DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956 Introduction:
This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956. The complainant is Rory Martin, who was involved in an intimate relationship with the late Mr Louis von Maltitz from February 1994, and shared von Maltitz's home for the last three years of his life. Von Maltitz was an employee of Beka (Pty) Ltd, and was a member of the respondent from 16 May 1994 until his death on 22 April 1998. The respondent is the Beka Provident Fund and Income Continuation Scheme, a defined contribution fund registered under the Pension Funds Act of 1956 ("the Act"). The Chairperson of the Board of Trustees is Mr Johann Schleritzko. The facts in this matter are straightforward and appear from the summary of evidence. There are two aspects to the complaint: the complainant takes issue with the respondent's decision to decline payment of a spouse's pension to the complainant, on the basis that the complainant falls outside the definition of "spouse" in the fund's rules; and also with the respondent's decision to decline payment of lump sum death benefits in terms of section 37C of the Act to the complainant, on the basis that the complainant was not a dependant of the late Mr Maltitz. Both aspects of the complaint therefore relate to the administration of the fund; the complainant alleges that he has sustained prejudice as a result of the maladministration of the fund, and that the fund has improperly exercised its powers. Furthermore the complainant alleges that a dispute of law has arisen in relation to the fund between himself and the fund; this relates to the interpretation and application of the rules of the fund.
After an exchange of correspondence between the parties the complainant's representative, the Gay and Lesbian Legal Advice Centre (GLLAC), lodged a written complaint on his behalf with regard to the first aspect of the complaint with the Pension Funds Adjudicator on 25 February 1999, having lodged same with the respondents in compliance with section 30A(1) of the Pension Funds Act. The decision of the trustees giving rise to the second aspect of the complaint was forwarded to the complainant on 3 May 1999 and thereafter the complainant's attorneys lodged a complaint in respect of this aspect as well. Mr Jonathan Berger, Co-ordinator of the GLLAC, represented the complainant. Submissions in response were received by the Adjudicator's office from Mr Johann S Schleritzko, chairman of the Board of Trustees of the respondent. No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on supplementary information obtained from telephone conversations conducted with the parties by my senior investigator, Sue Myrdal. Ms Myrdal has furnished me with a full report. I deal hereunder with the two aspects of the complaint separately. Having completed my investigation I have determined the complaint as follows. These are my reasons. Summary of the evidence and argument
The spouse's pension In refusing to pay the spouse's pension to the complainant, the respondent's consistent position has been that it can do no other than stand by its rules. Mr Schleritzko's letter to the complainant advising him of the Board's response to his complaint conveys this position. He quotes from Part 6 of the rules, which deals with death benefits, and in particular from Rule 6.2, governing the situation where a member dies before or on the normal retirement date while an employee: "The Board of Trustees of the BEKA Provident Fund has reviewed and considered your claim based on the following: 1. The Board can only rule within the Rules of the BEKA Provident Fund. 1. The Spouse's pension is covered under point 6.2(3) of the Rules of the BEKA Provident Fund and reads: In the case of a married Member who leaves a Qualifying Spouse, an annual pension equal to 50% of the Member's annual Remuneration is paid to him/her until his/her death.
