



2022 PENSION LAWYERS ANNUAL CONFERENCE

DEATH BENEFITS IN RETIREMENT FUNDS

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An update

- Section 37C of the Pension Funds Act – lump sum death benefits from retirement funds
- An update over the last year – legislation and cases
- Questions at the end

- Many submissions made to Treasury about amending section 37C
- An overhaul would delay the progress of the Bill
- Few significant amendments expected to section 37C
- COFI – still expected to go to Parliament this year – includes an amendment to the Pension Funds Act (the Retirement Funds Act)



COFI – new definition of nominee

”nominee”, in relation to a member, means —

- (a) a **natural person**, excluding a person that qualifies as a dependant; and
- (b) **listed in the member’s written expression of wish form to the retirement fund** to share in the member’s lump sum death benefit **in such fund** in terms of section 37C; and
- (c) who is **alive** at the date on which the retirement fund allocated that share to the nominee,

provided that the retirement **fund must be identifiable** from the expression of wish form, and the expression of wish form must have been completed after 30 June 1989



Amendments to 37C (COFI)

Section 37C rewritten in 'plainer' language but no significant, fundamental changes

- Use best endeavours to trace dependants (best endeavours is a higher test than reasonable endeavours and probably the most demanding standard of endeavours)
- Payment upon successfully tracing “a dependants or dependants” – problematic as need to find all dependants before allocation and payment is made – interpretation again...
- If dependants can't be traced in 12 months (from death), then nominees can be paid (sounds like – in the proportions specified – so no discretion) – subject to estate assets exceeding estate debts
- Dependants and nominees – pay in proportion as board deems equitable (as currently) within 12 months of death
- If can't trace a dependant within 12 months of death and there are no nominees or there are nominees – balance paid to estate after [nominated?] portion paid to nominated beneficiary (or, if no inventory, into the Guardian's Fund or an unclaimed benefit fund)



Amendments to 37C (COFI)

Death within a guaranteed period

If the deceased is a pensioner who received an in-fund living annuity or a life annuity which has a guaranteed period and the pensioner died within this guaranteed period —

- (a) any benefit must be paid to the pensioner's nominees, if any;
- (b) where the pensioner had not designated any nominees, it must be paid into the estate of the member or, if no inventory into the Guardian's Fund or an unclaimed benefit fund

(so no trustee discretion)

Hardship payments (advance payments/part payments)

- Not specifically permitted before under the PFA
- Board can resolve to make a hardship payment
- Then retirement fund may distribute a portion of the benefit (their benefit allocation?)
- Beneficiary must be alive at the date of the resolution

Age cap on benefits paid in instalments - majority/ age agreed with beneficiary (not older than 25)/ death (whichever first)— balance paid in full



Joining/ including all beneficiaries

Some technical issues...

Adjudicator will currently join all beneficiaries to a complaint involving section 37C

The **Tribunal** will dismiss an application to it where all beneficiaries have not been included as parties to the application for reconsideration



Aggrieved person

Applicant to the Tribunal must be aggrieved persons (CASE NO's: A18/2020; A7/2020 and others)

In terms of sec 230(1) of the Financial Sector Regulation Act, 2017:

“a person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision”.

Tribunal:

- **The fund does not have a legal interest in the allocation of a section 37C benefit**
- The fund is not a person aggrieved
- Accordingly, the fund has no legal standing to bring a section 37C matter to the Tribunal for reconsideration

A person's legal rights must have been infringed by the decision – “a person harbouring a *legal grievance*.”

“She may be aggrieved, but the grievance is not a legal grievance.”

Pecuniary or substantial interest is not enough



Swart case – beneficiaries

Swart N.O and Others v Lukhaimane N.O and Others (54157/2019) [2021] ZAGPPHC 124 (12 February 2021)

Wife

- *Remarried after member's death
- *Employed
- *39
- *claimed maintenance from estate
- Nominated for 50%

2 major children

- *Alleged dependency
- *Late 20's
- *Beneficiaries of family trust

Family trust

- *Nominated for 50%
- Children are beneficiaries



Swart case

Allocation decision

The fund allocated 100% of the benefit to the wife

The Pension Fund Adjudicator ordered the fund to reconsider its decision and fund made the same decision

The fund

Children would be taken care of by the trust

Children were not factual dependants

The children

Said that the fund had just accepted, without evidence, that the trust would be able to take care of them

Nomination form

The fund did not take into account the member's beneficiary nomination form in its first decision (wife 50% and trust 50%)

The matter went to the High Court



Solvency of the estate

The fund said that it was not required to consider the **solvency of the estate** when making the allocation decision

The Judge disagreed :

“this submission is strange considering the Fund’s own stance that section 37 C is intended to “protect dependency”, and that it fulfils the social function of ensuring that dependants are protected, even against the wishes of the deceased, if necessary. If the estate (or the trust) is not solvent, it cannot maintain the sixth and seventh applicants [children’s], a factor that must surely be considered”.



