

The legal interpretations of section 37(c) of the Pension Funds Act 24 of 1956 and monies payable upon the death of the deceased's member of a retirement fund

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1 Introduction

Section 37C of the Pension Funds Act¹ forms an integral part of the Bachelor Laws (LLB) and Masters of Laws (LLM) curriculums. In the LLB curriculum, section 37C (death benefits) forms part of Social Security Law which covers social assistance and insurance.² Social Security is offered in all most all universities in South Africa as an elective or compulsory course in the undergraduate LLB degree curriculum.³ Section 37C is part of social insurance which provides for the provision of pension benefits for members of pension funds. By discussing this topic in this chapter, the intention is to impart knowledge to students,

1 Act 24 of 1956.

2 Pieters defined social security as the 'body of arrangements shaping the solidarity with people facing (the threat of) a lack of earnings (that is, income from paid labour) or particular costs. The definition also includes preventative measures (D Pieters *Introduction into the basic principles of social security* (1993) 2). According to Liebenberg, social security encompasses such terms as 'an adequate standard of living' and 'a social safety net against destitution' (D Davis et al *Fundamental rights in the Constitution* (1997) 356-357).

3 Several South African universities offer social security law within their undergraduate LLB programme. These universities includes amongst others, University of Johannesburg, University of Pretoria, University of Limpopo, University of Venda, North-west University and other universities not listed here.

practioners and trustees on how death benefits are distributed amongst beneficiaries upon death of the pension fund member. In addition, this chapter will discuss recent case laws, legislations and literature on the current and future trends and pedagogy on pension law.

The pedagogy and practice of pension law is shaped by the principles of social security. In other words, pension law is contributory in nature wherein members and employers contribute certain percentage of their remuneration package. The intention is to provide members with safety net upon reaching retirement age. This chapter will focus on how to improve the pension funds system in South Africa drawing some valuable lessons from the United Kingdom (UK).

The South African system of social security is based on universal principle by which everyone has access to social security.⁴ These social security covers social assistance and insurance. The pension funds industry are the largest institutional investors in global financial markets.⁵ In South Africa, pension funds own about 40 percent of the assets in the Johannesburg Stock Exchange (JSE), despite the significant assets base of the system, only 23 percent of the working class is covered.⁶ In short, the retirement system consist of three elements, old-age pension grant, pension funds schemes and voluntary pension funds.⁷ These schemes provide for section 37C except the old-age grant pension.

To this end, section 37C of the Pension Funds Act⁸ (the PFA) came into effect in August 1976.⁹ This section regulates the benefits payable upon the death of a member of a retirement fund to the dependants.¹⁰ Ultimately, Section 37C places the onus on a fund's board of trustees

4 Section 27(1)(c) of the Constitution, 1996.

5 T Boeri, L Bovenberg, B Coeure & A Roberts *Dealing with the new giants: rethinking the role of pension funds*, International Centre for Monetary and Banking Studies.

6 N Pillay & J Fedderke *Characteristics of the South African retirement fund industry* South African Reserve Bank Working Paper Series WP/22/17, 2.

7 F Stewart *Finance, competitiveness and innovation global practice* the World Bank Group (2020) 8-9.

8 Act 24 of 1956.

9 The Pension Funds Act was amended by the Financial Institutions Amendment Act 101 of 1976 in 1976.

10 L Nevondwe, T Malatji & M Rapatsa 'Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?' (2011) *Pensions* 285.

in identifying and allocating these death benefits.¹¹ The benefit of the deceased stands to be dealt with by the Board of Trustees of the first respondent in accordance with the Pension Funds Act and rules of the Fund.¹²

The primary object of a pension fund organisation as defined in the PFA read with the Income Tax Act¹³ is to provide benefits to members of retirement funds when they retire from employment upon reaching retirement age.¹⁴ If a member dies before he retires, the pension fund must pay the benefit to his dependants and nominees.¹⁵ This scenario is dealt with by section 37C of the PFA, which prescribes to the board of trustees of a retirement fund how it should deal with the member's interest in the fund.¹⁶

There is a continuing obligation on a deceased member's estate to maintain a minor child who needs maintenance.¹⁷ It appears that paragraph (a) of the definition of 'dependant' in PFA is directed at situations where a member demise before their retirement.¹⁸ However, the duty of a child to support a parent, and other similar situations where a person is obliged to maintain another, is extinguished by death.¹⁹ Which then means unless it can be shown on a balance of probabilities that a person was a dependant for the purposes of section 37C, such person may not benefit from the member's fund.

11 MO Mhango 'What should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants?' (2010) *Potchefstroom Electronic Law Journal* 185. See also L Nevondwe L & KO Odeku 'The politics of cohabitation in South Africa: Exploring who qualifies for pension benefits under section 37C of the Pension Funds Act, 24 of 1956' (2014) *Mediterranean Journal of Social Sciences* 773.

12 *Mampe v Amplats Retirement Fund and Others* (2017) ZAGPPHC 687 (30 October 2017) para 9.

13 Act 58 of 1962.

14 L Nevondwe 'The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act 24 of 1956' *Pensions* 39.

15 L Nevondwe 'Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional?' (2007) *Juta Business Law* 164.

16 Section 37C of the Pension Funds Act 24 of 1956.

17 *Funds at work Umbrella Pension Fund v Guarnieri and Others* (83012018) (2019) ZASCA 78 (31 May 2019) para 13.

18 As above, 14.

19 As above.

2 Object of section 37(c) of the PFA

Section 37C regulates the distribution of benefits payable on the death of a member of a pension fund, and was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act and government policy.²⁰ Section 37C(1) reads:

‘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...’

Before Section 37C was introduced into the Pension Funds Act, death benefits from a pension fund were distributed according to the deceased’s last will and testament or the laws governing intestate succession.²¹

The section seeks to ensure that those who were dependent on the deceased member are not left destitute by that latter’s death.²² To achieve this object, section 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased as expressed in the nomination form.²³ It supersedes all other laws, including customary law.²⁴ It requires the fund’s board to allocate death benefits based on its provisions, thereby superseding the member’s will and any contradictory laws.²⁵ For this reason, the death benefit subject to the exceptions outlined in section 37C is excluded from the estate of a deceased member and placed under the control of a retirement fund. The board is not bound by the deceased’s will or nomination form.²⁶

20 Nevondwe (n 14).

21 *Snyman v Government Employees Pension Fund and Another* (80696/2016) [2024] ZAGPPHC 364 (8 April 2024) para 49.

22 Nevondwe (n 15).

23 Nevondwe et al (n 10).

24 *Sithole v CS Provident Fund* [2000] 4 BPLR 430 (PFA).

25 *Snyman v Government Employees Pension Fund and Another* (80696/2016) [2024] ZAGPPHC 364 (8 April 2024) para 49.

