

PENSION LAWYERS



A S S O C I A T I O N

FRIDAY, 14 AUGUST 2015, OYSTER BOX HOTEL, UMHLANGA

TOPICS

1. FRAUD IN PENSION FUNDS - TRUSTEES' DUTIES AND HOW TO DISCHARGE THEM

TASHIA JITHOO, STEVEN POWELL

2. DEATH BENEFIT ALLOCATION UNDER SECTION 37C – AN EXAMINATION OF THE UNRESOLVED / CONTROVERSIAL ISSUES FACING FUNDS

SAMANTHA DAVIDSON, JONATHAN MORT

MODERATOR : CARLYLE FIELD

PENSION LAWYERS



A S S O C I A T I O N

**FRAUD IN PENSION FUNDS - TRUSTEES'
DUTIES AND HOW TO DISCHARGE THEM**

TASHIA JITHOO, STEVEN POWELL

PENSION LAWYERS



A S S O C I A T I O N

1. Risk of exposure to fraud for retirement funds

- Benefit theft on withdrawal
- Fraudulent section 37C claim
- Theft by employees of fund or administrator – example of fraudulent surplus claim
- Unclaimed benefits fund

PENSION LAWYERS



A S S O C I A T I O N

2. Steps Fund must take if it suspects fraud

- Investigate the fraud – how to do this in practice?
- Report to SAPS (s34 Prevention and Combating of Corrupt Activities Act, 2004)

PENSION LAWYERS



A S S O C I A T I O N

3. Steps Fund must take once fraud has been established

- Section 37C - Fund must pay benefit to actual beneficiary
- Steps to recover loss:
 - Claim against fiduciary insurance policy
 - Claim against perpetrator
 - Claim against third party e.g. administrator / employer
 - Claim against trustees
 - Debit contingency reserve account

PENSION LAWYERS



A S S O C I A T I O N

4. Steps which Funds can take to reduce the risk of fraud happening in the future

Examples:

- Payment authorisations
- Verification of facts

PENSION LAWYERS



.....

A S S O C I A T I O N

Conclusion

PENSION LAWYERS



A S S O C I A T I O N

**DEATH BENEFIT ALLOCATIONS UNDER SECTION
37C**

**An examination of the unresolved / controversial
issues facing funds**

JONATHAN MORT, SAMANTHA DAVIDSON

PENSION LAWYERS



A S S O C I A T I O N

Section 37C of the Pension Funds Act, 1956

37C Disposition of pension benefits upon death of member

- (1) *Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) 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 27A (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 :*

PENSION LAWYERS



A S S O C I A T I O N

SUMMARY

- Only dependants – distributed amongst dependants (sub section (a))
- Only nominees – distributed according to nomination form after settling any debt/s in the deceased estate (sub section (b))
- Dependants and nominees – distributed amongst dependants and nominees as determined by the trustees (sub section (bA))
- No dependants or nominees (or balance remaining after payments to nominees) – paid to estate (sub section (c))

PENSION LAWYERS



A S S O C I A T I O N

Section 37C continued (modes of payment)

- (2)(a) *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 sub paragraph (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.*

PENSION LAWYERS



.....

A S S O C I A T I O N

1. What is the test for factual dependency?

- Considerations relating to a co-habitee who does not fall within the definition of a spouse.
- How regular must payment / financial contributions be?
- Once the quantum of factual dependency is determined, must the excess of the death benefit be paid per the nomination? What if there is no nomination? Conversely, what if the benefit is insufficient to meet the quantum of factual dependency and there are nominees?
- Is it necessary to determine the factual dependency of legal dependants?

PENSION LAWYERS



A S S O C I A T I O N

2. When may the guardian be deprived of control of benefits allocated to a minor?

- Factors to be considered according to PFA determinations :
 - the amount of the benefit, the age of the guardian and child, the ability and qualifications of the guardian (or lack thereof) to administer monies, ensuring that the funds are utilised to provide for the minor until the age of majority.
- To what extent can the health of the guardian be questioned and the manner in which they intend keeping the funds allocated to the minor separate from the guardian's own assets (which is relevant in the event of the untimely death of the guardian)?
- Can the trustees insist on the guardian opening a bank account of the minor beneficiary so that the benefit is paid out into that account?

PENSION LAWYERS



.....

A S S O C I A T I O N

3. Delegation of Section 37C powers

- How should a delegation on Section 37C powers be structured?
- What checks and balances / controls should be included?
- What is the liability of the board where a discretion has been delegated?

PENSION LAWYERS

.....
A S S O C I A T I O N



- 4. How thorough (with reference to resources to be used) must a death benefit investigation be and may it be risk based?**
- Affidavits vs face to face meetings in the presence of all claimants.
 - How do you share information among competing claimants to verify what is being said?

PENSION LAWYERS

.....
A S S O C I A T I O N



- 5. Are beneficiaries entitled to sign of other party's submissions?**
- The right to privacy vs *“audi alterem partem”* principles.

PENSION LAWYERS



A S S O C I A T I O N

6. Will the processing of personal information be considered *“necessary for pursuing the legitimate interests of the fund or of a third party to whom the information is supplied”* as contemplated in the Protection of Personal Information Act?

PENSION LAWYERS



.....

A S S O C I A T I O N

7. Can trustees change their mind?

- Does the concept of “*functus officio*” apply – what is the nature of the discretion exercised by the Board, fiduciary or administrative, or can it be both? PAJA considerations..

PENSION LAWYERS



.....
A S S O C I A T I O N

Conclusion