

**Section 37C of the Pension Funds Act, 24 of 1956: A social security measure  
to escape destitution.**

Matotoka Motlhatlego Dennis



A MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF MASTERS OF LAWS (LLM) IN LABOUR LAW IN THE  
SCHOOL OF LAW, UNIVERSITY OF LIMPOPO (TURFLOOP CAMPUS)

**SUPERVISOR: ADV L.T NEVONDWE**

**JANUARY, 2013**

## TABLE OF CONTENTS

	<b>Page</b>
<b>ABSTRACT</b>	<b>I</b>
<b>DECLARATION BY SUPERVISOR</b>	<b>II</b>
<b>DECLARATION BY STUDENT</b>	<b>III</b>
<b>DEDICATION</b>	<b>IV</b>
<b>ACKNOWLEDGEMENTS</b>	<b>V</b>
<b>TABLE OF STATUTES</b>	<b>VI</b>
<b>LIST OF ABBREVIATIONS</b>	<b>VII</b>
<b>TABLE OF CASES</b>	<b>VIII</b>
<b>CHAPTER ONE: INTRODUCTION</b>	<b>1</b>
1.1. Historical background to the study	1
1.2. Problem statement	3
1.3. Literature review	5
1.4. Aims and objectives of the study	9
1.5. Methodology	9
1.6. Scope and limitations of the study	10
<b>CHAPTER TWO: DISTRIBUTION OF DEATH BENEFITS</b>	<b>11</b>
2.1. What is a benefit for the purposes of section 37C?	11
2.2. Equitable distribution	13
2.3. Distribution to dependants only	13

2.4. Distribution to nominees only	21
2.5. Distribution to dependants and nominees	23
2.6. Distribution to estate	24
<b>CHAPTER THREE: CLASSES OF DEPENDANTS</b>	<b>27</b>
3.1. Who is a dependant?	27
3.2. Legal dependants	28
3.3. Non-legal dependants or <i>de facto</i> dependants	32
3.4. Future dependants.	42
<b>CHAPTER FOUR: MODES OF PAYMENT</b>	<b>44</b>
4.1 Introduction	44
2. Payment to a trust or Guardians fund	45
3. Payment to Minor	48
4. Payment to a Major	50
<b>CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS</b>	<b>55</b>
<b>BIBLIOGRAPHY</b>	<b>59</b>

## **ABSTRACT**

The study will analyse section 37C of the Pension Funds Act, 24 of 1956. This section limits the deceased's freedom of testate by placing the death benefits and the control of the board of trustees who are tasked to distribute such benefits equitably among the dependants and nominees of the deceased. Section 37C of the Act was enacted to protect dependency by ensuring that the dependants of the deceased are not left in destitute. In order to achieve this, three duties are placed on the board of trustees namely, to identify the dependants and nominees of the deceased member; to effect an equitable distribution of the benefit among the beneficiaries; and to determine an appropriate mode of payment. This section sees to all the interest of the dependants without discriminating consequently there are three classes of dependants that are created under section 37C namely; legal dependants, non-legal dependants, and future dependants.

## DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by **Matotoka Motlhatlego Dennis** for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

Signed.....

Date.....

**Adv. Lufuno Tokyo Nevondwe**

## DECLARATION BY STUDENT

I, **Matotoka Motlhatlego Dennis**, declare that this mini-dissertation for the degree of Masters of Laws in Labour Law in the University of Limpopo (Turfloop Campus) hereby submitted, has not been previously submitted by me for a degree at this or any other university, this is my own work in design and execution and all material contained herein has been duly acknowledged.

Signed.....

Date.....

**Matotoka Motlhatlego Dennis**

## **DEDICATION**

This work is dedicated to the following people:

1. To my parents, Mahlodi Nelson Matotoka and Ramadimetja Josephine Matotoka for all their support throughout my life. All your efforts and sacrifices have borne fruit, thank you very much.
2. To my brothers, Mashilo Mash Matotoka and Moba Ronald Matotoka, may this work inspire you to reach goals set in your respective lives.

## **ACKNOWLEDGEMENTS**

First and foremost I thank GOD for the wisdom and guidance throughout my studies. I thank you LORD for providing me with all the tools that were needed to complete this mini-dissertation. You are worthy to be praised Amen!

I am greatly indebted to my supervisor, Adv. Lufuno Tokyo Nevondwe for his patience and timeless assistance during the construction of this mini-dissertation. It is through your meticulous research skills and commitment that saw the completion of this work.

I wish to express my gratitude to my parents, Mahlodi Nelson Matotoka and Ramadimetja Josephine Matotoka who provided me with guidance and financial assistance during my entire years of studying, Catherine Mokadi who at times sacrificed her own leisure time to assist me to complete this mini-dissertation, Nonhlanhla Thobile Nsimbini who always believed in me and consequently kept me on my toes, Adv.Reuben Letšeku for his support and the materials he provided me with in order to complete this mini-dissertation, Konanani Happy Raligilia whose research skills contributed significantly during this journey. Lastly, my gratitude is extended to Dr.Jesika Singh for her guidance during this journey.



## **TABLE OF STATUTES**

- 1.Civil Union Act 17 of 2006.
- 2.Divorce Act 70 of 1979
- 3.Financial Intelligence Centre Act 38 of 2001.
- 4.Income Tax Act of 1962.
- 5.Maintenance Act 99 of 1998.
- 6.Maintenance of Surviving Spouses Act 27 of 1990.
- 7.Marriage Act 25 of 1961
- 8.Pension Funds Act 24 of 1956
- 9.Pension Funds Amendment Act 11 of 2007
- 10.Prescription Act, 1969 (Act 68 of 1969),
- 11.Recognition of Customary Marriages Act 120 of 1998.
- 12.South African Constitution Act 108 of 1996
- 13.The Financial Services General Laws Amendment Act 22 of 2008.
- 14.Trust Property Control Act 57 of 1998

**LIST OF ABBREVIATIONS**

JBL	Juta Business Law Journal
UK	United Kingdom
LEAD	Legal Education And Development
FSB	Financial Services Board
FICA	Financial Intelligence Centre Act

**TABLE OF CASES**

1. *Baloyi v Ellerine Holdings Staff Limited Pension Fund* 2005 (7) BPLR 606 (PFA).
2. *Bosch v The White River Toyota Provident Fund* [2001]3 BPLR 1702.
3. *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2193.
4. *Chitja v Alexander Forbes Financial services and others* PFA/GA/8633/2006/SM.
5. *Daniels v Campbell NO and Others* [2004] 6 BPLR 5743 (CC).
6. *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA).
7. *Dyas v CTS Provident Fund And Another* [2003] BPLR 4448 (PFA).
8. *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA).
9. *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA).
10. *Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA).
11. *Hlathi v University of Fort Hare Retirement Fund* 2009 1 BPLR 46 (PFA).
12. *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488.
13. *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA).
14. *Karam v Amrel Provident Fund* [2003] 9 BPLR 5098 (PFA).
15. *Kowa v Corporate Selection Retirement Fund* PFA/GA/14151/2007/SM.
16. *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 (PFA).
17. *Lebepe v Premier Foods Provident Fund* PFA/NP/5947/2005/RM.
18. *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA).
19. *Mashego and others v SATU national Provident Fund and another* [2007] 2 BPLR 229 (PFA).

-VIII-

20. *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W).
21. *Motsoeng v AECI Pension Fund and Another* [2003] 1 BPLR 4267 (PFA).
22. *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA).
23. *Moshidi v Kimberley-Clark Provident Fund and Another* [2003] 7 BPLR 4947 (PFA).
24. *Moralo v Holcim South African Provident fund* [2007] JOL 20415 (PFA).
25. *Musgrave v UNISA Retirement Fund* [2000] 4 BPLR 415 (PFA).
26. *Ramoitheki v Liberty Group LTD T/A Liberty Corporate Benefits and others* [2006] 3 BPLR 227(W).
27. *Robinson and another v Volks NO and Others* [2004] 4 BPLR 5599(C).
28. *Robinson v Central Retirement Annuity Fund (1)* [2001] 10 BPLR 2623 (PFA).
29. *Satchwell v President of the Republic of South Africa* [2004] 1 BPLR 5333 (CC).
30. *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA).
31. *Smith v Mutual and Federal Insurance Co Ltd* 1998 (4) SA 626 (C).
32. *Thene v Bidcorp Group Provident Fund* (PFA/GA/6863/05/LCM).
33. *Tsukudu and Another v Iscor Employees Provident Fund* PFA/GA/963/2004/LM.
34. *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA).
35. *Wasserman v Central Retirement Annuity Fund (1)* (2001) 6 BPLR 2160.
36. *Wellens v Unsgaard Pension Fund* (2002) 12 BPLR 4214 (PFA).
37. *Williams v Lester Algernon Kortje Trust and Another* [2001] 2 BPLR 1687 (PFA).

38. *Van Der Merve and Another v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 463 (PFA).

39. *Van den Berg v Durban Pension Fund* [2003] 3 BPLR 4518 (PFA).

40. *Van Vuuren Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 (PFA).

# CHAPTER ONE: INTRODUCTION

## 1. Historical background to the study

Modern pension funds schemes exist as a result of the industrial revolution and the social and technological advances that have since taken place during the 18<sup>th</sup> century.<sup>1</sup> During this period, the industrial revolution brought about change in the nature of society and the start of mass urbanization.<sup>2</sup> A lot of pressure mounted on the employers due to the stiff competition for skilled employees to ensure business efficiency and productivity and as a result of this, socially conscious employers recognized a need to make provision for those employees who had given them good service but had become too old to keep up with the physical pressures of work in a factory.<sup>3</sup> The provision of some form of benefits to retired employees by their employers attracted better and more qualified employees hence basic pensions began to expand as a means of attracting and retaining good employees.<sup>4</sup>

South Africa is the first country in the African continent to have a legislation that regulates retirement funds.<sup>5</sup> In 1956, the South African Pension Funds Act<sup>6</sup> was promulgated into law. It is almost 56 years since this Act was passed. This Act came into operation during the apartheid system of government and it offers little relief to the majority of the retirees.<sup>7</sup> In 1976, the legislature inserted section 37C into the Act, which deals with the distribution and payment of death benefits upon the death of a member of a pension fund organisation. This section was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act and

---

<sup>1</sup> Choma HJ and Nevondwe LT, Socio-economic rights and financial planning in South Africa (2010),1.

<sup>2</sup> Choma HJ and Nevondwe LT, *ibid*, 1.

<sup>3</sup> Choma HJ and Nevondwe LT, *ibid*, 2.

<sup>4</sup> Choma HJ and Nevondwe LT, *ibid*, 2.

<sup>5</sup> Olivier MP, Okpaluba MC, Smit N, Thompson M, Du toit AM, Greyling E, Jansen van Rensburg L, Liffmann R, Ogunronbi SO and Porter I, *Social Security Law General Principles* (1999), 178.

<sup>6</sup> Pension Funds Act 24 of 1956 (hereinafter referred to as the Act).

<sup>7</sup> Nevondwe LT, *South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act*, pensions and International Journal, Palgrave Macmillan Publishers, UK, Volume 15, issue 4, March 2010, 287.

government policy.<sup>8</sup> Its purpose is to make sure that the dependants of the deceased member are not left destitute upon the death of the member.<sup>9</sup> In order to achieve this, the death benefits are placed under the control of the trustees who are tasked with the duty to distribute the benefits equitably among the beneficiaries. According to this section, death benefits do not form part of the deceased's estate and as a result a beneficiary under the last will and testament of the deceased is not necessarily a beneficiary under section 37C of the Act. The board of trustees will consider a person as a beneficiary if the deceased member has nominated such a person in a valid nomination form.<sup>10</sup> This section therefore overrides the deceased's freedom of testation because the board of trustees are not bound by the deceased's wishes as completed in the nomination form. A nomination form is one of the factors which the trustees have to consider in the exercise of their discretion to make an equitable distribution.<sup>11</sup> The contents of the nomination form only serve as a guideline to the trustees and do not compel the trustees to distribute the benefits in accordance with the nomination form.

There are a number of factors which the board of trustees need to consider when making an equitable distribution. These factors were highlighted in the matter of *Sithole v ICS Provident Fund and Another*<sup>12</sup> (hereinafter referred to as *Sithole* case) wherein it was stated that the trustees must consider; the age of the dependants, the relationship between the deceased and the dependants, the extent of dependency, the wishes of the deceased placed either in the nomination and / or his last will, and financial affairs of the dependants including their future earning capacity. In order to ensure that the objects of the Act are achieved, section 37C essentially imposes three primary duties on the board of management, namely to identify the dependants and nominees of the deceased member; to effect an equitable distribution of the

---

<sup>8</sup> Nevondwe LT, Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional? Juta Business Law Journal (JBL), 2007 Volume 15, issue 4, 164.

<sup>9</sup> Nevondwe LT, *Ibid*, 164.

<sup>10</sup> Members are generally expected to complete nomination forms wherein they nominate the beneficiaries to receive their death benefits.

<sup>11</sup> *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705–3706). See also Nevondwe LT, Malatji T and Rapatsa M, Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?, *Pensions an International Journal*, November 2011, Volume 16, No.4, 289.

<sup>12</sup> *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at paragraphs 24 and 25.

benefit among the beneficiaries; and to determine an appropriate mode of payment.<sup>13</sup>

## **2. Problem statement.**

The intention of the legislature with section 37C is commendable but this section is not without problems. Firstly, section 37C confers the board of trustees with enormous discretion in the exercise of their duties. This enormous discretion is perpetuated by the fact that this section fails to provide the trustees with clear guidelines to distribute and pay benefits equitably amongst the beneficiaries. Consequently in the absence of clear guidance from this section, a large number of complaints are brought to the office of the Pension Funds Adjudicator, challenging decisions made by the board of trustees.

Secondly, there are practical difficulties in determining who is eligible and who is not eligible to receive death benefits and in addition the section is rather silent on the order of priority in which the dependants should receive benefits. Trustees are therefore placed in a difficult position as they are obliged to make an equitable distribution in the midst of these challenges, which again leads to a large number of complaints brought to the office of the Pension Funds Adjudicator challenging decisions made by the board of trustees.

Thirdly, section 37C provides that a dependant or a nominee has to be traced within a period of twelve (12) months. The latter is however not easy to achieve due to the practical difficulties faced by the trustees when tracing the dependants, especially with the dependants who reside in remote rural areas.

---

<sup>13</sup> *Mashego and Others v SATU National Provident Fund and another* [2007] 2 BPLR 229 at paragraph 5.3. See Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, *Pensions and International Journal* Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 39. See further M Mhango, what should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants? *Potchefstroom Electronic Law Journal*, Volume 13, No 2, 2010.



