

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/170/99/NJ

In the complaint between:

C J Fourie

Complainant

and

Central Retirement Annuity Fund

Respondent

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

1. This is a complaint lodged with the office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 (“**the Act**”). The complaint relates to the decision of the respondent to award the entire amount payable as a death benefit to the deceased’s mother to the exclusion of the complainant.
2. No hearing was held. An investigation was conducted by my investigator, Naleen Jeram. Accordingly, in determining this matter I have relied exclusively on the documentary evidence and written submissions gathered during the course of Mr Jeram’s investigation.
3. The complainant is Cornelius Jacobus Fourie, an adult male, of Pretoria, Gauteng. The complainant was initially represented by Mr Miltiadous of Barry Katz and Partners attorneys, who formulated the complaint on behalf of Mr Fourie. Hereafter, Mr Fourie terminated the services of Mr Miltiadous and instructed Dr P J Kotzé, a practising attorney to further act on his behalf.
4. The respondent is Central Retirement Annuity Fund, a pension fund duly registered

under the Act (“**the retirement annuity fund**”). The retirement annuity fund falls within the ambit of paragraph (a) of the definition of pension fund organization contained in section 1 of the Act. The rules of the retirement annuity fund allow its management committee to apply to a registered insurance company to issue policies in favour of the said retirement annuity on the lives of the members and purchase other retirement products. Any person has the right to become a member of the retirement annuity fund subject to the approval of the management committee and the assurer. Application for membership takes place by completion of proposal forms and documents provided by the insurer. The management committee collects contributions from the members and in turn pays it over to the insurance company. A member may decide what contribution he or she wishes to make subject to certain minimum amounts laid down by the insurer with whom the fund concludes the policy contract. Any monies payable by the insurance company in terms of the provisions of the policy concluded between the retirement annuity fund and the insurer will be payable by the insurer to the retirement annuity fund. The management committee, in turn, deals with the payment of benefits in accordance with the rules of the retirement annuity fund. In this matter, the respondent is represented by Mr P G Jonker of Sanlam Personal Finance, the administrator of the retirement annuity fund.

5. In about January 1990 the late Mr Nieuwenhuis (“**the deceased**”) applied to become a member of the retirement annuity fund and his application was approved by the management committee. At the time of the application, he was approximately 45 years of age and unmarried.
6. On 3 May 1999 Mr Nieuwenhuis passed away. At the time of his death, he was living with his mother, Mrs Martha Elizabeth Dorethea Nieuwenhuis. The relevant rule regulating the payment of death benefits arising from the retirement annuity fund is contained in section 8 of the rules, which in part reads:

Part 8: Benefits

1. The following benefits are available in terms of these rules.

1.1.1 A pension that commences on the MEMBER'S RETIREMENT DATE and which is payable at least until his death.

1.1.2 In the case of the death of a MEMBER before the RETIREMENT DATE and before the commencement of the pension stated in the preceding paragraph 1.1...

In terms of rule 3.1 of part 8, only one-third of the pension calculated in paragraph 1.1 may be commuted to a lump sum and the balance must be used to purchase a pension. In terms of rule 1.1, a death benefit of R80,175.51(lump sum) and a pension became available for distribution.

7. The management committee in determining the circle of beneficiaries and effecting an equitable distribution considered the following factors and information:

- The deceased was never married during his life time.
- The deceased did not nominate any beneficiary for his pension benefit. However, in his last will dated 19 March 1992, he wished for his motor vehicle to be awarded to his mother and the remainder of his estate to the complainant.
- The complainant and the deceased co-habitated for several years, however, this relationship was terminated three years prior to the deceased's death and for the last three years the deceased was living with his mother.
- The complainant is currently 47 years of age whereas Mrs Nieuwenhuis is 77 years old.
- The executor of the estate averred that Mrs Nieuwenhuis was factually dependant on the deceased at the time of his death.
- The management committee also considered affidavits by the deceased's mother and the complainant. The complainant's affidavit in part, reads:

