Section 37C Death Benefits under South African pension fund law

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PENSION LAWYERS ASSOCIATION 30TH ANNUAL CONFERENCE

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Exclusion of death benefits from the estate

In terms of section 37C (1), a death benefit payable by a retirement fund as a lump sum does not form part of the deceased member's estate. The benefit must be distributed as set out in the section.

The 6 Scenarios

- One Dependant only: Pay to Dependant
- More than one Dependant: Equitable distribution
- One Nominee only: Pay per nomination form but only after 12 months
- More than one Nominee: Pay per nomination form but only after 12 months
- Dependant(s) and Nominee(s): Equitable distribution
- No Dependant and no Nominee: Pay to the Estate or Unclaimed Benefit Fund

Introduction: Exclusion from the estate and the 6 scenarios

The 3 steps:

- Identify all the dependants and nominees
- Make an equitable allocation of the benefit
- Determine the appropriate mode of payment

In making an equitable allocation of the death benefit, apply the information collected to the following "basket of factors":

- Wishes of the deceased (nomination of beneficiary or other expression)
- Age
- Nature of the relationship
- Financial circumstances (including future earning prospects)
- Extent of dependency
- Amount available for distribution

Notembeko Bongiwe Gomo v Pension Funds Adjudicator & Others

1. Introduction

This matter concerns an application brought by Ms. N B Gomo ("the Applicant") before the Financial Services Tribunal ("FST") for reconsideration of a determination issued by the Pension Funds Adjudicator ("Adjudicator"). The dispute arose from the allocation of a death benefit of some **R1.5 million** following the death of the Complainant/Applicant's husband, Mr. M. Gomo, who was a member of the Metal Industries Provident Fund ("the Fund").

The Applicant challenged two key aspects of the Adjudicator's determination:

- The allocation of a portion of the death benefit to Ms. T Tasana and her two children, who did not use the deceased member's surname nor that of their mother (Ms. T Tasana).
- The refusal by the Fund to reimburse the Applicant of the funeral expenses amounting to about **R150 000**.

Notembeko Bongiwe Gomo v Pension Funds Adjudicator & Others

2. Background and Allocation of the Death Benefit

The Fund identified several dependants and allocated percentages of the death benefit accordingly. The relevant portion of the allocation was:

- Applicant (NB Gomo): **15%**
- Ms. T Tasana: **15%**
- Ms. T Tasana's child: **22.07%**
- Ms. T Tasana's other child: **18.07%**
- Other dependants (children and siblings of the deceased): varying smaller percentages

The Applicant's submissions were that:

- She was legally married to the Deceased and had seven children with him.
- The Deceased ceased financially supporting her and her children in 2015.
- Ms Tasana was never married to the Deceased and allegedly remained legally married to another man, who is listed as the father of her children on the children's birth certificates.

Notembeko Bongiwe Gomo v Pension Funds Adjudicator & Others

3. Findings of the Pension Funds Adjudicator

3.1 Recognition of Ms. Tasana and her Children as Dependants

The Adjudicator found that:

- The Deceased and Ms. Tasana were in a permanent life partnership of more than 10 years.
- They shared a common household.
- The surname difference of the children did not, on its own, disqualify them as dependants.
- The Deceased was presumed to be the biological or factual parent because he cohabited with and would likely have continued supporting the children had he lived.

3.2 Rejection of Funeral Expense Reimbursement

The Adjudicator found that:

- Death benefits distributed in terms of section 37C of the Pension Funds Act do not cover funeral expenses; such expenses form part of the deceased member's estate.
- Thus, the Applicant could not be reimbursed from the death benefit distributed in terms of section 37C.

Notembeko Bongiwe Gomo v Pension Funds Adjudicator & Others

4. <u>Findings of the FST</u>

4.1 Lack of Evidence Supporting Dependency of Ms. Tasana and her Children

The FST highlighted critical gaps in the Fund and the Adjudicator's findings, i.e.:

- No paternity tests were conducted for Ms. Tasana's children, whom the Fund and the Adjudicator accepted to be the children of the Deceased.
- Ms. Tasana failed to provide adequate documentary supporting evidence of her and her children's financial dependency on the Deceased.
- Therefore, Fund did not sufficiently verify the dependency claims.

