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Please quote our reference: PFA/GA/13150/2007/LTN

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – E VAN GRAAN (“the complainant”) v SIEMENS SUPERANNUATION FUND (“the first respondent”), OLD MUTUAL (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the alleged improper distribution of a death benefit by the first respondent following the death of Mr. Pagler (“the deceased”).
- 1.2 The complaint was received by this office on 30 March 2007. A letter acknowledging receipt thereof was sent to the complainant on 17 April 2007. On the same date a letter was dispatched to the second respondent giving it until 16 May 2007 to file its response to the complaint. This office received responses from the first and second respondent on 11 May 2007 respectively.
- 1.3 Having considered the written submissions filed before this office, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2. Factual Background

2.1 The deceased was a member of the first respondent and passed away on 25 January 2006. The complainant is the wife of the deceased. When the deceased died, he was survived by his ex-wife Mrs. Pagler whom the deceased was responsible to pay an amount of R600 per month towards medical aid expenses in terms of the divorce agreement order. He was also survived by the complainant, complainant daughter, complainant's grandchildren and his three daughters namely, Ms. A Pagler, Mrs. J Koeck and Ms. JA Pagler (who is now residing in Austria). The board of trustees of the first respondent distributed the death benefits as follows:

2.1.1 The deceased ex-wife, Mrs. Pagler received R150 000

2.1.2 Complainant and the deceased's two daughters namely, Ms. A Pagler and Mrs. J Koeck divided the remaining benefit equally.

3. Complaint

3.1 The complainant is dissatisfied with the distribution of a death benefit and alleges that the deceased's two daughters were not entitled to receive the benefit since they were not dependants of the deceased.

4. Responses

First respondent's response

4.1 Mr. Nico Loubser, in his capacity as the Principal Officer of the first respondent responded as follows:

4.2 With regard to the allegation that the board of the first respondent did not investigate extensively, it was submitted that interviews were held to ascertain the dependency of each of the possible beneficiaries.

4.3 The deceased died on 25 January 2006. He was residing with the complainant. The deceased was responsible to pay medical expenses of his ex-wife Mrs. Pagler in the sum of R600.00 per month.

4.4 It was submitted further that the deceased's one daughter did not receive any amounts regularly and the other daughter was not interviewed as she is currently residing in Austria.

- 4.5 The deceased's friend, Mr. Badenhorst made a statement to the effect that the deceased had been staying with the complainant on a regular basis, the deceased paid medical expenses in the amount of R600.00 per month towards the medical aid of the ex-spouse and that he had also given his daughters money on a monthly basis.
- 4.6 It was submitted that the deceased did not leave a Will, an ex-girl friend was nominated as a beneficiary in another policy; another nomination form in which the complainant was nominated as beneficiary was submitted; the complainant was nominated only as a beneficiary and not a dependant; she was not nominated as such on the medical aid, the complainant was employed and earned the sum of R23 987.67 per month; the deceased's daughter earned the sum R4 110.00 and the other daughter did not have fixed employment and was working on a contract basis.
- 4.7 The first respondent referred to a definition of a dependant in section 1 of the Act. It further referred to the definition of a spouse as set out in its rules.

Spouse in terms of the Rules of the Respondent is defined as follows:

"Spouse" shall mean a person who, at the date of the Member's or Annuitant's death, was either

- (a) the legal spouse of the Member or the Annuitant; or
- (b) the Member's or Annuitant's partner
 - (i) in a union according to customary law or a union recognized as a marriage under any religion; or
 - (ii) in a relationship of at least two years duration where the partners, who may be persons of the same or opposite sex, have cohabitated for that period or have shared a reciprocal duty of support.

- 4.8 In considering the above information, the trustees agreed that:
- 4.8.1 the ex-spouse was able to receive her monthly medical expense as per divorce settlement;
 - 4.8.2 the complainant was a factual spouse in terms of the definition in the first respondent's rules;
 - 4.8.3 the deceased's two daughters were factual dependants in terms of section 1 of the Act;
 - 4.8.4 the complainant's daughter and her grandchildren were not legally dependant on the deceased and there was no obligation on the deceased to maintain them.

