

**DOES FREEDOM OF TESTATION SUPERSEDE THE POWERS OF THE  
BOARD OF TRUSTEES TO ALLOCATE A DEATH BENEFIT IN TERMS OF  
SECTION 37C OF THE PENSION FUNDS ACT, 24 OF 1956?**

**BY**

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## **ABSTRACT**

*Section 37C of the Pension Funds Act was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act and government policy. Its purpose is to make sure that the dependants of the deceased member are not left destitute upon the death of the member. 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. 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.*

## DECLARATION BY SUPERVISOR

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

.....

**Adv. Lufuno Tokyo Nevondwe**

**March, 2015**

## DECLARATION BY STUDENT

I, **Mogari Loggen Marodi** declare that this mini-dissertation submitted to the University of Limpopo (Turfloop Campus) for the degree of Masters of Laws (LLM) in Labour Law has not been submitted previously by me for a degree at this University or any other University, that it is my own work in design and execution and all material contain herein has been dully acknowledged.

.....

**Mogari Loggen Marodi**

**March, 2015**

## **DEDICATION**

I dedicate this dissertation to my late mother Mahlako Nurse Marodi who has always seen good in me. It is also dedicated to my sources of inspiration my wife Linkie Shaku, my Uncle Maoto Legare, my brother Juda Marodi, my friend Steve Rakgalakane.

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I would like to appreciate the divine support of my family especially my grandmother, Mathabathe Legare, Linkie Shaku for their support, emotionally and financially during the whole period of my LLM Studies. I would like to thank them for giving me the courage to carry on and for always believing and having faith in me.

Honour and glory is God who has given me wisdom, understanding, courage, perseverance and divine protection throughout my studies. For I know that I can do all things in Christ who strengthen me.

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## **LIST OF ABBREVIATIONS**

LRA	Labour Relations Act
PFA	Pension Funds Act
DA	Divorce Act
EA	Estate Act
FISA	Financial Institution Second Amendment Act
TPCA	Trust Property Control Act
FSGLA	Financial Service General Law Amendment Act
PFAA	Pension Funds Amendment Act



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## CHAPTER ONE: INTRODUCTION

### 1.1. Historical background to the study

Modern pension funds owe their existence largely to the industrial revolution and the social and technological advances that have since taken place.<sup>1</sup>

Although pensions had been paid in one form or another for hundreds of years prior to these advances, particularly in Europe,<sup>2</sup> employees tended to work throughout their lives, and in infirmity were cared for by their extended family unit or by the local community.

The industrial revolution saw a major change in the nature of society and the start of mass urbanization. Industrial employers took over the role of work and sustenance provider, and the village and family unit was gradually broken down. As time went on, employers needed to strive for business efficiency and productivity which led to a shorter effective working life, and it was not too long before the more 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.

Later, as competition among employers for skilled employees became a factor, those socially conscious employers who were known to provide some form of provision for their retired employees were able to attract better and more qualified employees, so the provision of basic pensions began to expand as a means of attracting and retaining good employees.

In the early days, development in South Africa tended to follow that in the United Kingdom. Pensions were initially paid out of current earnings, but as

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<sup>1</sup> Jeram N, Introduction to Pension Law Manual (2005).

<sup>2</sup> For example, retiring generals were often given gifts of land or cash by way of payment for loyal service, and the servants of landed gentry were often rewarded in a similar fashion when they were no longer able to carry out their duties effectively.

their coverage widened and they were increasingly demanded by long-serving skilled employees, prudent employers started to look for ways of pre-funding these expectations. It is interesting to note that the internationally recognized normal retirement age of 65 was first introduced in Germany.<sup>3</sup>

Around the early 1920's, governments also saw the advantage of encouraging more formal arrangements as society became more dependent on savings made during employment as a means of survival in old age, rather than reliance on the family or community unit. They also realized, however, that some form of control over how pensions were being provided was necessary, and so, with the introduction of tax incentives to encourage the growth of savings for old age, they used their respective tax legislation to establish rules regulating pension benefits. This resulted in a rapid increase in the number of employers providing properly funded and secure pension benefits.

Funds were set up either as private arrangements where the employer employed his own staff to manage the fund and invest its assets, or alternatively employers often purchased life insurance policies in the names of individual employees, and in that way removed the risk of the pension not being available should something untoward happen to the employer. Group insured arrangements, where one master policy was issued to provide the benefits for all the employees of an employer were only introduced in the early 1950's.

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<sup>3</sup> Statistics at the time indicated that the average life-span of a male worker was 66 years. The benevolent Germans decided, therefore, that all male employees (very few women worked full-time in those days, if at all) would retire on reaching age 65 so that they had one year remaining to enjoy themselves and put their personal affairs in order, before they died. Therefore, the cost of providing pensions was relatively low as those few who actually retired rarely survived much longer.

In 1956, the South African Government introduced what is generally recognized to be the world's first ever Pension Funds Act<sup>4</sup> ("the Act") designed specifically to regulate the business of pension funds.<sup>5</sup>

The late 1950's and the 1960's saw incredible economic growth among first world countries and with it the emergence of giant multinational corporations employing thousands of people. The growth in pension funds during this period, and the improvement in the benefits they provided, mirrored this increase in employment and prosperity.

Since then, with the incredible advances in information technology and the growth of available investment vehicles, including the opening of international investment channels, pension funds have become highly sophisticated. This has led to a proliferation of new types of funds, including umbrella funds administered by professional sponsors and open to voluntary participation by any employer, on behalf of its employees, and preservation funds which cater for the "parking" of the retirement funding assets of individual members until they retire or decide to transfer them to another fund.