Fourthly, this section does not indicate the steps which the trustees must take in order to establish the existence of the dependants, their whereabouts, and the extent of their dependency and which occasionally creates difficulties to the trustees to perform their duties both timeously and efficiently.

Fifthly, section 37C read in conjunction with section 30I of the Pension Funds Amendment Act<sup>14</sup>, fails to provide a remedy or condonation if a complaint is lodged outside the three-year period. The implications are that those dependants who lodged their complaints outside the three-year period would not be able to access the benefits, which then is contrary to the object of section 37C to protect dependency.

Sixthly, Section 37C(2) provides that payment by a registered fund for the benefit of a dependant or nominee to a trustee contemplated in the Trust Property Control Act<sup>15</sup>, shall be deemed to be payment to such a dependant or nominee . The problem with this provision is that the fund is relinquished of its responsibility towards the beneficiary once payment is made to a trust. In other words the relationship between the fund and the beneficiary ceases. This, in essence, has dire consequences towards the beneficiary in that more often than not payments to trusts do not have proper governance structures in place which is prejudicial to the beneficiaries. This problem has partially been resolved by the introduction of the 2008 amendments to the Pension Funds Act which introduces the beneficiary funds which replaced the trusts.

Lastly, the interpretation and application of this section brings about confusion especially towards the nominees of the deceased. The nominees often contest that being nominated in the nomination form means that they are entitled to benefits. This section does not expressly state that a nominee is not automatically a beneficiary on

---

<sup>14</sup> Section 30I Pension Funds Amendment Act 11 of 2007 reads as follows : “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing. (2) The provisions of the Prescription Act, 1969 (Act 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)”.

<sup>15</sup> Trust Property Control Act 57 of 1998.

the basis of being nominated in the nomination form but rather only qualifies for consideration in the distribution phase.

### **3. Literature review.**

It is generally accepted that section 37C is a social security measure for the dependants of the deceased to escape destitution. According to Manamela this section is a social-security measure because it places the benefit payable on a member's death under the control of the fund, which has to pay it to the member's dependants in such proportions as it deems equitable.<sup>16</sup> Manamela further holds the view that this section is a mechanism that enforces the right of dependants to support, additional to the common law duty resting on certain people to support others, for example, the duty of support existing between parents and children, and additional also to the power of courts to grant maintenance orders in favour of certain people, for example, divorced people and illegitimate children.<sup>17</sup> This view seems to suggest that a person can claim support or maintenance from the deceased's death benefits through section 37C. However the person must prove that he or she falls within the definition of dependant in order to have a successful claim. This means that the person must be either a legal dependant of the deceased, where a duty of support emanates from a statute or common law, or non-legal dependant of the deceased, where the deceased is under no legal duty to support the claimant but the claimant was dependent on the deceased during the deceased's lifetime; and future legal dependant, where the deceased would have become legally liable to maintain the claimant at some future date had he or she notionally survived his or her death.

It is therefore safe to conclude that Manamela supports the phenomenon that section 37C offers social protection to the dependants of the deceased by ensuring that dependants still have financial support upon the death of the member. Other authors do not differ much with Manamela. Nevondwe, Malatji and Rapatsa view section 37C as a curious provision because ordinarily people have freedom of testate which entitles them to determine how their assets are to be distributed amongst their

---

<sup>16</sup> Manamela T, Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956, South African Mercantile Law Journal (2005) Volume 17, 278.

<sup>17</sup> Manamela T, *ibid*, 279.

beneficiaries.<sup>18</sup> However, this section provides that benefits payable by a pension fund upon the death of a member do not automatically form part of the deceased member's estate and thus exclude a member's freedom of testation.<sup>19</sup> This assertion implies that freedom of testate is not absolute; it may be limited by section 37C because the death benefits are put under the control of the board to make an equitable distribution amongst the dependants and nominees. However in the event that the trustees are unable to trace the dependants within the twelve (12) month period and the deceased has not completed a nomination form, the benefits shall be payable to the deceased's estate.<sup>20</sup>

The question is whether the limitation of freedom of testation by section 37C is justified under the Constitution?<sup>21</sup> According to Nevondwe this section accords with the provisions of the Constitution<sup>22</sup> and in support of this view, Nevondwe argues that a death benefit is part of social security, which is a mechanism that enables people to escape destitution and accordingly, the right to social security<sup>23</sup> includes the right to be allocated a death benefit if the requirements of section 37C Act are met.<sup>24</sup> Manamela is also of the view that this section accords with the provisions of the Constitution.<sup>25</sup> In particular Manamela argues that section 37C is in line with the Constitution on the issues of equality<sup>26</sup> and human dignity<sup>27</sup> because it sees to all the interests of dependants of a deceased member without discriminating.<sup>28</sup> It is therefore safe to conclude that the following rights are promoted by section 37C, namely, the right to have access to social security, equality, human dignity and

---

<sup>18</sup> Nevondwe LT, Malatji T and Rapatsa M, Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956 ?, Pensions an International Journal, November 2011, Volume 16, No.4, 289.

<sup>19</sup> Nevondwe LT, Malatji T and Rapatsa M, *ibid*, 289.

<sup>20</sup> Section 37C (1)(c) of the Act.

<sup>21</sup> South African Constitution, Act 108 of 1996.

<sup>22</sup> Section 27 of the South African Constitution, Act 108 of 1996.

<sup>23</sup> Section 27 of the South African Constitution, Act 108 of 1996.

<sup>24</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, at 46-47. See also Nevondwe LT, Section 37C of the Pension Funds Act 24 Of 1956, A social security measure to escape destitution, Insurance and Tax Journal, Volume 26, No 3, September 2011,3-24.

<sup>25</sup> Manamela T, *op cit*, 279.

<sup>26</sup> Section 9 of the South African Constitution Act 108 of 1996.

<sup>27</sup> Section 10 of the South African Constitution Act 108 of 1996.

<sup>28</sup> Manamela T, *op cit*, 279.

freedom. Against this background, it is submitted that section 37C's limitation of freedom of testation is reasonable and justifiable under the Constitution in that it aims to promote entrenched Constitutional rights that affirm democratic values of those dependants who are left in destitute.

Judge Hussain J in the matter of *Mashazi v African Products Retirement Benefit Provident Fund*<sup>29</sup> passed the following remarks about this section:

“Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. It specifically excludes the benefits from the assets in the estate of a member, and enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors”.<sup>30</sup>

The above remarks contribute significantly to this study in that they confirm the intentions of the legislature when enacting section 37C, which is to ensure that the dependants of the deceased are not left in destitute. Unfortunately, on the other hand the remarks also confirm the lack of guidance this section provides for the trustees regarding its implementation hence trustees are clothed with discretion in the exercise of their duties under this section.

Mhango also supports the view held in *Mashazi* case and asserts that section 37C has been enacted to protect dependency by restricting the member's capacity to dispose of their benefits upon their death.<sup>31</sup>

The adjudicator in the matter of *Dobie NO v National Technikon Retirement Pension Fund*<sup>32</sup> (hereinafter referred to as *Dobie* case) acknowledged the challenges that are brought by section 37C and stated that:

---

<sup>29</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W).

<sup>30</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) 3705–3706.

<sup>31</sup> M Mhango, An Examination of the Accurate Application of the Dependency Test under the Pension Funds Act 24 of 1956, (2008) Volume 20, South African Mercantile Law Journal (SAMLJ), 130. See also Mhango M, Examining the provision of pension death benefits to cohabitants or life partners under the South African Pension Funds Act of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 3 (2010), 226–237, at 228.

“One thing is certain about section 37C, is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply...”<sup>33</sup>

It can therefore be deduced from the view held in the *Dobie* case about section 37C, that the legislature had good intentions with this section but this section is one fraught with great difficulty, and places the trustees in a difficult position to implement it and this may be prejudicial to the dependants or nominees. In order to alleviate some of the problems of this section, Nevondwe suggests that this section needs to be amended to furnish guidelines for the boards of trustees in allocating and paying death benefits equitably.<sup>34</sup> Manamela also suggests that by introducing the order of priority in which the dependants should receive benefits will demystify the provisions of section 37C as this would make it much easier for trustees to apply the section and would also save a lot of time.<sup>35</sup> The adjudicator in the *Dobie* case stated that:

“One solution may be for the section to identify more precisely the steps required to be taken, including an appropriate form of publication, and then allowing for a final distribution to known dependants and nominees at the expiry of a reasonable period culminating in indemnification of the board against further claims”.<sup>36</sup>

It is clear that section 37C aims to place the beneficiaries in the same position as they were during the deceased’s lifetime. This, in essence, obviates destitution.<sup>37</sup> Manamela is of the opinion that the essence of section 37C, its interpretation and application cannot be ignored although the section is fraught with problems.<sup>38</sup>

---

<sup>32</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA).

<sup>33</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41F–J.

<sup>34</sup> Nevondwe LT, Section 37C of the Pension Funds Act 24 Of 1956, a social security measure to escape destitution, Insurance and Tax Journal, Volume 26, No 3, September 2011,3-24.

<sup>35</sup> Manamela T, *op cit*, 293.

<sup>36</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41I.

<sup>37</sup> Nevondwe LT, Section 37C Of the Pension Funds Act 24 of 1956: A social security measure to escape destitution. Insurance and tax Journal, Volume 26, issue 3, September 2011, 3-24.

<sup>38</sup> Manamela T, *op cit*, 294.

#### **4. Aims and objectives of the study.**

The aim of the study is to provide clarity and a better interpretation of section 37C of the Act so that it can be understood easily and implemented without difficulty.

The objectives are as follows:

- To identify the steps required in determining the existence of the dependants, their whereabouts, and the extent of their dependency.
  
- To establish the guidelines for the boards of trustees to allocate and pay death benefits equitably.
  
- To establish the order of priority in which the dependants should receive benefits.

The study will be of benefit to law students, pension fund associations, administrators of pension funds, practitioners of law with special interest in pension law, Jurisprudence, human rights law, social security law, State institutions, non-governmental organizations, industrial relations law, poverty alleviation centers and community law centers.

#### **5. Methodology**

The research methodology to be adopted in this study is qualitative. The study shall undertake a critical analysis of section 37C of the Act with ample footnote within the South African jurisdiction. The study shall go on legal historical excursion based on robust jurisprudential analysis.

The research is library based and reliance is placed on materials such as articles, textbooks, case laws, law reports, statutes and electronic sources.

## **6. Scope and limitations of the study.**

The study consists of five chapters. Chapter one is the introductory chapter laying down the foundation of the dissertation. Chapter two deals with the distribution of the death benefits. Chapter three focuses on different classes of the dependants. Chapter four deals with the modes of payments in death benefits. Chapter five deals with the conclusion and recommendations.

## 1. What is a benefit for the purposes of section 37C?

Section 37C constantly refers to the word “benefit” and this word is not defined in the Act other than it is benefit payable by a registered fund to the dependants or nominees of the deceased member.<sup>39</sup> It is however important to know what a death benefit is for the purposes of section 37C. This understanding would give clarity to the beneficiaries of the deceased and as a result of such an understanding; the beneficiaries would therefore lodge their claim for the benefits within the prescribed period. Pension funds generally pay benefits which normally depend on the occurrence of an event that relates to termination of the employment contract such as retirement, death, resignation, retrenchment, disability etc.<sup>40</sup> For the purpose of this section, a death benefit is a benefit payable to the dependants and nominees of the deceased member should the latter die in service before reaching normal retirement age.<sup>41</sup>

Often complaints are lodged with the office of the Pension Funds Adjudicator regarding the nature and computation of death benefits; complainants often contend that they have received fewer amounts of benefits than they were entitled to. The same issue arose in the matter of *Ellis NO v Lifestyle Retirement Annuity Fund*<sup>42</sup> (hereinafter referred to as *Ellis* case). The complainant (acting in his capacity as the executor in the estate of the late WMB Broughton) lodged a complaint with the office of the Pension Funds Adjudicator regarding the computation of the benefit with reference to the Income Tax Act.<sup>43</sup> The complainant was dissatisfied with the decision of the fund to pay a lesser death benefit to the estate than that which would have been paid to a nominee or a dependant.<sup>44</sup> The benefits paid to the estate were computed in terms of section 1(b)(vi) of the Income Tax Act<sup>45</sup> in terms of which if a

---

<sup>39</sup>George L Marx and Kobus Hanekom, *The Manual on South African Retirement Funds and Other Employee Benefits* (2010), 183.

<sup>40</sup>George L Marx and Kobus Hanekom, *ibid*, 183.

<sup>41</sup> Nevondwe L T, *Is the Distribution of Death Benefits under the Pension Funds Act 24 of 1956 constitutional?* Juta Business Law Journal (JBL), 2007 Volume 15, issue 4, 164.

<sup>42</sup> *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA).

<sup>43</sup> Income Tax Act of 1962.

<sup>44</sup> *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 at 10.

<sup>45</sup> Income Tax Act of 1962.



member dies before he becomes entitled to the payment of a retirement benefit, the death benefit shall not exceed a refund to his estate, therefore no annuities were payable to the estate. The complainant contended that the definition of a retirement annuity fund in the Income Tax Act<sup>46</sup> merely contain requirements for a fund to be approved by revenue authorities and further contended that paragraph (b)(vi) of section 1 of the definition only deals with what the rules of a retirement annuity fund must provide in the case of a member who dies before he becomes entitled to an annuity. The complainant further contended that the benefit ought to have been determined in terms of section 37C(1)(c) of the Act.<sup>47</sup> The legal question was whether section 37C regulated the computation of the death benefit? In arriving at the decision, the adjudicator observed that the value of the death benefit is not regulated by section 37C but by section 6.2 of the rules of the fund.<sup>48</sup> After evaluating the rule, the adjudicator concluded that there are two benefits payable. Firstly, a refund of the deceased's contributions is payable either to the estate or his dependants or nominees. However since there are no dependants or nominees, therefore the only benefit payable is a refund of the member's contributions. The estate did not qualify for the benefit because the estate is neither a dependant nor a nominee.<sup>49</sup>

It can therefore be deduced from the *Ellis* case that section 37C does not regulate the nature, computation, and value of a benefit. This section is only confined to regulate the distribution and payment of death benefits, in fact, section 37C establishes a compulsory scheme in terms of which death benefits payable after the death of a member of the fund have to be distributed to the deceased's dependants.<sup>50</sup> It is therefore submitted that the nature and computation of death benefits is regulated by the rules of the fund and not section 37C.<sup>51</sup>

---

<sup>46</sup> Income Tax Act of 1962.

<sup>47</sup> Pension Funds Act 24 of 1956.

