



Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE**, 2010
Tel: 087 942 2700; 011 783 4134 **Fax:** 087 942 2644
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/GA/12683/2012/SM**

BY REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): E PAXTON (“complainant”) v SENTINEL MINING INDUSTRY RETIREMENT FUND (“first respondent”) AND TB LUDICK (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the payment of a spouse's pension and a death benefit to the complainant following the death of Ms OL Barnard (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 30 July 2012. A letter acknowledging receipt thereof was sent to the complainant on 10 August 2012. On the same date, a letter was dispatched to the first respondent giving it until 10 September 2012 to file a response. Another letter was sent to the second respondent on 27 September 2012 giving him until 26 October 2012 to file a response. Responses were received from the first and second respondents on 26 September 2012 and 24 October 2012 respectively. On 15 January 2013, this Tribunal received

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

further submissions from the complainant.

- 1.3 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant alleges that he was involved in a relationship with the deceased from 2007 until she passed away on 1 June 2011. The deceased was a member of the first respondent until her death. The second respondent is the deceased's brother and a nominee of her death benefit.
- 2.2 A spouse's pension and a death benefit became payable following the deceased's death. On 13 June 2012, the board of trustees of the first respondent resolved that the complainant does not qualify for a spouse's pension in terms of the fund rules. It also decided that he is not qualified to receive a death benefit as a factual dependent of the deceased. The board of trustees decided to allocate the full amount of the death benefit to the second respondent.
- 2.3 The refusal of the first respondent to recognise the complainant as a co-habiting partner of the deceased and to allocate a portion of the death benefit to him is the subject matter of the complaint.

[3] COMPLAINT

- 3.1 The complainant states that he commenced his relationship with the deceased in 2007 whilst they were still married to their respective former spouses. He submits that they entered into a verbal co-habitation agreement and contributed jointly to their household. He contends that

they agreed to get married but the marriage was put on hold due to financial constraints. Therefore, the complainant states that he is entitled to receive a portion of the deceased's death benefit.

[4] **RESPONSES**

First respondent's response

4.1 The first respondent submits that in terms of rule 6.1.1.1 of its rules, a death benefit consisting of the deceased's fund credit and a death cover became payable to her beneficiaries upon her death. Further, in terms of rule 6.1.4, a spouse's pension which is secured by 50% of the benefit is payable to any surviving spouse of the deceased. The remaining 50% constitutes a lump sum benefit which is to be allocated to the dependants and nominees of the deceased in terms of section 37C of the Act. It asserts that a spouse's pension is only payable to a "spouse" as defined in the rules. The rules define a "spouse" as follows:

"**SPOUSE**" shall mean at the date of the death of the MEMBER..., the person who was:

- (a) the legal spouse of the MEMBER...; or
- (b) the MEMBER'S... partner of a union according to customary law; or
- (c) the MEMBER'S... partner of a union recognised as a marriage under any religion; or
- (d) the MEMBER'S... life partner in a relationship which the TRUSTEES regard as having been permanent, provided that in making such determination the TRUSTEES must have regard to whether or not there was, at the relevant date or dates, cohabitation as well as other factors which they, in their sole discretion, regard as being relevant;

... at the date that the MEMBER died..., provided that:

- (i) ...
 - (ii) the MEMBER must have notified the FUND of the existence of such a SPOUSE prior to the date upon which a death benefit becomes due from the FUND in terms of Rule 6.1, unless the TRUSTEES, in their sole discretion, decide that such notification is not necessary in the particular circumstances..."
- 4.2 The first respondent indicates that a lump sum death benefit became payable to the deceased's beneficiaries in terms of section 37C of the Act. In terms of section 37C of the Act, the board of trustees has a duty to identify and trace the deceased's dependants. They also have a discretion to determine who qualify to receive a portion of the death benefit as a dependant. In exercising their discretion, the board of trustees must take into account relevant factors such as the financial status of the beneficiaries, their future earning capacity, their state of health, the nature of their relationship with the deceased, the extent of their dependency on the deceased and the amount available as a death benefit.
- 4.3 It asserts that the deceased did not nominate the complainant as a dependant or a nominee prior to her death. She also did not notify the fund that she co-habited with the complainant. It avers that the complainant could possibly qualify for a spouse's pension if the trustees are satisfied that he co-habited with the deceased. He could also qualify for a death benefit as a dependant in terms of section 37C of the Act. The first respondent submits that the complainant's claim was disputed by members of the deceased's family. The fund also received affidavits and documents which disputed the complainant's claim. This includes a medical report submitted by the complainant. The complainant also failed to show that he was financially dependent on the deceased. The

deceased's family members were not aware that the complainant was co-habiting with the deceased.

- 4.4 The second respondent submitted a claim for a death benefit on the basis that he was nominated by the deceased as a beneficiary. According to the second respondent, he took care of the deceased's financial affairs and her intention with the nomination was for him to take care of their parents and siblings. After considering the matter, the board of trustees was not satisfied that the complainant qualifies as a "spouse" as defined in the rules or that he was a "dependant" as defined in the Act. As a result, no spouse's pension or death benefit was allocated to him. The entire amount of the death benefit was allocated to the second respondent.