Currently, society world-wide, is on the move again, and employment patterns are changing even more rapidly. Naturally, with changes in social patterns and working conditions come changes in retirement provision, and it is likely that we will see the effects of these changes sooner rather than later in pension funds. We may even find that the pension fund spawned by the industrial revolution gives way to something quite different, and is discarded into the history books. Meantime, attempts are being made by the South African Government, among others, to catch up with current social change and the ever increasing demands of consumer protection and good

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<sup>4</sup> Act 24 of 1956.

<sup>5</sup> At that time, and for several years thereafter, other countries relied mainly on trust law and various other legal principles, including, of course, the very powerful conditions imposed in their income tax acts.

governance, by re-writing the Act in terms of today's needs for tomorrow's society.<sup>6</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 government policy.<sup>7</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>8</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>9</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>10</sup> The contents of the nomination form only serve as a

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<sup>6</sup> See National Treasury *Retirement Fund Reform – a discussion paper* December 2004.

<sup>7</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>8</sup> Nevondwe LT, *Ibid*, 164.

<sup>9</sup> Members are generally expected to complete nomination forms wherein they nominate the beneficiaries to receive their death benefits.

<sup>10</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.

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>11</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 benefit among the beneficiaries; and to determine an appropriate mode of payment.<sup>12</sup>

## **1.2. Statement of the research problem**

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

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<sup>11</sup> *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at paragraphs 24 and 25.

<sup>12</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.



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.

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

### **1.3. Literature Review**

According to Manamela section 37C 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>13</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>14</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. According to Naleen Jeram, a former Deputy Pension Funds Adjudicator, section 37C is a type of

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<sup>13</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>14</sup> Manamela T, *ibid*, 279.

social security measure as places the benefit payable on the death of a member under the control of the retirement fund. 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 beneficiaries.<sup>15</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>16</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>17</sup>

The question is whether the limitation of freedom of testation by section 37C is justified under the Constitution?<sup>18</sup> According to Nevondwe this section accords with the provisions of the Constitution<sup>19</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>20</sup> includes the right to be allocated a death benefit if

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<sup>15</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>16</sup> Nevondwe LT, Malatji T and Rapatsa M, *ibid*, 289.

<sup>17</sup> Section 37C (1)(c) of the Act.

<sup>18</sup> South African Constitution, Act 108 of 1996.

<sup>19</sup> Section 27 of the South African Constitution, Act 108 of 1996.

<sup>20</sup> Section 27 of the South African Constitution, Act 108 of 1996.

the requirements of section 37C of the Act are met.<sup>21</sup> Manamela is also of the view that this section accords with the provisions of the Constitution.<sup>22</sup>

In particular Manamela argues that section 37C is in line with the Constitution on the issues of equality<sup>23</sup> and human dignity<sup>24</sup> because it sees to all the interests of dependants of a deceased member without discriminating.<sup>25</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 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>26</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,

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<sup>21</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>22</sup> Manamela T, *op cit*, 279.

<sup>23</sup> Section 9 of the South African Constitution Act 108 of 1996.

<sup>24</sup> Section 10 of the South African Constitution Act 108 of 1996.

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

<sup>26</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W).

and enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors<sup>27</sup>.

The above remarks contribute significantly to the better understanding of section 37C in that they confirm the intentions of the legislature when enacting this section, 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>28</sup>

The adjudicator in the matter of *Dobie NO v National Technikon Retirement Pension Fund*<sup>29</sup> (hereinafter referred to as *Dobie* case) acknowledged the challenges that are brought by section 37C and stated that:

"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>30</sup>

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<sup>27</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) 3705–3706.

<sup>28</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.

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

<sup>30</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41F–J.

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>31</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>32</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>33</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>34</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>35</sup>

#### **1.4. Aims and Objectives of the study**

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<sup>31</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>32</sup> Manamela T, *op cit*, 293.

<sup>33</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 411.

<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, issue 3, September 2011, 3-24.

<sup>35</sup> Manamela T, *op cit*, 294.

The aim of this study is to educate beneficiaries of the deceased's members of retirement funds to understand how section 37C of the Act is being interpreted and applied. This study will also assist beneficiaries to understand how trustees exercise their discretion in the allocation and payment of the death benefits. This study will benefit retirement industry, members of retirement funds, employers, National, provincial and local governments, parliament, pension funds, trustees, administrators of pension funds, insurance companies and other relevant stakeholders who operate in the retirement industry. It will also benefit pension lawyers and students who are studying pension law, social security law, labour law, actuarial science and economics. Lastly, it will also benefit young and emerging academics who are doing the same research to bring insight into their programmes.

### **1.5. Research Methodology**

This study shows the importance of section 37C of the Act which educate South Africans on how death benefits are allocated and paid to beneficiaries. The research methodology used in this study was qualitative in nature, and involved the synthesis of previous work and the collection of papers, case laws and legislation dealing with section 37C of the Act. Because of the diversity and nature of the topic, the study relied heavily on library resources such as policy documents, books, scholarly publications, decided cases, and statutes. Towards this end, the study used substantially useful information from scholarly works, Pension Funds Adjudicator determinations, case laws and Pension Funds Act.

### **1.6. Scope and limitation of the study**

This study consists of five interrelated chapters. Chapter one is introduction laying down the foundation. Chapter two deals with freedom of testation while chapter three deals who is a dependant under section 37C of the Act while chapter four deals with the distribution and payment of death benefits.

The last chapter deals with the conclusion drawn from the whole study and end with recommendations.



## CHAPTER TWO: FREEDOM OF TESTATION

### 2.1. Introduction

Freedom of testation does not supersede the power of board of trustees but only to serve as factors to be considered by the board for allocation of death benefits. In addition, section 37C requires the deceased to fill in the nomination form and nominate the beneficiaries who benefit upon his death. It must be noted that nomination form does not differ much from the last will and testament. The main purpose of section 37C<sup>36</sup> is to protect the dependants so that they are not left in destitute. Furthermore, freedom of testation dictates that when the deceased passed away, his assets must be distributed to the beneficiaries according to his wishes in his last Will and Testament. Freedom of testation is administered by the executor.