<sup>48</sup> Section 6.2 of the rules of the fund reads:

**"DEATH BEFORE RETIREMENT**

In the event of the MEMBER dying before his SELECTED RETIREMENT DATE, BENEFITS will be payable in accordance with the provisions of section 37C of the ACT and the Income Tax Act 1962 as amended, or any replacement thereof."

<sup>49</sup> *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 at 16.

<sup>50</sup> *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 at 16.

<sup>51</sup> See also Nevondwe LT, Is the Distribution of Death Benefits under the Pension Funds Act 24 of 1956 Constitutional? *Juta Business Law Journal (JBL)*, 2007 Volume 15, issue 4, 164.

## **2. Equitable distribution.**

Section 37C confers the board of trustees of a pension fund with discretionary powers which have to be exercised reasonably. In exercising their discretion, trustees are expected to make a distribution of benefits in such a manner that is deemed equitable.<sup>52</sup> In other words, trustees must distribute death benefits fairly and reasonably without discriminating unfairly against any person who qualifies as a dependant and/ or nominee of the deceased. The duty placed on the trustees to make an equitable distribution is not always an easy task as the trustees are generally faced with highly emotive circumstances that tend to have the bearing of losing sight of the real issues at hand.<sup>53</sup> It would therefore be prudent of the trustees to avoid issues that have no bearing on the matter. In other words, the trustees need to consider all relevant information and ignore irrelevant facts in order to make an equitable distribution. Furthermore, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.<sup>54</sup>

### **2.1 Distribution to dependants only.**<sup>55</sup>

Section 37C(1)(a) of the Act provides that if the fund within twelve (12) months of the death of the member becomes aware of or traces a dependant(s) of the deceased member, the benefit shall be paid to such dependant(s) or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants. It is therefore clear from the wording of section 37C(1)(a) of the Act that it only applies to a situation where the deceased member is only survived by the dependants who are traced and identified by the trustees during their investigations.

---

<sup>52</sup> Manamela T, *op cit*, 279.

<sup>53</sup> *Bosch v The White River Toyota Provident Fund* [2001] 3 BPLR 1702 at 1705H.

<sup>54</sup> Nevondwe LT, Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional? *Juta Business Law Journal (JBL)*, 2007 Volume 15, issue 4, 166.

<sup>55</sup> Section 37C(1)(a) of the Act.

This section imposes a time frame for distribution of benefits and the issue in this regard is whether the board has to effect the payment of distribution within the twelve (12) month period or the board has to wait for the period of twelve (12) months to lapse before effecting the said payment to the dependants. It is submitted that the time frame 'within twelve months of the death of a member' in this section only defines the period available for tracing dependants before making payment exclusively to a nominee and does not qualify the obligation to pay the benefit.<sup>56</sup>

The stipulated period in this section does not pose any limitation upon the distribution to dependants provided that the board is reasonably satisfied that it has traced all dependants.<sup>57</sup> In other words the provision does not prohibit distribution within twelve (12) months nor does it compel distribution at the expiry of the twelve months period, in essence, section 37C(1)(a) of the Act must be read in conjunction with section 37C(1)(b) of the Act which provides that an exclusive distribution to a nominee may take place only after the twelve (12) month waiting period has produced no dependants.<sup>58</sup> The crucial question here is whether the board has taken all reasonable steps to comply with its duty to trace all the dependants so as to allow it to distribute the benefit in the most equitable manner.<sup>59</sup> It is permissible for the trustees to postpone the distribution until they have taken reasonable steps to remove any doubt regarding the circle of beneficiaries.<sup>60</sup>

As mentioned above,<sup>61</sup> the factors deliberated below need to be taken into consideration by the trustees when making an equitable distribution.

#### **(i) Ages of dependants**

---

<sup>56</sup> George L Marx and Kobus Hanekom, *op cit*, 211. See also *Dobie Case* at 30F where the adjudicator stated that "The 12 month period referred to in the section relates to the time period within which the board has to trace dependants. It has no impact on the date on which the benefit becomes due and enforceable."

<sup>57</sup> George L Marx and Kobus Hanekom, *op cit*, 211.

<sup>58</sup> Manamela T, *op cit*, 285-286.

<sup>59</sup> Nevondwe LT, Section 37C Of the Pension Funds Act 24 of 1956: A Social Security Measure to escape Destitution. Insurance and tax Journal volume 26, issue 3, September 2011, 3-24. See also *Dobie Case* at 30F.

<sup>60</sup> Manamela T, *op cit*, 286

<sup>61</sup> See Chapter One.

This factor plays a vital role in the distribution of benefits because it indicates to the board of trustees the length of the time over which a beneficiary will need to be maintained.<sup>62</sup> This factor assists the trustees to allocate different proportions of the death benefits in accordance with the ages of the beneficiaries; accordingly a minor beneficiary would receive a higher proportion of benefits than a major beneficiary.

In *Motsoeng v AECI Pension Fund and Another*<sup>63</sup>, the fund conducted an investigation to determine the circle of beneficiaries of the deceased and thereafter effect an equitable distribution amongst them. Upon conclusion of investigations, the fund concluded that the deceased was survived by six dependants, namely, his five children and his surviving spouse (the complainant). The respective ages of the minor children were: 17; 13; 10; 6; and 4. The trustees awarded 20% of the benefit to each minor and regarded same as equitable. However the adjudicator arrived at a different conclusion. The adjudicator reiterated that in order for the trustees to effect an equitable distribution amongst the dependants of the deceased, the board needs to consider relevant factors and discard irrelevant considerations. The adjudicator concluded that the board did not properly consider all the facts in this matter, in that the ages of the minor children differ from 4 years to 17 years, yet each dependant was awarded an equal share in the distribution whereas the financial needs of the younger child (4 years) differ tremendously to those of an older child (17 years). It is therefore imminent that the trustees in this matter had failed to make an equitable distribution as required by section 37C.

## **(ii) The relationship with the deceased.**

The relationship between the beneficiary and the pension fund member plays a crucial role and may have a material impact on the distribution. The trustees must consider all the relevant factors that seem to suggest that the deceased and the beneficiary had a very close social and emotional relationship. By virtue of the

---

<sup>62</sup> George L Marx and Kobus Hanekom, *op cit*, 220.

<sup>63</sup> *Motsoeng v AECI Pension Fund and another* [2003] 1 BPLR 4267 (PFA).

provisions of section 37C, the trustees have discretion to award the entire benefit to a beneficiary based only on the relationship which the deceased had with the latter.

In the matter of *Karam v Amrel Provident Fund*<sup>64</sup>, the complainant lodged a complaint with the office of the Pension Funds Adjudicator; the complainant was dissatisfied with the distribution of death benefits which had the effect of excluding him from sharing the said benefits. In this matter the fund conducted investigations in order to determine the dependants and the extent of their dependency on the deceased. The investigations revealed that the deceased member was survived by her major son (complainant) and her sister (whom she had nominated as a beneficiary). Both the complainant and the beneficiary were financially independent. The investigations further revealed that the deceased's son was estranged from the deceased during her lifetime. The deceased had initially completed a nomination form in terms of which the complainant was nominated as a beneficiary; however the deceased revoked the nomination form and nominated her sister as the beneficiary to receive 100% of her death benefit.

The complainant contended that he was previously nominated by the deceased and this nomination should be given some recognition and therefore requested that the fund be ordered to pay him a portion of the death benefit.<sup>65</sup> The adjudicator agreed with the decision of the trustees to exclude the complainant from receiving a portion of the death benefit and held that the financial status of the beneficiaries were irrelevant by virtue of the fact that both beneficiaries being financially independent.<sup>66</sup> It was therefore the relationship which the deceased had with the beneficiaries that was relevant for consideration as a result the adjudicator was of the view that the trustees had acted equitably by excluding the complainant from distribution.

### **(iii) The extent of dependency.**

Section 37C requires the trustees to trace the dependants of the deceased and also establish the extent of dependency of the dependants. The extent at which the

---

<sup>64</sup> *Karam v Amrel Provident Fund* [2003] 9 BPLR 5098 (PFA).

<sup>65</sup> *Karam v Amrel Provident Fund* [2003] 9 BPLR 5098, at 8.

<sup>66</sup> *Karam v Amrel Provident Fund* [2003] 9 BPLR 5098, at 11.

dependants depend on the deceased can be a significant factor.<sup>67</sup> In determining this factor, the board of trustees must evaluate the extent to which the deceased member was liable to provide for the maintenance needs and thereafter assess the reasonable maintenance needs of each beneficiary.<sup>68</sup> The fund must ensure that the objects of section 37C are promoted at all times when exercising their discretion, therefore where the fund pays a beneficiary less than his or her maintenance needs, it cannot be deemed to promote the objects of section 37C, especially if there is enough amount available for distribution. The case of *Robinson v Central Retirement Annuity Fund*<sup>69</sup> (hereinafter referred to as *Robinson*) sets a good precedent in this regard.

In *Robinson*, a complaint was lodged with the office of the Pension Funds Adjudicator as a result of dissatisfaction with the distribution effected by the fund. In this matter the deceased was survived by four dependants, three minor children and his spouse. The deceased was a member of fund and two life policies were issued to the fund for the benefit of the deceased's dependants.<sup>70</sup> The complainant acting in her capacity as a guardian and mother of one of the minor children, contended that the widow and her two minor children had benefited substantially from various life insurance policies taken out by the deceased and further contended that her child's maintenance needs exceed the awarded amount. The fund however argued that it had properly considered the reasonable maintenance needs of all the dependants and therefore the distribution of 60% to the widow and her two minor children and 40% to the complainant's child is in accordance with section 37C.<sup>71</sup> However the adjudicator dismissed the fund's argument and failed to comprehend why the board decided to pay the complainant's child less than her maintenance needs. The adjudicator concluded that trustees did not properly consider the reasonable maintenance needs of the complainant's child and therefore ordered that the fund pay an amount of R22 873,00 together with interest to the complainant.<sup>72</sup>

---

<sup>67</sup> Nevondwe LT, Section 37C Of the Pension Funds Act 24 of 1956: A Social Security Measure to escape Destitution. Insurance and tax Journal Volume 26, issue 3, September 2011, 3-24.

<sup>68</sup> George L Marx and Kobus Hanekom, *op cit*, 219.

<sup>69</sup> *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2623 (PFA).

<sup>70</sup> *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2623, at 5.

<sup>71</sup> *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2628, at 4.

<sup>72</sup> *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2623, at 15.

**(iv)The wishes of the deceased placed either in the nomination and / or his last will.**

Section 37C does not expressly compel the member to complete a nomination form, but the wording of the section seems to suggest that a member must complete a nomination form in terms of which nominees are nominated. Against this background, pension funds generally do require their members to complete nomination forms in which they nominate the beneficiaries to receive their death benefits.<sup>73</sup> The trustees' discretion to deviate from the deceased's clear wishes is in accordance with section 37C as this section restricts freedom of testation. The adjudicators are therefore reluctant to interfere with the trustees' discretion of allocating certain proportions of benefits to the dependants and/or nominees unless there is a ground that suggests a need to do so.<sup>74</sup>

In *Mashazi v African Products Retirement Benefit provident Fund*<sup>75</sup> the applicant in his capacity as the natural guardian of his two minor children made an application in the High Court for the review of the allocation of death benefits by the respondent (The fund). The deceased died intestate on the 12<sup>th</sup> May 2000. During his lifetime, the deceased was a member of the fund and thus completed a nomination form to express his wishes. In the nomination form, the deceased allocated 40% each of the benefits to the minor children and 20% of the benefit was left to the deceased's wife. Upon the death of the deceased the trustees conducted investigation in terms of section 37C to identify and trace all the dependants of the deceased and the investigations revealed that the deceased's unemployed mother, a seventy-six (76) year old, was dependent on the deceased during the latter's lifetime.<sup>76</sup> In making an equitable distribution, the trustees deviated from the wishes of the deceased expressed in the nomination form and therefore allocated 20% each to the applicant's minor children, 40% to the deceased's wife and 20% to the deceased's

---

<sup>73</sup> Manamela T, *op cit*, 278.

<sup>74</sup> See also *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2623 (PFA) where the fund paid a dependant less than her maintenance needs and the adjudicator held that the fund fettered their discretion when distributing the benefits in this regard.

<sup>75</sup> *Mashazi v African Products Retirement Benefit provident Fund* [2002] 8 BPLR 3703 (W).

<sup>76</sup> *Mashazi v African Products Retirement Benefit provident Fund* [2002] 8 BPLR 3703 (W) at 9.

mother. The applicant contended that the allocation of the benefits by the fund was in violation of the deceased's clear wishes and furthermore the applicant alleged that the trustees failed to conduct a proper investigation in order to determine what the relationship was between the deceased and his wife. The applicant submitted that the deceased's wife should have been allocated 20% of the benefits and the remaining 20% be allocated to the minor children at 10% each.

The adjudicator in arriving at the decision stated that upon the death of the deceased the benefits due fell to be distributed according to the rules of the fund and the provisions of section 37C which require the trustees to make a distribution in proportions deemed equitable. The rules of the fund in this instance provided that the trustees shall be entitled to decide the proportions which shall be paid to the dependants and/or nominees, and in their absolute discretion, make any arrangements and regulations for the administration of the fund and that in their opinion is for the benefit and protection of the members and beneficiaries.<sup>77</sup> The adjudicator found that no evidence existed that suggested that a proper investigation was not carried out by the trustees. It is against this background that the adjudicator found that the trustees made an equitable distribution.

**(v) Financial affairs of the dependants including their future earning capacity potential.**

The financial position of the dependants upon the death of the deceased and their future earning capacity plays a vital role in assisting the trustees to make an equitable distribution. The lack of potential earning capacity of a dependant prompts the trustees in the exercise of their discretion to award higher proportions of benefits to such a dependant as opposed to a dependant who is in a much better financial position and/or capable of obtaining employment (here one thinks of a dependant who is in his or her prime, being in good health and having formal education).

---

<sup>77</sup> *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 10F-G.