1. ...
 2. I met Cornelius Adriaan Nieuwenhuis (NEELS) after his rehabilitation from alcoholism in September 1987. Subsequently I became involved with Neels in a Gay Relationship which lasted for nine years, until 1996. From March 1988 to March 1996, we lived together and shared a flat as well as communal expenses, of which for instance, I contributed rent as per attached document.
 3. However, Neel's longstanding battle with alcoholism, dependence on tranquilizers and depressions (for which he received medication from Geestes Gesondsheid), persisted during our relationship. As his partner, I supported him emotionally and, increasingly, financially. Neel's alcoholism and addictions, often, forced him to take unpaid leave from his work. I took out a bond for R15,000.00 to cover his expenses while he was not earning a salary. (With respect to the bond, supporting documentation is attached.)
 4. Over the nine years that we were living together, Neels was on numerous occasions admitted to the following institutions: HF Verwoerd Hospital, Astrid Clinic, Elim Clinic, Castle Carey and Magaliesoord (for a period of 3 months). With respect to Magaliesoord, on the advice of our GP, Dr L M van Zyl, I had Neels committed there. Neels had become a danger to himself and no clinic would admit him. Also, I could not look after him during the day and neither could his family.
 5. In 1996, we parted amicably. By then I had joined Life Line to help me cope with the emotional strain of Neels' illness. I also attended Al-Anon (Families and partners of Alcoholics Support Group). Neels chose early retirement in 1996 as it became increasingly difficult for him to work. His pension enabled him to support himself and he moved in with his mother. We remained friends, and I continued to support him emotionally until his untimely death on the 3rd of May 1999.
 6. In the light of our nine year relationship, of the emotional strain which I endured, and of my extensive financial contributions, as well as of the clear desire of the deceased as evidence in his last will and testament to appoint me the sole heir to his estate, a fact that he chose not to change in the last three years of his life, I humbly submit that it will be equitable that the proceeds of the annuity be paid to myself.
- Mrs Nieuwenhuis declared under oath as follows in her affidavit:

Aangaande die boedel van wyle CA Nieuwenhuis Polis No. 11146366x7.

Ek die moeder van wyle CA Nieuwenhuis was geheel afhanklik van hom. Daar my inkomste

(sic) per maand net die rente op 'n Sanlam polis wat R1,863.81 is.

My uitgawers per maand is soos volg:

Woonstel	R1,060.00 per maand
Ligte	R 90.00
Telefoon	R 180.00
Medies	R 200.00
Bediende	R 250.00
Huishoudelike benodighede	
En kruidenaars	R 800.00

My kinders moet my voorlopig help omdat die bydrae van Cornelius nie.....(ineligible in document) nie.

7. Based on the above evidence, in particular in light of there being no intimate relationship between the deceased and the complainant (apart from being friends) during the last three years of the lifetime of the deceased, the committee decided that the complainant did not fall within the definition of dependant. On the other hand, Mrs Nieuwenhuis was in fact dependant on the deceased and by virtue of being the only dependant in terms of the Act was awarded the entire benefit.
8. The complainant was dissatisfied with the committee's decision. However, Mr Miltiadous conceded that the complainant was not dependant on the deceased. In this regard, he averred:

Mr Fourie has never alleged that he was dependant on the deceased as it appears to be indicated in paragraph 5 of Sanlam's letter, but in fact contests the deceased's mother's allegation that she is a dependant.

9. If one accepts the argument that Mrs Nieuwenhuis did not qualify as a dependant, the deceased at the time of his death would not have had a dependant or a nominee.

Therefore, the benefit arising out of the retirement annuity fund would have to be paid to his estate in terms of section 37C(1)(c) of the Act and dealt with in terms of the laws of succession. In terms of the last will of the deceased, Mrs Nieuwenhuis was only entitled to a car (bequest) and the balance of the estate was to be awarded to the complainant. Thus, if the benefit falls into the estate, the complainant indirectly will enjoy the proceeds of the death benefit.

10. In support of the allegation that Mrs Nieuwenhuis was not dependant on the deceased, Mr Miltiadous claimed the following:

- Mrs Nieuwenhuis had an investment with Sanlam, as well as a pension from her employer and she belonged to a medical aid fund.
- In about 1996 when the deceased and his mother commenced living together, Mrs Nieuwenhuis was employed for approximately a further year and contributed R5,000.00 to each of her children from her investments.
- Mrs Nieuwenhuis also recently withdrew two investments from Nedcor Bank, the amounts of which were not available to the complainant's attorneys.
- In any event, it was not possible for Mrs Nieuwenhuis to be dependant on the deceased as he needed medical care and his pension was simply insufficient to support both of them.

Other than the references made by the complainant in his affidavit, no evidence was adduced to prove the above allegations. Nevertheless, the complainant seeks an order directing the fund to pay the death benefit to the deceased's estate, or alternatively to award the complainant and Mrs Nieuwenhuis 50% each of the benefit.

11. Although the complainant and the deceased co-habited for several years, their relationship was terminated three years prior to the deceased's demise and during the said three year period, the deceased was living with his mother. From the

evidence available to the committee, it concluded that there was a relationship of inter-dependence between the deceased and his mother in as much as his pension was utilized partially to help his mother “make ends meet”. The committee concluded that Mrs Nieuwenhuis was *de facto* dependant upon her son.

12. The payment of any death benefit arising out of membership of a pension fund organization as defined in section 1 of the Act is regulated by section 37C of the said Act, the relevant part of which 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:
 - (a) 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.
 - (b) ...
 - (bA) ...
 - (c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardians Fund.

