marriage” in terms of the Marriage Act (25 of 1961). They sought an order compelling the second respondent to register their “marriage”. After an exhaustive analysis of the aims of the Constitution in promoting equality, the court defined marriage in its order as “the union of two persons to the exclusion of all others for life”. It furthermore declared that the intended marriage between the parties was capable of lawful recognition as a legally valid marriage, provided the formalities in the Marriage Act were complied with.

- [13] In line with these two judgments, I think it is clear that a party to a permanent same-sex relationship would qualify as a “spouse” for purposes of subsection 1(b)(ii). The *Satchwell* case dealt with a government pension fund. However, the same principle should be applied to private pension fund organizations, and in particular the interpretation of the word “spouse” as it appears in paragraph 1(b)(ii) of the Pension Funds Act, which is also concerned with the provision of death benefits. In light of the move towards recognition of same-sex spouses, boards of funds should not hesitate to regard same-sex spouses as paragraph 1(b)(ii) dependants (provided the other requirements for a permanent, monogamous, life partnership are met).
- [14] For the reasons set out above, I am satisfied that the fund correctly identified the dependants of the deceased. Mr Visser qualifies as a factual dependant in terms of subsection 1(b)(i) and Ms Lang falls within the scope of subsection 1(b)(ii) as a spouse of the deceased. There is therefore no question of the benefit, or any portion thereof, being paid to the estate, and the complaint therefore cannot succeed.

DATED at Cape Town this 11th of February 2005

Vuyani Ngalwana

Pension Funds Adjudicator

Registered address of the fund

South African Retirement Annuity Fund
Mutualpark
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Section 30M filing: High Court

Complainants represented by De Wet & Shaw Attorneys

Respondent unrepresented