In *Van Vuuren v Central Retirement Annuity Fund and Another*<sup>78</sup> a complaint was lodged with the office of the Pension Funds Adjudicator to review the trustee's decision of awarding a death benefit in equal shares to the deceased's widow whom he had separated with but not divorced and the second respondent whom the deceased had lived with as husband and wife. The trustees in this matter concluded that both the deceased's widow and the second respondent appeared to have financial difficulties, however the complainant was considered to be slightly better off than the second respondent and at least two years prior to the death of the deceased, there was a factual inter-dependence between the deceased and the second respondent whereas such a relationship did not exist between the deceased and the complainant.<sup>79</sup> However the adjudicator arrived at a different decision and held that the trustees have not applied their minds because they failed to consider all the relevant factors in this matter when making distribution of benefits. The adjudicator held that:

"It is not clear why the trustees failed to consider the payment of proceeds of the Old Mutual Life Insurance Policy to Miss Boshoff. Any receipt of a cash benefit directly impacts on the financial status and future earning capacity of the dependant, which is two of the relevant considerations to be taken into account when making an equitable distribution".<sup>80</sup>

It is clear that the trustees must consider all the relevant factors that have the potential of adversely impacting on the final decision to award the benefits. All the relevant factors, whether presented by either party or not, remain of paramount importance in that these factors will assist the trustees in accurately determining the financial status of any dependant.

**(vi)The amount available for distribution.**

Section 37C requires the trustees of the board to make an equitable distribution towards the dependants of the deceased. However this duty may not at all times be feasible especially if the amount available for distribution is not sufficient to cover for

---

<sup>78</sup> *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 (PFA).

<sup>79</sup> *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 at 9.10.

<sup>80</sup> *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 at 23I-J.

all the maintenance needs of the dependants. It has been argued that where such maintenance needs exceed the amount available, it is not possible to effect an equitable distribution, as a consequence any distribution would be inequitable to the beneficiary who receives less than his or her reasonable maintenance needs.<sup>81</sup> Where the amount available for distribution is not sufficient the trustees may in terms of the rules of the fund, compute such available benefit and distribute it accordingly.<sup>82</sup>

## **2.2 Distribution to nominees only.**<sup>83</sup>

Section 37C(1)(b) of the Act covers a situation where the trustees do not become aware of or traced a dependant within the twelve (12) month period but rather the deceased has completed a nomination form whereby he or she has nominated a beneficiary to receive the death benefits. In contrast with section 37C(1)(a) of the Act, section 37(1)(b) of the Act obliges the trustees to distribute the benefit to that nominee on the expiry of twelve (12) months period. Payment of the benefit to a nominee under this sub-section is subject to the following requirements;<sup>84</sup>

- (a) The board has not traced and identified any dependants of the deceased member.
- (b) The twelve-month period has lapsed.
- (c) The deceased has completed a valid nomination form in which the person nominated in writing is not a dependant<sup>85</sup>, and
- (d) The aggregate assets of the deceased member's estate exceed its aggregate debts.

Once the above requirements are met the nominee can only receive a portion of the benefit as is specified by the member in the nomination.<sup>86</sup> The board is only authorised to pay such portion of the benefit as specified by the member in the

---

<sup>81</sup>George L Marx and Kobus Hanekom , *op cit*, 222.

<sup>82</sup>George L Marx and Kobus Hanekom, *op cit*, 222.

<sup>83</sup>Section 37C(1)(b) of the Act.

<sup>84</sup> Nevondwe LT, Section 37C of the Pension Funds Act 24 of 1956: A social security measure to escape destitution. Insurance and tax Journal Volume 26, issue 3, September 2011, 3-24.

<sup>85</sup> As defined in section 1 of the Pension Funds Act 24 of 1956.

<sup>86</sup>George L Marx and Kobus Hanekom, *op cit*, 214.

nomination form and if there is a remainder, such a remainder would have to be distributed to the estate of the deceased.<sup>87</sup> A good illustration of this principle is found in the matter of *Krishnnasamy and others v ABI Provident Fund*<sup>88</sup> (hereinafter referred to as *Krishnnasamy*), although this matter was concluded on different basis, it remains relevant. In *Krishnnasamy* the deceased member nominated his mother, father, sister (hereinafter referred to as complainants) and his girlfriend to receive 25% of the death benefit. The board conducted a lengthy investigation, thereafter the board awarded each nominee 25% of the benefit and deemed same as an equitable distribution.<sup>89</sup> The complainants were dissatisfied with the decision of the board and contended that the relationship between the deceased and the girlfriend had ceased four months immediately prior to the deceased's death and as a result the girlfriend no longer qualified as a nominee , consequently the girlfriend was not entitled to share in the distribution.<sup>90</sup>

The adjudicator however held that the complainants were under the false premise that because the relationship between the deceased and the girlfriend was terminated, in law, she no longer qualifies as a nominee.<sup>91</sup> The adjudicator dismissed this notion by the complainants and concluded that the trustees have correctly exercised their discretion in that the girlfriend qualified as a nominee as stipulated in the nomination form completed by the deceased. However had it been found that the girlfriend is not nominated to receive the benefit, the 25% would not be distributed amongst the known beneficiaries instead the amount would have been awarded to the estate of the deceased.

### **2.3 Distribution to dependants and nominees.<sup>92</sup>**

Section 37C (1)(bA) of the Act states that:

---

<sup>87</sup> George L Marx and Kobus Hanekom, *op cit*, 215.

<sup>88</sup> *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 (PFA).

<sup>89</sup> *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 at 6.

<sup>90</sup> *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 at 8.

<sup>91</sup> *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 at 14.

<sup>92</sup> Section 37C (1)(bA) of the Act.

“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”.

In contrast to section 37C(1)(a) and section 37C(1)(b) of the Act, section 37C(1)(bA) of the Act applies to a situation where the deceased is survived by both the dependants and nominees. This sub-section requires the trustees to effect an equitable distribution within the twelve (12) month period to both the dependants and the nominees. This sub-section considers as valid, only those nominations forms that have been completed on or after the 30 June 1989, thus all nominations made prior to this date for the purposes of this sub-section are deemed to be invalid.<sup>93</sup> Furthermore, by virtue of dependants being involved in this distribution, the payment to the beneficiaries is not subject to the assets of the estate exceeding the liabilities.<sup>94</sup> The factors that are outlined above in the *Sithole* case for considerations by the trustees when making an equitable distribution shall apply *mutatis mutandis* to considerations by the trustees under section 37C(1)(bA) of the Act.

In the matter of *Jordaan v Protektor Pension Fund*<sup>95</sup> the deceased was survived by the complainant (former spouse) and her three children. The deceased was further survived by his wife and two of her children of which one of the children is from her previous marriage. The deceased completed a nomination form in terms which he nominated his wife to receive benefits. The trustees in making an equitable distribution awarded 70% to his wife and two children and awarded 30% to the complainant's children. The complainant contended that the trustees acted inequitably by allocating only 30% of the benefit to her children and that an equitable

---

<sup>93</sup> George L Marx and Kobus Hanekom, *op cit*, 216.

<sup>94</sup> George L Marx and Kobus Hanekom, *op cit*, 216.

<sup>95</sup> *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA).

distribution would have been to distribute the benefit equally amongst the deceased's dependants. It was further contended that the trustees failed to take into account the fact that the deceased was liable for the maintenance, medical expense and schooling of the complainant's children and that they all have the potential for tertiary education. The adjudicator however was inclined to agree with the decision of the trustees in that the deceased's wife was currently unemployed and the children of the complainant were the sole beneficiaries under the deceased's will. The needs of the complainant's children were considered to be less greater than those of deceased's wife and thus it was deemed to be an equitable distribution.

## **2.4 Distribution to estate.<sup>96</sup>**

Section 37C(1)(c) of the Act states that:

“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,<sup>56</sup> into the Guardian's Fund.”

This sub-section applies to a situation where the trustees do not become aware of or cannot trace any dependant of the deceased within twelve (12) months and the latter has not completed a nomination form whereby a nominee is nominated to receive the death benefits. In the absence of a dependant and a nominee, the benefit must be paid into the estate or if no inventory has been filed with the Master of the High Court, the benefit is paid into the Guardian's Fund.<sup>97</sup>

---

<sup>96</sup> Section 37C (1)(c) of the Act.

<sup>97</sup> George L Marx and Kobus Hanekom, *op cit*, 225. See also *Wasserman v Central Retirement Annuity Fund* (1) (2001) 6 BPLR 2160 at 10 where the adjudicator held that :

“In terms of section 37C (1)(c) of the Act, where there are no dependants and nominees, the fund may pay the benefit to the deceased's estate. However, before paying into a deceased's estate, the fund is obliged to conduct an investigation to determine whether there are any dependants or other beneficiaries nominated by the deceased.”

This sub-section therefore provides three exceptions to the general rule that death benefits do not form part of the deceased estate namely;

(a) Where the fund has not discovered any dependants within twelve (12) months after the death of the deceased and there is a nominated beneficiary, however the deceased estate's liabilities exceed its assets;<sup>98</sup>

(b) Where the deceased has no dependants and has not nominated a beneficiary in writing;<sup>99</sup> or

(c) The deceased has designated a nominee only to receive a portion of the benefit, and then the remaining balance must be paid to the estate.<sup>100</sup>

In the matter of *Fourie v Central Retirement Annuity Fund*<sup>101</sup> the deceased was never married during his lifetime and did not complete any nomination form. However the deceased in his will bequeathed his motor vehicle to his mother and the rest of the estate to the complainant whom he was cohabiting with for several years. It became apparent that the relationship between the complainant and the deceased terminated three years prior the deceased's death. Upon the termination of the relationship, the deceased stayed with his mother until he died. In light of the above facts the trustees concluded that the deceased's mother was a *de facto* dependant of the deceased as there was a relationship of inter-dependence between the deceased and his mother. The complainant sought an order directing the fund to pay the death benefit to the deceased's estate, or alternatively to award the 50% each of the benefit between herself and the deceased's mother.

However the adjudicator concluded that the fact that the deceased and his mother were staying together for three years prior to the former's death and that the monthly expenditures of the deceased's mother exceeded her monthly income would indeed require maintenance support from other avenues to survive. This in consequence, qualified the deceased's mother as a dependant in terms of the definition of dependant in terms of section 1 of the Act.

---

<sup>98</sup> *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488 at 13.

<sup>99</sup> *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488 at 13.

<sup>100</sup> *Wasserman v Central Retirement Annuity Fund (1)* (2001) 6 BPLR 2160 at 10.

<sup>101</sup> *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA).

## **CHAPTER THREE: CLASSES OF DEPENDANTS.**

### 3.1. Who is a dependant?

The Pension Funds Amendment Act<sup>102</sup> defines a 'dependant' as follows:

'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 the 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(1) of the Act imposes a duty on the board to take reasonable steps to trace and identify the dependants and their extent of dependency on the deceased. From a reading of section 37C in its entirety, it is clear that dependants are favoured over nominees in the distribution phase.<sup>103</sup> There are three classes of dependants that are created by the definition of dependant above, namely legal dependants, non-legal dependants, and future dependants. These classes are discussed more in detail hereunder.

### 3.2. Legal dependants.

---

<sup>102</sup> Section 1 of the Pension Funds Amendment Act 11 of 2007. This Act came into effect on 13 September 2007.

<sup>103</sup> Nevondwe LT, The Distribution and Payment of a Death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010,39.



A person qualifies as a legal dependant if a legal right exists for such a person to claim maintenance from the deceased, in other words the deceased must be legally liable for the maintenance of the claimant. This category of dependants qualifies as dependants merely by their status and this includes spouses, children, and parents of the deceased who are thus eligible to receive a benefit. This duty imposed on the deceased to maintain a beneficiary under this category must be as a result of a common law obligation or statutory obligation.

The following requirements need to be met in order for a beneficiary to claim legal maintenance from the deceased:

- (a) The relationship between the parties must be such that the law imposes a duty of support;<sup>104</sup>
- (b) The person claiming maintenance must be unable to support himself /herself;<sup>105</sup>
- (c) The person called upon to provide support must have the necessary resources to maintain the claimant.<sup>106</sup>

Under the South African common law, a reciprocal duty of support exists between the following relatives: husband and wife, parent and child, grandparents and grandchildren (or further ascendants and descendants ad infinitum), and siblings.<sup>107</sup> No duty is owed to more remote relatives in the horizontal line, (nephews/nieces, uncles/aunts et cetera), and equally no duty is owed to those who are related through marriage only (in-laws and step-children/parents).<sup>108</sup>

### 3.2.1. Spousal Maintenance.

In a marriage , there is a reciprocal duty of support between the spouses and this duty exist irrespective of whether the parties are married in community of property or

---

<sup>104</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

<sup>105</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

<sup>106</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

<sup>107</sup> Karen Lehmann, Death and Dependency : The meaning of 'dependent' under section 37C of the Pension Fund Act 24 of 1956, The South African Law Journal Volume 126, part 4 ,2009, 653.

<sup>108</sup> Karen Lehmann, *ibid* at 653.

out of community of property.<sup>109</sup> This reciprocal duty of support does not cease when the parties divorce, instead it continues even if the parties are divorced.<sup>110</sup> Maintenance between the spouses may only terminate at the death of the liable party if the agreement so provides, however where there is doubt as to whether an obligation continues after the liable party's death, the courts tend to favour continuation.<sup>111</sup>

In the matter of *Lombard v Central Retirement Annuity Fund*<sup>112</sup> the complainant and the deceased were married for seventeen (17) years and the marriage terminated through a divorce order. A settlement agreement was incorporated in the decree of divorce order and the order did not contain a provision regarding maintenance of each other but only provided that the deceased shall pay the complainant's medical expenses. However the deceased failed to pay the deceased's medical expenses during his lifetime and as a result the complainant paid the expenses from her own pocket. The trustees, in the exercise of their discretion, held the view that the complainant is not a dependant because the settlement agreement which the deceased and the complainant entered into did not have the effect of qualifying the complainant as a dependant; in consequence, the trustees paid the benefits into the deceased's estate. However the adjudicator held the view that the clause in the divorce order relating to medical expenses constitutes a court order which qualifies the complainant as a dependant in terms of paragraph(a) of the definition of dependant and therefore the complainant had a claim against the death benefits arising from the deceased's membership of the fund.

---

<sup>109</sup> The reciprocal duty of support between the spouses is one of the invariable consequences of a marriage. This means that this duty comes into being automatically by operation of law and cannot be excluded by the parties.

<sup>110</sup> Section 7(1) of the Divorce Act 70 of 1979. See also *Dyas v CTS Provident Fund And Another* [2003] BPLR 4448 (PFA) where the adjudicator held that where the divorce order contain an order which required the deceased to pay maintenance in respect of the complainant or her daughter, they would have fallen within paragraph (a) of the definition of the dependant. Although the deceased and the complainant were divorced by a court order that does not *ipso facto* exclude the complainant from being a dependant in section 1 of the Act.

<sup>111</sup> DSP Cronje and J Heaton , South African Family Law, 2004 ,155.

<sup>112</sup> *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA).