### 2.2. Immovable property (removal or Modification of Restriction) Act

Freedom of testation is not absolute but only to serve as guidelines to be considered when allocation of death benefits is made. In other words, the wishes will be carried out in the way he stipulated, except if a particular provision is illegal, immoral and against public policy.

The immovable property Act empowers the court to amend restrictions places by a Will on immovable property. The Act also limits the number of successive fideicommissaries for which the testator could make provision to two. Fideicommissum is a legal process whrereby a testator bequeaths a benefit to a particular beneficiary on the condition that, after a certain time period has lapsed or a condition has been fulfilled , such benefit must pass to another beneficiary.

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<sup>36</sup> Nevondwe LT, Section 37C of the Pension Fund Act 24 of 1956; A social security measure to escape destitution. Insurance and Tax journal, Volume 26

### **2.3. Trust Property Control Act**

It authorises the court to amend the provision of the trust or even terminate the trust. The act defines trust as an arrangement whereby the wishes to benefit a specific beneficiary but intends to place ownership or control of assets in another person. The law requires that for the trust to be valid, certain requirements must be satisfied, namely, intention of the testator, available of trust assets and identification of trust beneficiaries, and lawfulness of the trust.

### **2.4. Maintenance of Surviving Spouse Act**

The Act confers upon surviving spouses a right to claim maintenance from the estate of their deceased spouse if they are not able support themselves financially. This was confirmed in the case of *Volks v Robison* where the court decided that a survivor of a permanent intimate relationship has the right to claim maintenance from the deceased estate.

In *Minister of Education v Syffrets*, the introduction of the equality clause both in the interim and final Constitution ensured that discrimination based on, inter alia, gender, religion, race and sex is eliminated from our constitutional order<sup>37</sup>. This, obviously, has a huge impact on the law of succession, as the testator's wishes will only be executed in as far as they are consistent with the fundamental values that underpin the Constitution such as human dignity, equality and freedom. Put in another way, the testator's wishes will only be enforced if they conform to the values mentioned above, and if they do not, the aggrieved party may challenge them on Constitutional grounds.

The relevant case wherein a provision in a testament was successfully challenged is that of *Minister of Education v Syffrets*. The facts involved a

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<sup>37</sup> The South African Constitution.

Trust that was established in terms of the Will of the late Dr Scarbrow. The Trust awards bursaries to deserving students with limited or no means of the University of Cape Town. However, eligibility is restricted to persons who are of European descent, not of Jewish descent, and not female.

The applicants approached the court claiming an order, deleting provisions in the Will, in terms of empowering legislation and common law. First, section 13 of the Trust Property Control Act empowers the court to delete or vary any provision or make in respect thereof any order which the court deems just, including an order whereby particular trust property is substituted for other property, or an order terminating the trust. Second, common law prohibits bequests that are unlawful or immoral or contrary to public policy. The court has to strike a balance between two constitutional rights: the right to equality and the right to private ownership of property. The court relied on the decision of *Holomisa v Argus*<sup>38</sup> Newspaper 1996(2) SA588 (W) where the court held that The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.

As such, the court concluded that the testamentary provision in question amounts to unfair discrimination therefore is contrary to public policy. Consequently, a variation order was ordered in terms of the trust deed by deleting the offending provision from the will.

Freedom of testation is governed by the Wills Act. A will or testament is a legal declaration by which a person, the testator, names one or more persons to manage his estate and provides for the transfer of his property at death (my own emphasis). According to De Waal MJ, Schoeman MC and

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<sup>38</sup> *Holomisa v Argus Newspaper* 1996 (2) SA 588

Wiechers<sup>39</sup> NJ in Law of Succession Student's Handbook, 'A will is defined as a unilateral declaration of the wishes of the person who drew it but is now dead (testator) in which he or she sets out the way his or her assets must be apportioned after his or her death to designated persons or institutions'. According to Kahn E and Hofmeyer G, 'A will is a declaration in a document executed in a manner required by law by the person making it, the testator, in regard to the devolution of the testator's property after his or her death'. A will is a document that formally sets out your wishes. In a will you can state who you want to leave your assets/money and belongings to, the amount you wish to leave each person, and also who will take care of the administration of your estate.

## **2.5. The wishes of the deceased**

The wishes of the deceased are indicated in the nomination form or the will.<sup>40</sup> In terms of the will, the pension fund benefits are expressly excluded from the estate of a deceased. Section 37C was enacted to protect the dependency over the clear wishes of the deceased, because it is believed that once they have been nominated, it means that they are entitled to the benefit. In addition, the content of the nomination form is one of the factors to be considered by the trustees when exercising their discretion.

## **2.6. Nomination**

Section 37C provides that the deceased is required to nominate a nominee on the nomination form who will benefit in case he dies. Contrary to popular belief, nominees are not entitled to a death benefit simply by virtue of having being nominated. The underlying objective of section 37C is to ensure that

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<sup>39</sup> MJ Schoman MC and Wiechers NJ in Law of Succession Student Hand Book

<sup>40</sup> Section 37C of the Act is a curious provision, people determine how their assets are to be allocated after death.

those who were dependent on the deceased are not left destitute by the death of the member, notwithstanding the wishes of the deceased.

The term 'nominee' is not defined in the Act. For a beneficiary to claim to be a nominee there must exist a valid nomination form. The nomination must be in writing, the beneficiary must not be a dependant and the nomination form must be directed to the fund.