The FST stated it was not in a position to confirm whether Ms. Tasana and her children were legally justifiable dependants under section 1 of the Pension Funds Act due to insufficient evidence.

4.2 Funeral Expenses

The FST upheld the Adjudicator's view that funeral expenses cannot be reimbursed from a death benefit payable in terms of section 37C of the Pension Funds Act

Notembeko Bongiwe Gomo v Pension Funds Adjudicator & Others

5. Final Order of the Tribunal

The FST issued the following order:

- The reconsideration application was granted in part.
- The refusal to reimburse funeral expenses **(R150 000)** was upheld.
- The remainder of the Adjudicator’s decision was set aside and remitted for fresh investigation, requiring the Adjudicator to:
  - Reinvestigate and establish dependency on the probabilities;
  - Consider supplementary affidavits and documentation from all parties.
- Parties were granted leave to file additional evidence.

PENSION LAWYERS ASSOCIATION 30TH ANNUAL CONFERENCE

NE NDLANGAMANDLA ("Ms Ndlangamandla") v BECSA PROVIDENT FUND ("fund"); NHLANHLA NDLOVU ("Nhlanhla") AND SLINDILE MLANGENI ("Slindile")

AUGUST 2025

NDLANGAMANDLA Matter

Background:

- Allocation of a death benefit following the death of Mr IB Ndlangamandla ("the deceased").
- Ms Ndlangamandla ("the complainant") is the deceased's estranged spouse and the deceased was a member of the fund until he passed away on 07 September 2023. She received 0% allocation of the death benefit.
- Total death benefit = R4 514 636.46.

Name	Age	Relationship	%
Nokuthula Marcia Ndlangamandla (Nokuthula)	38	Daughter	15%
Thembelihle Mzila (Thembelihle)	24	Daughter	22.5%
Slindile Mlangeni (Slindile)	23	Son	22.5%
Mafate Frans Thapelo Mabule (Mafate)	18	Son	25%
Nhlanhla Prosperity Ndlovu (Nhlanhla)	32	Girlfriend	15%

NDLANGAMANDLA Matter

Complaint:

- She was married to the deceased and was financially dependent on him.
- She provided a copy of a *lobola* letter dated 17 September 2022 and marriage certificate.
- She indicated that in terms of Section 2(2) of the Recognition of Marriage for Customary Marriages Act 120 of 1998, either spouse may apply to the registration to register his or her marriage after the death of the other and that after the deceased died, she registered her marriage in terms of customary law, with a valid customary marriage concluded on 17 September 2022.
- She never received money from the deceased by electronic means but in cash. The deceased would buy groceries for her and the children and sometimes she would go to the house and collect money. She submitted that she and the children qualify to receive the death benefit by virtue of her marriage in terms of section 37C of the Act.
- She resides in Kwa-Mhlanga and the deceased resided in Witbank. She indicated that although they did not reside together, she would visit him on weekends or when she was off from work.
- She does not have any proof that she was financially dependent on the deceased.

NDLANGAMANDLA Matter

Fund Response:

- Investigation report, the deceased was never married. The Fund was furnished with an affidavit from Nhlanhla (“the girlfriend”) indicating that she was the deceased’s partner and had been residing with him from June 2022 until the time of death.

- She also provided the fund with a bank statement showing money received from the deceased to prove her financial dependency.

- It established that the girlfriend qualified as a factual dependant on the basis that she was financially dependent on the deceased, she lived with him, and they shared common household responsibilities.

- The complainant did not furnish proof of marriage nor her dependency on the deceased. *Important to note that the purpose of section 37C, as previously articulated by the Adjudicator, is to serve a social function and to ensure that those who were dependant on the deceased are not left destitute.*

- It was unable to ascertain the complainant’s dependency on the deceased as at the time of investigation.

- It submitted that a dependant does not have an automatic right to receive a death benefit. The allocation of death benefits is made at the discretion of the board taking into consideration various factors, ***chief amongst which is financial dependency.***

NDLANGAMANDLA Matter

Fund Further Submissions:

- The fund noted a few discrepancies.