26 *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); *Kaplan & Another v Professional Executive Retirement Fund & Others* [2001] 10 BPLR 2537 (SCA). In *Mashazi* case, the court ruled that section 37C of the PFA enjoins the trustees of the pension fund to exercise an equitable distribution, taking into account a number of factors. The fund is expressly not bound by a will nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. See also *Kirsten v Allan Gray Retirement Annuity Fund* 2017 3 BPLR 566 (PFA) in which it was held that the duty to make equitable distribution rest

In *Matlakane v Royal Paraffin Provident Fund*,²⁷ the Adjudicator ruled that a beneficiary nomination form does not in law entitle the nominee to *ipso facto* receive death benefit. So, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in the nomination form, this does not necessarily imply that the whole amount of the benefit will in fact be awarded to that beneficiary.²⁸ In *Khambule v Telkom Retirement Fund*,²⁹ the Pension Funds Adjudicator ruled that in determining an equitable distribution, the board in this case took into consideration relevant factors. Considering the needs of the dependants and the small amount of the death benefit, the board was correct to exclude the complainants from sharing in the benefit as nominees.³⁰ For the deceased's intention as contained in the nomination form is only one of the factors considered when allocating a death benefit.³¹ The section³² essentially imposes three primary duties on the board of management:

- (i) to identify the dependants and nominees of the deceased member;
- (ii) to effect an equitable distribution of the benefit amongst the beneficiaries; and
- (iii) to determine an appropriate mode of payment.

Many complaints referred to the Pension Funds Adjudicator

with the board of a pension fund. See also *Tsele v Bidvest South Africa Retirement Fund* 2016 1 BPLR 146 (PFA) and *Van Zelser v Sanlam Marketers Retirement Fund* 2003 2 BPLR 4420 (PFA) in which it was decided that section 37C of the PFA is aimed at protecting dependency over wishes of the deceased.

The will or nomination form is one of the factors taken into account by the board of management when they decide on an equitable distribution.

27 2003 6 BPLR 4785 (PFA).

28 N Dyani-Mhango 'Does the board of a pension fund in South Africa perform a public function or exercise public power when determining death claims under section 37C of the Pension Funds Act?' (2021) *De Jure Law Journal* 558.

29 [2003] 10 BPLR 5214 (PFA).

30 *Khambule v Telkom Retirement Fund* [2003] 10 BPLR 5214 (PFA) at para A, page 5215 of the determination.

31 *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C.

Here the Court held that section 37C of the PFA is aimed at protecting dependency, even over the clear wishes of the deceased and the fact that the distribution did not strictly follow the nomination form in this case was not a ground for review. See also *Khambule v Telkom Retirement Fund* [2003] 10 BPLR 5214 (PFA) where the Adjudicator ruled that wishes of deceased was only one of the number of factors to be considered by fund in making equitable distribution.

32 Section 37C of the PFA.

Office concern the allocation or distribution, non-payment and computation of death benefits.³³

3 What is a benefit for the purposes of section 37C?

Section 37C regulates the distribution of death benefits but not their nature, computation and value. The Act does not define the term 'benefit'. So, the rules of the fund determine the value and computation of a benefit.³⁴ Benefit is then any amount payable to a member or beneficiaries in accordance with the rules of the fund.

4 Who is a dependant?

Section 37C in its entirety makes it clear that dependants are favoured over nominees in the distribution phase. Under section 37C(1) the board has a duty to take all reasonable steps to trace and locate the dependants

33 See *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA) where there was no legal duty on deceased pension fund member to maintain his mother at the date of his death as she was not indigent. However, the fund took view in particular circumstances that she would become dependent on him at future date if he had not died. The Adjudicator upheld fund decision to award portion of death benefit to her as a dependant in terms of paragraph (c). See also *Muir v Mutual & Federal Pension Fund* [2002] 9 BPLR 3864 (PFA) wherein the complainant was only dependant. Deceased completed nomination form with words 'I would like the full amount to go into my estate'. Fund treated estate as nominee and distributed death benefit between complainant and certain selected beneficiaries of the estate at its discretion. Adjudicator held estate cannot be a nominee and awarded entire benefit to complainant. See further also *Nisane v Municipal Employees Pension Fund & Another* [2007] 2 BPLR 241 (PFA); *Mangxiki v Mine Workers Provident Fund & Another* [2002] 5 BPLR 3450 (PFA); *Van Rooyen v ICS Pension Fund & Another* [2004] 10 BPLR 6168 (PFA); *Khambule v Telkom Retirement Fund* [2003] 10 BPLR 5214 (PFA); *Mohatla v Metal Industries Provident Fund* [2004] 6 BPLR 5797 (PFA); *Matseke & Another v NTI Provident Fund & Others* [2003] 6 BPLR 4788 (PFA); *Dyas v CTS Provident Fund & Another* [2003] 3 BPLR 4448 (PFA); *Gravett v Allianz Pension Fund* [2002] 11 BPLR 4033 (PFA); *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA); *Zulu v Illovo Sugar Provident Fund* [2002] 2 BPLR 3129 (PFA); *Kruger v Central Retirement Annuity Fund* [2002] 7 BPLR 3643 (PFA); *Kipling v Unilever SA Pension Fund* [2001] 8 BPLR 2368 (PFA); *Kaplan and Another v Professional and Executive Retirement Fund and Others* [2001] 10 BPLR 2537 (SCA); *Damgaard v EAC Provident Fund* [2001] 10 BPLR 2569 (PFA); *Dobbie No v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA); *Wasserman v Central Retirement Annuity Fund* [2001] 6 BPLR 2160 (PFA) and *Jacobs NO v Central Retirement Annuity Fund and Another* [2001] 1 BPLR 1488 (PFA).

34 See *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA) and *Gravett v Albanz Pension Fund* [2002] 11 BPLR 4033 (PFA).

of the deceased's member. What constitutes a reasonable investigation by the board will differ from case to case. The mere fact that a person qualifies as a dependant does not entitle him to receive the benefit, but only to be considered by the board in the distribution phase.

The Act defines a 'dependant' in section 1 as follows:

- (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;
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock,
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

So, Parliament has outlined three categories of dependants based on the deceased' member's liability to maintain such as legal dependants, non-legal dependants and future dependants.³⁵

4.1 Legal dependants³⁶

A person is regarded as a dependant if the deceased is legally liable to maintain that person.³⁷ This duty may arise as a result of a legal obligation, the common law or a statutory obligation.³⁸

35 Section 1 of the PFA.

36 Section 1(a) of the PFA.

37 See *Dyane v Tiger Oats Provident Fund* [2003] 6 BPLR 4773 (PFA), *Dyas v CTS Provident Fund & Another* supra note 4, *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA), *Mkaba v SA Breweries Staff Provident Fund* [2002] 3 BPLR 3209 (PFA), *Zikhali & Another v Metal Industries Provident Fund & Another* [2002] 5 BPLR 3494 (PFA); *Khutswane v Malbak Group Pension & Another* [2000] 12 BPLR 1354 (PFA), *Qosthuizen Obo Breed v Mercedes Benz of South Africa Pension Fund & Another* [2000] 11 BPLR 1284 (PFA).

38 At common law a duty to maintain will arise where the following three requirements are met:

- (a) The relationship between the parties is such that it imposes a duty of support.
- (b) The person claiming support is unable to maintain himself or herself.
- (c) The person from whom support is requested has capacity to support *Reyneke v Reyneke* 1990 (3) SA 927 (E)). See also *L Nevondwe & NN Lebepe* 'Maintenance

Dependants in respect of whom the member is legally liable for maintenance include a spouse³⁹ and children⁴⁰ who rely on the member for the necessities of life.⁴¹ Marriage gives rise to a reciprocal duty of support⁴² between spouses. A spouse's claim, unlike a parent's maintenance claim against children, is not restricted to the bare necessities of life. This duty of support can continue after the marriage ends in divorce,⁴³ and the extent of the support will then usually be specified in the divorce order. A member is legally obliged to maintain an ex-spouse where a court has made such an order against the member. This obligation will survive the member's death if a settlement agreement is made an order of court. So, this former spouse will qualify as a legal dependant.⁴⁴

The common law imposes a duty on a parent of a dependent child to support that child. This duty survives a parent's death. In *Governing Body, Gene Louw Primary School v Roodtman*⁴⁵ the Court said that a court order simply regulates the parents' common-law duty parents to support a dependent child.