The definition of a Qualifying Spouse is as follows: Qualifying Spouse in regard to a Member means the woman/man with whom the member at the time of his/her death was joined in Marriage, and if a member at the time of his/her death was joined in marriage with two or more spouses, only that one of them whom he/she first married, provided that the spouse is a Dependant. Marriage means - a. a legal marriage b. a union which is recognised as marriage in accordance with any indigenous law, custom or religion; or c. a union of a man and a woman in respect of whom the Board has been satisfied that the
The Board of Trustees regret to advise that in view of the Rules of the BEKA Provident Fund none of the above rules and its definitions allow you to qualify for Spouse's pension as a result of the untimely death of Mr Louis von Maltitz." This position was the same as that put to the complainant in his earlier dealings with the group benefits/legal services department of SANLAM (administrators of the respondent), to whom he had turned first in his quest for payment of a spouse's pension. A Mrs Schoeman of this department, in her letter to the complainant dated 17 June 1998, quoted the rule and definitions as above and concluded: "cohabitation of persons of the same sex is not at this stage being recognised as marriage." The complainant's attorney, Mr Berger, in alleging a dispute of law relating to the interpretation and application of rules, places the dispute squarely within the constitutional arena. After referring to the horizontal application of the Bill of Rights, he alleges that the abovementioned rule, with its associated definitions, is invalid on the grounds of unfair discrimination based on sexual orientation and marital status, both of which are prohibited in section 9(3) of the Bill of Rights (Chapter 2 of the 1996 Constitution): "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." In dealing first with sexual orientation discrimination, Mr Berger cites a recent case, The National Coalition for Gay and Lesbian Equality and Others v The Minister of Home Affairs and Others (unreported decision of the High Court of South Africa, Cape of Good Hope Provincial Division, case no: 3988/98, delivered 12 February 1999), in which Justice Dennis Davis declares section 25(5) of the Aliens Control Act 96 of 1991 unconstitutional on the basis of the right to equality. The offend
discriminatory stereotyping and prejudice. In short, the manner in which [the section] differentiates on the grounds of sexual orientation is both unfair and unjustifiable." Mr Berger argues that the rules of the respondent differentiate on the ground of sexual orientation in a manner which is both unfair and unjustifiable. Lesbian or gay domestic partners of deceased members of the fund are excluded from the spousal pension, and Mr Berger avers that "the impact of such exclusion profoundly affects the dignity, personhood and identity of lesbians and gay men. This favouring of certain forms of domestic partnership to the exclusion of others is based merely on the form of the relationship, in effect "perpetuat[ing] patterns of discriminatory stereotyping and prejudice" by failing to acknowledge and recognise diversity of domestic partnerships." Turning to marital status discrimination, Mr Berger expresses his opinion that the rules of the fund on spousal pension clearly indicate a favouring of civil, religious or customary forms of marriage, while a discretion is granted in respect of the recognition of the relationships of heterosexual cohabitees. He holds the view that the absence of criteria against which this discretion may be applied "grants the Board unfettered powers and paves the way for unnecessary incursions into the private realm." This, together with the exclusion of same-sex domestic partnerships from the ambit of the rules altogether, renders the rules unfairly discriminatory with regard to marital status. Mr Berger then turns his attention to the allegation of maladministration, and the improper exercise of the fund's powers. He argues that the fund's failure to amend its rules, despite having been requested to do so, to bring them in line with the provisions of the Constitution, by including same-sex relationships within its definition of marriage for the purposes of spousal pensions, constitutes an unfairly discriminatory "decision". Mr Berger refers to section 39(2) of the Constitution, whi
"promote the spirit, purport and objects of the Bill of Rights" whenever it interprets legislation, and then goes on to say: "The complainant submits that this tribunal is empowered by section 39(2) of the Constitution to interpret the definition of "complaint" in the Act so as to infer that a failure to implement constitutional obligations within a fund's powers constitutes maladministration of a fund by omission, and that the continued application of unconstitutional rules amounts to the improper exercise of the fund's powers." In outlining the relief sought by the complainant, Mr Berger refers to section 172(1) of the Constitution, which enjoins courts to declare any law or conduct inconsistent with the Constitution invalid to the extent of its inconsistency, and permits courts to make any order that is just and equitable. The complainant therefore seeks an order declaring the definition of marriage in the respondent's rules to be inconsistent with the provisions of the Constitution to the extent that it excludes the payment of the spousal pension to same-sex domestic partners, and thus to be invalid. Mr Berger also alludes to the remedies of "striking down" and "reading in", and requests the application of these judicial remedies in order to update the rules of the fund, seeking "an order directing the first respondent to amend the definition of "marriage" in its rules so as to read as follows: (a) a legal marriage (b) a union which is recognised as a marriage in accordance with any indigenous law, custom or religion;