- a Death certificate was issued on 11 September 2023, with Home Affairs reference number YDE222 and certified by the police station on 11 September 2023 as well as the Department of Home Affairs, was submitted to the fund by the deceased's brother, November. According to this death certificate the deceased member was never married.

- Further to this, the fund was furnished with a Department of Home Affairs death notice form dated 08 September 2023. The fund indicated that the notice states the deceased's marital status as single.

- It established that the deceased had the following type of dependants. His children and Nhlanhla who is the deceased's partner, qualified as legal and factual dependants respectively and submitted affidavits indicating their dependency on the deceased.

- The fund submitted that on 28 January 2025, it received a complaint from the Adjudicator, which was accompanied by a second death certificate, marriage certificate, and lobola letter.

- The second death certificate has an issue date of 21 November 2023 and now indicates that the deceased was married.

NDLANGAMANDLA Matter

Fund Further Submissions:

- The fund indicated that the marriage certificate was printed on 13 March 2024 with the date of marriage recorded as 17 September 2022.

- The *lobola* letter indicates that the deceased was married to the complainant in terms of customary marriage on 17 September 2022.

- The fund submitted that in light of the date of *lobola* and marriage, it is in possession of a beneficiary nomination form completed by the deceased signed and dated 21 April 2023, wherein the deceased had indicated his marital status as single and further nominated his brother, November, to receive the deceased's funeral benefit. The fund noted that the deceased completed this nomination form although, according to the complainant, the customary marriage occurred in 2022.

- At all reasonable times the fund was of the understanding that the deceased was never married. This was supported by official documentation received by the fund.

- It considered the information submitted to it by the identified dependants, namely the death certificate of the deceased, affidavits completed by the deceased's children, as well as the girlfriend, together with bank statements of the respective dependants.

NDLANGAMANDLA Matter

Fund Further Submissions:

- The fund submitted that it contacted Nokuthula ("the deceased's eldest daughter") on 17 April 2025, to enquire about the complainant. She advised that she does not know the complainant, She further stated that the deceased was not married and that, prior to his passing, he was residing with his girlfriend, whom she would see when visiting the deceased in Tasbet.

- The fund submitted that the complainant initially lodged a complaint with it regarding her dependency and the investigating trustee requested her to submit the following documentation to support her claim:

✓ *lobola* letter between her and the deceased;

✓ birth certificates of the children that the deceased had with her; and

✓ her proof of financial dependency on the deceased.

- the above requested documents were never submitted, and it subsequently received them through the Adjudicator with the attached complaint. Furthermore, the complainant has not provided any proof of financial dependency, which was previously requested.

- because of the registration of the marriage after the deceased's death, it ran a check on the credit bureau, and the deceased's status has now changed to married.

- Thus, it requests the guidance of the Adjudicator on the treatment of this matter as it has two conflicting death certificates as well as on the treatment of the above-mentioned inaccuracies and whether a customary marriage may be registered after the death of the member.

NDLANGAMANDLA Matter

Determination *(Preliminary issue)* - Posthumous registration of the marriage between the complainant and the deceased:

- There was a discrepancy between the death certificate it received with the claim and the one that was attached to the complaint.
- According to the death certificate issued on 11 September 2023, the deceased was never married. Further, the fund indicated that on the notice of death states the deceased's marital status as single.
- However, the death certificate printed on 13 March 2024 indicates that the deceased was married, with the date of marriage recorded as 17 September 2022.
- In the *Khasane v Minister of Home Affairs and Others* 052246/20230 [2024] ZAGPPHC 3; 2024 (5) SA 242 (GP) matter the applicant sought to have her customary marriage to the deceased registered after his death. The court ruled in her favour, condoning the late registration and directing the Department of Home Affairs to register the marriage and issue a marriage certificate. The applicant provided evidence of *lobola* negotiations, a celebration where she was welcomed into the deceased's family as a daughter-in-law, and cohabitation as husband and wife until his death. The court's decision was based on the Recognition of Customary Marriages Act, 120 of 1998, which recognizes and regulates customary marriages in South Africa.
- **Thus, the Adjudicator accepts that the posthumous registration of a marriage is allowed.**

NDLANGAMANDLA Matter

Determination *(Merits):*

Did board of the fund exercised its discretion properly in terms of section 37C of the Act and allocated the death benefit equitably when it excluded the complainant?