A parent, grandparent and grandchild can also qualify as a dependant. Like parents, children with the means to do so have a reciprocal duty to maintain their parents. But the parents must prove the need or necessity

benefits payable by retirement funds under SA law' (2014) 29 *Insurance & Tax Journal* 8.

39 *Lekhozi v Auto Worker's Pension Fund* [2004] 5 BPLR 5714 (PFA).

40 The duty of support will normally end once the child reaches the age of majority, but may continue until the child becomes self-supporting, provided that the parents have the means to continue to support the child until he becomes self-supporting. See also the case of *Sikatele v Sikatele* (1996) 2 All SA 95 (TK).

41 Necessities of life include food, accommodation, medical care and education (s 15(2) of the Maintenance Act 99 of 1998).

42 Maintenance includes food, clothing, medical and dental care and whatever else is reasonably required.

43 Section 7(1) of the Divorce Act 70 of 1979. In *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA), the complainant divorced the deceased in 1999. During the divorce proceedings the complainant did not ask for maintenance and it was also not contained in the divorce order, which incorporated the settlement agreement. The settlement agreement stated at the time that the deceased member should be liable for the complainant's reasonable medical expenses. The Adjudicator found that although the order stated that no maintenance was sought, the rest of the order clearly related to another aspect of maintenance (medical expenses). So, the Adjudicator found that the deceased member was legally liable for the complainant's maintenance, though limited, and that the complainant should be treated as a dependant under section 1(1)(a).

44 S Khumalo 'Unpacking the definition of death benefit "dependants" in the Pension Funds Act' 2008 *Pensions World South Africa* 34.

45 2004 (1) SA 45 (C).

for support⁴⁶ and cannot merely allege the existence of a parent-child relationship. Authority?

Subject to the same requirements, a reciprocal duty of support also exists between grandparents and grandchildren. So, a grandchild can be treated as a dependant if he can prove that he depended on his grandparents. Correspondingly, the same applies to the grandparents. Authority?

A duty of support also arises between brothers and sisters. But the claimant will have to prove that he was indigent and in fact depended on the deceased sibling during his lifetime.

To recap, dependants that fall into this category are determined with reference to their relationship with the deceased. The mere fact that a person is related is not sufficient to be considered for a death distribution. The person must prove that the deceased had a legal duty to support him.⁴⁷

4.2 Non-Legal Dependents⁴⁸

Section 1(b) deals with persons who were not legally dependent on the deceased member for maintenance, and it then outlines three categories of such dependants.⁴⁹

4.3 Section 1(b)(i) Dependents : de facto dependants

Where there is no duty of support, a person might still be a dependant if the deceased contributed to the maintenance of that person in some way. The person claiming to be a factual dependant will have to prove that

⁴⁶ Parents will have to prove on a balance of probabilities that they are indigent and cannot support themselves, and that the deceased was able to or did contribute to their maintenance (*Smith v Mutual and Federal Insurance Co Ltd* 1998 (4) SA 626 (C); *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA)).

⁴⁷ In *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA), the deceased member was survived by his two sisters and no other dependants. The deceased did not complete a nomination form. The Adjudicator rejected the complainants' argument that by virtue of their relationship with the deceased alone they were legal dependants.

⁴⁸ Section 1(b) of the PFA.

⁴⁹ *Nevondwe & Odeku* (n 11) 773.

he was dependent on the deceased (despite the latter's not having a legal duty of maintenance) when the member died.⁵⁰

To constitute maintenance, payments should have been made regularly⁵¹ by the deceased to the beneficiary claiming to be a factual dependant. They should not have been once-off but should have been made until the deceased died.⁵²

4.4 Section 1(b)(ii) Dependants: Spouses

Section 1(b)(ii) applies to spouses in respect of whom there exists no statutory law in terms of which the marriage or union is recognised. Spouses that might be treated as dependants under this subsection include cohabitees living as 'husband and wife'.

In *Volks NO v Robison & Others*,⁵³ it was held that the Constitution of the Republic of South Africa, 1996, prohibits unfair discrimination on the ground of marital status. They concluded that where relationships serving a similar social function to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status arises. This does not include cohabitees, but it does include same-sex marriages.

The definition of a dependant in section 1 of the Act qualifies a cohabiting partner as a dependant.⁵⁴ Of the three dependant classes; legal, non-legal and future, the cohabiting partner seems to qualify as a

50 L Nevondwe & M Rapatsa 'Cohabitation: A nightmare on the allocation and distribution of death benefits in terms of section 37C of the South African Pension Funds Act 24 of 1956' *Pensions* 155.

51 *Govender v Alpha Group Employees Provident Fund & Another* (2) [2001] 8 BPLR 2358 (PFA).

52 See *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA) where the complainant was excluded from the distribution and payment of the death benefit solely because she was a cohabitee. The Adjudicator ruled that the complainant qualifies as a factual dependant in terms of section 1 of the PFA and she was supposed have been considered for the benefit in terms of section 37C of the PFA. In *Hlathi v University of FortHare Retirement Fund & Others* [2009] 1 BPLR 37 (PFA), the Adjudicator ruled that a permanent life partner of a deceased member who has successfully proved that she had an inter-dependent relationship with the deceased member and as a consequence of his death she is left in a financial predicament or with a financial void or financially worse off is sufficient to bring her within the scope of the definition of a factual dependant as set out in section 1(b)(i) of the PFA and eligible to be considered in the distribution of a death benefit by the pension fund.

53 Case no CCT 12/04.

54 See *Tladi v Pfizer Provident Fund* PFA/GA/717/02/CN (unreported); *Dhiamini & Another v Xstrata SA Provident Fund* PFA/GA/561/02 (unreported).

non-legal dependent or 'factual dependant'. Clearly, she (assuming the person is female) cannot qualify as a legal dependant, because she is not a spouse of the deceased fund member.

A person can qualify as a factual dependant even if owed no duty of support by the deceased fund member. But a person might still be a dependant if the deceased in some way contributed to that person's maintenance. The person claiming to be a factual dependant will have to prove that she was dependent on the deceased at the time of his death. A person can also qualify as a factual dependant if she was the cohabiting partner, living with the fund member as husband and wife. Yet there is no statute that recognises their union.⁵⁵

Some years ago, John Murphy, the then Adjudicator, determined that a woman complainant had no right to a death benefit purely on the grounds of cohabitation, but that she qualified as a factual dependant under section 1 and should have been considered for the benefit under section 37C of the Act.⁵⁶

4.5 Section 1(b)(iii) Dependants: Children

Any child⁵⁷ of the deceased member whom he was not legally required to support and maintain qualifies as a dependant. An example would be a financially independent major child of the deceased. This result depends on the facts before the Board of Trustees.⁵⁸

55 See *Hlathi v University of Fort_hare Retirement Fund & Others* [2009] 1 BPLR 37 (PFA).

56 *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA).

57 'Child' includes a posthumous child, an adopted child and an illegitimate child.

