



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/WE/4801/2005/LS

Re: DETERMINATION IN TERMS OF 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”) – R. BRABANT V CENTRAL RETIREMENT ANNUITY FUND (“the fund”) / SANLAM LIFE INSURANCE LIMITED (“Sanlam”) / AJ FERGUS

Introduction

1. This matter concerns the distribution of the death benefit of the late Mrs Fergus (your ex wife) by the fund. Your complaint was received by this office on 7 August 2005. On 16 August 2005 a letter was sent to the Fund and Sanlam, with your complaint giving them until 6 September 2005 to file a response. A letter was also sent to Mr Alistair J Fergus (the deceased’s husband at the time of her death) on 19 May 2006 joining him as party to these proceedings in terms of section 30G of the Act and giving him an opportunity to respond to the complaint. A response was received from the fund on 1 September 2005. On 8 September 2005 the response was sent to you for a reply by 22 September 2005. We received a reply from you on 25 September 2005. Mr Fergus responded on 31 May 2006. Mr Fergus’s attorney also responded in a letter dated 16 August 2006. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor appear below.

Factual Background

2. You were formerly married to the deceased, the late Mrs Ailsa Joy Fergus. Your two children, namely Kirsten Joy Brabant (“Kirsten”) and Lauren

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

Ashleigh Brabant (“Lauren”), were born from the marriage. The marriage ended in divorce on 26 August 1997. On 4 October 2003 the deceased married Alistair J Fergus, the third respondent in this matter.

3. The deceased died on 14 July 2004 whereupon a death benefit of R95 067.16 became payable by the fund of which she was a member. In her nomination form, the deceased nominated Kirsten and Lauren. (The deceased also bequeathed her entire estate to Kirsten and Lauren).
4. In their discretion the trustees distributed the benefit as follows:

R39 145.30 to Alistair J Fergus
 R26 096.87 to Kirsten Brabant and
 R29 824.99 to Lauren Brabant

Complaint

5. You are aggrieved that Alistair Fergus received the greatest portion of the benefit after only 8 months of marriage to the deceased. You state that Kirsten and Lauren (who have been in your custody since the deceased’s death) need the money for their maintenance as the deceased estate has insufficient funds to make any payment for their maintenance. Alistair Fergus on the other hand has no dependants. In any event, according to you, he is fit and capable of working to provide for his own needs. You conclude that the trustees’ decision is “shocking” and request my intervention.

Response

Fund’s response

6. The fund submits that it complied with section 37C of the Act and then sets out the factors which the trustees took into account in reaching their decision.
7. Despite your contention (and that of the deceased’s mother) that the marriage between the deceased and Mr Fergus was not a happy one, the fund states that the trustees took into account that the marriage in fact still subsisted at the time of the deceased’s death.
8. The trustees also took into account the fact that the marriage had endured for only 8 months. (It is unclear from the response in what way this affected the trustees’ decision. Presumably this resulted in Mr Fergus receiving a smaller portion than he otherwise would have).
9. The trustees also looked at Mr Fergus’s financial position. According to his

statement of assets and liabilities submitted to the fund on request, Mr Fergus earns a monthly salary of R2 300 which is supplemented by a monthly allowance of R1 460 from his parents. This is a total of R3 760 which, according to Mr Fergus, equates his monthly expenses.

10. By contrast, according to the fund, you are in a relatively strong position financially in that you are left with a monthly surplus of R8100 after expenses have been deducted. (You point out in your reply however that this figure fails to account for the tax deducted from your salary every month).
11. The trustees also considered that Kirsten and Lauren were nominated by the deceased.
12. Finally, the trustees considered that the deceased did not bequeath any portion of her estate to Mr Fergus. He therefore stood to receive nothing if indeed there had been assets to distribute (which according to you, there were not).

Alistair Fergus's response

13. Mr Fergus states that although he was only married to the deceased for 8 months, he lived with her for a year prior to their marriage. Therefore their relationship in fact endured for 20 months.
14. Mr Fergus denies that the marriage was in any kind of trouble as your family asserts. According to Mr Fergus both you and the deceased's family disapproved of their relationship because of his relatively poor financial standing and that it is therefore not surprising that you would object to any portion of the death benefit being apportioned to him.
15. In conclusion Mr Fergus requests that the trustees' decision be upheld.
16. A letter dated 25 May 2006 from Mr Fergus' sister, Sally Leppan, was also enclosed with Mr Fergus' response. Ms Leppan confirms that there was never any talk of divorce or separation between Mr Fergus and the deceased. She also mentions that Mr Fergus paid for the entire funeral and that he still keeps in contact with the deceased's children.
17. Mr Fergus's attorneys thereafter made further submissions on his behalf in a letter dated 16 August 2006. Mr Fergus's attorneys submit that the distribution should stand because *inter alia* the minor children are to receive R55 921.86 from the proceeds of the deceased's policies which is sufficient to maintain them given that this will be supplemented by your income and further the amount awarded to Mr Fergus is an 'opportunity to help him survive' his 'dire financial position'.