(c) a union of two adults, whether of the same or opposite sex, based on the objective criteria of mutual dependency and a shared and common household." (my emphasis) The complainant also seeks an order directing the respondent to pay the spousal pension to the complainant. The lump sum death benefits The complainant has also laid claim to the other death benefits payable in terms of the rules of the fund to a member who dies before or on the normal retirement date while an employee. Rule 6.2, which governs this contingency, stipulates that, in addition to the spouse's pension (and a children's pension not applicable here), the other benefits payable are a "Risk death in service lump sum benefit", where "an amount equal to twice the Member's annual Remuneration is paid to his/her Dependants and Nominees"; and a "Benefit relating to contributions for retirement benefits", where "the Member Share is paid to his/her Dependants and Nominees". "Member Share" is in turn defined in Part 9 as being the cumulative contributions for retirement benefits (defined as contributions made to the fund for the member, less the fund's average expenses per member), together with fund interest (defined as a rate determined by the Administrator from time to time, taking into account the rate of net investment return that the Fund earns and is expected to earn), plus the cumulative amounts allocated to the member in terms of Part 10: Distribution of Surplus, being amounts annually distributed to employee members from the surplus. Mr Schleritzko has furnished this office with a calculation by SANLAM, underwriters and administrators of the respondent, setting out the death benefit payable in respect of the late Mr Von Maltitz as follows: Lump sum death benefit R240 000.00 Equitable share 30 893.00 Less: lump sum tax 46 507.68
Total R224 385.32 The deceased had nominated his estate as the beneficiary of the benefits payable at his death. Rule 12.1 of the fund's rules deals with "Beneficiaries of death benefits". The relevant clauses provide as follows (irrelevant wording omitted): 12.1(1) Subject to the prescriptions laid down by the Fund, a Member may, in writing, designate a person (and revoke such designation in writing) to receive the benefits at his/her death. 12.1(2) The benefits payable to the Dependants and Nominees of a deceased Member, other than those payable to a particular Dependant or Dependants in terms of other Rules, are paid by the Fund to the Dependants and Nominees in proportions deemed equitable by the Board. If the Fund does not become aware of or cannot trace any Dependant or Nominee within twelve months of the death of the member these benefits are paid into the estate of the Member This sub-Rule is subject to section 37C of the Act. 12.1(4) The Fund may at any time alter its decision to make a payment to a particular person. And if a person, other than a Member, to whom payment is made in terms of the Rules, dies before payment of the benefit to him/her has been completed, the
As the rule points out, these provisions are subject to the application of section 37C of the Pension Funds Act, and are in fact modelled upon that section. The relevant portion of section 37C is 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 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) 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, and the member has designated in writing to the fund a nominee who is not a dependant of the member, and the member has designated by the benefit as is specified by the member in writing to the fund, 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 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 debts and 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. (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 such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made 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 proportion to any or all of this dependants and nominees. The section has to be read in conjunction with the definition of a dependant in section 1 of the Act. This reads:- "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 dependent on the member for maintenance. 1. is the spouse of the member, including a party to a customary union according to Black law and custom or to a union recognised 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. Initially the complainant appeared to assume that Von Maltitz's nomination meant the lump sum death benefits would automatically be paid to the estate; in his letter of 6 May 1998 addressed to SANLAM Group Benefits, the ABSA Trust and the Beka Provident Fund he writes: "I have no doubt about the fact that the lump sum death benefit will be paid to the estate;" but he also notes his "serious intention to contest the estate and beneficiary", adding that "What concerns me is, sheer prejudice stopped Louis naming his common-law spouse - knowing office memos get read etc. he wrote to estate." By November 1998 the complainant, although advised by his legal representative that he could lay claim to the lump sum death benefits, had formed an intention not to do so; Mr Berger wrote to the fund on the complainant's behalf on November 2 1998 explaining that the complainant had taken this decision as a "gesture of respect" for Mr Von Maltitz's father, who stood to benefit from the payment of the benefits, being an intestate beneficiary of the estate. The complainant his self-wind bood to benefit from the payment of the benefits, being an intestate beneficiary of the estate. The complainant his self-wind to the fund on 4 November 1998 saying the lump sum benefits had "never been a consideration - as a gesture of respect to Mr R A Von