This was emphasised in the case of *Moir v Reef Group Pension Plan*<sup>41</sup> where complainant and the deceased member were divorced in 1984 but continued living together as husband and wife until the member died in March 1997. The deceased had completed a nomination form wherein his brother was nominated as sole beneficiary. The Fund awarded the entire benefit to the brother on this basis. In this case, the complainant a de facto spouse, object to the distribution. As a result, the adjudicator held that the board had fettered its discretion blindly following the nomination form without considering any of the other factors. The adjudicator concluded that the distribution was not equitable, because the board fettered its discretion by basing its distribution solely on the nomination form.

In terms of the law of succession, when a person died everything he or she owned falls into that person estate. The estate is administered by the executor. Once all the debts and other obligations have been settled, everything that remains in the estate passes by inheritance to people qualified to succeed the deceased. If a person has left a will, the estate is inherited in accordance with the law of testate succession. The contents of a will are left mainly in the discretion of an individual testator.

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<sup>41</sup>*Moir v Reef Group Pension Plan*

The reason for this is that in South African law a high premium is placed on the principle of freedom of testation. However, this freedom is not absolute. The testator's wishes will be carried out in the way he or she stipulated except in as far as a particular provision is illegal, immoral, against public policy, vague or impossible to enforce.

Freedom of testation may in certain respects also be limited by common law or statute on both economic and social grounds.

In terms of section 37C, whether or not a nomination form exists, benefits payable to the dependants and nominees of a deceased member are paid by the fund in the proportions deemed equitable by the board of trustees of the fund<sup>42</sup>. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. The wife and children of the deceased qualify for consideration as dependants whether or not they are also nominated by the member, and any nomination made cannot exclude the others from consideration. The expressed wishes of the deceased member would be one factor to be taken into account. It is equally incumbent upon the trustees to take account of the needs of the beneficiaries and the degree of dependency that exists.

Section 37C is an example of how freedom of testation may be limited on social grounds. The other relevant issues would be whether death benefits are a form of 'property' and, if they are, whether the limitation brought about

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<sup>42</sup> Members are generally expected to complete nomination forms wherein they nominate the beneficiaries to receive their death benefits.

by s 37C on the right to property is reasonable and justifiable in terms of s 36 of the Constitution.

### CHAPTER THREE: WHO IS A DEPENDANTS UNDER SECTION 37C

From a reading of section 37C in its entirety, it is clear that dependants are favoured over nominees in the distribution phase. In terms of section 37C(1), there is a duty on the board to take all reasonable steps to trace and locate the dependants of the deceased member. What constitutes a reasonable investigation by the board will differ from case to case. The mere fact that a person qualifies as a dependant does not entitle him to the entire benefit; it only entitles him to be considered by the board in the distribution phase.<sup>43</sup>

The Act defines a "dependant" in section 1 as follows:

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person—
  - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
  - (ii) is the spouse of the member;
  - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

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<sup>43</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 ' spouse ' in the Pension Funds Amendment Act 11 of 2007 is in turn defined as a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No, 68 of 1961), the Recognition of Customary Marriages Act, 1998, (Act No, 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion.<sup>44</sup>

It is evident that for a spouse to be recognised for the purposes of the Act, it must be proved that he or she is a spouse of a deceased member in accordance with the Marriage Act 68 of 1961, the Recognition of Customary Marriages Act 120 of 1998 or the tenets of a religion, or a civil union partner in terms of the Civil Union Act 17 of 2006. The legislature has used the term ' permanent life partner ' to encompass both heterosexual and same-sex relationships.

This is in line with the various Acts that treat heterosexual life partners and spouses similarly (see the Insolvency Act 24 of 1936 and the Compensation for Occupational Injuries and Diseases Act 130 of 1993). This is also in line with some Acts that extend the same protection to heterosexual and same-sex life partners by treating both groups like spouses (see the Estate Duty Act 45 of 1955, the Income Tax Act 58 of 1962, the Maintenance Act 99 of 1998, the Domestic Violence Act 116 of 1998 and the Rental Housing Act 50 of 1999).

The Constitutional Court in *Volks No v Robinson and Others*<sup>45</sup> at paragraph 60, held that the different treatment of formally married spouses, on the one hand, and cohabitees in a permanent life partnership, on the other, for purposes of maintenance claims against the deceased ' s estate is not unconstitutional. We are of the view that, the same principle applies in the

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<sup>44</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, 39-40.

<sup>45</sup>*Volks No v Robinson and Others* (2005) 2 BPLR101 (CC) .

treatment of a cohabitee for purposes of qualifying as a spouse, as defined in section 1(b)(ii) of the Act.

Thus, the legislature has outlined three categories of dependants based on the deceased member ' s liability to maintain such a person, namely legal dependants, non-legal dependants and future dependants.

### **Legal dependants.**

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>46</sup>
- (b) The person claiming maintenance must be unable to support himself /herself;<sup>47</sup>
- (c) The person called upon to provide support must have the necessary resources to maintain the claimant.<sup>48</sup>

There always exists a reciprocal duty of support between spouses as a direct consequence of marriage. The duty of support can continue after the

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<sup>46</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

<sup>47</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

<sup>48</sup> George L Marx and Kobus Hanekom, *op cit*, 187.

marriage has been ended by divorce.<sup>49</sup> In the matter of *Lombard v Central Retirement Annuity Fund*<sup>50</sup> where 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.

