

Death benefits – interpretation of section 37C through recent adjudicator cases

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Death Benefits – recent cases

Format of presentation

1. Dependants and nominees – *SUE*
2. Section 37C(1) – the four scenarios – *NALEEN*
3. Modes of payment – *SUE*

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Definition of a “dependant”:

- dependant”, in relation to a member, means -
- (a) a person in respect of whom the member is legally liable for maintenance;
 - (b) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - 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;
 - (ii) 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.

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Paragraph (a) dependants

Lombard v Central Retirement Annuity Fund - Case No PFA/WE/227/02

- Maintenance clause in divorce order stating “no” maintenance payable by defendant (later deceased pension fund member), although defendant liable to pay plaintiff’s (complainant’s) medical expenses, and to place plaintiff on his medical aid scheme.
- Fund holding view complainant was not a dependant. Definition of maintenance considered and found to include unquantified obligations in respect of medical expenses. Complainant held to be a dependant in terms of paragraph (a).

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Paragraph (b) dependants

(b) (ii) Spouses include parties to a customary union

Need to establish:

- that a customary union was celebrated – requirements of particular customary law of marriage met
- that the customary union continues to exist –whether a divorce has occurred.

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Paragraph (c) dependants

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

No legal duty on deceased pension fund member to maintain his mother at the date of his death as she was not indigent. However fund took view in particular circumstances she *would* become have become dependant on him at future date if he had not died. Adjudicator upheld fund’s decision to award portion of death benefit to her as a dependant in terms of paragraph (c).

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Nominees

Muir v Mutual & Federal Pension Fund [2002] 9 BPLR 3864

Complainant was the 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 benefit between complainant and certain selected beneficiaries of the estate at its discretion. Adjudicator held estate cannot be a nominee – awarded entire benefit to complainant.

Zulu v Illovo Sugar Provident Fund [2002] 2 BPLR 3129

Complainant alleged a misdescription of the beneficiary in nomination form: said it referred to him, not someone else. He may adduce extrinsic evidence. Failed to discharge onus on him to establish that the nominee was in fact himself.

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Kruger v Central Retirement Annuity Fund [2002] 7 BPLR 3643 (PFA)

Complainant was the deceased member’s daughter. She alleged father’s nomination of his “close friend” was invalid as the friend had unduly influenced him to nominate her. Complainant unable to establish requirements to have nomination set aside on ground of undue influence.

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Section 37C

(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, 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 manner:

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- *Kipling v Unilever SA Pension Fund* (1) [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)
- *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA)

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Section 37C(1)(a)

(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.

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- *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA)
- *Khutswane v Malbak Group Pension Fund and Another* [2000] 12 BPLR 1354 (PFA)
- *Mthiyane v Fedsure Life Assurance Limited and Others* (as yet unreported)
- *Magwaza v BB Cereals Provident Fund* [2000] 1 BPLR 2978 (PFA)
- *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W)

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Section 37C(1)(b)

If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the 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.

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- *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W)
- *Krishnasamy & Others v ABI Provident Fund* (as yet unreported)

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Section 37C(1)(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 on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee 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.

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Jordaan v Protektor Pension Fund [2001] 2 BPLR 1593 (PLA)

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Section 37C(1)(c)

If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee,

shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund.

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- *Wasserman v Central Retirement Annuity Fund (1)* [2001] 6 BPLR 2160 (PFA)
- *Jacobs NO v Central Retirement Annuity Fund and Another* [2001] 1 BPLR 1488 (PFA).

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Modes of payment Section 37C

(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 No. 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, 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.

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Modes of payment - Two interim determinations where benefit for minor paid into trust:

Lukhozi v SACCAWU National Provident Fund (Case No PFA/KZN/682/01)

Why not keep the money in the fund and pay in instalments, or pay to guardian?

Ramluckan v Federal Mogul of SA Staff Provident Fund (PFA/KZN/3696/01).

Why not pay the money direct to the guardian?