58 *Lobekov Central Retirement Annuity Fund*, Case Number: PFA/GA/14345/2007/CMS, unreported, this case was signed by the Pension Adjudicator in 2007. It concerned the alleged failure by the trustees to pay a benefit arising out of the death of the deceased. The complainant, a major son of the deceased, was aggrieved by the failure of the fund trustees to apportion part of the death benefit to him. The fund trustees explained, among other things, that the complainant was gainfully employed and that the deceased was not responsible for the complainant's maintenance at the time of his death. The trustees decided to apportion the entire death benefit to the surviving spouse of the deceased on the ground of her dependence on the deceased during his lifetime. After examining the rules and the applicable law, the Adjudicator concluded that the fund trustees' decision in awarding the death benefit was legally sound.

4.5.1 Future Dependants

Section 37C covers persons whom the deceased was not legally liable to maintain at the time of his death. Such a person may still qualify as a dependant if he can show that the deceased would have become liable to maintain had he notionally been alive.⁵⁹ Possible dependants in terms of this section might include parents⁶⁰ who are not legally dependent on the deceased for maintenance at the time of his death, engaged couples, and parties intending to marry.

5 Nominees

Nominees are not entitled to a death benefit by virtue of having been nominated. The term 'nominee' is not defined in the Act. For a beneficiary to claim to be a nominee there must be a valid nomination form.⁶¹ The nomination must be in writing, the beneficiary must not be a dependant, and the nomination form must be directed to the fund.⁶² An estate or an artificial person cannot be a nominee. Apart from the specified exceptions, a death benefit cannot be paid into an estate.

The benefit is allocated to a nominee who is not a dependant only if no dependant is identified.⁶³ Conversely, if a dependent is found, the nominee is disregarded.⁶⁴ A nominee does not automatically have a right to the entire benefit if dependents are identified.⁶⁵

59 L Nevondwe & LP Mogashoa 'When does a fund conduct DNA tests on a child to determine dependency' (2011) *Insurance & Tax Journal* 33.

60 See *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA).

61 The importance of classifying a beneficiary correctly as either a dependant or nominee is important, for it will affect how the payment will be made and whether it will be made in terms of s 37C(1)(a) or (b). One of the more obvious distinctions between the sections is that in terms of subs (1)(a), the payment of a benefit to a dependant does not depend on the assets of the estate exceeding its liabilities, whilst payment in terms of subsection (b) to a nominee requires the assets of the estate to exceed the liabilities of the estate.

62 In *Kruger v Central Retirement Annuity Fund* [2002] 7 BPLR 3634 (PFA) the Adjudicator took the view that the nomination was similar to a contract, and so the ordinary contractual principles applied.

63 *Kaplan and Ano NNO v Professional and Executive Retirement Fund and Others* 1998 (4) SA 1234 (W).

64 As above.

65 *Hlatshi v University of Fort Hare Retirement Fund* [2009] 1 BPLR 37 (PFA).

6 The twelve-month period

The board has twelve months in which to trace and identify the possible beneficiaries that might share in the benefit. If satisfied that it has taken all reasonable steps to trace and identify dependants,⁶⁶ the board need not wait for the twelve months to lapse before making payment. Nor is it obliged to pay after the twelve months have lapsed if it considers that further investigation is needed.⁶⁷ The duty to pay depends not on the expiry of the twelve-month period but on whether the board is satisfied that it has investigated and considered the matter with due diligence and can make an equitable allocation.⁶⁸

The twelve-month period is relevant only as regards payment to a nominee. A designated nominee will be considered only after the twelve-month period has lapsed and the fund has not managed to trace a dependant. Any claim by a nominee before the twelve months have lapsed will be premature.⁶⁹

Whether the board acted properly under section 37C(1)(a) will thus not necessarily be determined with reference to the time frame. The relevant question will always be whether the board took all the reasonable steps necessary to identify and trace all possible dependants so as to allow it to distribute the benefit in the most equitable manner.⁷⁰

An enforceable debt of a dependant entitled to share in a benefit does not arise when the twelve-month period has lapsed, but when the board has taken a decision to distribute the benefit to the selected beneficiaries.

If the board of trustees failed to comply with the Act and the beneficiaries therefore lodge a complaint with the Office of the Pension Funds Adjudicator, the adjudicator may order the board of trustees to complete its investigation and distribute the benefit under section 37C,

66 The duty to trace and identify dependants rests on the fund, which should take all reasonable steps to identify the dependants. There is no duty on a dependant to come forward and prove that he is a dependant (*Mthiyane v Fedsure Life Assurance Ltd & Others* (2) [2002] 5 BPLR 3460 (PFA)).

67 But it does not mean that the board can delay in its decision. If the board fails to take a decision in time without good reason, this will amount to maladministration giving rise to a claim for delictual damages for any quantifiable loss suffered.

68 *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA).

69 L Nevondwe 'Section 37C of the Pension Funds Act, 24 of 1956: A social security measure to escape destitution' (2011) *Insurance & Tax Journal* 10.

70 As above.

together with interest on it of 15,5 per cent from the date when the period of twelve months elapsed to the date of final payment within six weeks of the date of determination.⁷¹

7 Distribution of death benefit⁷²

Section 37C establishes a statutory hierarchy of beneficiaries entitled to share in the allocation of death benefits. Section 37C of the PFA is a rational and reasonable law of general application that justifiably limits freedom of testation in relation to the distribution of death benefits.⁷³ Dependency will always be the overarching requirement in this allocation, keeping in mind that the objective of the section is to ensure that dependants of the deceased are not left destitute by his death. It is only once the search and identification of the possible beneficiaries is completed that the board will determine to whom to allocate a share of the benefit.

7.1 Distribution to dependants only (s 37C(1)(a))

Section 37C(1)(a) regulates the payment to dependants only and reads:

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.

If the deceased is survived only by dependants and no nominees, the board must allocate and effect an equitable distribution among them. When exercising its discretion the board needs to consider six factors:⁷⁴

⁷¹ *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA).

⁷² In *Kowa v Corporate Selection Retirement Fund & Another* PFA/GA/1415172007/SM (unreported) the Adjudicator ruled as follows with respect to the principle on distribution of death benefits: the board of trustees have a legislative duty to identify the beneficiaries of a deceased member. The board has discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. In exercising those powers, the board must give proper consideration to relevant factors and exclude irrelevant ones. The board must not fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

⁷³ MC Marumoagae 'The status of nomination forms and wills when retirement funds' death benefits are distributed' (2023) *De Jure Law Journal* 668-686.

⁷⁴ See *Sithole v ICS Provident Fund & Another* [2000] 4 BPLR 430 (PFA) para 24-25.

- (i) the wishes of the deceased;
- (ii) the financial status of the dependants, including their future earning potential;
- (iii) the ages of the beneficiaries;
- (iv) the relationship with the deceased;
- (v) the extent of dependency; and
- (vi) the amount available for distribution.

These will now be discussed.

7.2 The wishes of the deceased⁷⁵

The wishes of the deceased are often expressed in the nomination form or the will.⁷⁶ As regards the will, pension fund benefits are expressly excluded from the deceased's estate. Nominated beneficiaries often under the mistaken impression that they are entitled to the benefit because the deceased member nominated them. But this not so, because s 37C was enacted to protect dependency over the clear wishes of the deceased. The content of the nomination form is merely one of the factors considered by the trustees in the exercise of their discretion.⁷⁷

In *Snyman v Government Employees Pension Fund and Another*⁷⁸ the Plaintiff relied on the contents of the deceased's testament and her

75 See *Kowa v Corporate Selection Retirement Fund*, Case Number: PFA/GA/14151/SM, unreported. This determination was signed by the Adjudicator in 2007.

