

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO:PFA/GA/977/99/NJ

In the complaint between:

**W J A Seymore N.O.**

**Complainant**

and

**Colgate-Palmolive Pension Fund**

**First Respondent**

**N Wright**

**Second Respondent**

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

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1. This case involves a complaint lodged in terms of section 30A of the Pension Funds Act 24 of 1956 ("**the Act**"). The complaint relates to the distribution of a death benefit in terms of section 37C of the Act, in particular, whether the second respondent qualifies as a spouse and whether the distribution was equitable as required by the Act.
2. An investigation was conducted by my investigator, Naleen Jeram. No hearing was held in this matter. In determining this matter I have relied exclusively on the documentary evidence, written submissions and additional information, all obtained during the course of Mr Jeram's investigation.
3. The complainant, Ms Elma Seymore, has lodged a complaint on behalf of her two minor children, Henri and Daniel Seymore, in her capacity as mother and legal guardian. The minor children are currently residing with the complainant at Florida, Gauteng. Henri Seymore is currently 13 years of age, attending secondary school and Daniel Seymore, is 18 years of age attending Pretoria Technikon studying for an

electrical engineering degree.

4. The first respondent is Colgate-Palmolive South Africa Pension Fund, a pension fund duly registered under the Act (“**the fund**”). The fund is represented by its principal officer, Mr R W Pollard and one of the trustees, Ms K Kanjee.
5. The second respondent is Ms N Wright, an adult female of Westwood, Gauteng. Despite a copy of the complaint being served on Ms Wright and my investigator specifically requesting her to respond to the complaint, she has failed to do so. Accordingly, this matter has been determined in the absence of any submissions from Ms Wright.
6. On 4 June 1977 the complainant and Mr Seymore were married in community of property. Mr Seymore commenced employment with Colgate-Palmolive South Africa (Pty) Ltd in November 1983 as an accountant, at which point he became a member of the fund. Two children were born from this union, namely Daniel and Henri. On 16 July 1996, the complainant was divorced from Mr Seymore. In terms of the divorce order, she was entitled to 50% of Mr Seymour’s pension interest in the fund. Further, a maintenance order was also made in terms of which Mr Seymore was required to pay R1 350.00 per child per month to the complainant. This amount was subsequently increased to R1 425.00.
7. On 5 December 1998, Mr Seymore died (“**the deceased**”). The various benefits that became payable upon the death of Mr Seymore were regulated by rule 6, which reads:

6.1 Death in Service before Normal Retirement Date

6.1.1 Lump Sum Benefit

On the death in Service of a Member before his Normal Retirement Date, the following lump sum benefit shall be payable from the Fund:

- (i) in the case of a Married Member on whose death a Pension becomes payable in terms of Rule 6.1.2 or Rule 6.1.3: twice the Member's Pensionable Salary at the date of his death; or
- (ii) ...

The deceased's pensionable salary at the date of his death was R265,068.00. Therefore, the lump sum available in terms of rule 6.1.1 was R530,136.00.

8. Rule 6.1.2 regulates a pension payable to an eligible spouse and reads:

6.1.2 Pension to Eligible Spouse

On the death in Service before his Normal Retirement Date of a Married Member a Pension shall be payable to his Eligible Spouse of an amount equal to 30% of the Member's Pensionable Salary at the date of his death.

"Eligible Spouse" shall mean:

- (a) The widow, or widower, of a Married Member; or
- (b) The widow, or widower, of a Pensioner (other than a Pensioner who became a Deferred Pensioner before 1 January 1985),

provided that such person:

- (a) ...
- (b) ...
- (c) ...
- (d) was the Member's or Pensioner's legal spouse, by whatsoever rites married or a person with whom the Member or Pensioner lived in a customary union as defined in the Black Administration Act, 1927, or a person with whom the Member or Pensioner was living as man and wife, although not legally

married, whom the Trustees in their absolute discretion may regard as an Eligible Spouse but not to the exclusion of a legal spouse; and provided further that only one person shall qualify as an Eligible Spouse and if a Member or Pensioner is survived by more than one person as described above, the Trustees, in their absolute discretion, shall direct which of such persons is to be recognized as the Eligible Spouse for the purpose of the Rules.

Therefore, the eligible spouse is entitled to 30% of R265 068.00, which amounted to an annual pension of R79 520.40 (R6 626.70 per month). For reasons, which appear fully below, the fund deemed Ms Wright to fall within the definition of a spouse and therefore she qualifies for this pension.