- Section 1 of the Act recognises three categories of dependants, namely,
  - ✓ Legal dependants,
  - ✓ factual dependants and
  - ✓ future dependants.
- The complainant qualifies as a legal dependant because she was married to the deceased.
- The submissions indicate that Nhlanhla was the deceased's life partner and resided with the deceased as at the time of death.
- Section 1 of the Act defines a spouse as a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion.
- This definition does not define what is a permanent life partner also, what will constitute as a permanent life partner – this must be decided on the facts of each case.

NDLANGAMANDLA Matter

Determination *(Merits)*:

- The complainant telephonically submitted that she did not reside with the deceased full time as she lives in KwaMhlanga and the deceased lived in Witbank, Tasbet.

- Furthermore, the deceased's daughter confirmed that the deceased resided with Nhlanhla at the time of death. These facts on their own indicate that Nhlanhla and the deceased shared a common household and expenses. Therefore, she qualifies as a factual dependant as defined in section 1 subparagraph (b)(ii) of the Act.

- Thus, she is entitled to a portion of the death benefit also as a factual dependant hence she was allocated a portion of the death benefit.

- As the deceased's children qualify as his legal dependants in terms of section 1(b)(iii) of the Act. The deceased's children have a right to be considered for a death benefit. Whether or not such dependants will at the end receive anything, will be subject to the factors of dependency as presented before the board.

- In principle, a member is legally liable for the maintenance of a spouse and children as they rely on him or her for the necessities of life. In the case of non-legal dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The facts indicate that the complainant was the deceased's legal spouse. However, the investigations indicated that she was an estranged spouse as confirmed by submissions to the fund as well as the fact that the deceased resided with Nhlanhla.

NDLANGAMANDLA Matter

<u>Determination *(Merits):*</u>

- Whilst the complainant qualifies as a legal dependant by virtue of her marriage to the deceased, this does not necessarily entitle her to an allocation of the death benefit as the death benefit does not form part of the deceased's estate and is therefore, not subject to any matrimonial property regime.

- In the case *Modibedi v Superfund and Another* [2019] PFA 7 at para 5.7, the Adjudicator held that marriage is not decisive in the allocation of a death benefit.

- **The objective of section 37C of the Act is to provide for those who were dependent on the deceased at the time of the deceased death.** Thus, a board may not allocate a portion of the death benefit to a spouse solely due to the existence of a marriage as this would have the effect of depriving other dependants of an equitable allocation.

- **It is trite law that the extent to which a beneficiary was dependent on the deceased is a significant factor to consider by the board when allocating a death benefit.**

- Adjudicator is satisfied that the board took into account relevant factors and ignored irrelevant factors. The board did not fetter its discretion in the allocation of the deceased's death benefit and there is no reason to set aside the board's decision

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

1. Introduction

- Discovery Life Provident Umbrella Fund ("the Fund") made a distribution of a death benefit in terms of section 37C of the Pension Funds Act following the death of a member.
- The Fund allocated **60%** to the deceased's mother (the Complainant) and **40%** to a minor child, whom the Fund considered a dependant.
- The Deceased's mother lodged a complaint with the Pension Funds Adjudicator ("Adjudicator"), arguing the minor child was not the Deceased's biological child, and should, therefore, not receive the benefit.

2. The Adjudicator (Decision: 30 March 2023)

- held that the Fund did not conduct a thorough investigation;
- set aside the Fund's distribution decision; and
- directed the Fund to:
  (i) obtain a paternity test with consent from the child's mother, or
  (ii) if consent not given, exclude the minor and reassess the allocation.

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

3. Financial Services Tribunal (Decision: 1 September 2023)

- The Fund applied to the Financial Services Tribunal ("FST") to reconsider the Adjudicator's decision in terms of section 230 of the Financial Sector Regulation Act.
- On 1 September 2023, the FST dismissed the application on the basis that:
  - The Fund lacked *locus standi in iudicio* (legal standing) to bring the application for reconsideration because it was not an 'aggrieved person' as required by section 230 of the Financial Sector Regulation Act.

