

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/198/99/LS

In the complaint between:

M A Chittenden

Complainant

and

Estcourt Butchery (Pty) Ltd Provident Fund

First Respondent

Cindy Gillitt

Second Respondent

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

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act of 1956 relating to the fund's distribution of a death benefit.

No hearings were conducted and therefore in determining this matter, I have relied solely on the documentary evidence submitted by the parties and the report by my investigator, Lisa Shrosbree.

The late Jason Smith ("the deceased") was employed by Estcourt Butchery (Pty) Ltd before stopping work in August 1997 due to serious illness. He never recovered and died of cardio respiratory arrest on 24 August 1998.

Prior to his death, the deceased was a member of the Estcourt Butchery (Pty) Ltd Provident Fund. On 3 May 1997 he nominated his girlfriend Cindy Gillitt, the second respondent in this matter, as beneficiary in respect of any monies payable in terms of the fund rules. However shortly before his death, on 2 August 1998, the deceased changed the nomination to his mother, Marjorie Chittenden, the complainant in this matter. The second nomination effectively cancelled and revoked the first nomination.

After the deceased's death a benefit in the sum of R48 000 became payable by the

fund. Thereafter a dispute between the complainant and the second respondent ensued as to whether the second respondent qualified as a dependant in terms of the Act entitled to share in the distribution of the benefit in terms of section 37C.

The definition of 'dependant' in the Act reads as follows:

"dependant", 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 dependant 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;
 - (ii) 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

On 24 November 1998, the fund's trustees held a meeting to discuss the distribution of the deceased's benefit. After considering all the evidence, they concluded that the second respondent was in fact dependant on the deceased for maintenance upon his death and accordingly fell within (b)(i) of the above definition and entitled to be considered in the distribution.

As stated, the deceased nominated the complainant shortly before his death. Therefore the distribution would be governed by section 37C(1)(bA) of the Act providing for the situation where there are both dependants and nominees. Section 37C(1)(bA) reads

thus:

If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

The Act clearly confers a discretion on the board where a deceased member is survived by both dependants and nominees to distribute the benefit in such proportions as the board may deem equitable. In the exercise of that discretion in this instance, the trustees decided to divide the benefit of R48 000 equally between the complainant and the second respondent.

The complaint

The complainant argues that the second respondent was not factually dependant on the deceased at the time of his death and thus does not fall within the definition of 'dependant' in the Act entitling her to be considered in the distribution of the death benefit. She states that the fact that the second respondent and the deceased may jointly have occupied a flat and presumably shared the rent and other living expenses does not mean that the deceased was maintaining her.

The complainant also points to the fact that the second respondent was employed during her relationship with the deceased and is still employed. She argues that this shows that the second respondent has the ability to support herself and therefore cannot be classed as a dependant in terms of the Act.

The complainant also argues that it is unlikely that the trustees acted impartially since they were antagonistic towards the complainant at the time they took their decision. According to the complainant this antagonism was expressed in their letter to the complainant's attorneys dated 20 December 1998. That letter reads in part:

A factor taken largely into account when reaching our decision was the dishonesty of your client regarding the relationship between Jason Smith and his fiancée Cindy Gillitt. All those in Estcourt knowing the couple, will testify as their living together as husband and wife. Your client has "continuously" [sic] tried to mislead people into believing otherwise.

The response

The trustees respond that they went to great lengths to consider all the evidence and apply their minds to what would be an equitable distribution of the death benefit.

The deceased acknowledges the second respondent as his fiancée in his will and the trustees therefore have reason to believe that the couple would have married had the deceased lived. Furthermore in a letter dated 25 July 1998 from the deceased to the administrators of the fund, Liberty Life, he refers to the second respondent as his common law wife which shows that the deceased was committed to the relationship, that it went beyond merely living together and probably involved an emotional and sexual bond.

The trustees also considered that the deceased and second respondent were able to maintain a certain standard of living by combining their respective incomes. However when the deceased died, the second respondent was no longer able to maintain that standard without the financial support of the deceased and was compelled to move out of the flat they were sharing. She now lives with her mother. In the opinion of the trustees, this revealed the second respondent's high level of dependency on the deceased's income.

The trustees also considered the letter dated 8 September 1998 from the couple's landlord stating that the deceased and Cindy Gillitt lived together as an engaged couple.

In light of the above, the trustees concluded that the second respondent was factually dependant on the deceased as defined in terms of the Act.