### 3.2.2. Maintenance between children and parents.

A duty to maintain a child is regulated by the Maintenance Act.<sup>113</sup> Section 15(1) of the said Act provides that a maintenance order is directed at the enforcement of the common law duty of the child's parents to support that child. The basic principle is that there is a reciprocal maintenance obligation in accordance with both parent's respective abilities.<sup>114</sup> Where a maintenance order exists, such an order demystifies the task of the trustees in that the trustees are only left to examine the order and determine whether the payment by the parent represents a maintenance payment.<sup>115</sup> In the absence of such an order, the common law still imposes a duty on the parents to maintain their children and this duty includes the provision of food, clothing, accommodation, medical care and education.<sup>116</sup>

Children with the necessary means are also under a reciprocal duty to maintain their parents provided that the parents are indigent.<sup>117</sup> Whether the parents are indigent or not would be determined by the facts of each particular case, however our courts have indicated that in order for the claimants to succeed with a claim of parental maintenance, such claimants must prove on balance of probabilities that they are indigent and cannot support themselves, in addition, the deceased must have been able to contribute or did in fact contribute the required support.<sup>118</sup> The mere fact that the parents of the deceased are receiving a pension does not necessarily mean that they are indigent and therefore dependent on the deceased. When a parent receives a pension, such a pension is the source of income that would support him or her for the rest of his or her life and therefore the latter cannot be classified as a dependant of the deceased.<sup>119</sup> There mere allegation that there is a parent-child relationship is not sufficient, there must be evidence that the parent is indeed in need or requires support.

---

<sup>113</sup> Maintenance Act 99 of 1998.

<sup>114</sup> Legal Education And Development (LEAD), Matrimonial Matters 2010 manual compiled by Neels Campher, Pretoria, 45.

<sup>115</sup> George L Marx and Kobus Hanekom, *op cit*, 188.

<sup>116</sup> Section 15(2) of the Maintenance Act 99 of 1998.

<sup>117</sup> George L Marx and Kobus Hanekom, *op cit* 189.

<sup>118</sup> *Smith v Mutual and Federal Insurance Co Ltd* 1998 (4) SA 626 (C).

<sup>119</sup> *Thene v Bidcorp Group Provident Fund* (PFA/GA/6863/05/LCM) (unreported) at paragraph 5.6.

### 3.2.3. Maintenance between grandchildren and grandparents.

A reciprocal duty of support exists between the grandchildren and grandparents subject to the requirements that the claimant is unable to support himself or herself and the deceased was able to provide support or was in fact providing such support to the claimant. The trustees must consider all the relevant factors before effecting distribution. If the parents of the minor child are receiving child grants through social assistance programme, this does not disqualify the minor child from being a dependant of his or her grandparents if the minor had lived with the grandparents and further depended on them both emotionally and financially. A good illustration is found in the matter of *Williams v Lester Algernon Kortje Trust and Another*<sup>120</sup>, where the deceased was survived by five (5) children, however at the time of her death the deceased was living with her grandson, a twelve (12) year old minor whose parents were still alive but unable to support him. The trustees distributed the death benefit in equal shares between the deceased's five children and her grandchild.

A complaint was lodged by one of the deceased's children who contended that the mere fact that the minor child was living with the deceased at the time of her death, does not mean that he (minor) was dependent on the deceased. The complainant's contention suggested or implied that the minor does not qualify as a dependant of the deceased on the basis that the minor's parents are still alive and therefore are still legally liable to maintain their child. The adjudicator dismissed this view and stated that the complainant's view misconstrues the nature of dependency required by the Act. It was therefore concluded that the minor was indeed a dependant of the deceased in that the minor had also developed a strong emotional bond with the deceased and relied on the deceased for financial support.

### 3.2.4 Maintenance between brothers and sisters.

There is a reciprocal duty of support between brothers and sisters subject to the requirements stated above.<sup>121</sup> However it is rather difficult to claim maintenance under this category unlike where a child is claiming maintenance from a parent. The

---

<sup>120</sup> *Williams v Lester Algernon Kortje Trust and Another* [2001] 2 BPLR 1687 (PFA).

<sup>121</sup> See note 3.2 above.

extent of maintenance is not entirely clear and it appears to be payable at the discretion of the presiding officer.<sup>122</sup>

A good illustration on this difficulty of siblings claiming maintenance from each other is found in the matter of *Mokele v SAMWU National Provident Fund*<sup>123</sup> whereby the deceased was unmarried and did not complete a nomination form. After the completion of investigations the trustees found that the deceased was survived only by his two siblings. However the trustees reached a decision and concluded that the siblings were not the dependants of the deceased and therefore paid the benefits to the estate of the deceased. The complainant contended that by virtue of being the sister of the deceased she is, by law, entitled to receive the benefits. However this submission was rejected by the adjudicator and held that there was no legal duty on the deceased to maintain his siblings. It was concluded that the complainant was not financially dependent on the deceased for maintenance at the time of the deceased's death and therefore the complainant fell outside the definition of dependant and is thus not entitled to share in the distribution.<sup>124</sup>

### 3.3. Non-legal dependants or *de facto* dependants

This category refers to those persons whom the deceased was not under any legal obligation to maintain. The dependants under this category may claim maintenance against the deceased despite the latter having no legal duty to maintain the former, subject to the former proving that he/she is dependent on the deceased.<sup>125</sup> This sub-section recognises three classes of dependants namely those persons who in the opinion of the board were dependent on the deceased for maintenance (factual dependents), the spouse of the deceased member and lastly a child of the deceased, including a posthumous child, an adopted child and a child born out of wedlock. The inclusion of the deceased's spouses and children under this sub-section is to ensure that the trustees consider the interests of spouses and children

---

<sup>122</sup> George L Marx and Kobus Hanekom, *op cit* 194.

<sup>123</sup> *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA).

<sup>124</sup> *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA) at 16.

<sup>125</sup> Nevondwe LT, Section 37C Of the Pension Funds Act 24 of 1956: A social security measure to escape destitution. Insurance and tax Journal Volume 26, issue 3, September 2011, 3-24.

in every disposition of death benefits they may make, regardless of the spouse and children's personal circumstances and ages.<sup>126</sup>

### 3.3.1 Factual dependants: sub-section (b)(i) of the definition.

This sub-section gives effect to the provision of section 37C of the Act which is to protect proven dependency even for persons who are involved in relationships which the law does not necessarily accept as constituting legal dependency.<sup>127</sup> The maintenance by the deceased to the claimant under this category must be regular and not be occasional, this maybe through, for example the provision of rent – free accommodation; paying the school fees of a neighbour's child; a mistress paying for her married partner's son's university education abroad, albeit on the expectation that the fees will be repaid, and providing the son with 'pocket money' in excess of what he would have received from his father.<sup>128</sup> The adjudicator in the *Hlathi* case held as follows:

"It follows therefore that there is no exhaustive list of the degrees or levels of dependency for purposes of section 1(b)(i) of the Act. Put differently, "wholly dependent" is not the sole yardstick to determine or measure dependency for purposes of section 1(b)(i) of the Act. Having that in mind, it would certainly be contrary to the intentions of the legislature to exclude a party for purposes of section 1(b)(i) of the Act on the basis that he or she had an "inter-dependent" relationship with the deceased member, or alternatively the parties had an equal relationship as opposed to the dominant and servient one. This leads this tribunal to conclude that in such cases what suffices to prove factual dependency is the sufficient evidence that the parties in a relationship are inter-dependent and as a consequence of the other party's death the surviving partner is left in a financial predicament, or with a financial void or is financially worse off".<sup>129</sup>

It can be concluded from the above remarks that section 37C indeed promotes equality rights of all the dependants of the deceased. The trustees must not be rigid in considering the dependency because each matter differs with merits hence the

---

<sup>126</sup> Karen Lehmann, Death and Dependency : The meaning of 'dependent' under section 37C of the Pension Fund Act 24 of 1956, The South African Law Journal, Volume 126 part 4 .2009, 657.

<sup>127</sup> *Hlathi v University of Fort Hare Retirement Fund* 2009 1 BPLR 46 (PFA) at paragraph 34-35.(hereinafter referred to as the *Hlathi* case)

<sup>128</sup> Karen Lehmann, *op cit*, 658.

<sup>129</sup> *Hlathi v University of Fort Hare Retirement Fund* 2009 1 BPLR 46 (PFA) at paragraph 34-35.

trustees must aim to consider all the factors, such as inter-dependency between the deceased and the claimant, and whether the claimant is in destitute as a result of the passing of the deceased. Suffice to say that there is no sole yard stick to determine dependency; it is therefore in the hands of the trustees to investigate each matter thoroughly and have an open mind to factors that suggests dependency between parties. If there is no dependency between the deceased and the claimant, this therefore makes the task of the trustees easier, because it means that the claimant would not qualify as a factual dependant. A good precedent is found in the matter of *Govender v Alpha Group Employees Provident Fund*<sup>130</sup> (hereinafter referred to as *Govender*)

In *Govender*, the deceased was survived by his wife (complainant) and three major children. Two children of the deceased were financially independent and had indicated that they would cede their benefits to the complainant. The trustees conducted investigations in accordance with section 37C in order to trace all the dependants of the deceased. Upon completion of investigations, it became apparent that the deceased had a girlfriend and a child who was not fathered by the deceased. The deceased paid approximately R200, 00 a month to assist the girlfriend with household supplies and further assisted with payments towards the child's schooling. Having regard to the above information, the trustees awarded 85% of the benefit to the complainant and 15% to the child as a *de facto* dependant. However the complainant contended that the minor child cannot be classified as *de facto* dependant of the deceased. The adjudicator found in favour of the complainant and held that factual considerations did not warrant the minor child to be factually dependent on the deceased as the deceased made only sporadic payments and occasionally made visits to the girlfriend and the minor child.

### 3.3.2 Dependants sub-section (b)(ii) - spouses.

There is no statutory law that recognises the union between the deceased and the spouses<sup>131</sup> referred to under this sub-section. This means that without such statutory

---

<sup>130</sup> *Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA).

<sup>131</sup> This section was amended with effect from 13 September 2007 to the effect that it only refers to the term "spouse". A permanent life partner or spouse or civil union partner with certain Acts of

recognition of the union, there is no automatic reciprocal duty of support that comes into effect between the parties to the union. The spouses that are referred to under this sub-section include customary unions or those unions accordance with the tenets of any Asiatic religion, those who are staying in a monogamous homosexual relationship and cohabitees living as 'husband and wife'.<sup>132</sup> The various categories of spouses are discussed in more detail hereunder.

### 3.3.2.1. Customary law spouses.

Customary marriages were previously not recognised by law as they were polygamous in nature and in consequence contrary to civil marriages. Before the enactment of the Recognition of Customary Marriages Act<sup>133</sup>, parties to the customary marriage were not afforded the same legal protection and benefits similar to those parties who were party to civil marriages. This Act currently gives full legal recognition to customary marriage whether they are monogamous or polygamous in nature, subject to the requirements set out in the Act.<sup>134</sup> This Act however poses a lot of challenges to the trustees regarding claims for benefits by customary spouses in respect of marriages entered into before the enactment of the Act, in that the provision regarding the validity of the customary marriage applies to customary marriages that entered into after the commencement of the Act on the 15 November 2000.<sup>135</sup>

---

Parliament or tenets of any religion is covered by the term "spouse". See also *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA), *Daniels v Campbell NO and Others* [2004] 6 BPLR 5743 (CC).

<sup>132</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, *Pensions and International Journal* Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010,41.

<sup>133</sup> Recognition of Customary Marriages Act 120 of 1998. This Act came into force on the 15 November 2000.

<sup>134</sup> Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 provides that in order for a customary marriage entered into after the commencement of the Act to be valid-

a) the prospective spouses-

i) must both be above the age of 18 years; and

ii) must both consent to be married to each other under customary law; and

b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.

<sup>135</sup> George L Marx and Kobus Hanekom, *op cit*, 197.



Adjudicators are often faced with a task to determine whether there is a concluded marriage under certain traditions. Similarly in the matter of *Moshidi v Kimberley-Clark Provident Fund and Another*<sup>136</sup>, the deceased was survived by his wife (complainant) and four children. The deceased had completed a nomination form whereby he nominated his wife, his four children and his younger brother as beneficiaries. The trustees conducted investigations to trace all the dependants of the deceased and it became apparent that the deceased had a customary wife (Second respondent) who was dependent on the deceased at the time of his death. The trustees departed from the deceased's nomination form and awarded 45% of the benefit to the complainant, 10% each to the children and 15% to the second respondent.

The crux of the complaint is that there is no legal basis for the board's decision to include the second respondent in the distribution of the benefit. The complainant disputed that the deceased had a customary wife as the deceased never consulted her when taking a second wife as required under the *sepedi* culture. The complainant further submitted that if the alleged customary marriage between the deceased and the second respondent indeed took place, the deceased's uncle who under the *sepedi* culture is the one who must negotiate *lobola* on behalf of the deceased, was not present to negotiate such *lobola* on behalf of the deceased. However the deceased brother, sister and the Chief attested to affidavits and confirmed that the deceased and the second respondent were indeed customarily married. It was also apparent that the deceased was staying with the second respondent and occasionally returned to the common home of the complainant. The adjudicator found that the fund's decision to regard the second respondent as the deceased's customary law wife, alternatively as his dependant on the basis of a long-standing relationship of co-habitation, was not improper or incorrect.<sup>137</sup>

Similarly in *Ramoitheki v Liberty Group LTD T/A Liberty Corporate Benefits and Others*<sup>138</sup> the issue was whether the marriage was lawfully concluded in accordance with the Xhosa customary culture. Tshiqi AJ stated:

---

<sup>136</sup> *Moshidi v Kimberley-Clark Provident Fund and Another* [2003] 7 BPLR 4947 (PFA).

<sup>137</sup> *Moshidi v Kimberley-Clark Provident Fund and Another* [2003] 7 BPLR 4947 (PFA) at 4955-24.

<sup>138</sup> *Ramoitheki v Liberty Group LTD T/A Liberty Corporate Benefits and others* [2006] 3 BPLR 227 (W).