A parent, grandparent or grandchild can also qualify as a dependant. Like parents, children have a reciprocal duty to maintain their parents provided that they have the means to do so. The parent will, however, have to prove the need or necessity for support, and cannot merely allege the existence of a parent – child relationship. A reciprocal duty of support also exists between grandparents and grandchildren, subject to the same requirements outlined above. A grandchild can therefore be treated as dependant, provided he can prove that he was dependent on the grandparents. The same will apply to the grandparents.<sup>51</sup>

A duty of support also arises between brothers and sisters. The claimant will, however, have to prove that he was indigent and was indeed dependent on the deceased during his lifetime.<sup>52</sup> In the matter of *Mokele v SAMWU National Provident Fund*<sup>53</sup> whereby the deceased was unmarried and did not

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<sup>49</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, 40.

<sup>50</sup> *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA).

<sup>51</sup> *Williams v Lester Algernon Kortje Trust and Another* [2001] 2 BPLR 1687 (PFA).

<sup>52</sup> vhhvvhvvhvvhvvhvvhvvhv

<sup>53</sup> *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA).

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>54</sup>

### **Non-legal dependants/ de facto dependants**

Non-legal dependants are those dependants who are not legally dependent on the deceased member for maintenance. There are three categories of these dependants, namely, *defacto* dependants, co-habitees and children.

Where there is no duty of support, a person might still be a dependant if the deceased contributed to the maintenance of that person in some way. The person claiming to be a factual dependant will have to prove that he was dependent on the deceased (despite the latter not having a legal duty of maintenance) when the member died. To constitute maintenance, payments should have been made regularly<sup>55</sup> by the deceased to the beneficiary claiming to be a factual dependant. They should not have been once-off, but should have been made until the deceased died.

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<sup>54</sup> *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA) at 16.

<sup>55</sup> *Govender v Alpha Group Employees Provident Fund & Another* (2) [2001] 8 BPLR 2358 (PFA).

Section 1 (b) (ii) applies also to co-habitees. Cohabitation can be defined as a stable, monogamous relationship where couples who do not wish to, or are not allowed to, get married, live together as spouses.<sup>56</sup> This definition includes people of the same sex living together in a stable, exclusive relationship.<sup>57</sup> Some authors still use the more traditional definition that limits the term cohabitation to two people of the opposite sex living together.<sup>58</sup>

A person qualifies as a factual dependant if there is no duty of support on the part of the deceased member, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have to prove that she was dependent on the deceased at the time of the deceased member's death. A person can also qualify as a factual dependant if both the deceased member and cohabiting partner were staying together as husband and wife but there are no statutory laws which recognise their union.<sup>59</sup>

In *Musgrave v Unisa Retirement Fund*,<sup>60</sup> the complainant was excluded from the distribution and payment of the death benefit solely because she was a co-habitee. The Adjudicator held that the complainant qualifies as a factual dependant in terms of section 1 of the Pension Funds Act and she was

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<sup>56</sup> Hutchings and Delpont "Cohabitation: a responsible approach" 1992 *De Rebus* 121–122; Thomas "Konkubinaat" 1984 THRHR 455. According to Keezer, *The Law of Marriage and Divorce*, cohabitation means the dwelling or living together of a man and wife. According to Cronjé and Heaton, *South African Family Law*, page 227, cohabitation refers to the 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>57</sup> See Hutchings and Delpont 121–122; Thomas 455; Schweltnus "The Legal Implications of Cohabitation in South Africa – A Comparative Approach" 1994 1; Singh "Cohabitation relationships revisited: Is it not time for acceptance?" 1996 CILSA 1 n 1. See also Schweltnus "The Legal position of Cohabitees in the South African Law" 1995 *Obiter* 134. See also Nevondwe L "Cohabitation versus section 37C of the Pension Funds Act 24 of 1956" *Insurance and Tax Journal* Vol. 24 No. 2 (2009) 9

<sup>58</sup> See Sinclair *The Law of Marriage* 1996 268.

<sup>59</sup> See note 67.

<sup>60</sup> [2000] 4 BPLR 415 [PFA].

supposed to have been considered for the benefit in terms of section 37C of the Act.<sup>61</sup>

In *Hlathi v University of Fort Hare Retirement Fund & Others*,<sup>62</sup> the Adjudicator held that a permanent life partner of a deceased member, who has successfully proved that she had an inter-dependant relationship with the deceased member and as a consequence of his death she is left in a financial predicament, or with a financial void or is financially worse off, is sufficient to bring her within the scope of the definition of a “factual dependant” as set out in section 1(b)(i) of the Act, and eligible to be considered in the distribution of a death benefit by the pension fund.

The effect of the determination is that pension funds are now obliged to regard permanent life partners who have successfully met the new test for factual dependency to regard them as factual dependants as set out in section 1(b)(i) of the Act in all death benefit matters involving them, which happened before 13 September 2007. It is, however, significant to note that in terms of the Pension Funds Amendment Act, which came into force and effect on 13 September 2007, the definition of a spouse also includes permanent life partners. The point of departure in this matter is that, the cause of action in this matter arose before 13 September 2007 and therefore the said amendment does not apply retrospectively with regard to this specific issue and thus the permanent life partner could not be considered as a spouse.

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<sup>61</sup> Nevondwe L “Living together is ok” *Today Trustees* (2009) 39.

<sup>62</sup> PFA/EC/9015/2006 (unreported).