Mr Berger also makes the following submission on behalf of the complainant: "Mr Martin realistically foresees no major changes to his earning potential and future prospects. Mr Martin requires the lump sum death benefit for this reason and the fact that he is living with HIV – continued unfair denial of the benefits owed to him places undue stress and a further burden on his health. While there are many affordable drugs which target opportunistic infections associated with HIV infection, and despite advances in the management of HIV/AIDS, it remains a sad reality that the mo;st effective treatments (called combination therapy and protease inhibitors) are very expensive. In the United States last year these treatments led to a 50% decrease in the number of people dying of AIDS. But these drugs can cost over R4000 per month, and are clearly beyond Mr Martin's current reach. Clearly, Mr Martin would have been financially dependent on Mr Von Maltitz for the management of his HIV infection if Mr Von Maltitz were alive today." The respondent's Board met on 28 April 1999 to consider the complainant's claim. At this meeting the Board came to the conclusion that the complainant's dependency on the late Mr Von Maltitz did not exist, and therefore decided to award the lump sum benefit to the estate. I quote at some length from Mr Schleritzko's letter of 3 May 1999, which sets out the reasons: "The Board is of the opinion that your dependency on the late Louis von Maltitz income did not exist, since you would have requested the Lump Sum Benefit shortly after his death, had your financial circumstances warranted it. However, you chose not to contest it. We wish to quote from your correspondence: [here the writer sets out quotations from the letters written by the complainant and his attorney in November 1998 as quoted above, wherein they stated that it was not intended to lay claim to the lump sum benefits]
The Board is of the opinion that a "dependant" partner would have reacted and responded differently; we feel that had you been financially dependant on Louis, the lump sum would most definitely have been an issue, as any means of additional income would have greatly relieved any financial burden you may have had at that time. The Board concluded that no substantial evidence was submitted which proved your dependency. Furthermore the Board has made the ruling in accordance with Louis' written instruction on his Provident Fund Nomination form. Despite the fact that Louis was fully aware of his ailment and in view of the fact that his passing was not a sudden one, but a painful one of some 4 weeks, Louis did not make or initiate any changes to his nomination form, Louis could have, if he so desired, expressed a revised nomination request to members of the Board of Trustees, who visited him in hospital. This however, was not done. Your belated decision to now contest the Lump Sum Pay-out has been motivated by revenge, as a result of an apparent altercation between yourself and Mr R.A.von Maltitz. We are of the opinion that revenge, especially against Louis father, shall and may not be the motivation for claiming benefits, the contributions for which have been paid not only by the employer, BEKA (Pty) Ltd but most importantly, Louis von Maltitz." The Board went further and drew a connection between the lump sum death benefits and the spouse's pension, as an additional reason for turning down the spouse's pension:
"In view of the Board of Trustees ruling to award the Lump Sum benefit to the Estate and not to yourself in the capacity of a dependant, we therefore have not considered you to be eligible for the Spouse's pension." In referring this aspect of the dispute to this office as an alleged instance of maladministration and an improper exercise of its discretionary powers, the complainant's attorney argued that the respondent had failed to take into consideration my previous rulings in <i>TWC and Others v Rentokil Pension Fund</i> (PFA/KZN/129/98, delivered on 26 October 1998) and <i>Van der Merwe and Others v The Southern Life Association Ltd</i> (PFA/WE/21/1/98, delivered on 19 May 1998), both dealing with the objective criteria of a mutual dependency and a shared and common household as the test for deciding whether someone falls within the terms of paragraph (b)(i) of the definition of a dependant (a "factual" dependant). Mr Berger had drawn the respondent's attention to these cases in the complainant's submission supporting his claim of dependency. He argues further: "At no point did I state the Mr Martin had indeed irrevocably waived his right to claim the sum payable. However, even if this were the case, we submit that this is an irrelevant consideration. Section 37C(1)(b) of the Pension Funds Act of 1956 (as amended) allows for the payment of a benefit in circumstances where "the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member".
One assumes that Mr Berger is referring to payment in terms of the nomination, (in this case to the estate) if the fund cannot trace any dependant/s; it appears also that his reference to the twelve month period is to indicate that the complainant's claim was lodged within the twelve month period, regardless of earlier intentions not to claim. Mr Berger concludes: "The mere fact that Mr Martin has reconsidered his intention not to contest the lump sum benefit is not and cannot be a valid consideration in the Board's deliberations as to whether the objective criteria of mutual dependency and a shared and common household have been met. There is no rational basis for drawing the inference that no financial dependency existed from Mr Martin's failure to request the "Lump Sum Benefit shortly after [Mr Von Maltitz'] death, had [his] financial circumstances warranted it." In response to a telephone call from Ms Myrdal, Mr Schleritzko confirmed in writing that the complainant was the only dependant to be considered for the lump sum payment; the fund had taken into account that the deceased's parents were well-off and, far from being dependant on their son, had actually assisted him financially throughout his life. There were no other dependants. Mr Schleritzko concluded: "Our decision to pay the entire lump sum payment into the estate was in accordance with Louis' wishes on his nomination form." Ms Myrdal also telephoned Mr R A von Maltitz, the deceased's father. While Mr Von Maltitz was of the view that the death benefit should be paid to the estate (of which he was an intestate beneficiary), he confirmed the fact that he enjoyed a "very reasonable" income from his pension (he had been employed for over forty years as a mine manager) and that he could, in his words, "finance Inim]self". He confirmed that he and his wife had assisted the deceased financially.