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

4. <u>High Court Application</u>

- The Fund then brought a High Court review application seeking:
  - Review and setting aside of the FST's decision on *locus standi in iudicio;*
  - A declaration that the FST panel was improperly constituted — but this relief was later abandoned
  - Review of the Adjudicator's substantive decision, alternatively, remittal of the matter to the FST.

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

5. <u>High Court Application (Decision: 10 October 2025)</u>

The Court agreed with the FST and held that:

- "Person aggrieved" requires a legal right to be affected
  - ➢ It is not enough that the Fund was unhappy with the Adjudicator's decision or had administrative inconvenience.
  - ➢ The test from *Francis George Hill Family Trust v SARB* 1992 (3) SA 91 AD applies: An "aggrieved person" is one whose legal rights have been infringed, not merely someone with a pecuniary or indirect interest.

- The Fund has no legal interest in the benefit allocation
  - ➢ The Fund does not suffer a legal harm from the distribution outcome.
  - ➢ Its duties under section 37C are administrative — it does not have a personal legal right in the benefit.

Therefore, the Tribunal was correct. The Fund lacked *locus standi in iudicio* to apply to the Tribunal for reconsideration.

Discovery Life Provident Umbrella Fund & Another v Financial Services Tribunal & Others

6. <u>Practical implications for retirement funds</u>

- How eager will retirement funds be to pay death benefits where there is a sense that someone might lodge a complaint with the Adjudicator?
- Will it be fair on beneficiaries, those who want to lodge a complaint and those who do not want to lodge a complaint, to delay payment until all disputes are resolved (until every party confirms that they are satisfied with the distribution decision)?
- What about instances where the Fund concerned has already parted with the money?
- What about decisions (whether Adjudicator's or FST's) which could potentially benefit an imposter or someone who is not legally entitled to a benefit or a portion thereof – does the Fund lack *locus standi* even though it is close to the matter and has all the relevant information available to help (Interests of justice argument)?

OPFA COMMUNICATION 2 OF 2025
Death Benefits – Clarification on Jurisdiction

PENSION LAWYERS ASSOCIATION 30TH ANNUAL CONFERENCE

OPFA COMMUNICATION 2 OF 2025
Death Benefits – Clarification on Jurisdiction

- Section 37C of the PFA affords a wide discretion to decide on the equitable distribution of a death benefits. Ensure that its decision is supported by a proper investigation of all the relevant facts, all of which must be considered.

- Where a fund fails to exercise its discretion properly, the Adjudicator may set aside its decision and direct a reinvestigation or reconsideration. Such orders are binding, and the original fund decision becomes void.

- ***In rare cases, where all the relevant facts have been placed before the Adjudicator and the proper distribution is a foregone conclusion, the Adjudicator may substitute the fund's decision with a new distribution (see Swart N.O (neé Van der Merwe) and others v Lukhaimane N.O and others [2021] JOL 49952 (GP) at paragraph [44]). However, this is exceptional, and the fund's discretion is generally respected.***

- When a death benefit allocation is remitted back to the fund by the Adjudicator, it is expected that, the fund must take earnest steps to implement the order. The fund must act promptly, supplement its investigation where necessary, and issue a new decision. It can no longer rely on the original decision and must communicate the revised decision to beneficiaries.

OPFA COMMUNICATION 2 OF 2025
Death Benefits – Clarification on Jurisdiction

- **The fund's new decision may justifiably mirror the original decision**, save that the fund would have arrived at the new decision having had the benefit of considering new factors including those brought to light in the Adjudicator's determination.

- **Importantly:** any person aggrieved by the fund's *new* decision has the right to lodge a *new* complaint with the Adjudicator.

- The Adjudicator's jurisdiction is neither ousted by the doctrine of *functus officio* nor the principles relating to *res judicata*.

- The new complaint will be based on the new decision by the fund and the Adjudicator's investigation, and determination of the complaint will relate to the fund's new decision (see *Momentum Retirement Annuity Fund v LH Botha and Others* – PFA47/2021, Financial Services Tribunal at page 4, paragraph [3]).

THANK YOU