76 Section 37C of the Act is a curious provision. Ordinarily, people have freedom of testation, which means that they can determine how their assets are to be distributed after their death. However, in terms of section 37C, benefits payable by a pension fund upon the death of a member do not automatically form part of the deceased member's estate, and so this provision excludes a member's freedom of testation. Nor does the Intestate Succession Act 81 of 1987 govern the death benefit if the member died intestate (*Mthethwa v Whirlpool Provident Fund* PFA/KZN/560/04/Z/CN (unreported)).

77 *Mashazi v African Products Retirement Benefit Provident Fund* op cit note 2. In *Bushula v SATAWU National Provident Fund & Others* PFA/WE/1742/2006/LN (unreported), the complainant was dissatisfied with the decision of the board of trustees to exclude him from the distribution and payment of the death benefit even though the deceased nominated him as a beneficiary who was to receive 10 per cent upon his death in his will. The Adjudicator ruled that the mere nomination by the deceased in his nomination form or in his will did not necessarily mean that the nominee was automatically entitled to a portion of a death benefit. This was only one of the factors taken into account in the allocation of the death benefit.

78 (80696/2016) [2024] ZAGPPHC 364 (8 April 2024) para 55 - 56.

appointment as executrix in the deceased's estate of her daughter to claim from the GEPF. She was not on the fund's nomination form, and she failed to prove dependency on the deceased. She was not awarded any claim by the pension funds adjudicator and subsequently the court.

The court held that it cannot be denied that one's right to freely decide how his or her property should be disposed of is one of the fundamental rights recognised under the Constitution. Where in the case? However, this right is not absolute and section 37C of the PFA is one of the provisions that aims to ensure that this right is not enjoyed in a manner that absolves deceased members from their maintenance obligations.

Testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on this freedom.⁷⁹ The PFA is one of the pieces of legislation that places an important restriction on testators' freedom of testation.⁸⁰ The PFA was placed above all other laws when it comes to the distribution of death benefits and any provision contained in any statute or rule of the common law that makes provision for the distribution of death benefits when the deceased retirement fund member dies which is contrary to what is contained in section 37C of the PFA will have no force of law, and thus, invalid.⁸¹

In *Moir v Reef Group Pension Plan*,⁸² the complainant and the deceased member were divorced in 1984 but continued living together as husband and wife until the member died in March 1997. The deceased completed a nomination form nominating his brother as the sole beneficiary. The fund awarded the entire benefit to the brother on this basis. The complainant, a de facto spouse, objected to the distribution.

The Adjudicator, treating the complainant as a de facto dependant, held that the board had fettered its discretion by blindly following the nomination form without considering any of the other factors. So the Adjudicator concluded that the distribution was not equitable, because the board fettered its discretion by basing its distribution solely on the nomination form.

79 *King v De Jager* 2021 5 BCLR 449 (CC) para 23.

80 *Snyman v Government Employees Pension Fund and Another* (80696/2016) [2024] ZAGPPHC 364 (8 April 2024) para 57.

81 As above.

82 [2000] 6 BPLR 629 (PFA).

7.3 The financial status of the dependants,⁸³ including their future earning potential⁸⁴

The financial status of each dependant will allow the board to determine the reasonable maintenance needs of the various dependants.

In *Van Vuuren v Central Retirement Annuity Fund & Another*⁸⁵ the deceased member was survived by his widow from whom he was separated but not divorced.

He was also survived by a de facto spouse with whom he lived in a relationship of husband and wife. The fund awarded the death benefit in equal shares to the widow and the de facto spouse. The latter was also a sole beneficiary of life insurance policy taken out by the deceased.

The adjudicator held that the distribution of the death benefits was not equitable, because the failed to consider that the de facto spouse was the sole beneficiary under the life insurance policy. The adjudicator held further that 'any receipt of cash benefit directly impacts on the financial status and future earning capacity of the dependant...'

7.4 The ages of the beneficiaries

This factor played an important role in determining the length of time that a beneficiary will need to be maintained.

In *Motsoeneng v AECI Pension Fund & Another*⁸⁶ the deceased was survived by five minor children (two of them from a relationship with another woman) and his widow. The children were aged 17, 13, 10, 6 and 3 respectively. The board resolved to award each of the children 20 percent of the benefit. The widow, the mother of three minors, lodged a complaint. The adjudicator found that the fund had fettered its discretion by not considering the respective ages of the minor children and different needs of the 3-year-old as opposed to a 17-yearold.

83 Whenever this factor is considered, it is advisable for the board of management to look at the liquidation and distribution account prepared by the executor of the deceased estate. This will indicate how and to whom all the deceased's assets were distributed (*Van Vuuren v Central Retirement Annuity fund & Another* [2000] 6 BPLR 661 (PFA)).

84 *Brummelkamp v Babcock Africa (1997) Pension Fund & Another* [2001] 4 BPLR 1811 (PFA).

85 As above.

86 [2003] 1 BPLR 4260(PFA).

7.5 The relationship with the deceased

In *Karam v Amrel Provident Fund*⁸⁷ the deceased was survived by a major son and a close friend, whom she nominated as the beneficiary. Both of them were financially independent. The deceased and her son were estranged from each other up to her death. Before they became estranged, the deceased nominated her son as a sole beneficiary and a sole heir but later revoked the nomination. The fund awarded the entire benefit to the nominee. The adjudicator confirmed the decision of the fund and held that where dependants are mature adults and gainfully employed, their relationship with the deceased becomes a critical factor.

7.6 The extent of dependency

The extent to which a dependant was dependent on the deceased can be a significant factor.

In *Robinson v Central Retirement Annuity fund*⁸⁸ the Adjudicator found that fund exercised their discretion improperly for failing to consider that the deceased was required by a divorce order to pay for the reasonable maintenance needs of the complainant, a minor child.

7.7 The amount available for distribution

The amount available for distribution is always a critical factor. Often, especially where there is more than one dependant, the amount distributable is insufficient to ensure that all share in it. This factor may compel the board to award a dependant an amount less than his reasonable maintenance needs or even to exclude certain dependants.

The above factors are not a closed list, circumstances might dictate that other factors should be considered.⁸⁹ The list of factors is only a guide, by no means exhaustive. Under the rules on exercising a discretionary power, the board must consider all relevant factors and ignore irrelevant ones. A board decision involving an exercise of discretion will not lightly be interfered with unless the board has misconceived the nature of

87 [2003] 9 BPLR 5098 (PFA).

88 [2001] 10 BPLR 2623 (PFA).

89 See *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 152C-D; *Haira & Another v Booysen & Another* 1992 (4) SA 69 (A) at 93B-C).

the discretion conferred upon it and considered irrelevant considerations or ignored relevant ones, or the decision is so unreasonable as to warrant the inference that the board has failed to apply its mind to the question at hand. But usually the board should not fetter its discretion by considering irrelevant factors to the exclusion of relevant factors or by over emphasizing a particular factor.⁹⁰ Yet the board need not consider the solvency of the estate. Payment to dependants does not depend on whether the assets of the estate exceed its liabilities.