Determination and reasons therefor

18. Section 37C regulates the distribution of death benefits. The provisions of this section trump testamentary freedom well as any other law including the law of contract.
19. Although Kirsten and Lauren were nominated by the deceased, as the deceased's children they qualify as dependents in terms of part (b)(iii) of the definition of "dependant" in the Act. Mr Fergus also qualifies as a dependant in terms of part (b)(ii) of the definition.
20. Therefore section 37C(1)(a) is applicable to the distribution. It reads:

"If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants."
21. The issue for determination is whether the trustees exercised their discretion in terms of section 37C(1)(a) properly. This is essentially an enquiry into the reasonableness and rationality of the decision.
22. Broadly speaking, one asks whether the board of management has properly applied its mind to the matter with reference to the basis and purpose and effects of the decision. One has regard to the information upon which the decision maker relied and determines whether proper consideration has been given to all relevant factors and that irrelevant factors have been excluded. The decision should also not be motivated by an improper purpose.
23. It is of concern to me that the trustees appear to have looked at your financial position and assumed that to be the financial means of Kirsten and Lauren. Your financial means and standing does not however reflect that of Kirsten and Lauren. They are 2 minors aged 13 and 11 years respectively, incapable of supporting themselves at present. However it would appear that the trustees did not request any details in this regard. For example what are their monthly maintenance needs at present? What will their expected maintenance needs be in the future? Will they require funding for further study after school?
24. It is also of concern to me that the trustees apparently failed to take into account the fact that there were insufficient funds in the deceased estate to pay for the maintenance of Kirsten and Lauren. Therefore, in relation to the estate, they are in precisely the same position as Mr Fergus.
25. The trustees' duty in terms of section 37C(1)(a) 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 dependency;
- the wishes of the deceased placed either in the nomination and/or his last will; and
- the financial affairs of the dependants including their future earning capacity potential.”

26. With regards to the age of the dependants, Kirsten is 13 years and Lauren is 11 years. Mr Fergus on the other hand is an adult male of 36 years. With regards to the respective relationships to the deceased, Mr Fergus had a relationship with the deceased which, according to him, endured some 20 months. Kirsten and Lauren on the other hand were the deceased’s only daughters who were in her care and custody at the time she died. With regards to the wishes of the deceased, Kirsten and Lauren were nominated both in the nomination form and in her will whereas Mr Fergus was excluded in both instances. Finally with regards to the financial affairs and future earning capacity of the dependants, according to information obtained by the trustees during the course of their investigations, Mr Fergus is currently working in Botswana. Kirsten and Lauren on the other hand are currently at school and unable to support themselves at all at this stage. It is not apparent from the pleadings what the future earning capacity of the dependants is.
27. Based on the fund’s response and considering the test in *Sithole* and its application to the present case (see paragraph 26), I am not convinced that the trustees took all relevant factors into account in arriving at their decision. In fact, as set out in paragraph 23 it appears that they considered irrelevant factors. Therefore the appropriate order is to remit the matter back to the trustees for their reconsideration.

Relief

28. In the result I make the following order:

- 28.1 It is hereby declared that the trustees of the fund failed properly to exercise the discretion conferred on them by section 37C of the Act.
- 28.2 The decision of the trustees to allocate R39 145.30 to Alistair J Fergus and R26 096.87 and R29 824.99 to Kirsten Joy Brabant and

Lauren Ashleigh Brabant respectively is hereby set aside.

- 28.3 The trustees of the fund are directed to properly exercise their discretion in the allocation and distribution of the deceased's death benefit with due consideration of the observations made in this determination.
- 28.4 The trustees are further directed to report in writing to this tribunal and to the complainant by no later than Friday, 27 October 2006 what their decision is and the reasons and all the factors they have taken into account in arriving at this decision.
- 28.5 The complainant and the third respondent may file written submissions in this tribunal within two weeks of receiving the trustees' decision and reasons therefor if they should be dissatisfied with the trustees' decision and/or reasons therefor.
- 28.6 This file will be closed if no such submissions are received from the complainant or the third respondent within the period stipulated in paragraph 28.5 above.

DATED AT CAPE TOWN THIS DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR