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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): ML VAN DRIMMELEN v CENTRAL RETIREMENT ANNUITY FUND (“the fund”) and SANLAM LIFE INSURANCE LTD (“Sanlam”)**

**Introduction**

[1] This matter concerns your dissatisfaction with the second decision made by the board of trustees of the fund, following a directive from this tribunal on 13 December 2004 setting the first decision aside. The complaint was received by this office on 26 October 2005. On 3 May 2006 a letter was dispatched to the respondents giving them until 17 May 2006 to file a response to the complaint. The response dated 11 May 2006 was received on the same day, a copy of which was sent to you. Having examined and investigated the complaint, I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, is set out below.

[2] The facts of this matter are well known to all parties and will not be repeated here. On 13 December 2004 I made the following order under the above case number, between the same parties:

“10.1 The decision taken by the board of trustees of the respondent on 20 November 2000, in respect of the distribution of the benefit payable in terms of section 37C of the Pension Funds Act, 24 of 1956 as a consequence of the death of Ms L. Niemand, is hereby set aside;

10.2 The respondent is ordered to make a proper investigation into the possible dependants (as defined in section 1 of the Act) of Ms L.

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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

Niemand, and thereafter to re-exercise the discretion conferred on it in terms of section 37C pertaining to the distribution of the benefit payable;

- 10.3 The investigation is to be made, and the discretion exercised no later than **Friday 28 January 2005**
- 10.4 The respondent is further ordered to advise this tribunal and the complainant in writing by no later than **Friday 28 January 2005** of the results of its investigations and decision as regards equitable distribution of the benefit.”

- [3] The board of trustees duly exercised its discretion and sent a record of its decision together with the reasons therefor to this tribunal on 28 January 2005. The effect of this decision was the same as the previous one, which awarded the entire benefit of R61 838 to Mrs M M Niemand, the mother of the deceased, Ms L. Niemand. However, the reasons for arriving at this finding were different as will appear below.

### **Complaint**

- [4] Your complaint is substantially the same as your previous one. You rely on the fact that you were a dependant of the deceased, in that you lived together, maintained a common household, and lived in a “same-sex” partnership with the deceased. You also maintain that Mrs MM Niemand was not a beneficiary of the deceased as she was receiving a state pension, as well as a pension from her deceased husband’s pension fund. You contend that the amounts you received from the Truworths Pension Fund arising from the death of Ms Niemand are not relevant to the decision of the trustees in the present dispute.
- [5] You set out your financial situation as follows:
- [5.1] You owned one half share of the common home (the value is not stipulated by you);
- [5.2] You inherited the other half share in terms of the will of the deceased, but had to take out a further bond for R50 000 in order to pay out the deceased’s family for an unspecified portion of the estate;
- [5.3] The household contents which remain in your possession amount to R10 000 worth;
- [5.4] You received R7 000 from the Barno Plastics Ltd pension fund when you resigned to take care of the deceased, since you had only been a member for three years and three months;

[5.5] You received R330 000 from the Truworths pension fund of which the deceased was a member.

[6] You therefore request that the matter be “settled” with Sanlam in a manner that is acceptable to both sides. By this I take you to mean that you wish to share in the distribution.

### **Response**

[7] The board of trustees of the fund, in arriving at its second decision, has included you, along with Mrs MM Niemand as a dependant of the deceased. The board states that it has to allocate and distribute the death benefit among the identified beneficiaries according to a fair and reasonable ratio, bearing in mind the financial circumstances of each identified dependant. For this reason you were approached for information concerning your financial situation.

[8] The board’s information concerning the respective financial positions of the two dependants can be summarized as follows. An amount of R407 933 was deposited into the Truworths Staff Dependants Trust account. Of this, Mrs MM Niemand received a monthly income of R2 200, whereas you received R6 000 monthly. You also received a lump sum of R198 354 from Truworths Group Life. After Mrs MM Niemand died you received the remainder of the trust account, which the board assumes is the amount of R330 000 you refer to. At paragraph 4.8 of the letter to my office setting out the reasons for the decision, the board concluded that it appears that you had inherited most of the assets of the deceased, namely her share in the house (which it values at R57 000), furniture, clothing, jewellery, together with the portion of pension and group schemes set out above.