“In conclusion I find that on a balance of probabilities the following factors indicate that a customary union existed between the deceased and the second Respondent at the time of his death:

- (i) The payment of *lobola*;
- (ii) The duration of the relationship;
- (iii) The formal nature of the relationship;
- (iv) The involvement of the second respondent in the affairs of the deceased’s family;
- (v) Her active involvement as a primary caregiver during his illness;
- (vi) Her involvement in his funeral arrangements.”<sup>139</sup>

### 3.3.2.2. Asiatic spouses.

According to the Oxford dictionary<sup>140</sup> the term “Asiatic” refers to something/ anything that is connected to Asia. For the purposes of this paper, the term “Asiatic” refers to persons of the Indian community, that is the Muslims, Hindus, Tamils etc. It is submitted that where the parties have concluded their marriage under the tenets of the respective Asian religion, then the surviving spouse from such a union shall be regarded as a dependant.<sup>141</sup>

In *Mashego and others v SATU National Provident Fund and another*<sup>142</sup>, the deceased had an existing customary union with her husband, and the union was solemnised according to Islamic rites. The trustees conducted investigations in terms of section 37C and identified the deceased’s husband as the sole legal dependant by virtue of him being the surviving spouse. The trustees resolved to pay 50% of the benefit to the deceased’s husband and the remainder to the three children of the deceased (complainants) in equal proportions. The complainants contended that their father was not a legal dependant of the deceased. The complainants alleged that their parents separated prior the deceased’s death. The crux of the complaint was whether the deceased’s husband qualified as a spouse of the deceased for

---

<sup>139</sup> *Ramoitheki v Liberty Group LTD T/A Liberty Corporate Benefits and others* [2006] 3 BPLR 227(W) at 238A-C.

<sup>140</sup> Oxford Advanced Learner’s Dictionary, 2005 International Student’s Edition, 7<sup>th</sup> edition. A.S Hornby.

<sup>141</sup> George L Marx and Kobus Hanekom, *op cit*, 200.

<sup>142</sup> *Mashego and others v SATU National Provident Fund and Another* [2007] 2 BPLR 229 (PFA).

purposes of sub-section (b)(ii) of the definition of “dependant” in the Act. It was however submitted that the mere fact that the deceased and the second respondent were separated prior to her death does not *ipso facto* constitute a divorce in terms of Islamic Law.<sup>143</sup> A divorce in terms of Islamic Law is constituted when the husband pronounces or issues a *talaq* (Islamic divorce) for the third time. Consequently, the complainants failed to prove that their father pronounced or issued a *talaq*, thereby dissolving the marriage. It was therefore accepted that the marriage was still in existence at the time of the deceased’s death. The adjudicator was satisfied that the deceased’s husband is a dependant of the deceased as defined in part (b)(ii) of the definition of “dependant” in section 1 of the Act and entitled to be considered in the distribution. The complainants were also considered to be the dependants of the deceased by virtue of them being the children of the deceased in terms of part (b)(iii) of the definition of “dependant” and also by virtue of being nominated in the nomination form they were entitled to be considered for distribution.

### 3.3.2.3. Same-sex spouses

Prior to 30 November 2006 same-sex partners were not regarded as spouses in the definition of dependant or spouses under the Maintenance of Surviving Spouses Act<sup>144</sup>, however many matters were brought before our courts by same-sex partners claiming benefits or maintenance as the “spouses” of the deceased. In *Robinson and another v Volks NO and Others*<sup>145</sup> the deceased and the applicant were involved in a monogamous permanent life relationship for more than 16 years and supported each other both emotionally and financially. The applicant had lodged a claim for maintenance against deceased’s estate in terms of the Maintenance of Surviving Spouses Act<sup>146</sup> however the claim was denied on the basis that the consequences of civil marriage do not apply to permanent life partnerships. The court ordered that the term ‘Spouse’ for the purposes of the Maintenance of Surviving Spouses Act<sup>147</sup> shall include a person in a permanent life partnership; ‘Marriage’ for the purposes of the

---

<sup>143</sup> South African Law Commission, discussion Paper 101: Islamic Marriages and Related Matters: 44. Website : <http://www.justice.gov.za/salrc/dpapers/dp101.pdf> accessed on 23 July 2012.

<sup>144</sup> Maintenance of Surviving Spouses Act 27 of 1990.

<sup>145</sup> *Robinson and another v Volks NO and others* [2004] 4 BPLR 5599 (C).

<sup>146</sup> Maintenance of Surviving Spouses Act 27 of 1990.

<sup>147</sup> Act 27 of 1990.

Maintenance of Surviving Spouses Act<sup>148</sup> shall include a permanent life partnership.<sup>149</sup>

Prior to the 30 November 2006 the same-sex partner could fall within the subsection (b)(i) of dependants provided that the claimant can prove that he/she was dependent on the deceased member for maintenance at the time of his death alternatively if the claimant could prove that they lived in a permanent partnership in which the parties had undertaken reciprocal duties of support, then the claimant may qualify as a spouse under sub-section(b)(ii).<sup>150</sup> The Civil Union Act<sup>151</sup> offers the same legal protection enjoyed by spouses contemplated in the Marriage Act<sup>152</sup> by providing that “husband”, “wife”, or “spouse” in any other law, including common law, includes a civil union partner.<sup>153</sup> This therefore means that the civil union partner is included within the definition of dependant and shall be eligible to receive benefits of the deceased provided that the requirements of dependency are satisfied.

### 3.3.2.4 Cohabitees.

Cohabitation refers to two partners who are living together outside marriage in a relationship which is analogous to or has most of the characteristics of a marriage.<sup>154</sup>

---

<sup>148</sup> Act 27 of 1990.

<sup>149</sup> See also *Satchwell v President of the Republic of South Africa* [2004] 1 BPLR 5333 (CC), where the Applicant who was involved in a long term same-sex relationship challenged the constitutional validity of the provisions of section 8 and 9 of the Judges Remuneration and Conditions of employment Act 88 of 1989. Section 8 provided for payment of two-thirds of the salary which would have been payable to that judge in terms of either section 5 or section 3(1)(a) of the Act until the death of such spouse, respectively section 9 of the Act provided that for the payment of the gratuity contemplated in section 6 of the Act to the Surviving spouse of a deceased judge or to the estate of the said judge if he or she is not survived by a spouse. The Court held that the omission from section 8 and 9 of the Act after the word “spouse” of the words “or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” is inconsistent with Constitution. The court ordered that section 8 and 9 are to be read as though the words “ or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support” appear after the word “spouse”.

<sup>150</sup> George L Marx and Kobus Hanekom, *op cit*, 203.

<sup>151</sup> Civil Union Act 17 of 2006.

<sup>152</sup> Marriage Act 25 of 1961.

<sup>153</sup> Section 13(1) of the Civil Union Act 17 of 2006.

<sup>154</sup> Cronje and Heaton, *South African Family Law*, 227. See also AM Anderson, A Dodd and M C Roos, *Everyone’s Guide to South African Law*, 2006, 53.

The difference between the same-sex partners and the cohabitees is that the cohabitees simply chose not to marry each other and prefer to stay together as husband and wife. A cohabitee whose relationship is not regulated by any legislation, that is, the Marriage Act<sup>155</sup>, Civil Union Act<sup>156</sup>, Recognition of customary Marriages Act<sup>157</sup> or the tenets of any religion, qualifies as a *de facto* dependant.<sup>158</sup> In this regard, many pension funds that provide for spouses' pensions specifically define "spouse" to include legal spouses, customary and Asiatic spouses, same-sex partners and cohabitees.<sup>159</sup> The adjudicator in *TWC and Others v Rentokil Pension Fund and Another*<sup>160</sup> passed the following remarks regarding sub-paragraph (b) of the definition of dependant:

"A more purposive and contextual interpretation of paragraph(b) reveals that the purpose of the legislature in enacting the provision was to broaden the category of persons entitled to share in death benefits by including persons involved in relationships which the law traditionally does not accept as constituting legal dependency. The provision has the progressive aim of recognising that modern society is tolerant of relationships besides the nuclear family arrangements sanctioned by the common law. The test in this regard is whether the parties lived in a relationship of mutual dependence and ran a shared and common household".<sup>161</sup>

The test is whether the parties lived in a relationship of mutual dependence and ran a shared common household. This test was also applied in *Musgrave v UNISA Retirement Fund*<sup>162</sup>. In this matter, the complainant brought a complaint before the office of the Pension Funds Adjudicator regarding her exclusion from the distribution of the deceased's death benefits on the basis that she was cohabiting with the deceased. The adjudicator held that the trustees failed to apply their minds properly to all the circumstances of this matter in that evidence showed that the deceased and the complainant lived together as husband and wife for a period of four years, sharing living expenses and assisting each other financially. The adjudicator held

---

<sup>155</sup> Marriage Act 25 of 1961.

<sup>156</sup> Civil Union Act 17 of 2006.

<sup>157</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>158</sup> George L Marx and Kobus Hanekom, *op cit*, 206.

<sup>159</sup> George L Marx and Kobus Hanekom, *op cit*, 206.

<sup>160</sup> *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA).

<sup>161</sup> *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA) at 223J-224A.

<sup>162</sup> *Musgrave v UNISA Retirement Fund* [2000] 4 BPLR 415 (PFA).

that the complainant was a *de facto* dependant of the deceased and was accordingly entitled to be included in the distribution of benefits.

The funds must not automatically assume that a surviving cohabitee falls under sub-section (b) (i) of the definition of dependant without making further enquires as to the actual financial relations between the deceased and the claimant. Although the board of trustees is entrusted with a discretion to decide the question of factual dependence, this discretion must be exercised on the basis of certain jurisdictional facts and it is further important to take cognizance that factual dependence requires at the very least a dominant-servient relationship, in which one party is the substantive provider.<sup>163</sup>

### 3.3.3. Sub-section (b)(iii) - dependants (children).

This sub-section applies to instances where the deceased member is legally liable to maintain any of his children; this includes a posthumous child, and adopted child and an illegitimate child. The persons under this category would not be dependent on the deceased for maintenance during his or her lifetime, but the deceased member would have become liable for such maintenance at some future date. The Act does not define a Child, but given its ordinary meaning it clearly refers to a minor or adult child.<sup>164</sup> It is submitted that this duty extends to cover also major children of the deceased who were not dependent on the deceased for maintenance.<sup>165</sup>

Similarly in *Van den Berg v Durban Pension Fund*<sup>166</sup> the adjudicator stated that:

“The Act thereby recognises the reasonable expectation of the children to share in the estate of their parents irrespective of the extent of their dependency at the date of death. Therefore the fact that the deceased’s five major children are all self-

---

<sup>163</sup> *Van Der Merve and Another v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 463 (PFA) at 16.

<sup>164</sup> *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2193 at 2198A.

<sup>165</sup> In *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2193 the adjudicator stated that the deceased member’s major child qualified as a dependant of the deceased under sub-section (b)(iii) by virtue of being the deceased’s child.

<sup>166</sup> *Van den Berg v Durban Pension Fund* [2003] 3 BPLR 4518 (PFA).

supporting did not, as contended by the Complainant, disqualify them from sharing in the distribution.”<sup>167</sup>

It is however prudent that the trustees award a higher portion of the benefits to minor children, in the event they are in existence, as opposed to the major children who are financially independent. This decision of awarding major children lesser benefits than minor children would not be deemed unreasonable, the trustees would have acted rationally and reasonably in the exercise of their discretion, which in turn constitutes an equitable distribution.

### **3.4. Future dependants.**

The dependants under this category are those whom the deceased would have been liable to maintain had the latter lived. The fact that the deceased was not legally liable to maintain the claimant at the time of his death is irrelevant under this category. The cardinal question is whether the deceased member would have become legally liable to maintain the claimant at some future date had he or she notionally survived his or her death. The concept of “dependant” is broadened under this category in that all persons whom the deceased was not legally liable to maintain at the time of his death may nevertheless fall within the definition, subject to the requirement that such persons would have been legally maintained by the member had he or she notionally survived his or her death.<sup>168</sup>

A good illustration of this section is found in the matter of *Wasserman v Central Retirement Annuity*<sup>169</sup> where the deceased did not complete a nomination and the trustees after conducting investigations concluded that the deceased had no dependants, thus the entire benefit was paid into the deceased’s estate. A complaint was lodged with the office of the Pension Funds Adjudicator by the deceased’s mother who contended that she was entitled to receive benefits although she was not dependent on the deceased. The adjudicator held that the deceased would have been legally liable to maintain the complainant in light of the complainant’s dire need

---

<sup>167</sup> *Van den Berg v Durban Pension Fund* [2003] 3 BPLR 4518 (PFA) at 4523-9F.

<sup>168</sup> *Wellens v Unsgaard Pension Fund* (2002) 12 BPLR 4214 (PFA) at 4218A-B.

<sup>169</sup> *Wasserman v Central Retirement Annuity* (1) [2001] 6 BPLR 2160 (PFA).

for financial, medical and probably emotional support. This duty arises out of the parent-child relationship. It was therefore concluded that the complainant fell within the paragraph(c) as a future dependant. The significance of this matter cannot be over emphasised in that it implies that this section 37C may also be used to cover future maintenance liability.

Possible dependants in terms of this section might include parents who are not legally dependent on the deceased for maintenance at the time of his death, engaged couples, parties intending to marry and so on.<sup>170</sup>

---

<sup>170</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 41.



## CHAPTER FOUR: MODES OF PAYMENT

### 4.1. Introduction

Section 37C imposes a duty on the trustees to effect the appropriate mode of payment to beneficiaries. Unfortunately modes of payment effected by trustees are also subject to complaints lodged with the office of the Pension Funds Adjudicator. The trustees are tasked, in the exercise of their discretion, to determine whether payment should be effected directly to the beneficiary. The modes of possible payment are dealt with by sections 37C(2),(3) and (4).<sup>171</sup> In addition it must be remembered that section 37C(1) of the Act provides that the benefit shall be paid to such dependant/s or nominee/s as the case may be. This on its own is direct payment to the beneficiary although it is not expressly stated in sections 37C(2),(3) and (4) and therefore forms part of the methods of payment.<sup>172</sup> It is therefore safe to say that the following modes of payments are regulated by section 37C, namely

---

<sup>171</sup> Sections 37C (2), (3) and (4) reads:

(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 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.

<sup>172</sup> Naleen Jeram, Modes of payment.

[http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu)  
Accessed 19 June 2012. See also M Mhango and N Dyani, The duty to effect an appropriate mode of payment to minor pension beneficiary under scrutiny in death claims, Potchefstroom Electronic Law Journal (2009) volume 12, no 2, 145.

direct payment to the beneficiary, payment to a trust or guardian's fund, payment to a minor and payment to a major. These payments can be made in one of the methods or a combination thereof.<sup>173</sup> The objective of these provisions is to prevent the misuse of the benefits by irresponsible beneficiaries or any person who is the lawful guardian of the beneficiary (where for instance, payment is made in a lump sum). In order to curb this misuse of the benefits, the sections provide that in certain circumstances,<sup>174</sup> the trustees may without written consent of the beneficiary, pay the benefits either in the trust or instalments, provided that the trustees deem such mode of payment to be in the interest of the beneficiary. The discretion that is exercised by the trustees when deciding the appropriate mode of payment must be exercised vigilantly by taking in to consideration all the relevant factors in that specific case and must be objectively defensible if it is to survive judicial review in the event that it is challenged.<sup>175</sup>

#### **4.2. Payment to a trust or Guardians fund.**

Section 37C(2) regulates the payment of death benefits to a trustee as contemplated in the Trust Property Control Act<sup>176</sup> for the benefit of a dependant or nominee and deems same as payment to the beneficiary. As already stated above<sup>177</sup> there has been a lot of difficulty in regulating payments of death benefits to a trust as contemplated in the Trust Property Control Act<sup>178</sup>. This difficulty is perpetuated by the mismanagement and improper governance of these funds which operate under the jurisdiction of the Master of the High Court and ultimately prejudicing the recipients of the benefits, that is the dependant or nominee or both. The mismanagement of funds is generally as a result of lack minimal professional skills on the part of the trustees to properly administer the trust, moreover due to poverty and debts, there is always a threat that the benefits may be utilised to make ends

---

<sup>173</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 45.