In *Van der Merwe v Central Retirement Annuity Fund and Another*,<sup>63</sup> the Adjudicator ruled that:

“Section 39 of the Constitution of the Republic of South Africa Act 108 of 1996 (“the Constitution”) provides in section 39(2) that when interpreting any legislation, every tribunal must promote the spirit, purport and objects of the Bill of Rights contained in Chapter 2. It is clear that in interpreting the provisions of section 1(b)(ii) of the Pension Funds Act I am enjoined to have regard to the constitutional background against which such provisions must be interpreted. It must therefore be evaluated, in the light of the recent challenges to the interpretation of the word “spouse” as it appears in several pieces of legislation, whether it is constitutionally defensible to exclude a co-habitee from the meaning of “spouse” for purposes of section 1(b)(ii). In *Robinson*, the Constitutional Court has now given an unequivocal answer to this question by holding that the different treatment of formally married spouses, on the one hand, and co-habitees in a permanent life partnership, on the other, for purposes of maintenance claims against a deceased estate is not unconstitutional. There can be no difference in principle between that situation and the treatment of a co-habitee for purposes of qualifying as a “spouse” as defined in section 1(b)(ii) of the Act. In both cases the parties would be relying on a statutorily conferred right of maintenance after death where none lay in life. Also, in both cases, the deceased may still provide for such co-habitee, subject to the limitations of other laws, by testamentary disposition, or, in the case of a pension fund, by nominating the partner as a beneficiary”.

Therefore, in a nutshell, the only manner in which a cohabitee, whose relationship has not been formalised either in terms of the Marriage Act, Civil Union Act, Black law and custom or Asiatic religion, can now share in a death benefit distribution, is by falling within the provisions of paragraph (b)(i), namely a *de facto* dependant. 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. The rules also place restrictions on eligibility criteria, such as the requirement that the parties must not be separated on the death of the member. It is suggested that these funds amend their rules to define “spouse” with

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<sup>63</sup> [2005] 5 BPLR 463 (PFA).

reference to the Marriage Act, Civil Union Act, Black law and custom and Asiatic religion.

In *Volks NO v Robison and Others*,<sup>64</sup> the Constitutional Court as per Mokgoro and O' Regan JJ emphasise that the Constitution prohibits unfair discrimination on the ground of marital status. They conclude that where relationships that serve a similar social function to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status arises. This does not include co-habitees and it includes same-sex marriages.

Section 1(b)(iii) applies to any child<sup>65</sup> of the deceased member, whom he was not legally required to support and maintain, qualifies as a dependant. An example would be a financially independent major child of the deceased. This result depends on the facts before the Board of Trustees.<sup>66</sup>

### **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

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<sup>64</sup> Case No. CCT 12/04.

<sup>65</sup> "Child" includes a posthumous child, an adopted child and an illegitimate child.

<sup>66</sup> *Lobeko v Central Retirement Annuity Fund*, Case No.: PFA/GA/14345/2007/CMS, unreported, this case was signed by the Pension Adjudicator in 2007. It concerned the alleged failure by the trustees to pay a benefit arising out of the death of the deceased. The complainant, a major son of the deceased, was aggrieved by the failure of the fund trustees to apportion part of the death benefit to him. The fund trustees explained, among other things, that the complainant was gainfully employed and that the deceased was not responsible for the complainant's maintenance at the time of his death. The trustees decided to apportion the entire death benefit to the surviving spouse of the deceased on the grounds of her dependence on the deceased during his lifetime. After examining the rules and the applicable law, the Adjudicator concluded that the fund trustees' decision in awarding the death benefit was legally sound



“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>67</sup>

A good illustration of this section is found in the matter of *Wasserman v Central Retirement Annuity*<sup>68</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 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>69</sup>

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<sup>67</sup> *Wellens v Unsgaard Pension Fund* (2002) 12 BPLR 4214 (PFA) at 4218A-B.

<sup>68</sup> *Wasserman v Central Retirement Annuity* (1) [2001] 6 BPLR 2160 (PFA).

<sup>69</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 THREE: ALLOCATION AND PAYMENT OF DEATH BENEFITS

### **Distribution of the death benefits**

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>70</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>71</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>72</sup>

### **Distribution to dependants only.**

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

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<sup>70</sup> Manamela T, *op cit*, 279.

<sup>71</sup> *Bosch v The White River Toyota Provident Fund* [2001] 3 BPLR 1702 at 1705H.

<sup>72</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.

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.

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>73</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>74</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>75</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

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<sup>73</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>74</sup> George L Marx and Kobus Hanekom, *op cit*, 211.

<sup>75</sup> Manamela T, *op cit*, 285-286.

distribute the benefit in the most equitable manner.<sup>76</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>77</sup>

**(i) Ages of dependants**

This factor plays an important role in determining the length of time that a beneficiary will need to be maintained. In *Motsoeneng v AECI Pension Fund & Another*,<sup>78</sup> the deceased was survived by five minor children (two of them from a relationship with another woman) and his widow. The children were aged 17, 13, 10, 6 and 4 respectively. The board resolved to award each of the children 20 per cent of the benefit. The widow, the mother of three minors, lodged a complaint. The Adjudicator found that the fund had fettered its discretion by not considering the respective ages of the minor children and different needs of a 3-year old as opposed to a 17-year old.

**(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 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.

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<sup>76</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>77</sup> Manamela T, *op cit*,286

<sup>78</sup> [2003] 1 BPLR 4260 (PFA).

In the matter of *Karam v Amrel Provident Fund*<sup>79</sup> the deceased was survived by her major son and a close friend, whom she nominated as a beneficiary. Both of them were financially independent. The deceased and her son were estranged from each other up to her death. Before they became estranged, the deceased nominated her son as sole beneficiary and sole heir, but later revoked the nomination. The fund awarded the entire benefit to the nominee. The Adjudicator confirmed the decision of the fund and held that where dependants are mature adults and gainfully employed, their relationship with the deceased becomes a critical factor.

**(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 dependants depend on the deceased can be a significant factor.<sup>80</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>81</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. In the matter of *Robinson v Central Retirement Annuity Fund*<sup>82</sup> the Adjudicator found that the fund exercised their discretion

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<sup>79</sup> *Karam v Amrel Provident Fund* [2003] 9 BPLR 5098 (PFA).

<sup>80</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>81</sup> George L Marx and Kobus Hanekom, *op cit*, 219.