Second respondent's response

- 4.5 The second respondent states that the deceased's family only met the complainant for the first time a few days before the deceased's death. The deceased never mentioned or indicated that she moved in with the complainant. There was nothing which indicated that they lived together. The second respondent submits that the deceased and the complainant never had a written agreement of co-habitation. He asserts that the deceased's family would have known if there was a possibility of marriage between the complainant and the deceased. The second respondent disputes the complainant's submission that he took care of the deceased whilst she was in hospital.
- 4.6 He asserts that the complainant does not qualify as a "spouse" and that he was the only nominee of the deceased's death benefit. He states that the deceased could have nominated the complainant as a beneficiary if their relationship was strong and they shared household expenses. The second respondent disputes that the complainant contributed to the deceased's medical expenses as she had her own medical fund.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The issue that falls for determination is whether or not the refusal of the first respondent to pay the complainant a spouse's pension or a death benefit is lawful in terms of its rules.

The fund rules and the complainant's entitlement

Spouse's pension

- 5.2 The respondent's rules provide for payment of a spouse's pension (rule 5.3.7) or a death benefit (rule 6.1.1) upon the death of a member. However, in order to qualify for a spouse's pension, the claimant must fall within the definition of a "spouse" as defined in the fund rules (see the definition in paragraph 4.1 above).
- 5.3 In terms of paragraph (d) of the definition of a "spouse", the complainant could qualify as the deceased's life partner and a spouse for the purposes of a spouse's pension and a death benefit. However, the trustees have the power to determine whether or not the complainant can be regarded as the deceased's spouse having regard to whether or not there was cohabitation and other factors which in their sole discretion regard as being relevant. The board of trustees also has the power to determine whether or not the complainant qualifies as a dependant of the deceased in terms of section 37C of the Act read together with the definition of a "dependant" in section 1 of the Act.

- 5.4 The first respondent submits that the deceased did not notify it about the existence of the complainant as her spouse or co-habiting partner. Paragraph (d)(ii) of the definition of a “spouse” states that the member must have notified the fund of the existence of such a spouse prior to the date upon which a death benefit becomes due from the fund in terms of rule 6.1, unless the trustees, in their sole discretion, decide that such notification is not necessary in the particular circumstances.
- 5.5 The deceased passed away on 1 June 2011. At the time of the deceased’s death, the fund did not receive any notification of a co-habiting partner of the deceased. Thus, as at the date of death, the deceased did not have a co-habiting partner that was notified to the fund. The complainant could qualify as a spouse of the deceased if he satisfies the trustees that he was the life partner of the deceased and that the deceased notified the fund of his existence prior to her death. In this matter, the complainant failed to show that he qualify to receive a spouse’s pension as a spouse of the deceased. The fund was also not notified of his existence as a spouse or life partner of the deceased. The deceased’s family members also dispute the existence of any relationship between the deceased and the complainant, which would qualify him for a spouse’s pension. The board of trustees had regard to affidavits and other relevant factors in arriving at its decision. Thus, this Tribunal is satisfied that complainant is not eligible for a spouse’s pension from the fund in terms of its rules.

Death benefit

- 5.6 As indicated above, paragraph d(ii) of the definition of a “spouse” in the fund rules requires that the member must have notified the fund of the existence of her spouse prior to the date upon which a death benefit becomes due from the fund in terms of rule 6.1. In this matter, the fund

was not aware of the existence of the complainant as the deceased's life partner. Submissions also indicate that the complainant failed to establish that he lived together with the deceased and that they shared household expenses. The existence of a co-habiting relationship between the complainant and the deceased is being disputed by family members of the deceased. The onus was on the complainant to prove that he lived with the deceased as her life partner and that they shared household expenses. The complainant failed to discharge his onus of proof in this matter. Submissions also indicate that the complainant did not show that he was dependant on the deceased or that he qualifies to receive a death benefit as a factual dependant. The trustees' investigations established that the complainant did not qualify to receive a portion of the death benefit as a factual dependant of the deceased in terms of section 37C of the Act.

- 5.7 The deceased nominated the second respondent as the sole beneficiary of her death benefit prior to her death. It is clear that if the complainant shared household expenses with the deceased, she would have designated the complainant as a nominee. Although a beneficiary nomination form is not binding on the trustees, it serves as a guide as to how the death benefit should be distributed (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). The board of trustees had regard to the nature of the relationship between the complainant and the deceased, the length of their relationship and their financial status before distributing the death benefit.
- 5.8 Therefore, this Tribunal is satisfied that the trustees of the first respondent exercised their discretion reasonably and properly in refusing to allocate a portion of the death benefit to the complainant. The facts show that the board of trustees took into account relevant factors and exercised its

discretion properly.

[6] ORDER

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 8TH DAY OF FEBRUARY 2013

**MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR**

Section 30M filing: Magistrate's Court

Complainant was represented by: Piet Van Staden Attorneys

No legal representation for the respondents