Analysis of the evidence and argument The spouse's pension The complainant's representative, Mr Berger, has made out an argument that the rules regarding the spouse's pension, in particular
the definition of "marriage" employed, unfairly discriminate against same-sex relationships/domestic partnerships. In Low v BP Southern Africa Pension Fund and Another (PFA/WE/9/98, delivered on 2 December 1998) I set out the basis upon which I am entitled to grant relief against unfair discrimination. I do not propose to cover this in detail here, and would merely state by way of summary that section 30E(1)(a) of the Pension Funds Act of 1956 empowers me to investigate any complaint and make any order which any court of law may make, including orders allowed under Section 172 of the Constitution in constitutional matters. A complaint that a rule is discriminatory falls under my jurisdiction since it is a complaint relating to the interpretation and application of the fund's rules, alleging that a dispute of law has arisen in relation to a fund between the fund and a complainant, the dispute of law being whether the rule is invalid on the grounds of unconstitutionality, unreasonableness or illegality. A rule found to be discriminatory would be in violation of the non-discrimination clauses (the so-called equality clauses) of the Constitution, Section 9(4), which provides for horizontal application, and Section 9(3) which prohibits unfair discrimination on several grounds, inter alia on grounds of sexual orientation and marital status. The enquiry concerning unfair discrimination has three legs: firstly, the differentiation must amount to discrimination; secondly (and this overlaps to some extent with the first) the discrimination must be unfair; and thirdly, there should be no justification for the unfair discrimination. It is clear to me that the definition of marriage in respondent's rules differentiates between man/woman cohabitee relationships and same-sex cohabitee relationships, and discriminates against the latter; this discrimination is unfair in that the former group may obtain benefits denied to the latter group essentially on grounds of the sexual orientation of the parties to a same-sex relation
in Law v BP Southern Africa Pension Fund and Another (PFA/WE/9/98, delivered on 2 December 1998) I set out the basis upon which I am entitled to grant relief against unfair discrimination. I do not propose to cover this in detail here, and would merely state by way of summary that section 30E(1)(a) of the Pension Funds Act of 1956 empowers me to investigate any complaint and make any order which any court of law may make, including orders allowed under Section 172 of the Constitution in continoal matters. A complaint that a rule is discriminatory falls under my jurisdiction since it is a complaint relating to the interpretation and application of the fund's rules, alleging that a dispute of alw has arisen in relation to a fund between the fund and a complainant, the dispute of law has arisen in relation to a fund between the fund and a complainant, the dispute of law being whether the rule is invalid on the grounds of unconstitutionally, unreasonableness or illegality. A rule found to be discriminatory would be in violation of the non-discrimination clauses (the so-called equality clauses) of the Constitution. Section 9(4), which provides for horizontal application, and Section 9(3) which prohibits unfair discrimination on several grounds, inter alia on grounds of sexual orientation and marital status. The enquiry concerning unfair discrimination has three legs: firstly, the differentiation must amount to discrimination, secondly (and this overlaps to some extent with the first) the discrimination must be unfair; and thirdly, there should be no justification for the unfair discrimination of marriage in respondent's rules differentiates between man/woman cohabitee relationships, and discriminates against the latter; this discrimination is unfair in that the format year of the premark of th
The certain of "marringe" emproyed, unfairly discriminate against same sex restoroships/somestic partnerships. In Janu v. B. Souther Artice Planting in Plant and Archery (PRAME 5008, designed on 2 Decomber 1989) I set up to the basis upon which I am entitled to grant relat against unfair discrimination. I do not propose to nower this indetail here, and would merely after by way of summary that section 305(1) (3) of the Permission Funds Act of 1950 croposes into the investigation any comparish and make any order which any court of law may make, including orders allowed under Section 172 of the Constitution in constitutional makes any order which any court of law may be a complement of the proposes of the including orders allowed under Section 172 of the Constitution in constitutional makes any order which any court of law may be a complement on the proposes of the proposes of the including and proposes of the Constitution of the including and the constitution of the constitution of the proposes of the propo
The cargoty concenting unfair discrimination has bries type. The state of the contribution of the cargoty of th
no definition of "harrisage" enables(ut, orbit) documents against some as processing of the processing
no definition of "manings" emproved, analist decorations against accesses absorbation place of the property of the control of the property of the control of
the description of memory employs complete ground and excellent expectations are excellent expectations of the property of the
The devices of many rapid controlly. All high date manual goaled can be excellented professor for all food of the basis upon any or among the devices of the control of the control. Let's day of the control of the con
The control of the co