<sup>174</sup> Section 37C(2) and section 37C(3).

<sup>175</sup> Karin Mackenzie, Who will guard the Guards? Insurance and Tax, Volume 22 no 4, December 2007 40.

<sup>176</sup> Trust Property Control Act 57 of 1998.

<sup>177</sup> See Chapter One, Note 2 above.

<sup>178</sup> Trust Property Control Act 57 of 1998.

meet and not for the purpose that the benefits are intended to fulfil. Furthermore, the costs of establishing and administering a trust is often high which has the consequences of reducing the benefits which generally are not so much to support the dependants for a longer period. It is therefore submitted that payment of benefits into a trust is not at all times prudent in that the legislation that regulates the trust, that is the Trust Property Control Act<sup>179</sup>, was not enacted to offer social protection to the dependants of the deceased. As a result of these disparities, there would always be gap between social security legislations and those legislations that are not meant to offer social security, which ultimately is to the prejudice of the beneficiaries.<sup>180</sup>

The problems brought about payment of benefits to the trustees who do not have proper governance of the trust fund have led to the creation of beneficiary funds.<sup>181</sup> The aforementioned funds were solely created to minimise the mismanagement and abuse of death benefits allocated to minors and widows by pension funds, held in trust by trust funds.<sup>182</sup> In order to alleviate the abuse and mismanagement of death benefits, the Act<sup>183</sup> no longer recognises payment of benefits to a trust or a trustee as constituting payment towards the dependants or nominee, rather the Act recognises payment of death benefits to beneficiary fund or guardians and caregivers as a payment to the dependant or nominee.<sup>184</sup>

---

<sup>179</sup> Trust Property Control Act 57 of 1998.

<sup>180</sup> Karin Mackenzie, *op cit*, 40.

<sup>181</sup> Beneficiary Funds have been created by The Financial Services General Laws Amendment Act 22 of 2008 which came into operation with effect from 1 November 2008.

<sup>182</sup> Nevondwe LT, Creation of beneficiary funds in terms of section 15(2) of the Financial services General Laws Amendment Act 22 of 2008, *De Rebus*, June 2009, 47.

See also Naleen Jeram, Benefits payable by retirement funds:

[http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu)  
Accessed 19 June 2012.

<sup>183</sup> The Financial Services General Laws Amendment Act 22 of 2008.

<sup>184</sup> Section 15(2) of The Financial Services General Laws Amendment Act 22 of 2008 of reads:

(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

The Act provides provisions that regulate beneficiary funds in such a manner that curbs the financial losses that emerged as a result of the Trust Property Act. In order to ensure that there is no reoccurrence of mismanagement of funds there are certain formalities that have been put in place. The beneficiary funds require the following to be complied with:<sup>185</sup>

- (a) The fund must be subjected to the annual audit;
- (b) The fund must have independent trustee representation;
- (c) It is imperative that the fund reports to Financial Services Board (hereinafter referred to as (FSB) annually on financial statements;
- (d) The rules that are applicable in the fund have to be registered and approved by the FSB;
- (e) The fund must obtain a section 13B administrator licence; this will in turn ensure that the fund meets prescribed requirements for systems and capabilities.
- (F) The fund must be exempted from the provisions of Financial Intelligence Centre Act<sup>186</sup> (hereinafter referred to as FICA) and finally;
- (g) The fund must have an administration agreement with the administrator setting out duties and service standards.

The beneficiary funds seem to protect the interest and dependency of the beneficiaries which is the main objective of enacting section 37C. These funds regulate the death benefits and ensure that at an appropriate time, such benefits are available to the beneficiaries, whether it is a minor or a major beneficiary. It is

---

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.

See also Nevondwe LT, Recent amendments in the Pension Funds Act on divorce and death benefits in the Financial Services Laws General Amendment Act 22 of 2008, pension world South Africa, 2009.

<sup>185</sup> Nevondwe LT, Creation of beneficiary funds in terms of section 15(2) of the Financial services General Laws Amendment Act 22 of 2008, De Rebus, June 2009, 47.

<sup>186</sup> Financial Intelligence Centre Act 38 of 2001.

therefore safe to say that beneficiary funds demarcated the loophole that existed in the pension industry by imposing strict measures that promote section 37C as a social security measure for the dependants of the deceased to escape destitution. Since the beneficiary funds falls under the ambit of the pension funds organization, the advantage that will be enjoyed by the beneficiaries is that in case of any dissatisfaction on the part of the beneficiary, the disgruntled beneficiary can lodge a complaint against this fund with the office of the Pension Funds Adjudicator. This privilege was not enjoyed by disgruntled beneficiaries where funds have been misused under a trust because the fund's responsibility terminated immediately when payment was made to a trust and such payment was deemed to be payment to a beneficiary. In other words the beneficiaries had no recourse where there has been a mismanagement of funds under a trust.

#### 4.3. Payment to Minor.

It is prudent to first establish who qualifies as a minor person. According to the South African Constitution, which is the supreme law of the country, a child is a person who is under the age of 18 years.<sup>187</sup> There are certain juristic acts which a minor cannot perform without the assistance of his or her guardian (for example, conclusion of contract). This means that consent of a guardian must be obtained.<sup>188</sup>

Payment of benefits to a minor in this respect may take form in three different ways namely, payment to the guardian in instalments<sup>189</sup>, payment of a lump sum to the guardian and payment into the beneficiary fund.<sup>190</sup> The question is whether a guardian can be deprived of the right to administer the monies on behalf of the minor? Although this question relates to administration of benefits in trust in terms of section 37C(2), its significance to this study cannot be ignored as it forms part of the jurisprudence in the pension industry. The answer to this question is affirmative and it is confirmed in the matter of *Chitja v Alexander Forbes Financial services and*

---

<sup>187</sup> South African Constitution, Act 108 of 1996, Section 28(3).

<sup>188</sup> DSP Cronje and J Heaton, South African Family Law, 2004, 20.

<sup>189</sup> This is subject to reasonable interest rate, having regard to the fund return earned by the fund.

<sup>190</sup> As stated above (see note 2), section 37C(2) has been deleted and replaced with Section 15(2) of the Financial services General Laws Amendment Act 22 of 2008 which recognises payment of benefits into beneficiary funds as payment made to the beneficiary.

others<sup>191</sup> where the adjudicator stated that it is not prudent to allow a person who cannot administer his or her own assets to administer the minor's benefit. The adjudicator further stated that the following factors regarding the person requesting to administer the minor's benefits must be taken into consideration, namely; educational status, financial literacy, past record of managing the family's financial affairs and the child's needs and whether the person has a history of having outstanding and poorly managed debts.<sup>192</sup> The mere fact that the person is not the legal guardian of the minor is not in itself sufficient to deprive such a person of a right to administer the monies on behalf of the minor child. There must be cogent reasons for depriving such a person of this right and it must be in the best interest of the child.<sup>193</sup>

In the matter of *Mabuza v Mine Workers Provident Fund*<sup>194</sup> the complaint also related to the mode of payment whereby the complainant contended that the board's decision to pay the minor's benefits into trust without first ascertaining whether she was indeed incapable of administering such benefits was unjustifiable. The fund was however not in a position to file any response; consequently the adjudicator exercised its powers in terms of which a default judgement was granted against the fund. It was ordered that the fund must first determine whether the complainant was not qualified to administer the benefits on behalf of the minor children. The significance of this matter is that the board must always ensure that before depriving any person of the right to administer the benefits of the minor children, there must be

---

<sup>191</sup> *Chitja v Alexander Forbes Financial services and others* PFA/GA/8633/2006/SM (unreported).

<sup>192</sup> *Chitja v Alexander Forbes Financial services and others* PFA/GA/8633/2006/SM (unreported) at 5.8 and 5.9. See also *Malanga v Group Five Multi Benefit Retirement Fund* [2001] 10 BPLR 2607 (PFA) at 2610H–2611B where it was stated that failure to consider these factors would have the consequence of leaving the dependants of the deceased without support, which would defeat the purpose of section 37C which is to protect the dependency of the dependants.

<sup>193</sup> In the matter of *Kowa v Corporate Selection Retirement Fund* PFA/GA/14151/2007/SM (unreported), the adjudicator stated that the board erred in their decision to pay the minor's share of benefits into trust without first considering, *inter alia*, the ability of the guardian to administer the monies. See also *Lebepe v Premier Foods Provident Fund* PFA/NP/5947/2005/RM (unreported) where the complainant was dissatisfied with board's decision to pay the benefits of her minor children into trust. The complainant contended that such a decision was unjustified in that she had passed her grade 11 and had attended several financial management courses at educational and business institutions. The Adjudicator concluded that the board had erred in failing to consider the ability to administer the benefits; consequently the board's decision to pay the benefits in trust was set aside.

<sup>194</sup> *Mabuza v Mine Workers Provident Fund* [2008] 1 BPLR 39 (PFA).

cogent reasons either in law or in facts that allows the board to deny such a person the right concerned.

The board should carefully assess the appropriate mode of payment, weighing both the advantages and disadvantages of each and further considering the best interest of a child. Mhango and Dyani suggest that the board should first consider direct payment of the benefit before other alternative modes of payment, and where there is a good reason both in law and fact not to effect a direct payment such other alternative modes of payments may be considered.<sup>195</sup> However, if the board considers the payment in instalment as appropriate and in the best interest of the minor, the board may effect such mode of payment until such time the minor reaches the age of majority where now the full amount shall be payable to him. The board may also provide the amount in instalments to the minor who just reached the age of majority provided that the minor now gives consent. It is generally not advisable for the board to pay the lump sum of the benefits to the guardian, despite the guardian's ability to administer the monies or having educational status and financial literacy. This is because of the risks that are generally associated with this mode of payment and this includes inter alia, the fact that the money might be usurped by the creditors of the guardian and the money might be used for other purposes.<sup>196</sup>

#### **4.4. Payment to a Major.**

The board remain tasked with determining the appropriate mode of payment with regard to major beneficiaries. Such a determination must be justified by law or the circumstances of that particular case.<sup>197</sup> However a distinction must be drawn between modes of payment that are applicable to minor and major beneficiaries due

---

<sup>195</sup> M Mhango and N Dyani, The duty to effect an appropriate mode of payment to minor pension beneficiary under scrutiny in death claims, Potchefstroom electronic law journal 2009 Volume 12, No 2,165.

<sup>196</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 45. See also Karin MacKenzie. Who will guard the Guards? Insurance and Tax, Volume 22, no 4, December 2007, 40.

<sup>197</sup> Naleen Jeram, Modes of payment.

[http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu)  
Accessed 19 June 2012.

to different considerations and principles that are applicable.<sup>198</sup> Payment of benefits to majors is regulated by section 37C(4) and according to this sub-section payment may be effected in two ways, namely, directly to the major or in instalments to the major beneficiaries. The board may not unilaterally effect payment of benefits instalment without the consent of the major beneficiaries. This therefore means that where the board made such a decision without the written consent of the major beneficiary, such a disgruntled beneficiary may lodge a complaint with the office of the Pension Funds Adjudicator.

Where the major has furnished the board with a written consent to pay the benefits in instalments, the board must effect such payment in accordance with the agreement entered into with the major beneficiary.<sup>199</sup> The agreement entered into may be terminated by either party, provided that the party intending to terminate the agreement provides a written notice of such termination. The said notice must not be less than ninety (90) days, failing which same constitutes short notice which therefore does not compel the other party to act upon expiry of such notice.<sup>200</sup> This means that where a major beneficiary gives the fund a termination notice of less than ninety (90) days, the fund shall not cease paying in instalments on the expiry of such notice; instead the fund shall cease paying in instalments upon the expiry of the ninety (90) days period. After the expiry of the 90 days period the major shall be entitled to the remaining full amount.

In *Tsukudu and Another v Iscor Employees Provident Fund*<sup>201</sup> the fund distributed benefits equally amongst the deceased's major children. The fund did not pay the benefits forthwith to the beneficiaries; instead the fund withheld the funds and paid the interests that accrued on the benefits. The benefits were only paid at a later stage to an academic institution to cover the tuition fees of both beneficiaries and this led to a complaint being lodged with the office of the Pension Funds Adjudicator. The Adjudicator acknowledged that payment to major beneficiaries may only be paid in instalments provided that there is a written consent, failing which the amount must

---

<sup>198</sup> George L Marx and Kobus Hanekom, *op cit*, 236.

<sup>199</sup> It is paramount that the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement [section 37C(4)(a)(i)].

<sup>200</sup> Section 37C(4)(a)(ii) of the Act.

<sup>201</sup> *Tsukudu and Another v Iscor Employees Provident Fund* PFA/GA/963/2004/LM (unreported).



be paid in full to the beneficiaries. In arriving at a decision, the adjudicator stated that both beneficiaries were majors at the time when the benefit accrued to them and as a result they were entitled to have the benefits paid to them directly unless they have entered into an agreement with the fund to have the benefits paid in instalments. On this basis, the adjudicator concluded that a benefit in terms of section 37C(4)(a) cannot be held in the fund's portfolios, unless the major beneficiary consents to the instalment payment basis, consequently it was ordered that the fund pay the benefit directly to a major beneficiaries.