<sup>82</sup> *Robinson v Central Retirement Annuity Fund* (1) [2001] 10 BPLR 2623 (PFA).

improperly for failing to consider that the deceased was required by a divorce order to pay for the reasonable maintenance needs of the complainant, a minor child.

**(iv) 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).

In *Van Vuuren v Central Retirement Annuity Fund and Another*<sup>83</sup>, the deceased member was survived by his widow from whom he was separated, but not divorced. He was also survived by a *de facto* spouse with whom he lived in a relationship of husband and wife. The fund awarded the death benefit in equal shares to the widow and the *de facto* spouse. The latter was also the sole beneficiary of a life insurance policy taken out by the deceased. The Adjudicator held that the distribution of the death benefit was not equitable, because the board failed to consider that the *de facto* spouse was the sole beneficiary under the life insurance policy. The Adjudicator held further that any receipt of a cash benefit directly impacts on the financial status and future earning capacity of the dependant.

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

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<sup>83</sup> *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 (PFA).

The amount available for distribution is always a critical factor. Often, especially where there is more than one dependant, the amount distributable is insufficient to ensure that all share in it. This factor may compel the board to award a dependant an amount less than his reasonable maintenance needs or even to exclude certain dependants.

### **Distribution to nominees only.**

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. 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> Where the deceased member has only allocated a certain percentage of the benefit to a nominated beneficiary, that nominee will only be entitled to

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<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.

the portion specified. The remainder of the benefit will be paid into the estate in terms of section 37C(1)(c).<sup>87</sup>

### **Distribution to dependants and nominees.**<sup>88</sup>

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

“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>89</sup> Furthermore, by virtue of dependants being involved in this distribution, the payment to the beneficiaries is not

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<sup>87</sup> *Krishnnasamy and others v ABI Provident Fund* [2004] 2 BPLR 5471 (PFA)

<sup>88</sup> Section 37C (1)(bA) of the Act.

<sup>89</sup> George L Marx and Kobus Hanekom, *op cit*, 216.



subject to the assets of the estate exceeding the liabilities.<sup>90</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.<sup>91</sup>

### **Distribution to estate.**<sup>92</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."

The general rule in section 37C(1) that the benefit does not form part of the estate<sup>93</sup> allows three exceptions. The fund can only pay a benefit into the deceased's estate if on the existence of one of the following three scenarios:;

(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>94</sup>

(b) Where the deceased has no dependants and has not nominated a beneficiary in writing;<sup>95</sup> or

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<sup>90</sup> George L Marx and Kobus Hanekom, *op cit*, 216.

<sup>91</sup> See also *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA).

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

<sup>93</sup> *Matlakane v Royal Paraffin Provident Fund* [2003] 6 BPLR 4785 (PFA).

<sup>94</sup> *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488 at 13.

(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>96</sup>

## **MODES OF PAYMENT**

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>97</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

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<sup>95</sup> *Jacobs NO v Central Retirement Annuity Fund & Another* (2001) 1 BPLR 1488 at 13.

<sup>96</sup> *Wasserman v Central Retirement Annuity Fund (1)* (2001) 6 BPLR 2160 at 10.

<sup>97</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.

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>98</sup> It is therefore safe to say that the following modes of payments are regulated by section 37C, namely 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>99</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>100</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>101</sup>

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

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<sup>98</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.

<sup>99</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>100</sup> Section 37C(2) and section 37C(3).

<sup>101</sup> Karin Mackenzie, Who will guard the Guards? Insurance and Tax, Volume 22 no 4, December 2007 40.

Section 37C(2) regulates the payment of death benefits to a trustee as contemplated in the Trust Property Control Act<sup>102</sup> for the benefit of a dependant or nominee and deems same as payment to the beneficiary. 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>103</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 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>104</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>105</sup>

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<sup>102</sup> Trust Property Control Act 57 of 1998.

<sup>103</sup> Trust Property Control Act 57 of 1998.

<sup>104</sup> Trust Property Control Act 57 of 1998.

<sup>105</sup> Karin Mackenzie, *op cit*, 40.

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>106</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>107</sup> In order to alleviate the abuse and mismanagement of death benefits, the Act<sup>108</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>109</sup>

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<sup>106</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>107</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.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 19 June 2012.

<sup>108</sup> The Financial Services General Laws Amendment Act 22 of 2008.

<sup>109</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 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.

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>110</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>111</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 therefore safe to say that beneficiary funds demarcated the loophole that existed in the pension industry by imposing

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<sup>110</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>111</sup> *Financial Intelligence Centre Act* 38 of 2001.

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.

When should a beneficiary fund be used? When a member of a retirement fund dies, benefits (which include insured benefits if payable by the fund) become payable to the dependants or nominees. Section 37C of the Act provides various options for trustees to deal with payments. Where it is not suitable to pay the benefits directly to the dependant, nominee or guardian/caregiver, the benefits may be paid to a beneficiary fund, subject to certain criteria. These options are normally considered in the case of minor dependants or nominees or persons with legal disabilities.

Only section 37C death benefits (approved benefits) payable by a registered fund for the benefit of a dependant or nominee may be paid to a beneficiary fund. This can be for a minor or major if considered appropriate by the retirement fund trustees. The main purpose of the regulator, the Financial Services Board, in creating a new legal vehicle, the Beneficiary Fund, was to offer greater protection to dependants of lump-sum benefits under the Pension Funds Act. Beneficiary funds began operating from 1 January 2009. By this date, they all had to register with the Financial Services

Board. The Financial Services Board granted the retirement fund industry an extension to 31 March 2009 for completing the requirements for registering the rules for beneficiary funds.<sup>112</sup> The beneficiary funds are required to perform the annual audit. Their rules must be registered and approved by the Financial Services Board.