Analysis

Section 37C(1)(b) provides for the situation where there are only nominees and reads thus:

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 the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

If the complainant can show that the second respondent was not factually dependant on the deceased and the trustees were unable to trace any other dependant of the deceased within 12 months of his death, the trustees would then be obliged to act in terms of section 37C(1)(b) and the complainant would be entitled to the entire benefit to the exclusion of the second respondent.

Therefore the crux of this complaint lies in the meaning of 'dependant' as defined in the Act.

In *van der Merwe v Southern Life Association Ltd PFA/WE/21/98* I applied a purposive and contextual interpretation to the definition of 'dependant' in the Act and held that the purpose of the legislature in enacting the provision was to broaden the category of persons entitled to share in death benefits by including persons involved in relationships which the law traditionally does not accept as constituting legal dependency. The test for dependency was espoused thus: whether the parties lived in a relationship of mutual dependence and ran and shared a common household. A relationship of mutual dependency involves, amongst other things, an emotional and intimate bond.

On the evidence available there can be little doubt that the deceased and second respondent lived in a relationship of mutual dependence, ran and shared a common household and had an emotional and intimate bond. The complainant refers to the fact that there appear to be certain discrepancies in the second respondent's submissions and therefore the evidence as to the nature of their relationship cannot be relied upon. She refers for example to the affidavit of the second respondent wherein it is stated that she lived with the deceased for two and a half years and a seemingly contradicting statement by the second respondent's attorneys that the parties lived together for approximately five years. However, I do not think that this is of itself determinate as to whether or not the second respondent was in fact dependant on the deceased for maintenance. At most it goes to the question of the extent of dependency, that is, usually the longer a couple live together, the greater the degree of mutual dependency. Assuming we accept that the second respondent lived with the deceased for the shorter period of two and a half years, that is still sufficient time for a state of mutual dependency to develop.

It is strange that the deceased nominated the second respondent as beneficiary in 1997, confirmed that nomination in writing to the fund in July 1998 and then only few weeks thereafter, shortly before his death, changed his mind and nominated the

complainant as sole beneficiary instead. The letters written by the complainant dated 25 July 1998 and 2 August 1998 respectively read thus:

So as to make the matter “completely” clear.....I would hereby state that any monies due to me from yourselves upon my death would be made payable to Cindy Gillitt with whom I have been living over the past years and whom I think of as my “common law wife”. [letter dated 25 July 1998]

I Jason Brian Smith wish it to be known that I am not living with or supporting Cindy Gillitts in any way what so ever [sic] and wish that the benneficiary [sic] of the provident fund and disability insurance be my mother Marjorie Annette Chittenden who is my soul support and supporter. [letter dated 2 August 1998]

The deceased makes two contradicting statements in these letters as to the nature of his relationship with the second respondent. In my view this points to their unreliability as evidence as to the nature of the relationship and, as such, I do not think that much weight can be accorded them. As stated, it is not disputed that the deceased and the second respondent shared a common home and on the other evidence available including the statements in the deceased’s will and the landlord’s affidavit respectively, the probabilities are that the second respondent does fall within the definition and therefore entitled to be considered in the distribution of the benefit in terms of section 37C(1)(bA).

The complainant has not specifically contested the terms of distribution of the benefit. Her argument is premised solely on the assertion that the second respondent was not a dependant as defined and therefore not entitled to any portion of the benefit. Section 37C(1)(bA) does not specify any criteria to assist a board of trustees in the exercise of its discretion other than to require it to act equitably. In my previous determinations I have stated that in order to act equitably, the fund should have regard to a basket of factors including (but not limited to) the age of the parties, the relationship with the deceased, the extent of dependancy, the financial affairs of the dependant and the

future earning potential and prospects of the potential beneficiaries.

Taking the above factors into account, I would not have considered it unreasonable to award the entire benefit to the second respondent. Be that as it may, my function is not to second guess the trustees' decision in this regard. Rather my task is to review the decision broadly on the grounds of reasonableness and fairness to determine whether the decision was in excess of powers, an improper exercise of powers or maladministration. There is no evidence to suggest that the trustees did not exercise their discretion reasonably. On the contrary, I am satisfied that they made a conscientious effort to gather all the facts and to take all relevant considerations into account and accordingly exercised their discretion reasonably and impartially.

The complaint is accordingly dismissed.

DATED at CAPE TOWN this 17th day of SEPTEMBER 1999.

.....
JOHN MURPHY
PENSION FUNDS ADJUDICATOR