Similarly in the matter of *Baloyi v Ellerine Holdings Staff Limited Pension Fund*<sup>202</sup> a complaint related to the trustees' decision to invest death benefits of the complainant in a fixed-term interest-bearing account with a banking institution without her prior knowledge and consent. Although the fund argued that such an investment was made with the knowledge of the complainant, the adjudicator concluded that the fund's decision to effect this mode of payment without the consent of the complainant was contrary to the provisions of section 37C and was thus unlawful. The adjudicator ordered that the fund pay the complainant's benefits forthwith.<sup>203</sup>

Prior to 1 November 2008 it was not unclear whether the board may, without the consent of the major beneficiary pay the benefit due to a major to trust company in terms of section 37C(2). However, this issue was ironed in the matter of *Moralo v Holcim South Africa Provident fund*<sup>204</sup> where the fund placed the benefits of the deceased's widow into a trust without her consent and argued that such a decision was necessary as the widow was unemployed, cared for a minor of the age of five and was twenty five (25) years from retirement her retirement age.<sup>205</sup> The adjudicator arrived at a different view and reiterated that compelling or exceptional circumstances must exist in order to depart from the default position of direct payment of benefits to a major beneficiary. In arriving at the decision, the adjudicator stated that:

---

<sup>202</sup> *Baloyi v Ellerine Holdings Staff Limited Pension Fund* 2005 (7) BPLR 606 (PFA).

<sup>203</sup> See Cikizwa N Nkuhlu, Choosing an appropriate mode of payment of death benefit proceeds Website::[http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexis.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) Accessed on 19 June 2012.

<sup>204</sup> *Moralo v Holcim South African Provident fund* [2007] JOL 20415 (PFA).

<sup>205</sup> *Moralo v Holcim South African Provident fund* [2007] JOL 20415 (PFA) at Paragraph 17.

“However, the direct payment of a major beneficiary's benefit is the default position which should be adopted save for exceptional circumstances. It is needless to state that the facts of each case must be carefully evaluated in determining whether to depart from the default position. Circumstances which may warrant payment of a major beneficiary's benefit into trust may be in instances where the beneficiary is labouring under a legal disability such as (but not limited to) prodigality, insolvency or mental disability consistent with the Mental Health Act 18 of 1973. However, since the direct payment of the benefit to the major should be the norm, any deviation therefrom has to be justifiable on legal or factual grounds”.<sup>206</sup>

These exceptional or compelling circumstances must be justified in law or by facts of that particular matter. It was thus concluded that there are no compelling or exceptional circumstances in this matter that justified the departure of direct payment of benefits to the major and consequently the fund was ordered to pay the benefits directly to the major beneficiary.

The significance of this decision cannot be over emphasised in that it contributes to the jurisprudence of the South African pension law. The fund cannot take a unilateral decision to depart from the default position of direct payment of benefits to major beneficiary without compelling circumstances. These circumstances include insolvency or mental disability on the part of the major beneficiary or his inability to manage his own affairs. Only when these circumstances exist the decision to depart from the directly paying the benefits to the major beneficiary will be justified.

The following options are available with regard to the payment of a benefit to a major after 1 November 2008:

- (a) The default position that requires direct payment to be made to the major beneficiary remains applicable.
- (b) The board may pay the benefits to a trust company (as permitted prior 1 November 2008) that has been nominated by the member or the major beneficiary or person recognised in law or appointed by a Court (such as a

---

<sup>206</sup> *Moralo v Holcim South African Provident fund* [2007] JOL 20415 (PFA) at paragraph 20.

Curator) as the person responsible for managing the affairs or a meeting the daily care needs of a major.<sup>207</sup>

- (c) The board may pay the benefit to the person recognised in law appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of a major.<sup>208</sup>
- (d) The board may pay the benefit to the beneficiary fund.<sup>209</sup>
- (e) The payment can be made in instalment basis subject to the consent of the beneficiary.<sup>210</sup>

The adjudicators are not eager to interfere with the management of the benefits of a major beneficiary unless factors in law or facts exist which justify such interference. In order to minimise the complaints that are brought before the office of the Pension Funds Adjudicator the board must conduct extensive investigations into the affairs of a major beneficiary. This will in turn provide proper guidelines as to whether compelling circumstances do exist that justifies the decision to depart from directly paying the benefit to the major beneficiary.

---

<sup>207</sup> George L Marx and Kobus Hanekom, *op cit*, 235.

<sup>208</sup> George L Marx and Kobus Hanekom, *op cit*, 236.

<sup>209</sup> George L Marx and Kobus Hanekom, *op cit*, 236.

<sup>210</sup> George L Marx and Kobus Hanekom, *op cit*, 236.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS.

The intentions of the legislature are very clear pertaining to section 37C. The section was enacted to serve a social function by protecting the dependants of the deceased from destitution. This also has the effect of minimising the state's liability to support the dependants of the deceased through social assistance programmes. The government clearly had good intentions with section 37C because the death benefits are put under the control of the trustees to distribute equitably amongst the dependants and nominees of the deceased.<sup>211</sup> It has been illustrated in this study the difficulties which the trustees encounter, when determining whether a person qualifies as a dependant of the deceased.

I am inclined to agree with the adjudicator in *Bosch's case*<sup>212</sup> that it is prudent for the trustees to avoid issues that have no bearing on the matter because these issues often have the effect of having the trustees lose sight of the real issues at hand. It is therefore submitted that once the trustees lose sight of the issues at hand, their discretion would be based on an incorrect principle which ultimately would be subjected to a complaint lodged with the office of the Pension Funds Adjudicator.

It is evident from this study that section 37C does not provide guidance to the trustees to allocate and pay death benefits but it can be concluded that the crucial factors will always be dependency and the six factors that have been mentioned in *Sithole's case*.<sup>213</sup>

It is further evident from this study that section 37C is fraught with many problems. I submit that the amendment of this section is necessary rather than abolishing the whole section because its object is to ensure that those persons who were

---

<sup>211</sup> See Manamela T, *op cit*, 292. See also Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 47.

<sup>212</sup> *Bosch v The White River Toyota Provident Fund* [2001] 3 BPLR 1702 at 1705H.

<sup>213</sup> See also Nevondwe LT, Malatji T and Rapatsa M, Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?, Pensions and International Journal, November 2011, Volume 16, No.4, 289.

dependent on the deceased are not left in destitute. This is vital especially in a society where poverty thrives.

I agree with Nevondwe that section 37C needs to be amended in order to provide guidelines to the trustees to distribute and pay the death benefit in an equitable manner.<sup>214</sup> These guidelines may for example, provide the order of priority of the dependants and nominees. This would minimise the number of complaints that are lodged with the office of the Pension Funds Adjudicator regarding the trustees' failure to distribute and pay the death benefit equitably among the dependants and nominees of the deceased.

I concur with Manamela that section 37C needs to be amended in order to provide the steps to be taken by the board in determining the existence of the dependants, their whereabouts, and the extent of their dependency.<sup>215</sup> This is important because without such guidelines, the investigations into the existence of these dependants will continue to be flawed. Ultimately the dependants would be prejudiced.

It has been suggested that the trustees must consult third parties in order to ascertain the existence of the dependants.<sup>216</sup> This includes consultation with, *inter alia*, the employer of the deceased, the spouse or cohabiting partner, former spouse or cohabiting partner, if any, major dependants, nominated beneficiaries, colleagues at the deceased member's workplace, and other family members.<sup>217</sup>

In addition to the aforementioned amendments, section 37C should be amended to also provide condonation in respect of complaints lodged outside the three (3) year period in terms of section 30I of the Act. The lack of condonation in this respect

---

<sup>214</sup> Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 47.

<sup>215</sup> Manamela T, *op cit*, 293.

<sup>216</sup> ABSA Consultants and Actuaries Guidelines for the Distribution of Death Benefits at 6-7, available at <http://www.easyinfo.co.za/html/custom/absa/distribt.htm>, visited on 13 March 2012.

<sup>217</sup> *Ibid*.

disadvantages the poor people in the rural areas because most of them are not aware of their rights under pension law.<sup>218</sup>

It is further suggested that the funds amend their rules and make it compulsory for members to complete nomination forms. Furthermore, it would be prudent if the fund requests members to update these nomination forms annually identifying both their legal and non-legal dependants.<sup>219</sup> This measure would ensure that dependants are identified and traced expeditiously without any complexities.

One may, however, argue that the pension member is in a much better position to determine the dependency needs of his or her beneficiaries and the amount to be allocated to each beneficiary, as a result greater recognition should be given to these nomination forms. It is however submitted that pension members generally conceal *de facto* dependants to avoid recriminations from family or public members in general. One here thinks naturally of community leaders who are generally given the utmost respect by members of the community. If such a person impregnates another woman outside his marriage which would be perceived as against good morals, such a situation would likely be kept a secret for the sake of the reputation of the community leader. Therefore where such a community leader is a member of a pension fund and has also failed to disclose such a *de facto* dependant in the nomination form, this would be prejudicial to such a dependant. This would, in essence, be contrary to the legislature's intention in terms of section 37C.

It is evident from *Wellen's*<sup>220</sup> case that section 37C requires the trustees to determine, through current evidence, whether a claimant would have become dependent on the deceased in future based on that evidence. This was however much easier to determine in this matter because the claimant's health had deteriorated. What is interesting is how the trustees were going to evaluate the claimant as beneficiary assuming the claimant's health did not deteriorate and was financially independent. It has been argued that it is impossible for the board to

---

<sup>218</sup> Nevondwe LT , Time limits on lodging complaints to the Pension Funds Adjudicator, Juta Business Law Journal , 2008 volume 16, issue 2, 47.

<sup>219</sup> See also Ngwalana V, Presentation on section 37C, Pension Lawyer's Association (7 March 2005). Website: [www.pensionlawyersassociation.co.za](http://www.pensionlawyersassociation.co.za) (accessed on 06 August 2012).

<sup>220</sup> See chapter 3 above, 41.

determine whether a person would have become dependent on a member based on current evidence as there are too many variables and anomalies present in the exercise of this discretion.<sup>221</sup> It is however, suggested that the trustees must consider all the relevant factors that would determine whether a person would have been dependent on the deceased and this includes *inter alia*, sickness and old age. Although it may be argued that the aged receive old age grants in terms of social assistance, it is however submitted that old grants are merely used for basic needs and such amount would not suffice where an aged person's health needs medical attention. So it is concluded that the inclusion of future maintenance liability regardless of the current maintenance liability is in accordance with the provisions of section 37C that sees to all the interest of the dependants of the deceased.

In conclusion, the board of trustees are under an obligation to act in the best interest of the members.<sup>222</sup> It is submitted that this duty extends to the dependants and nominees of the deceased member because these are the recipients of the member's death benefits. Accordingly the board of trustees must act impartially at all times with the objective of equitably distributing death benefits to the beneficiaries in accordance with the object of section 37C.

---

<sup>221</sup> Ngwalana V, *op cit*, 22.

<sup>222</sup> Section 7C of the Act. This section regulates the objects of the board of trustees.

## **BIBLIOGRAPHY**

### **Books**

AM Anderson, A Dodd and M C Roos, Everyone's Guide to South African Law, 2006.

Choma HJ and Nevondwe LT, Socio-economic rights and financial planning in South Africa (2010).

DSP Cronje, J Heaton, South African Family Law, 2004.

George L Marx and Kobus Hanekom , The manual on South African Retirement Funds and other Employee Benefits, 2010.

Legal Education And Development (LEAD), Matrimonial Matters, 2010 manual compiled by Neels Campher, Pretoria.

Olivier MP, Okpaluba MC, Smit N, Thompson M, Du toit AM, Greyling E, Jansen van Rensburg L, Liffmann R, Ogunronbi SO and Porter I, Social Security Law General Principles (1999).

### **Articles**

Karen Lehmann, Death and Dependency : The meaning of 'dependent' under section 37C of the Pension Fund Act 24 of 1956, The South African Law Journal, Volume 126 part 4 .2009.

Karin MacKenzie. "Who will guard the Guards?" Insurance and Tax, Volume 22 no 4, December 2007 at page 40.

Manamela T, Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956 , South African Mercantile Law Journal ( 2005 ) Vol 17.

M Mhango, An Examination of the Accurate Application of the Dependency Test under the Pension Funds Act 24 of 1956, Potchefstroom electronic law journal 2010, Volume 13, No 2.



M Mhango and N Dyani, The duty to effect an appropriate mode of payment to minor pension beneficiary under scrutiny in death claims, Potchefstroom electronic law journal 2009 Volume 12, No2.

Mhango, Examining the provision of pension death benefits to cohabitees or life partners under the South African Pension Funds Act of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume. 15, 3, 226–237

M Mhango, what should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants? Potchefstroom electronic law journal 2010, Volume 13, No 2.

Nevondwe LT, South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act, pensions and International Journal, Palgrave Macmillan Publishers, UK, Volume. 15, 4, March 2010

Nevondwe L T, Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional?, Juta Business Law Journal(JBL), 2007 Volume 15, issue 4

Nevondwe L T, The distribution and payment of a death benefit in terms section 37C of the South African Pension Funds Act, 24 of 1956, Pensions and International Journal Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010

Nevondwe LT, Malatji T, Rapatsa M, Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956 ?, Pensions and International Journal, November 2011, Volume 16 No.4,

Nevondwe LT, Section 37C of the Pension Funds Act 24 Of 1956, a social security measure to escape destitution, Insurance and Tax Journal, Volume 26, No 3, September 2011.

Nevondwe LT, Creation of beneficiary funds in terms of section 15(2) of the Financial services General Laws Amendment Act 22 of 2008, De Rebus, June 2009, page 47.

Nevondwe LT, Recent amendments in the Pension Funds Act 24 of 1956 on divorce and death benefits in the Financial Services Laws General Amendment Act 22 of 2008, pension world South Africa, 2009, Lexis Nexis Publishers.

Nevondwe , Time limits on lodging complaints to the pension funds Adjudicator, *Juta Business Law Journal* , 2008 volume 16 issues 2, page 43-47.

### **Dissertations and papers presented in Conferences**

Ngwalana V, Presentation on section 37C, Pension Lawyer's Association (7 March 2005). Website: [www.pensionlawyersassociation.co.za](http://www.pensionlawyersassociation.co.za) (accessed on 06 August 2012).

### **Websites**

ABSA Consultants and Actuaries Guidelines for the Distribution of Death Benefits at 6-7, available at <http://www.easyinfo.co.za/htm/custom/absa/distriht.htm> (accessed on 13 March 12)

*Cikizwa N Nkuhlu*, "Choosing an appropriate mode of payment of death benefit proceeds".

[http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (Accessed on 19 June 2012)

Naleen Jeram, "Modes of payment".

[http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (Accessed on 19 June 2012)

Naleen Jeram, Benefits payable by retirement funds:

[http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates\\$fn=default.htm\\$vid=mylnb:10.1048/enu](http://www.mylexisnexus.co.za/nxt/gateway.dll?f=templates$fn=default.htm$vid=mylnb:10.1048/enu) (Accessed on 19 June 2012).

South African Law Commission, Discussion Paper 101: Islamic Marriages and Related Matters: 44).

<http://www.justice.gov.za/salrc/dpapers/dp101.pdf> (Accessed on 23 July 2012)