### **Payment to Minor.**

Payment of benefits to a minor in this respect may take form in three different ways namely, payment to the guardian in instalments<sup>113</sup>, payment of a lump sum to the guardian and payment into the beneficiary fund.<sup>114</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 others*<sup>115</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

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<sup>112</sup> It was reported in *Business Day* newspaper on 13 March 2009.

<sup>113</sup> This is subject to reasonable interest rate, having regard to the fund return earned by the fund.

<sup>114</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.

<sup>115</sup> *Chitja v Alexander Forbes Financial services and others* PFA/GA/8633/2006/SM (unreported).



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>116</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>117</sup>

In the matter of *Mabuza v Mine Workers Provident Fund*<sup>118</sup> the complainant was the brother of a member of the respondent pension fund who had died, leaving five children. A death benefit became payable on the death of the deceased. As the children were being cared for by the mother of the complainant and the deceased, the fund decided to pay the deceased's mother R19 346, while the balance was placed in a trust for the benefit of the deceased's minor children.

The essence of the complaint was that the balance of the death benefit was placed in a trust without the complainant or his mother being consulted. It was requested that the remaining amount of the death benefit should be paid directly to the deceased's mother in a lump sum, because she could administer the financial affairs of the minor children. Despite several interventions to address the complaint, the fund refused to respond.

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<sup>116</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>117</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.

<sup>118</sup> *Mabuza v Mine Workers Provident Fund* [2008] 1 BPLR 39 (PFA).

The Adjudicator, Mamodupi Mohlala, held that as the tribunal had the authority to issue determinations that had the same power as a civil judgment of any court in terms of section 30O of the Act, the relevant rules of the High Court relating to default judgment were applied. The tribunal had the power to issue a default judgement where it had not succeeded in obtaining a response from a respondent.

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

Payment to a major can be made in instalments if the beneficiary has agreed to this in writing. The agreement between the beneficiary and the board can be cancelled by either party on written notice not exceeding 90 days. On such cancellation, the balance of the benefit is payable to the beneficiary.

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>119</sup> However a distinction must be drawn between modes of payment that are applicable to minor and major beneficiaries due to different considerations and principles that are applicable.<sup>120</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

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<sup>119</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.

<sup>120</sup> George L Marx and Kobus Hanekom, *op cit*, 236.

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.

In *Tsukudu and Another v Iscor Employees Provident Fund*<sup>121</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 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.

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<sup>121</sup> *Tsukudu and Another v Iscor Employees Provident Fund* PFA/GA/963/2004/LM (unreported).

## CHAPTER FIVE: CONCLUSIONS 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>122</sup> It has been illustrated in this chapter the difficulties which the trustees encounter, when determining whether a person qualifies as a dependant of the deceased.

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 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>123</sup>

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<sup>122</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>123</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.

It is further evident that section 37C is fraught with many problems. It is 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 dependent on the deceased are not left in destitute. This is vital especially in a society where poverty thrives. It is recommended 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>124</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.

It is further recommended 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>125</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>126</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

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<sup>124</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>125</sup> Manamela T, *op cit*, 293.

<sup>126</sup> ABSA Consultants and Actuaries Guidelines for the Distribution of Death Benefits at 6-7, available at <http://www.easyinfo.co.za/htm/custom/absa/distriibt.htm>, visited on 13 March 2012.

beneficiaries, colleagues at the deceased member's workplace, and other family members.<sup>127</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 disadvantages the poor people in the rural areas because most of them are not aware of their rights under pension law.<sup>128</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>129</sup> This measure would ensure that dependants are identified and traced expeditiously without any complexities.

This study recommends that section 37C must be amended to give clear guidelines on how death benefits must be distributed amongst beneficiaries.

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<sup>127</sup> Ibid.

<sup>128</sup> Nevondwe LT , Time limits on lodging complaints to the Pension Funds Adjudicator, *Juta Business Law Journal* , 2008 volume 16, issue 2, 47.

<sup>129</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).

## BIBLIOGRAPHY

### Books

1. Jeram N, Introduction to Pension Law Manual (2005).
2. MJ Schoman MC and Wiechers NJ in Law of Succession Student Hand Book
3. Cronjje and Heaton, *South African Family Law*, page 227.
4. George L Marx and Kobus Hanekom, *The Manual on South African Retirement Funds and Other Employee Benefits* (2010), 183.

### Articles published in journals

1. 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. 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.
3. 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.
4. Mhango M, 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.
5. 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.

6. 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.
7. Mhango M, 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.
8. 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.
9. 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.
10. 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.
11. Hutchings and Delport "Cohabitation: a responsible approach" 1992 *De Rebus* 121–122; Thomas "Konkubinaat" 1984 THRHR
12. Keezer, *The Law of Marriage and Divorce*, cohabitation means the dwelling or living together of a man and wife.
13. Schweltnus "The Legal Implications of Cohabitation in South Africa – A Comparative Approach" 1994 1.
14. Singh "Cohabitation relationships revisited: Is it not time for acceptance?" 1996 CILSA 1 n 1.
15. Schweltnus "The Legal position of Cohabitants in the South African Law" 1995 *Obiter* 134.
16. Nevondwe L "Cohabitation versus section 37C of the Pension Funds Act 24 of 1956" *Insurance and Tax Journal* Vol. 24 No. 2 (2009) 9.



17. Nevondwe L "Living together is ok" *Today Trustees* (2009) 39.
18. Mackenzie K, Who will guard the Guards? *Insurance and Tax*, Volume 22 no 4, December 2007 40.
19. 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.

### **Policies and Documents**

1. National Treasury Retirement Fund Reform – a discussion paper, December 2004.