

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

**CASE NO: PFA/WE/2932/01/SM**

**In the complaint between:**

**RENETTE MUIR**

**Complainant**

**and**

**MUTUAL & FEDERAL PENSION FUND**

**Respondent**

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

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1. This is a complaint lodged with the Pension Funds Adjudicator on 1 June 2001 concerning the payment of a death benefit in terms of section 37C. The complaint relates to the administration of the fund and essentially alleges that the decision of the trustees was an improper exercise of its powers, and that a dispute of law has arisen between the fund and the complainant.
2. The complainant is Renette Muir, a lesbian woman who was involved in an intimate relationship with the late Miss Cheslynne Brewer from 1993 until the death of Miss Brewer on 21 April 1999. Miss Brewer was an employee of Mutual & Federal Insurance Company Ltd, and was a member of the respondent, a defined contribution pension fund, from 21 April 1986 until her death.
3. The complainant is represented herein by the Gay & Lesbian Legal Advice Centre (GLLAC). A response to the complaint has been received from Mr Pascal Daniel Pau, legal advisor to the fund's trustees.

4. No hearing was held in this matter and in making this preliminary determination I have relied on the documentary evidence and submissions and on the investigation of the complaint by the deputy adjudicator, Sue Myrdal, under my supervision.

5. A death benefit of R331 078 became payable on the death of Miss Brewer in terms of rule A.3.1, which reads as follows:

A.3.1.1 On the death of a MEMBER whilst in the service of an EMPLOYER, there shall be payable to the MEMBER'S BENEFICIARIES in such proportions as determined by the TRUSTEES in terms of Section 37C of the Act, a pension purchased from an INSURER of such amount as can be purchased by:-

- (a) subject to the provisions of Rule 2.3. and Rule 2.4., such multiple of the MEMBER'S PENSIONABLE SALARY as can be secured by the EMPLOYER'S contribution in terms of Rule A.1.2.1.(b); plus
- (b) his ACCUMULATED CREDIT at the date of death; plus
- (c) his INDIVIDUAL RETIREMENT RESERVE at the date of death; plus
- (c) his ENHANCEMENT AMOUNT at the date of his death.

A3.1.2 The multiple of PENSIONABLE SALARY applicable to each age in Rule A.3.1.1 shall be set in advance of each FUND ANNIVERSARY, minuted by the TRUSTEES and communicated to MEMBERS.

A.3.1.3 It is specifically provided that the MEMBER'S BENEFICIARIES shall have no further claim against the FUND or the EMPLOYER in respect of any pension purchased from an INSURER in terms of Rule A.3.1.1.

A.3.1.4 The BENEFICIARIES may, at the time of the MEMBER'S death or within six months of the MEMBER'S death, request the TRUSTEES to commute the whole or part of the pension in Rule A.3.1.1. for cash. It is specifically provided that the BENEFICIARIES shall have no further claim against the FUND or the EMPLOYER in respect of any benefit they elect to receive as a lump sum.

6. The relevant provisions of section 37C are as follows:

- (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 sections 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 trace a dependant or dependants of the member, the benefits 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) 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 benefits 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 benefits as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
  - (bA) 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 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, in proportions to any or all of those dependants and nominees.; and
  - (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 a member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1956 (Act No.66 of 1965), into the Guardian's fund.

7. On 11 April 1997 the deceased had completed a beneficiary nomination form with the words "I would like full amount to go into my estate."
8. Shortly after the death of Miss Brewer, the complainant made a representation to the trustees to the effect that she had been involved in a long-term lesbian relationship with the deceased and was a dependant of the deceased; she furnished affidavits from her siblings in support hereof.
9. According to Mr Pau, the trustees initially had some doubts as to whether to accept the evidence of the relationship (it seems that their investigations revealed that the deceased's family, specifically her sisters, were unaware that the deceased had been involved in a lesbian relationship), nor did they feel that the complainant was financially dependent upon the deceased, "being gainfully employed and self-sufficient". However they ultimately accepted that she was a dependant, and this is not in dispute. They then considered that they were dealing with a situation where section 37C(1)(bA) was applicable, in that there was both a dependant and a nominee, the nominee being the estate.
10. The trustees thereupon took into account the deceased's will. In terms thereof the deceased had left her farm to her two nieces, Justine and Bernice Demmer, her house to the complainant (with the proviso that she look after the deceased's dogs and that when the dogs died, the house be sold and the proceeds be split between the complainant and the two nieces), her furniture and other goods to her sister,

Margaretha Demmer, and the balance of the estate in various parts to her nieces, her two sisters, Margaretha Demmer and Hannelte Brewer, the complainant, the SPCA, the Dutch Reformed Church and the Cancer Association.