7.7.1 *Distribution to nominees only (s 37C(1)(b))*

Section 37C(1)(b) governing the distribution to nominees reads:

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 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.⁹¹

A distribution to nominees will take place only where the deceased member is not survived by any dependants and has completed a valid nomination form. Payment of the benefit to a nominee is subject to the following conditions:

- (i) the board have not traced and identified any dependants of the deceased member;
- (ii) the twelve-month period has lapsed;
- (iii) the deceased has completed a valid nomination form in which the person nominated is not a dependant; and

90 *Nieuwenhuizen v SAB Staff Provident Fund & Another* [2000] 12 BPLR 1413 (PFA).

91 So if a deceased member has nominated a person who is not a dependant and the board has not become aware of or traced a dependant within the twelve-months period, the board is obliged to distribute the benefit to that nominee on the expiry of twelve months (see T Manamela 'Chasing away the ghost in death benefits: a closer look at Section 37C of the Pension Funds Act 24 of 1956' 2005 17 *SAMLJ* 286).

- (iv) the aggregate assets of the deceased member's estate exceed its aggregate debts.

If the deceased member has allocated only a certain percentage of the benefit to a nominated beneficiary, that nominee will be entitled only to the portion specified. The remainder of the benefit will be paid into the estate under section 37C(1)(c).⁹²

7.7.2 *Distribution to nominees and dependants (section 37C(1)(bA))*

The distribution to dependants and nominees forms the subject-matter of several complaints before the Adjudicator.⁹³ This distribution is regulated by s 37C(1)(bA), which reads:

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 a 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 a portion thereof to such a 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 the 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 same factors applicable to an allocation involving only dependants will equally apply.

Only nomination forms completed on or after 30 June 1989 will be valid for a consideration in terms of this section. The provision that the aggregate assets must exceed the aggregate liabilities applicable to the payment of a benefit payable to the nominees only is not applicable.

92 *Krishnasamy & Others v ABI Pension Fund* [2004] 2 BPLR 5471 (PFA).

93 See *Karam v Amrel Provident Fund* supra note 40; *Phashe & Others v Metro Group Retirement Fund* [2003] 9 BPLR 5123 (PFA); *Bukashe & Another v Umthunzi Provident Fund* [2003] 5 BPLR 4635 (PFA); *Kruger v Central Retirement Annuity Fund* supra note 25; *Morgan V SA Druggies Provident Fund & Another* [2001] 4 BPLR 1886 (PFA); *Kipling v Unilever SA Pension Fund* [2001] 8 BPLR 2377 (PFA); *Diegaard v KVV-Voorsorgfonds* [2001] 11 BPLR 2703 (PFA).

7.7.3 Distribution of the deceased estates (s 37C(1)(c))

Payment to the estates is outlined in s 37C(1)(c), which reads:

If the fund does not become aware of or cannot trace any dependant of the member within 12 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 Administration of Estates Act, 1965 (Act 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

The general rule in s 37C(1) that the benefit does not form part of the estate⁹⁴ allows three exceptions. The fund can only pay a benefit into the deceased estates if on the existence of one of the following scenarios;

- (i) the fund has not discovered any dependants and there is a nominated beneficiary, but the deceased's estate's liabilities exceed its assets;
- (ii) the deceased member has no dependants and did not designate a nominee in writing; or
- (iii) the deceased has designated a nominee only to receive a portion of the benefit, then the remaining balance must be paid to the estate.⁹⁵

8 Modes of payment

Another instance in which the board can incur the wrath of complainants is with regard to the method of payment to beneficiaries. The modes of possible payment are dealt with by ss 37C(2), (3) and (4), which read:

(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate,

⁹⁴ *Matlakane v Royal Paraffin Provident Fund* [2003] 6 BPLR 4785 (PFA).

⁹⁵ *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488 (PFA).

having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(4)(a) Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that —

- (i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and
- (ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.

Payment to beneficiaries can be made in one of the methods or combination thereof:

8.1 Payment to a minor

For paying a minor, the board has three options: instalments to a guardian, a lump-sum payment to the guardian,⁹⁶ or into a trust for the minor's benefit. These options may be summarised as follows:

- If the board considers it appropriate, instalment payments⁹⁷ may be made to the guardian for the benefit of the minor. When the minor attains the age of majority, the full benefit becomes payable to him.
- The board may also make a lump-sum payment to the guardian on behalf of the minor. But there are risks associated with this method:
 - the money might be usurped by the creditors of the guardian;
 - the guardian might use the money for other purposes.

96 Before the board deprives the guardian of the right fully to control and administer the moneys on behalf of the minor child, there must be grounds in fact and law for doing so (*Ramenyelo v Mineworkers Provident Fund* PFA/GA/228/02/NJ (unreported)).

97 Instalment payments may be made if the board ensures that the interest rate is reasonable and that the investment return earned by the fund is capped on the capital amount (s 37C(3)).

- The board can if appropriate pay the money into a trust for the benefit of a minor beneficiary.⁹⁸ Payment in this way is deemed to be payment to that beneficiary.

In *Mabuza v Mine Workers Provident Fund*⁹⁹ the complainant was the brother of a member of the respondent pension fund who had died leaving 5 children. A death benefit became payable on the death of the deceased. As the children were being cared for by the mother of the complainant and the deceased, the fund decided to pay the deceased's mother R19 346 while the balance was placed in a trust benefit of the deceased's minor children.

The essence of the complaint was that the balance of the death benefit was placed in a trust without the complainant or his mother being consulted. It was requested that the remaining amount of the death benefit should be paid directly to the deceased mother in a lump sum because she could administer the financial affairs of the minor children. Despite several interventions to address the complaint, the fund refused to respond.

The Adjudicator held that as the tribunal had the authority to issue determinations that had the same power as a civil judgment of any court in terms of s 300 of the Act, the relevant rules of the High Court relating to default judgement were applied. The tribunal had the power to issue a default judgement where it had not succeeded in obtaining a response from a respondent.

The Adjudicator further held that section 37C(2)(3) of the Act regulated the mode of payment of a benefit to a minor dependant or nominee. A benefit paid to a minor was usually paid to the minor's guardian. The payment of the minor child's benefit to his legal guardian should be done in the ordinary course of events unless there were cogent reasons for depriving the guardian of the duty to take charge of his minor child's financial affairs and the right to decide how the benefit due to that minor child should be used in the latter's best interests. The Adjudicator also held that here the board of trustees placed the remaining amount of the death benefit in trust without investigating the ability of the deceased's mother to administer the financial affairs of the

98 Section 37C(2) of the Act provides the board with the option to make payment into a trust.

99 [2008] 1 BPLR 39 (PFA).

minor children. The board fettered its discretion by failing to investigate this ability. Finally, the Adjudicator referred the matter to the board for a fresh exercise of its discretion.

8.2 Payment to a major beneficiary

Payment to a major child can be made in instalments if the beneficiary has agreed to this in writing.¹⁰⁰ The agreement between the beneficiary and the board can be cancelled by either party on written notice not exceeding 90 days. On such cancellation, the balance of the benefit is payable to the beneficiary.

8.3 Payment to a trust or the guardian's fund

Under s 37C(2) of the Act the payment of a benefit payable upon a member's death to a trustee as defined in the Trust Property Control Act¹⁰¹ for the benefit of dependant or nominee is deemed to be a payment to that dependant or nominee.

Such a payment formerly absolved a fund of its responsibility. Problems arose when payments were made to trusts or trustees who did not have proper governance structures in place to the prejudice of beneficiaries.¹⁰²

So Parliament intervened: the Financial Services General Laws Amendment Act¹⁰³ took effect on 1 November 2008. This Act no longer recognises the payment of a benefit payable upon a member's death to a trust as constituting a payment to the beneficiary. It only recognises the payment of this benefit to a beneficiary fund or guardians and caregivers as a payment to the beneficiary.