Solvency of the trust

The fund said that it was not required to take into account the solvency of the trust when making its decision

Again, the Judge disagreed:

“It [the fund] accepted that the trust was possessed of assets and that it could therefore provide for sixth and seventh applicants’ [children’s] needs. This argument does not take account of the fact that the trust had a substantial cash shortfall. Simply because the trust is possessed of assets does not make it solvent.”



Thorough investigation

The court - the fund had not investigated the wife's and children's circumstances sufficiently to conclude that the wife was in need of maintenance and the children were not:

"I find it striking that there is such a dearth of information regarding the financial affairs of the fourth respondent [wife] on the one hand, and the sixth and seventh respondents [children] on the other. One would have expected the Fund to have obtained financial statements, bank statements, proof of income, proof of expenses, and suchlike from all the parties. ... Instead, all I have is an unsubstantiated statement that the Fund believes that fourth respondent [wife] is in need of maintenance".

Court:

- the fund had unreasonably and irrationally ignored the fact that the wife had remarried and not considered the impact of the wife's remarriage on her financial position and maintenance requirements
- the fact that the wife had filed a maintenance claim of R10 million against the estate did not mean that her claim against the estate was well founded or that she was dependant on the deceased (as submitted by the fund)



P.S. re re-marriage

Note – in subsequent Tribunal decision (post *Guarnieri*) PFA67/2020 – *Discovery Retirement Annuity Fund/Discovery Investment Retirement Fund and CB Griffin/ PFA* – the Tribunal said:

On the factor of marriage or remarriage, the Adjudicator stated that it is true that the Supreme Court of Appeal in *Guarnieri* case mentioned a spouse remarriage as one of the factual circumstances that could change during the course of the investigation. According to the Adjudicator, this does not mean that such an event will automatically preclude a spouse from being a dependant. The Adjudicator proceeded to state that in this regard, the board of the fund is still required to exercise its discretion and should not fetter its discretion by simply relaying on the occurrence of one event.

In my view, correct



One step further?

The nomination of beneficiary form

When considering how the fund had dealt with the nomination form, the Judge made the following points:

- The fund is not bound by the wishes of the deceased (tick)
- The “wish” expressed in a nomination form or will **should not be lightly ignored**
- A nomination form is one of a number of factors to be taken into account (tick), but it is a **“substantial factor”**
- The fund needs **“compelling reasons” to ignore the nomination**. For example, if it would result in an injustice or be inequitable should the member’s wishes be given effect to, then the fund would be **“justified in deviating from the member’s wishes”**
- There was no evidence that the fund placed any weight at all on the nomination form



Nomination of the trust

The nomination of the trust in the nomination form

Court seems to accept the nomination of the trust. The Judge referred to section 37C(2)(a) and stated that:

“It is consequently not the trust that is the dependant, but the person who receives a benefit by way of payment to the trust. Payment to the trust is regarded as a payment to the dependant”

My view – (currently) better to nominate person and then specify the trustee/trust as the mode of payment

Current PF Act wording –talks about nomination of a “trustee of a trust” in the context of payment

Not going to be permitted to nominate a trust if the amendment to the PF Act goes forward as currently drafted – will have to nominate a natural person, but then specify trustee/trust as the mode of payment



Naheem Essop

Another interesting finding made in the Swart judgment was that a trust can be nominated as a beneficiary by the deceased member and that the beneficiaries of the trust become the dependants (nominees?) and payment to the trust constitutes payment to the dependants (nominees?).



Swart Findings

- The fund argued that it merely had to show that it took the decision “honestly”
- The Judge said that this was not the test - it was required to act reasonably and rationally
- Fund’s decision irrational and not rationally connected to the section 37C purpose to look after dependants
- Set aside the fund’s decision and ordered the fund to remake its decision within 90 days
- Ordered the fund to fully investigate specific questions when reconsidering the matter and to pay the costs of the court application



Does legal dependency automatically equate to allocation of benefit?