11. The trustees decided to split the death benefits by granting 20% to each of the deceased's nieces, 5% to each of her sisters, and the remaining 50% to the complainant.
12. On 8 November 2000 the complainant's representative, Wendy Isaack of GLLAC, lodged a complaint on her behalf against this decision. It appears that the trustees met again to consider the matter and confirmed their decision, conveying this to the complainant by fax dated 13 December 2000. Not satisfied with the reply to the complaint, the complainant lodged a complaint with this office on 1 June 2001.
13. The complainant's representative contends that the deceased's relations were not dependants of the deceased, and that the only dependant was the complainant. She submits that pension benefits are, in terms of the Act, excluded from the estate of a deceased, and that therefore a nomination of a member's estate ought not to carry any weight at all in the trustees' considerations; a nomination in favour of the estate would, she submits, be *in fraudem legis* of section 37C. Lengthy arguments were also furnished alleging that the respondent had discriminated against the complainant on the basis of sexual orientation or marital status, in violation of the Bill of Rights in the Constitution.
14. The respondent in its response to the complaint has reaffirmed the reasoning followed by the trustees and maintains that the fund acted in accordance with the Act and the rules of the fund, since it was entitled and obliged to take account of both the nominee and the dependant and to distribute the benefit equitably between them. The respondent also points out that "the vast bulk of the death benefits" have already been paid out in accordance with the breakdown decided by the trustees.

15. I note firstly that the complainant's allegations of discrimination are not relevant in this instance, since, as stated, it is not in dispute that the complainant was a dependant. The complaint falls to be disposed of on a proper interpretation of section 37C of the Pension Funds Act.
  
16. Section 37C is a social security type measure. Its policy and purpose is to place the benefit payable upon a member's death under the control of the retirement fund, which has a discretion to pay it to the member's dependants in such proportions as it deems equitable. In this way the state aims to ensure that monies in respect of which it allowed tax concessions are utilised for the benefit of the deceased member's dependants, thereby reducing the state's liability in this regard. The opening subparagraph of the section indicates clearly that the aim of the section is to limit a pension fund member's freedom of testation in relation to his pension benefits, and to exclude pension benefits from the estate of a deceased:

37C(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 ... not form part of the assets in the estate of such a member, but shall be dealt with in the following manner.
  
17. Section 37C(1)(b) makes it additionally clear that an estate cannot be a nominee. The provision states that if there are no dependants and "the member has designated in writing to the fund a nominee *who is not a dependant of the member*", then the benefit should be paid to the nominee. Clearly a deceased estate cannot, in law, be a person "who is not a dependant of the member". While the trustees would have been obliged to bring into consideration any nomination of a person as a beneficiary, the nomination of the "estate" as beneficiary may not be treated in the same way as other nominations, since the Act refers only to nominees who are dependants and nominees who are not dependants, and an estate cannot be either.
  
18. Accordingly a nomination in favour of the estate is *in fraudem legis* and invalid.

Benefits are only ever payable to the estate by default, as it were, in the circumstances set out in subparagraph (b) (to the extent required to settle the unpaid debts of an insolvent estate, where a member has nominated a non-dependant as a beneficiary and the trustees do not become aware of any dependants within twelve months, after which the nominated beneficiary receives any balance) and subparagraph (c) (where the fund is unaware of or cannot trace any dependants within twelve months of the member's death and no nomination has been made). None of these circumstances apply in this case.

19. The fund's distribution of 50% of the death benefits to some of the beneficiaries of the estate was thus an improper exercise of its discretion in terms of the rules and the Act. In light of the invalidity of the nomination of the estate as a beneficiary, they were effectively faced with a situation where there was one dependant and no nominees. Such a situation is regulated by section 37C(1)(a), which clearly states that "the benefit shall be paid to such dependant"; the entire benefit should therefore have been paid to the complainant.
20. Since no hearing has been held in this matter and since the estate and the deceased's nieces and sisters, who have an interest in this matter, have not been joined as parties to these proceedings, in the interests of procedural fairness I shall not make a final order at this stage, but shall join the other parties and allow them an opportunity to make submissions in regard hereto.
21. Accordingly the preliminary order of this tribunal is as follows:
  - 21.1 The deceased's nieces, Justine and Bernice Demmer, and her sisters, Margaretha Demmer and Hannelle Brewer, are joined as Second, Third, Fourth and Fifth Respondents respectively to the complaint in terms of section 30G(d) of the Act.
  - 21.2 The complainant is directed to serve a copy of the complaint, its reply and

any subsequent submissions on the abovementioned second to fifth respondents within seven days of the date of this ruling.

21.3 The respondent is directed to serve a copy of its response, rejoinder and any subsequent submissions on the abovementioned second to fifth respondents within seven days of the date of this ruling.

21.4 A rule *nisi* is hereby issued in terms of which the parties are called upon to show cause, if any, within 21 days of this ruling why the following order should not be granted:

21.4.1 The decision of the respondent to award 50% of the benefit to the abovementioned second to fifth respondents is contrary to section 37C of the Act and is therefore unlawful and hereby set aside.

21.4.2 The respondent is directed to pay to the complainant, within six weeks of the date of final determination, the balance of the death benefit in the amount of R165 539, together with interest thereon at a rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 30 April 2000 to date of payment.

DATED at CAPE TOWN on 13 MAY 2002

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**JOHN MURPHY**  
**PENSION FUNDS ADJUDICATOR**