Dependant, in turn defined in section 1 of the Act as follows:

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 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;

13. The only issue to be determined is whether Mrs Nieuwenhuis qualified as a dependant in terms of the Act. The management committee of the retirement annuity fund deemed that Mrs Nieuwenhuis fell within the ambit of paragraph (b)(i) of the definition of dependant.
14. The definition creates three categories of dependants. The first category set out in paragraph (a) requires the beneficiary to be dependant on the member for maintenance, where such dependency is as a result of a legal duty arising out of a statute or the common law. Paragraph (b) regulates the position of beneficiaries dependant on the member, where there is no duty of support in terms of the law, for example, an independent adult child. The third category outlined in paragraph (c) refers to persons who are currently not dependant on the member for maintenance, but in respect of whom the pension fund member could potentially become liable for maintenance at some future date.
15. With regard to the first category of dependants in paragraph (a), there is a legal duty on parents to pay maintenance in respect of their children. However, there is also a legal duty on the child to pay maintenance in respect of his parents. The existence and scope of this duty has been fully canvassed by our courts. In *Stander v Royal Exchange Insurance Company* 1962 (1) SA 454 (SWA), the plaintiff was a widow in

the employment of a motor metal works company and sued the defendant insurance company for damages resulting from the death of her son allegedly due to the negligent driving of a motor vehicle insured by the defendant. In her particulars of claim the plaintiff merely alleged the relationship of parent-child from which the duty to support flowed and adduced no evidence to show that she was in fact dependant on her son. However, counsel for the defendant submitted that such a declaration is insufficient and does not disclose a full cause of action. The plaintiff contended that the relationship of mother and son in itself creates a duty to maintain and therefore it is only necessary to allege such a relationship. Badenhorst, J, in light of the previous cases, commented as follows (at 455 C – H):

A perusal of the authorities shows that in actions by widows and minor children of a deceased parent the practice is well settled of merely alleging the relationship between the claimant and the deceased. (See *Gildenhuis v Transvaal Hindu Educational Council*, 1938 WLD 260 at p.262). “In such cases”, says SCHREINER, J (as he then was), on p 262, “the declaration need only allege the relationship from which the duty flows”. Where other dependants sue, however, further allegations are necessary to establish a cause of action. In *Waterson v Maybery*, 1934 TPD 210, an action was instituted on behalf of parents for damages based on the loss of maintenance contributed by their son who was killed through the default of the defendant. On p. 214 GREENBREG, J. (as he then was), says that there is no authority for the view that the mere fact of being supported entitled a person to sue for damages in such a case. The learned Judge says the following on p. 215.

“It appears from the cases already cited, viz. *Fort v Allen* and *In re Knoop and from Grobler v Union Government*, 1923 TPD 429, that one of the essentials is that the claimant must be unable to support himself, i.e. there must be a necessity for support”.

The learned Judge held in that case that as there was no allegation in the declaration that the parents were unable to support themselves, that the declaration did not disclose a cause of action and upheld an exception to the claim.

16. Thus, the court concluded that an allegation of parent-child relationship is insufficient and there must be evidence as regards to the parent’s need or necessity for support.

The Court also confirmed that the requirement of a need or necessity for support is not relevant in respect of a maintenance claim by child *vis-a-vis* parents or a widow(er) *vis-a-vis* the deceased spouse.

17. Applying this principle, in order for Mrs Nieuwenhuis to establish that there was a legal duty on her son to maintain her and to qualify as a dependant under paragraph (a), she needs to establish a need or necessity for support from the deceased prior to his death. From the evidence presented to me and that considered by the management committee, I am satisfied that such need or necessity for support existed at the time of the deceased's death. It is common cause that the deceased and Mrs Nieuwenhuis were living together in the same household for the three years immediately prior to his death. From the affidavit completed by Mrs Nieuwenhuis, it is clear that her monthly expenditure exceeds her monthly income and she will need maintenance support from other avenues to survive. Furthermore, the executor of the estate also maintained that Mrs Nieuwenhuis was dependant on the deceased. The complainant on the other hand has made several allegations that Mrs Nieuwenhuis has income from other sources. However, he has adduced no evidence to substantiate these allegations and consequently he has failed to discharge the onus on himself to show on a balance of probabilities that Mrs Nieuwenhuis was not dependant on the deceased.

18. Accordingly, having established that Mrs Nieuwenhuis falls within paragraph (a) of the definition of dependant contained in section 1 of the Act, it is unnecessary to rule on whether she falls within any of the other subsections contained in the definition. However, even if I am mistaken as to the existence of a duty of support, absent such a duty I would agree with the management committee on the evidence available, Mrs Nieuwenhuis factually depended on the deceased and in such an event would fall within paragraph (b)(i) of the definition. Therefore, Mrs Nieuwenhuis qualifies as a dependant and by virtue of being the only dependant (and there being no nominees) is entitled to the entire death benefit in terms of section 37C(1)(a) of the Act. Thus,

the complaint is dismissed.

Dated at **CAPE TOWN** this 5th day of September 2000.

John Murphy

Pension Funds Adjudicator