The Act stipulates that 'for the purposes of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act... for the benefit of a dependant or nominee contemplated

100 The agreement must disclose the amount of the payments, intervals of payments, interest rate, including any other important terms and conditions (section 37C(4)(a)).

101 Act 57 of 1998.

102 Giselle Gould 'Rush Against Time to Prepare for Beneficiary Funds' 2008 *Pension World South Africa* 12.

103 Act 22 of 2008.

in this section shall be deemed to be a payment to such a dependant or nominee’.

This provision has been changed by the new Act (Financial Services General Laws Amendment Act). Section 15(2)(a) states that:

for the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to —

- (i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by —
 - (aa) the member;
 - (bb) a major dependant or nominee, subject to subparagraph (cc); or (cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs;
- (ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or
- (iii) a beneficiary fund.
 - (b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act; and
 - (c) the insertion after subsection (4) of the following subsection:
- (5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian’s Fund.

Beneficiary funds were first mooted by the then Finance Minister, Trevor Manuel, in March 2007, after the Fidentia scandal arose from glaring gaps in the regulation of umbrella trusts. These trusts traditionally operated under the jurisdiction of the Master of the High Court. The aim of the law reform was to strengthen the regulation and supervision of beneficiaries’ assets to prevent future losses, improve the protection

of beneficiaries, and ensure that the trustees of trusts adhere to their fiduciary duties.

When should a beneficiary fund be used? When a member of a retirement fund dies, benefits (which include insured benefits if payable by the fund) become payable to the dependants or nominees. Section 37C of the Act provides various options for trustees to deal with payments. Where it is not suitable to pay the benefits directly to the dependant, nominee or guardian's caregiver, the benefits may be paid to a beneficiary fund, subject to certain criteria. These options are normally considered in the case of a minor dependants or nominees or persons with legal disabilities.

Only s 37C death benefits (approved benefits) payable by a registered fund for the benefit of a dependant or nominee may be paid to a beneficiary fund. This can be for a minor or major if considered appropriate by the retirement fund trustees. The main purpose of the regulator, the Financial Services Board, in creating a new legal vehicle, the Beneficiary Fund, was to offer greater protection to dependants of lump-sum benefits under the Pension Funds Act. Beneficiary funds began operating from 1 January 2009. By this date, they all had to register with the Financial Services Board. The Financial Services Board granted the retirement fund industry an extension to 31 March 2009 to complete the requirements for registering the rules for beneficiary funds.¹⁰⁴ The beneficiary funds require the fund to perform the annual audit, the board to have independent trustee representation. Fund rules are registered and approved by the Financial Services Board, and the fund must report annually to that Board on financial statements. FSB, 13B administrator license, fund is FICA exempt, and the fund has administration agreement with administrator setting out duties and service standards.

The objective of the beneficiary fund is to receive lump-sum death benefits from transferor funds (approved funds) and administer them for the benefit of the beneficiary fund member (dependant). Approved funds include transfers from other registered beneficiary funds and trusts.

¹⁰⁴ It was reported in *Business Day* newspaper on 13 March 2009.

9 The effects of time-barring and prescription on death benefit cases

A complaint must be lodged in the Office of the Pension Funds Adjudicator (OPFA) within three years of the conduct that gave rise to the complaint.¹⁰⁵ This period commences when the complainant becomes aware of the act or omission, or should reasonably have become aware of it.¹⁰⁶ If the three-year period has expired, the Adjudicator may not investigate the complaint unless he exercises his discretion to condone the late lodging on good cause shown.¹⁰⁷

Good cause usually devolves into several interactive components: the period of time elapsed, the prospects of success of the complaint, the prejudice to either party, or the reason(s) for the late submission.¹⁰⁸ This position has now changed: the complaint must be lodged within three years, and the aspect of condonation has been removed.¹⁰⁹

10 The position before the Pension Funds Amendment Act 11 of 2007 took effect

In 1996 the Act was amended by the Pension Funds Amendment Act,¹¹⁰ to include section 30I. This section setting time-limits for the lodging of complaints with the Adjudicator reads as follows:

- (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion -
 - (a) either before or after the expiry of any period prescribed by this Chapter, extend such period; [or]

105 Section 31(1).

106 Section 31(2).

107 Section 31(3).

108 See *Mahlknecht v Non-Ferrous Metal Works Pension Fund* (2004) 7 BPLR 5888 (PFA); *Longo v Cape Joint Pension Fund* [20/00] 6 BPLR 623 (PFA), *Ngoma v Metro Employees Provident Fund & Others* 2003) 9 BPLR 5114 (PEA), *Epol Provident Fund & Others v Premier Retirement Fund* [2002] 3 BPLR 3148 (PFA).

109 S 301(1)(2) of the Pension Funds Amendment Act 11 of 2007.

110 Act 22 of 1996.

- (b) condone non-compliance with any time limits prescribed by this Chapter.’

These provisions mean that once a complaint has been barred, the Adjudicator still has discretion to extend the three-year period or to condone non-compliance. But the complainant needs to show good cause to enable the Adjudicator to exercise her discretion under s 301(3).

11 The current position

Parliament removed the Adjudicator’s discretion with the passage of the Pension Funds Amendment Act.¹¹¹ This has presented the Adjudicator with some problems when considering the late complaints she receives. For example, now she may not investigate a complaint if it concerns conduct that took place more than three years before the Adjudicator received the complaint. That period of three years begins to run from the date on which the complainant became aware of the act or omission concerned.

The problem with these new legislative changes is that in certain circumstances the date on which a complainant becomes aware of the act or occurrence could be longer than ten years after the act or occurrence. For instance, imagine a complainant who claims that he began to correspond with his pension fund about a potential dispute about a death benefit some time in 1980 but failed to resolve this potential dispute until 2007.¹¹² It is difficult to determine whether the three-year period commences in 1980 when the complainant began to correspond with the fund or in 2007 when the parties failed to resolve the dispute. A further complication may arise when the complainant is unsophisticated and cannot reasonably be expected to be aware of an occurrence to which his complaint relates.

Because of these legislative changes and the problem that has arisen, the Adjudicator has determined that as regards complaints submitted to it prior to 13 September 2007, when the Pension Funds Amendment Act 2007 took effect, it will apply the legal framework that existed at the time that the complaint was lodged. This means that the Adjudicator will

¹¹¹ Act, 11 of 2007.

¹¹² See, eg, *Seripe v Emfuleni Local Municipality*, PFA/GA/T765/06/FM (where the complainant argued that they had been corresponding with the fund prior to lodging a late complaint and the Adjudicator applied its discretion under s 301 and condoned the late complaint).

continue to exercise its discretion which existed prior to 13 September 2007.¹¹³

The Supreme Court of Appeal (formerly the Appellate Division) has ruled on the standard for granting condonation in these circumstances. In *Melane v Santam Insurance Company Limited*¹¹⁴ the Court said (at 5328-13):

In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus, a slight delay and a good explanation may help to compensate for the prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked.

In *Makobo v Black Tops Surface Provident Fund*,¹¹⁵ the Adjudicator reasoned that although the discretion in subs (3) had been removed, the complainant was entitled to have his complaint adjudicated on the law applicable when he lodged his complaint. After applying his discretion, however, the Adjudicator ruled that there was an extraordinarily long delay and that the complainant had given no reasons for the delay to support condoning his non-compliance with the time limits in the Act. The Adjudicator was also confident that the complaint would probably fail.

