

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/603/00

In the complaint between:

Leslie Strassburg

Complainant

and

Telkom Retirement Fund

First respondent

Cheryl Strassburg

Second respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the fund's distribution of the late W L Strassburg's death benefit. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.
2. Mr W L Strassburg was employed by Telkom (Pty) Ltd and became a member of the Telkom Retirement Fund ("the fund") on 1 April 1998. He died on 12 September 1998 and a lump sum death benefit, a widow's pension and a children's pension accordingly became payable in terms of rule 5.1 which reads:

The following benefits shall be payable on the death of a MEMBER while in SERVICE prior to the attainment of his NORMAL RETIREMENT DATE or while in receipt of a disability income benefit referred to in RULE 6.2:

- (a) a lump sum equal to three times the MEMBER'S PENSIONABLE EMOLUMENTS or, if neither a QUALIFYING SPOUSE'S PENSION nor a QUALIFYING

CHILDREN'S PENSION is payable in terms of (b) or (c) below, the greater of the said lump sum or the MEMBER'S SHARE at the date of his death;

- (b) a PENSION to his QUALIFYING SPOUSE equal to 40% of the MEMBER'S PENSIONABLE EMOLUMENTS immediately before his death, provided that the TRUSTEES manage to locate the QUALIFYING SPOUSE within twelve months of the MEMBER'S death;
- (c) a PENSION in respect of QUALIFYING CHILDREN of the MEMBER equal in total to a percentage of the MEMBER'S PENSIONABLE EMOLUMENTS immediately before his death, in accordance with the following table:

Number of QUALIFYING <u>CHILDREN</u>	Percentage of MEMBER'S PENSIONABLE <u>EMOLUMENTS</u>
1	7,5%
2	15%
3 or more	22,5%

Subject to RULE 5.2(1), the PENSION payable in respect of QUALIFYING CHILDREN of a MEMBER is doubled for any month for which no PENSION is payable to a QUALIFYING SPOUSE of the MEMBER in terms of (b) above

- (d) after the last payment of a QUALIFYING SPOUSE'S PENSION and/or QUALIFYING CHILDREN'S PENSION has been made, the TRUSTEES shall deduct the total amount paid to the QUALIFYING SPOUSE and/or NOMINEES, including any amount which may have been paid in a lump sum, from the amount of the MEMBER'S SHARE at the date of death. Should there be any positive difference, such positive difference shall be paid to the MEMBER'S DEPENDANTS and/or NOMINEES and/or the PENSIONER'S estate.

where "QUALIFYING SPOUSE" is defined as

a surviving partner of the MEMBER, PENSIONER or C-PENSIONER in a RECOGNIZED MARITAL UNION existing at the time of the death of the MEMBER, PENSIONER or C-PENSIONER; provided that in the event of the death of a PENSIONER or C-PENSIONER such RECOGNIZED MARITAL

UNION must already have existed at the earlier of the PENSIONER'S or C-PENSIONER'S NORMAL RETIREMENT DATE or his actual retirement date,

“RECOGNIZED MARITAL UNION” defined as

a legal marriage or customary union according to Black Law and custom or a union recognized as a marriage under any Asiatic religion, or a cohabitation or any other union between a MEMBER, PENSIONER or A-, B- or C- PENSIONER and another person, which is regarded as a RECOGNISED MARITAL UNION by the TRUSTEES at their sole discretion; provided that a RECOGNIZED MARITAL UNION may, at the discretion of the TRUSTEES, include a RECOGNISED MARITAL UNION which has been dissolved but where the other person is still financially dependent upon the MEMBER; PENSIONER or A-, B- or C-PENSIONER

and “QUALIFYING CHILDREN” defined to include

a child of the MEMBER, PENSIONER or C-PENSIONER including an illegitimate or a legally adopted child, under the age of 18 years and unmarried

3. In terms of section 37C(1)(a) of the Pension Funds Act the Board has a discretion to distribute the lump sum death benefit provided for in rule 5.1(a) to the deceased's dependants as they deem equitable. A discretion is also conferred on the trustees in terms of rule 5.1(b) to recognize, in addition to a legal marriage, a cohabitation or any other union as a marital union for the purposes of distributing the widow's pension.
4. The deceased was survived by the complainant who is the deceased's ex-wife, the two children born of the marriage between the complainant and the deceased, namely, Lisa Strassburg and Evan Strassburg, and Cheryl MacDonald, who had her surname changed to Strassburg on 23 April 1999 by notice in the government gazette and who was the deceased's girlfriend with whom he was co-habiting at the time of his death.

5. The complainant's pensionable salary as at the date of his death was R104 733 per annum. The lump sum death benefit payable in terms of rule 5.1(1)(a) was accordingly an amount of R314 199, the widow's pension in terms of rule 5.1(1)(b) an amount of R3 491.10 per month and the children's pension (equal to 7.5% of pensionable salary since the deceased was survived by two children), an amount of R1 309.16 per month.

6. The trustees distributed the death benefit as follows:

Lisa Strassburg	R131 785.85 (in trust)
Evan Strassburg	R91 977.39 (in trust)
Lesley Strassburg (ex-wife, complainant)	R34 238.57
Cheryl Strassburg (girlfriend)	<u>R56 197.19</u>
	<u>R314 199.00</u>

7. The trustees awarded the widow's pension of R3.491.10 per month to Cheryl Strassburg. In so doing, they recognized the deceased's relationship with his girlfriend, Cheryl Strassburg, as a marital union for the purposes of rule 5.1(b).