[9] In contrast, the deceased’s mother’s financial position (set out in the dependency affidavit of 22 July 2002) clearly indicated that her monthly expenses of R4 295 exceeded her income of R3 425, with no possibility of relief from another source to supplement her income. The above income included the R2 200 monthly pension from the Truworths fund. She apparently also received R40 037 from her daughter’s estate as a beneficiary in terms of the will.

[10] In response to your contention that the deceased’s mother was not a dependant, the board points out that you mentioned in a previous complaint letter that the deceased paid her monthly donations. She was also identified by the executor of her estate as a dependant, as well as by the Truworths fund. In addition, the board took note of the fact that in terms of the common law, the deceased (as her daughter) would have

been liable for her maintenance and therefore in view of their relation to each other, she should be considered as a dependant.

[11] Further factors the board considered in arriving at its decision were:

[11.1] In view of her old age, Mrs MM Niemand did not have any possibility of obtaining a job in order to increase her monthly income to make ends meet;

[11.2] She would in all probability have needed further funds from a medical point of view;

[12] The board therefore decided to award the full amount of R61 838 to Mrs MM Niemand. In its view it was evident from the available information that you had already received adequate funds and assets to support yourself.

### **Determination and reasons therefor**

[13] 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 or her 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 nominated beneficiary, it does not necessarily imply that a benefit will in fact be awarded because the deceased’s intention as contained in her will 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 responsibility of the board of trustees when dealing with payment of death benefits to conduct a thorough investigation to determine the beneficiaries (which consist of dependants and nominees), and thereafter to decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit allocated.

[14] In order for the board to ensure that it makes an equitable distribution of the benefit, it will normally undertake an investigation to determine potential beneficiaries. The board must then decide on a distribution of the death benefit after the deceased’s dependants have been identified. Section 37C(1)(a) of the Act is applicable to the present distribution. It reads as follows:

“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.”

- [15] The initial decision taken by the board was set aside by this tribunal as it had not taken appropriate steps to identify properly the dependants of the deceased. In its second decision, the board has now recognized you as a dependant of the deceased. It is not stated whether you were identified as a dependant in terms of section 1(b)(i) (factual dependency) or 1(b)(ii) (same sex spouse). It is not necessary for me to make a finding on the correctness or otherwise of your inclusion as a dependant in view of the basis on which this matter will be determined. I assume (without deciding) in your favour that you were correctly identified as a dependant of the deceased.
- [16] I am satisfied that Mrs MM Niemand was correctly identified as a dependant. The evidence points unanimously to the conclusion that she was in receipt of financial assistance from her daughter, even on your own version. That already brings her within the ambit of section 1(b)(i), and it is therefore not necessary to decide whether or not she also qualified as a dependant in terms of section 1(a) or 1(c).
- [17] Having identified the dependants and nominee (yourself), the board was then tasked with allocating the resources between the beneficiaries. In deciding on an equitable distribution the board's duty in this regard was cogently summarised 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
  - 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.”
- [18] In the present case the board has given prominence to the question of the financial position of the respective parties, and has established, as far as it was able, the circumstances of both you and Mrs Niemand. In this regard the board states that you were reluctant to provide it with information about additional benefits you had received, and for this reason there is some uncertainty on the actual amounts received by you from the Truworths pension fund. The extent of the benefits you received from other sources is highly relevant to the present enquiry, as it impacts significantly on your financial position.

- [19] Even assuming that the R330 000 received from the Truworths pension fund included both the lump-sum payment and the balance of the trust set up in respect of Mrs Niemand, it is apparent that you have been by far the larger beneficiary of the financial benefits available for distribution as a result of the death of Ms L Niemand. It cannot be said that it was unreasonable of the board, against that background and a demonstrable financial need on the part of Mrs Niemand, to award her the full amount of the benefit that forms the subject matter of this dispute.
- [20] It is trite law that only in instances where the functionary (in this case the board) has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be reviewed. On considering all the information before me, I am satisfied that the board has acted reasonably and properly in this case, has taken into account all the relevant factors, and has not taken into consideration any irrelevant factors. Therefore, no legal grounds exist for me to alter its decision.

**Relief**

- [21] The complaint is dismissed for the above reasons.

DATED AT CAPE TOWN ON THIS THE                      DAY OF                      2006.

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR