

Death Benefits

Naleen Jeram

Legal Advice Manager: Momentum &
Adjunct Prof. at UCT Law Faculty

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Content/Topics

- When does Section 37C apply – Interpretation Ruling?
- Par (a) dependants – date of death or resolution?
- Advanced Payments
- Par b(i) dependants – Regular payments
- Par (c) dependants – Future dependants
- Duty to trace dependants & 12-month period
- DNA testing and costs of tracing
- Nominations – when and who?
- Mode of Payment & Beneficiary Fund
- *Functus Officio* principle
- Reform on object

- Position Prior to 1 March 2019
- What event is giving rise to the payment of benefit?
- Position Confirmed in many PFA rulings & Circular PF No. 2 of 2010

When does S 37C apply?

Paid up Members/Retirees – does S37C apply?

- Regulation 38(1) introduces paid-up member
- Deferred Retirees – permitted in Income Tax Act
- FSCA Interpretation Ruling 1 of 2020 published on 25 March 2020
- Meaning of “*payable ...upon the death of a member*”
- Words “any benefit” cannot be read in isolation
- Change from previous wording supports current interpretation

- Can the same reasoning apply to Unclaimed Benefits?
- *Benjamin* [2021] 1 BPLR 195 (PFA)
 - Member died in original fund and s37C applied
- *Bailes* [2021] 1 BPLR 187 (PFA) – common scenario
 - Member resigned and benefit transferred to UBF
- Number of Reasons as to why section 37C cannot apply

Express Exclusions

- Spouse's & Child's Pensions expressly excluded
- Proposed Amendment: Pensioner (living and life annuity) to be excluded
- Why not list all exclusions?

- Par (a): “a person in respect of whom the member is legally liable for maintenance;”
- *FAW Umbrella Pension Fund (830/2018) [2019] ZASCA 78 (31 May 2019)*
 - Beneficiary died 4 days prior to resolution
 - Received Advanced Payment
 - Whether qualified as a dependant?
- SCA: cannot read in words “as at date of death” in par (a)
- SCA: accepted that circumstances of a dependant may change from date of death to date of resolution
- Practical effect on funds – need for disclaimer on changed circumstances?

Par (a) – legal dependants – date of death or resolution?

Advanced or Interim Payments

- *FAW Umbrella Pension Fund (830/20218) [2019] ZASCA 78 (31 May 20219)*
 - No resolution passed for interim payment
 - PFA and HC accepted interim payment as valid
 - SCA rejected interim payment (issue not fully considered)
- Solution – Adopt resolution for advanced payment
- Do we need a provision similar to section 26(1A) of the Administration of Estates Act 66 of 1965?

- Par (b)(i): “... was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;”
- Par (b)(i) only section worded as “in the opinion of the board”
- Section based on meaning of maintenance
- *Gunpath* – 8 October 2019 (FST)
 - Whether payments regular enough to constitute maintenance?
 - Over 20 months – made 9 payments varying from R1000 to R 9000
 - Did not indicate pattern of maintenance
 - Distinguish between maintenance and generosity
 - Dangerous consequences if generosity converted into obligation

Par b(i) - *de facto* dependants – Regular payments

Duty to trace dependants

- Duty on Fund to trace dependants – confirmed in many cases
 - *University of Pretoria Provident Fund* [2016] JOL 35014 (GP)
 - *Skhosana* [2019] 2 BPLR 545 (PFA) & *Itumeleng* [2007] 3 BPLR 311 (PFA)
- Proposed Amendments
 - “best endeavours to trace dependants”
 - “best endeavours” vs “reasonable endeavours”
 - *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335
 - How far reaching will this obligation be?

- Dependants only – 12 months to trace but not fixed period
- Nominees only – wait 12 months before can pay
- Proposed Amendments:
 - Dependants only - fund to pay to the dependants “... within two months of the fund tracing the dependant.”
 - Not clear what this two-month period means?
 - Nominees only - the 12-month period retained but only ends 12 months after the fund became *aware* of the death of the member
 - Amendment in line with ratio in *Masindi* (16/24267) [2016] ZAGPJHC 360 (13 December 2016) & *Buitendag* [2006] 4 BPLR 284 (SCA)
 - Uniform application of 12-month period?

12 - month period

DNA Testing

- Whether child is biological child of the deceased?
- *Malindi* 20 August 2020 (PFA) – qualified as *de facto* dependant – no need for testing
- *M and Another v D* (A5020/2016) [2018] ZAGPJHC 602 (24 October 2018) – leading HC ruling
 - Applies ratio from *Y D (Now M) v L B* (465/09) [2010] ZASCA
 - Rejects ratio in *Botha v Dreyer* (4421/08) [2008] JOL 22809 (T)
 - On facts – there was not a genuine dispute that could not be resolved and no need for DNA testing

- Rules allowing for deduction of such costs
- Is this contrary to Section 37A?
- 2 schools of Thought
 - First – on death, benefit accrues and then cannot be reduced
 - Second – Can be reduced as who will pay for such costs in DC Funds?
 - Is such an empowering rule inconsistent with the Act and financially unsound?
 - Doubtful if a court/FST will set aside such rules

Par(c) dependants – future dependants

- Par (c): “a person in respect of whom the member would have become legally liable for maintenance, had the member not died;”
- *FAW Umbrella Pension Fund (830/20218) [2019] ZASCA 78 (31 May 2019)*
 - Section couched in futurity and careful & deliberate use of tense
- 3 critical dates – date of death & resolution & future date
- Covers: Parents; engaged couples; or parties intending to marry
- *Wasserman [2001] 6 BPLR 2160 (PFA), Wellens [2002] 12 BPLR 4214 (PFA) & Van Zyl 11 February 2005 (PFA)*
- Section can become a guessing game – too far reaching?

- *Bosch* [2001] 3 BPLR 1702 (PFA)
 - Member left employment and re-joined – first nomination cannot be used

Section 14 Transfers

- Is the nomination completed with transferor fund binding?
- 2 Schools of Thought
- First – as part of rights transferred into s 14 – nomination must also be transferred
- Second – based on ratio in *Xaba* (A279/2013) [2014] ZAGPPHC 812 (15 October 2014) – nomination must be iro legal entity at the time of membership

Nomination to be completed whilst a member of the fund

Artificial Persons – can they be nominees?

- Estates – generally accepted that cannot nominate
- Artificial Persons – no direct case law – question of interpretation
- Nominee – literal meaning includes corporates
- Structural & Textual Interpretation – does not support a corporate nomination
- Legislative clarity needed
- Nomination of Trusts – permissible?

- Minors' benefits – when do you deprive the guardian of control?
- Complex decision to make – does it achieve the desired outcome?
- Should we even pay minors' benefits as a lump sum?

Beneficiary Fund

- Restrictive definition introduced in 2014 – not clear why
- Proposed Amendment – Expanded definition – welcome change
- No legal nexus with original fund once benefit paid
 - *Transport Sector Retirement Fund* (Gauteng Division, Pretoria) case no. 48382/2018 31 August 2020
- Is fund obliged to consult guardian on choice of B/F?
 - *Tsele* [2016] 1 BPLR 146 (PFA)
- Regular and ad hoc payments
 - *Peete* [2016] 3 BPLR 420 (PFA)

- PFA and FST – free service – leads to many complaints
- *Functus Officio* principle
- *Van Rhyn* (2138/18) [2021] ZAGPPHC 165 (31 March 2021)
 - Death benefit set aside
 - Fund adopted another decision
 - Second decision challenged
 - *Functus Officio* principle applied

Object – Time for Reform

- Social Protection Policy
- If so important – why limited to retirement funds?
- Proposed Amendments – minor changes
- Overhaul of section (incl. definition of dependant & nominee) overdue
- Lessons from case law to feed into rewrite

THANK YOU

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