8. The child's pension of R1 309.16 per month payable in terms of rule 5.1(c) was awarded to the deceased's only two children, Lisa and Evan Strassburg.

9. The complainant's complaint is that the fund erred in distributing a portion of the lump sum death benefit and the widow's pension to Cheryl Strassburg. She states that although the trustees have a discretion to award the widow's pension to a cohabitee, Cheryl Strassburg did not fall into this category. According to the complainant, Cheryl Strassburg lived with the deceased for only six weeks and furthermore was not financially dependant on him. She also states that the deceased advised her during a holiday which she and their two children spent with the deceased in July 1998, that he intended

terminating his relationship with Cheryl Strassburg. Furthermore, that this sentiment was reiterated to the complainant less than a week before his death. The complainant goes on to say that

I do not believe that the pension fund Trustees have in this instance judiciously exercised their discretion in paying sums to ... Cheryl ... which effectively deprives the minor children of the late Mr Strassburg's support.

10. The complainant is therefore contesting firstly Cheryl Strassburg's *entitlement* to the widow's pension and secondly the distribution of a portion of the death benefit to her. I shall deal with each of these contentions in turn.
11. In order to qualify for the widow's pension, Cheryl Strassburg had to fall within the definition of "qualifying spouse", that is, she had to be the surviving partner of the deceased in a "recognized marital union".
12. The rules define "recognized marital union" to include a union regarded by the trustees as a recognized marital union. The trustees state that they regarded the relationship between Cheryl and the deceased as a recognized marital union. Therefore, prima facie, Cheryl Strassburg was entitled to the widow's pension in terms of rule 5.1(b).
13. However that is not the end of the enquiry. The next question is whether the trustees exercised their discretion in terms of rule 5.1 reasonably, that is, whether they took all relevant considerations into account and excluded irrelevant considerations in deciding to regard Cheryl Strassburg's relationship with the deceased as a marital union.
14. The fund states that the following considerations were taken into account:

- 14.1 The deceased divorced the complainant on 23 January 1997 in order to marry Cheryl Strassburg. Cheryl Strassburg also divorced her husband to marry the deceased. The couple were therefore committed to each other.
 - 14.2 The reason that Cheryl and the deceased only moved in together on 29 July 1998 was that the couple waited for Cheryl's divorce to come through on 27 July 1998.
 - 14.3 Cheryl and the deceased lived together as husband and wife until the deceased's death on 12 September 1998.
 - 14.4 Cheryl's ex-husband shot and killed the deceased which reveals his anger towards Cheryl that he could not win her back.
 - 14.5 The deceased and Cheryl bought a house together.
 - 14.6 The deceased proposed to Cheryl whilst they were on holiday in the Comores in June 1998.
 - 14.7 Cheryl and her two children born of her previous marriage changed their surnames from "MacDonald" to "Strassburg" because they considered themselves to be the deceased's new family
 - 14.8 The fund received thirteen affidavits from family and friends confirming that the relationship between Cheryl and the deceased was of an enduring nature. (Copies of these affidavits were submitted with the fund's response).
15. In light of the above, I am satisfied that the trustees took all relevant considerations into account and excluded irrelevant considerations in

deciding to recognize the relationship between Cheryl and the deceased as a marital union for the purposes of rule 5.1(b).

16. It should be noted that the complainant does not in any event qualify for the widow's pension as she was not in a recognized marital union *at the time of the death of the deceased* as required by the definition of "qualifying spouse" to be entitled thereto.
17. The complainant's second contention relates to the distribution of a portion of the death benefit to Cheryl Strassburg. The complainant is presumably also contesting the amount awarded to Cheryl. In terms of the Act, Cheryl Strassburg had to be a dependant of the deceased as defined to be entitled to a share therein.
18. In terms of part (b)(i) of the definition in the Act, a "dependant" includes a person who, in the opinion of the Board, is in fact dependant on the deceased for maintenance. The fund opined that Cheryl Strassburg was a dependant on the basis of the following considerations:
19. Cheryl Strassburg was living with the deceased at the time of his death. The deceased also contributed R10 000 towards Cheryl's divorce. For most of the time that Cheryl and the deceased were living together, Cheryl was unemployed. Cheryl had to rely on the deceased to support her two children since her ex-husband failed to pay her child support.
20. In light of the above, I am satisfied that the trustees reasonably concluded that Cheryl Strassburg was dependant on the deceased for maintenance.
21. I am also satisfied that the amount distributed to Cheryl Strassburg was reasonable. Cheryl has been left with no child support. She eventually sued her ex-husband for maintenance and he was due to appear in the

maintenance court on 7 January 1999. However he was not able to appear as he is currently in the Westville jail serving a five-year prison sentence for shooting and killing the deceased.

22. I am also satisfied that the complainant and her two children have been adequately provided for: the complainant received an amount of R34 238.57 in respect of the death benefit. The trustees explain that this was pursuant to the divorce order in terms of which the complainant was entitled to 30% of the deceased's withdrawal benefit from the fund as at the date of divorce. The complainant also receives a monthly income from the trust for the care of the children. Her two children received the greatest portion of the death benefit. An amount of R223 763.24 (R131 785.85 + R91 977.39), was paid into a trust account for their benefit. The complainant's children also received the children's pension.

23. For the foregoing reasons the complaint is dismissed.

DATED at CAPE TOWN this 6th day of AUGUST 2001.

.....
JOHN MURPHY
PENSION FUNDS ADJUDICATOR