'dependant', in relation to a member, means

(a) a person in respect of whom the member is legally liable for maintenance;

(b) a person in respect of whom the member is not legally liable for maintenance, if such person
(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;

(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;"

Section 37C is intended to *protect dependency* with the intention to serve a social function



Legal duty of support

- Legal duty on parents to maintain their children – Smit v Smit 1980 (3) SA 1010
- Section 15 of Maintenance Act - Duty of parents to support their children
- Minor or major child is a dependant in terms of the Act
- Spouses - legal consequences of marriage is the spouses' reciprocal duty of support
- Section 2(1) Maintenance Act – enables a surviving spouse to claim against the estate for spousal maintenance.



Vilakazi v Mondi Mpact Group Fund Provident Section and others - [2018] 2 BPLR 535 (PFA)

- Complainant was the estranged wife
- Complainant excluded from the distribution of the death benefit
- She submitted that she was entitled to half of the death benefit by virtue of her marriage
- She alleged financial dependency and disputes having been estranged
- Deceased was not supporting the complainant financially at the time of his demise.
- Interdict preventing payment of death benefit



Determination

- No duty of support - requires proof of support
- Complainant bears the burden of proof
- Girlfriend qualified as factual dependent
- No automatic right to allocation
- Opportunity to provide proof was granted
- Failure to provide proof results in resolution being followed
- Marriage does not equate to allocation without financial dependency

“it is imperative to note that even though the complainant was married to the deceased, in the face of evidence indicating that she was separated from the deceased and was not receiving financial support from him, the complainant has no automatic right to be allocated a share of the death benefit”

Spouses ordered to provide proof of financial dependency



K Naidoo v Coca Cola Shanduka Beverage Provident Fund and AFFS – FST 48/2019

- The Complainant was the spouse of the deceased member
- Board resolved to pay the deceased's entire death benefit into her late estate
- Complainant was not financially dependent on the deceased at the time of the deceased's death

Tribunal:

“The mere fact that a person qualifies as a dependant does not entitle him to the entire benefit; it only entitles him to be considered by the board in the distribution phase”

“There is no duty on the dependant to come formal and prove that he is a dependant.”

*“We are mindful of the fact that even though Mr Naidoo is a spouse, he is **not automatically entitled** to a percentage of the death benefit/full benefit”*

“starting point should have been to acknowledge that Mr Naidoo was a legal dependant”

Matter remitted to the OPFA for reconsideration



Krzus v Momentum Retirement Annuity Fund – FST 53/2019



- Complainant dissatisfied with the board's decision to allocate the entire benefit to the deceased's estranged wife
- Board resolved to allocate the entire benefit to the deceased's estranged wife on the basis that she was the deceased's legal dependant
- Adjudicator set aside decision of board & ordered fund to pay benefit to the estate – s37C(1)(c) – lack of financial dependency



Krzus v Momentum Retirement Annuity Fund – FST 53/2019

In South Africa, children and spouses are legally entitled to be maintained in certain circumstances; those circumstances depend on the facts of a particular case but they generally include a need for maintenance and the means.

This means that section 37C, read with the definition of dependant and spouse, does not require the dependents under subsection (b)(ii) to be financially dependent on the deceased.

Therefore, the deliberate distinction between legal, relational/factual and future dependants respectively, clearly indicates that the determining factor is not only financial but also relational or factual.

Financial dependency is a different category from dependency established by the relationship with the deceased or factual dependency. If the legislature had intended for dependency to be merely a financial issue, there would not have been a need to make provision for various categories.



Wilkinson and another v Pension Fund Adjudicator – FST 73/2019

- Complainants were the deceased's 2 adult children – independent & employed
- Fund allocated benefit to spouse and children
- Adjudicator found no basis to allocate any benefit to the adult children, as they did not show that they were dependent and ordered fund to allocate full benefit to spouse.

Tribunal:

“A person who is a legal dependant qualifies as a dependant for purposes of being considered for the allocation. If a legal dependant is not considered despite being financially independent, then any such allocation that follows thereafter will be improper”

“Any child of the deceased is a legal dependant who has a right to be considered for a death benefit”



Sanlam Umbrella Provident Fund vs the Pension Funds Adjudicator – FST 16/2020

- Fund lodged the application with FST
- Board had allocated benefit to deceased estranged major children
- Deceased's children fall within the definition of dependant, even though the deceased was not legally liable for their maintenance.
- Tribunal found that the Adjudicator had erred in holding that the deceased's two children were not his legal dependants



Conclusion

- Primary purpose of the section is to protect those who were financially dependent
- Protection does not override what the Act provides and cannot be overridden by using a purposive approach to the section
- Legal dependency entitles one to be considered and lack of financial dependency does not disqualify legal dependent

THANK YOU

We are looking forward to discussing your
questions and comments with you –
Mpho and Leanne