The situation may be different, though, in that if the complaint is more than ten years old the Adjudicator considers that such complainants should not be permitted to rely on the discretionary powers in subs (3) above. So, the Adjudicator's policy (where the facts allow and there are no compelling reasons for doing otherwise) is to apply the legal framework that existed before 13 September 2007.

113 See *Makobo v Black Tops Surface Provident Fund* PFA/NP/12091/2002/LTN (unreported).

114 1962 (4) SA 531 (A).

115 As above.

To put this policy into context, if the complaint was submitted before 13 September 2007, the Adjudicator will not investigate his complaint because of the policy, unless she finds some compelling reasons to use her discretion, since the act or omission giving rise to the complaint occurred in 1980 (30 years ago). The outcome would be different if the conduct occurred in 1997, because the complaint would fall within the policy above and would probably be investigated by the Adjudicator.

Complaints submitted after 13 September 2007 are governed by the current regime. They are not investigated, regardless of whether the conduct giving rise to them occurred in 1980 or 1997.

Section 30I of the Pension Funds Amendment Act imposes certain time limits with regard to lodgment of complaints before the Adjudicator and states as follows:

- (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the ample is received by him or her in writing.
- (2) The provisions of the Prescription Act, 1969 (Act no 68 of 1969), relating to a debt apply in respect of the calculation of the three-year period referred to in subsection (1).¹¹⁶

There is a good reason for limiting the time during which litigation may be launched. As the Constitutional Court held:¹¹⁶

Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interest of justice. They protract the disputes over the rights and obligations are sought to be enforced, prolonging the uncertainty of all concerned about their affairs, nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.' This part of the paper appears to be somewhat disconnected with the rest of the paper. This can be a theme that can sustain a separate paper.

12 Comparative study between South Africa and England

In the England jurisdiction, the distribution and payment of death benefits differed to the South African jurisdiction which is regulated by

116 *Mohlomi v Minister of Defence* 1997 (1) SA 124 para 11.

section 37C which determines how death benefits must be distributed amongst beneficiaries (nominees and dependants). In England, trustees have the power to select the beneficiaries and allocate the death benefits between them.¹¹⁷ This process is regulated by the Rules of the Fund and are contractual in nature.¹¹⁸ The law which governs the distribution and payment of death benefits upon the death of the pension fund member is the Pension Schemes Act.¹¹⁹ Fund rules determines how death benefits are distributed to beneficiaries in England. Nominations in the nomination form are not binding similar to section 37C of the PFA which advocates it as a guiding principle to the trustees.

Both jurisdictions have ombudsman which are responsible for adjudication of pension funds complaints. In England, Pension Ombudsman (PO) impartially investigates complaints from members of pension schemes (including personal pensions) or their beneficiaries, employers or trustees. It is an independent body that investigates complaints and disputes related to pension schemes. Their primary role is to resolve conflicts between members, trustees and administrators of pension schemes. They have the power to make binding decisions that can be enforced by the courts, ensuring fairness and impartiality in resolving pension related issues. While in South Africa, we have Pension Funds Adjudicator which investigates pension funds complaints which includes computation, distribution and payment of death benefits. Whether the trustees in the allocation of death benefits, consider relevant factors and ignore irrelevant factors to determine who must receive the death benefits.

13 Conclusions and challenges

Section 301 of the PFA disadvantaged poor people in rural areas, because most are not aware of their rights in retirement law.¹²⁰ This means that even if entitled to the pension, they cannot access it if they lodged their complaint outside the three-year period. Section 11 of the Prescription

117 K Lehmann *The distribution of retirement fund death benefits an analysis of the equality and constitutionality of section 37C of the Pension Funds Act 24 of 1956* LLD Thesis, University of Cape Town, 2020, 287.

118 As above, 287.

119 This Act was promulgated in 1993.

120 See LTokyo Nevondwe 'Time limits on lodging complaints to the Pension Funds Adjudicator' (2008) 16 *Juta's Business Law* 47.

Act¹²¹ stipulates that the period of prescription of debt shall be three years in respect of any other debt not mentioned in subsection (a), (b) and (c).¹²² The previous provision in the Act¹²³ was better because it gave the Adjudicator the discretion to condone non-compliance with the three-year period if the complainant had a prospect of success.

If the complaint is prescribed, what happens to the retirement fund member's retirement savings: who owns that money – the pension fund or the state? What happens to the poor man who works hard for many years and saves some money for himself and his family? The further question will be whether the Act is intended to improve the life of the poor or to enrich the rich still further. In this instance it is obvious that the Act does not heal the injustices of the past and protects the marginalized or previous disadvantaged individuals.

There are various death benefits that are unclaimed for various reasons ranging from illiteracy and lack of financial education, changed addresses, and beneficiaries unaware that the retirement funds have their funds. The new law excludes beneficiaries who appear after the three-year period has elapsed.

A death benefit is part of social security, which is a mechanism that enables people to escape destitution. Social security thus meets people's basic needs when their income stream has stopped or been disrupted or has never adequately developed.

Social insurance usually protects the income of people vulnerable to certain contingencies that threaten their income-earning capacity, such as illness and old age. It aims at ensuring that poor people do at least

121 Act 68 of 1969.

122 This section provides that the period of prescription shall be the following:
 '(a) thirty years in respect
 (i) any debt secured by mortgage bond
 (ii) any judgment debt
 (iii) any debt in respect of any taxation imposed or levied by or under any law
 (iv) any debt owed to the State in respect of any share of the profits, royalties or any similar consideration payable in respect of the right to mine minerals other substances
 (b) fifteen years in respect of any debt owed to the State and arising out of an advance or loan of money or a sale or lease of land by the State to the debtor, unless a longer period applies in respect of the debt in question in terms of paragraph (a),
 (c) six years in respect of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, unless a longer period applies in respect of the debt in question in terms of paragraph (a) and (b).'

123 Act 24 of 1956.

gain access to a minimum income in order to satisfy their basic needs. Under our Constitution, everyone has the right to social security.¹²⁴ This includes the right to be allocated a death benefit if the requirements of section 37C of the Pension Funds Act are met.

It is clear that that the Government had good intentions with section 37C. This section ensures that each dependant receives a portion of the benefit in accordance with what the board of trustees of the pension fund considers equitable. The extent of the loss of support as a result of the death of a member of the retirement fund depends on his or her earnings and age, the number and age of the dependants, the extent of support provided for each dependant, and the period for which this support would have been continued.

I suggest that section 37C of the Act needs to be amended to furnish guidelines for the boards of trustees in distributing and paying death benefits equitably.¹²⁵ Section 37C does not provide steps which need to be followed, but only addresses the scenarios and also what happens from one to the other.

Section 37C of the PFA needs to be amended in its current form so that it provides clear directions to the board of trustees on how they must distribute and pay death benefits equitable and fairly in line with the government policy of ensuring that those who were dependant on the deceased's member during his lifetime are not left in destitute and are in a position where they were when the deceased's member was still alive. Policy makers and legislators must craft a new section 37C which provides clear guidelines to the board of trustees to avoid biasness and inconsistency in the application of section 37C of the PFA.

124 Section 27 of the South African Constitution.

125 There are various cases lodged in the Office of the Pension Funds Adjudicator and seeking their assistance to review the decision of the board of trustees that ignored factors that needed to be taken into account in the allocation of death benefits under s 37C.