9. Rule 6.1.3 regulates the pension payable to eligible children and provides:

6.1.3 Pension to Eligible Children

6.1.3.1 On the death in Service before his Normal Retirement Date of a Married Member, a Pension shall be payable to his Eligible Children equal to the following percentage of the Eligible Spouse's Pension described in Rule 6.1.2:

<u>Number of Eligible Children</u>	<u>Percentage</u>
1	20
2	40
3	60
4	80
5 or more	100

6.1.3.2. If no Pension is payable to an Eligible Spouse in terms of Rule 6.1.2, then the Pension payable in terms of Rule 6.1.3.1 shall be doubled.

6.1.3.3 The Pension payable to the Eligible Children shall be recalculated and adjusted

when any child ceases to be an Eligible Child or on the cessation of payment of Pension to the Eligible Spouse.

“Eligible child” is defined as:

A child of a Member and shall include

- (i) a posthumous child;
- (ii) a stepchild, or a child born out of wedlock, who is dependent on the Member;
- (iii) an adopted child on proof of adoption to the satisfaction of the Trustees;

provided that such child:

- (a) has not been married;

and

- (b)
  - (i) is under the age of 18 years; or
  - (ii) is under the age of 21 years and is undergoing compulsory training in the Citizen Force; or
  - (iii) Is under the age of 24 years and is a full-time student at an educational establishment approved by the Trustees; or
  - (iv) is, in the opinion of the Trustees, permanently incapacitated by reason of physical or mental infirmity from supporting himself;

and provided further that if such child is in receipt of an earned income from any source, the Trustees at their absolute discretion may direct that he shall not be regarded as an Eligible Child for the purposes of these Rules.

The fund deemed Daniel and Henri Seymore to fall within the definition of eligible children and therefore entitled to an annual pension amounting to 20% of the spouse's pension. Thus, the minor children were each entitled to R15,904.08 per annum (R1 325.34 per month).

10. Therefore, the following benefits were available for distribution as a result of the death of the deceased:

- lump sum (rule 6.1.6) - R530 136.00 (before tax)
- spouse's pension (rule 6.1.2) – R79,520.40 p.a.
- children's pension (Rule 6.1.3) – R31,808.16 p.a.

11. The payment of any death benefit is regulated by section 37C of the Act, which in part reads:

(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of section 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(e) If the fund within twelve months of the death of the member becomes aware 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.....

(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act No. 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.

Dependant is also defined as the Act as follows:

(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, is such person –
- (i) was, in the opinion of the board, upon the death of the member in fact dependent 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;
  - (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child:
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

12. In about September 1999 after conducting a thorough investigation, the trustees decided to effect as distribution of the benefits in terms of section 37C of the Act. In making their distribution they considered the following factors:

- The deceased had two dependants.
- The deceased commenced his relationship with Ms Wright after his divorce. They bought a house together which was the sole asset of a close corporation of which they were the only members and shared household expenses. They were living together as “husband and wife”. They shared a relationship of mutual dependency and were living together at the time of the death of the deceased. Mrs Wright was also financially dependent on the deceased.
- Prior to deceased’s death, the complainant was receiving R2,850.00 per month in respect of maintenance payments for the minor children. The minor children were also on the deceased’s medical aid policy. The employer has agreed to provide medical aid for the minor children until they attain the age of 21 years.
- Mrs Wright is employed by ABSA Bank Ltd and her present salary after deductions is R4,036.31. She is a member of a pension fund and has a life

insurance policy. She also received R27,659.34 from Sanlam in respect of a death policy taken out by the deceased. In respect of her monthly expenses and income submitted to the fund her current expenditure exceeded her income by approximately R3,000.00.

- In terms of the last will of the deceased, Daniel and Henri Seymore were the sole heirs. However, there was a condition that the benefit shall only be paid to the minors upon them attaining the age of 25 years and in the event of him pre-deceasing the minors before this age, the benefit is to be kept in a trust on behalf of the minor children. Accordingly, after the death of the deceased, two trusts were set up for the benefit and further education of Daniel and Henri Seymore. After the liquidation and distribution of the deceased's estate, it appears as if no assets (other than lump sum payment from pension fund) were available to be held in trust.

13. Based on the above and the provisions of section 37C of the Act, the trustees decided to make the following distribution. Although not legally married to the deceased, the fund deemed Mrs Wright to be an eligible spouse and dependant in the Act and therefore to qualify for a spouse's pension. An annual pension of R79,520.40 was granted to her until her death or remarriage and an annual pension of R15,904.08 was awarded to each minor child. Such pensions are payable until the minor children reaches the age of 24 or earlier in terms of the conditions set out in rule 6.1.3 read together with the definition of "eligible children".
14. With regard to the lump sum benefit of R530,136.00, R155,857.68 was deducted for tax owing to the Receiver of Revenue. R43,063.87 was paid to the complainant representing 50% of Mr Seymore's pension interest in the fund. In terms of the Divorce Act of 1979, "*pension interest*" is the amount which a member would have been entitled to had he withdrawn (resigned) from the fund at the date of divorce. In terms of rule 12.1.1 the withdrawal benefit of Mr Seymore at 16 July 1996 amounted to R86,127.74. Thus, the complainant in her personal capacity was entitled to R43,063.87 in terms of the divorce order. 10% of the remainder of the

lump sum, amounting to R33,122.44 was awarded to Ms Wright. The balance of the lump sum in the amount of R298,093.00 was awarded to the minor children in equal shares (90% of lump sum). The minors' benefits were paid into the trusts set up in terms of the last will of Mr Seymore. In summary, the distribution was as follows:

**Lump sum**

Benefit		R530,136.00
Tax	R155,857.68	
Complainant	R 43,063.87	
Ms Wright	R 33,122.45	
Henri Seymore	R149,046.00	
Daniel Seymore	<u>R149,046.00</u>	
	<u>R530,136.00</u>	<u>R530,136.00</u>

**Pensions**

Ms N Wright – R79,520.40 p.a. (R6,626.70 per month)

Henri Seymore – R15,904.08 p.a. (R1,325.34 per month)

Daniel Seymore– R15,904.08 p.a. (R1,325.34 per month)

15. Complainant was dissatisfied with the above distribution. In particular, she argued that Mrs N Wright did not qualify as the spouse as she only resided with the deceased for a period of 16 months and therefore should not share in the lump sum benefit as well as the annual pension. In the alternative, she contended that even if Mrs Wright qualified as a spouse she should not share in the lump sum benefit.
16. The fund deemed Mrs Wright to fall within the definition of spouse and dependant for the reasons set out in paragraph 12. The fund also argued that the distribution was equitable as required by section 37C(1)(a) and the financial needs of the minor children are well catered for.
17. Turning to the complainant's main argument that Mrs Wright does not qualify as a

spouse, it must be noted that there are two benefits payable. That is, a spouse's pension and a lump sum benefit. With regard to the spouse's pension, the rules of the fund define an eligible spouse as "...a person with whom a member or pensioner was living as man and wife, although not legally married whom the trustees in their absolute discretion may regard as an eligible spouse...". The definition of dependant (applicable to the lump sum payment) allows for "a person in respect of whom the member is not legally liable for maintenance, if such a person was in the opinion of the board upon the death of the member in fact dependant on the member for maintenance..." The fund deemed Mrs Wright to fall within both definitions and therefore qualify for a spouse's pension and a portion of the lump sum benefit. The test for determining whether a person is a dependant in terms of paragraph b(i) is whether the parties demonstrated a mutual dependence and ran a shared common household. The time period for which the parties resided together may be a relevant factor in determining whether the parties were in fact dependant on each other or shared a mutual dependence, but not a decisive factor, that is, the mere fact that Mrs Wright and the deceased only lived together for 16 months does not *ipso facto* exclude here from sharing in the benefits. From the evidence, even though Mrs Wright only lived for 16 months with the deceased, I am satisfied that there was a mutual dependence between the parties and they ran a common household. Therefore, Mrs Wright is entitled to a spouse's pension and qualifies as a dependant in terms of the Act.

18. In making an equitable distribution in terms of section 37C of the Act, the trustees need to consider the following factors in respect of the dependants:
  - age;
  - relationship with the deceased;
  - extent of financial dependency;
  - financial status and future earning prospects; and
  - wishes of the deceased.
  
19. From the evidence, it is clear that the trustees have considered all relevant factors

and ignored irrelevant ones and made a fair and equitable distribution in terms of section 37C. The financial needs of the two minor children are catered for, in that, immediately prior to the death of the deceased they were each receiving R1,450.00 per month in terms of a maintenance order incorporated in a divorce order. The High Court has already determined the reasonable maintenance needs of the minor children amounted to R1,450.00 per month. The monthly pension of R1,325.34 from the fund is almost in line with the reasonable maintenance needs of the minor children assessed by the High Court. Further, insofar as the monthly pension may prove to be insufficient, the minor children may lodge a claim with the respective trusts (payment of a benefit from a pension fund to a trust is permitted by section 37C(2)). That is, medical expenses, education fees or any other extraordinary cost incurred by the minors may be recovered from the trusts. Upon attaining the age of 25 years, the minors will be entitled to the lump sum benefit remaining in the trusts.

Therefore, all factors considered, the minors are financially well provided for and there is no basis in law or otherwise to interfere with the trustees' distribution in terms of section 37C.

20. Accordingly, for the foregoing reasons the complaint is dismissed.

Dated at **CAPE TOWN** this 8<sup>th</sup> day of May 2000.

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**John Murphy**

Pension Funds Adjudicator