- 4.9 The first respondent explained that in allocating the benefits as such, it considered case law, particularly *De Wilzem v SARAF* (PFA/EC/1726/02/KM) where it was held that :

“Financial dependence must compromise a financially dominant/subservient relationship; otherwise an absurd situation may arise where people sharing rent in a flat might claim mutual dependence. The absurdity would also result where the parties show no commitment to living together on a permanent basis, but are merely living together as romantic partners, but there is no dependency from one of the partners.”

- 4.10 It was submitted that the complainant was advised that the trustees had to consider the nomination form, the current financial situation, the relationship with the deceased in order to determine the dependency. Further that the medical aid was utilized because it was information available.
- 4.11 The first respondent submitted that there was no maladministration as it used all the information submitted and considered all the factors.

Second respondent's response

- 4.12 Ms Anne Petricevic, an Account Executive at the second respondent, advised that the second respondent, as an administrator of the first respondent, did not have jurisdiction to comment on complaints concerning the distribution of death benefits as in terms of section 37C of the Act the duty of distributing death benefits was placed on the board of trustees of the first respondent.

5. Determination and reasons therefor

- 5.1 The payment of death benefits is regulated by section 37C of the Act read in conjunction with the definition of a dependant in section 1. The primary purpose of this section is to protect those who were financially dependent 'on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. Thus, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in his nomination form, it does not necessarily imply that the whole amount of the benefit will in fact be awarded to him because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.

5.2 The duties of the board in this regard were cogently summarized in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants,
- the relationship with the deceased,
- the extent of dependant,
- the wishes of the deceased placed either in the nomination and / or his last will, and
- financial affairs of the dependants including their future earning capacity potential

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.3 In this matter, the complainant is disputing that two daughters of the deceased, Ms. A Pagler and Mrs. J Koeck are also dependants of the deceased. From the facts, they qualify as dependants, because they are children of the deceased. Section 1 of the Act defines a “dependant” in the following terms:

“dependant” in relation to a member means-

- (a) a person in respect of whom the member is legally liable for maintenance.
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) was, in the opinion of the board, upon the death of the member in fact dependant on the member for maintenance;
 - (ii) is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;
- (c) a person in respect of whom the member would have become legally liable for maintenance had the member not died.

5.4 Having addressed the first issue in *supra* the second issue which falls for determination is whether the trustees exercised their discretion properly in the distribution of the benefit. In this matter, the Board of Trustees of the first respondent allocated R150 000 of the benefit to the deceased ex-wife Mrs. Pagler whom the deceased was responsible to pay an amount of R600 per month towards medical aid

expenses in terms of the divorce agreement order. This benefit is not in dispute since the complainant is satisfied with this allocation of benefit. The board of trustees investigations revealed that the complainant worked for Transnet and earned R23 978.67 per month while Ms. A Pagler (deceased's daughter) worked for Virith Converting Machinery CC and earned a gross monthly salary of R4 110 and Mrs. J Koeck (deceased's daughter) did not have a fixed income and worked on a contract basis from time to time. From the analysis in *supra*, it is obvious that both the complainant and deceased two daughters have sufficient source of income and there is no reason why they should not share the benefit equally.

5.5 After considering all the information before us, this office is satisfied that the board has acted reasonably and properly in this case. The board is vested with a discretionary power to decide on an equitable distribution of the death benefit. It is trite law that only in instances where the functionary has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be reviewed. As discussed in the preceding paragraphs, in the present matter it cannot be said that the opinion of the board was not an honest one, nor can it be said that it was not reasonable in the circumstances. Therefore, no legal grounds exist for this office to alter its decision to award the benefit to be shared equally by the complainant and deceased daughters.

6. In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR