Original Article

The distribution and payment of a death benefit in terms section 37C of the South African Pension Funds Act, 24 of 1956

Received (in revised form): 27th March 2009

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ABSTRACT This paper discusses the distribution and payment of the death benefit in terms of section 37C of the Pension Funds Act. The distribution of benefits payable on the death of a member of a pension fund is regulated by section 37C of the Pension Funds Act. This section was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act and government policy. The section provides that death benefits do not form part of the deceased's estate. Its purpose is to make sure that the dependents of the deceased member are not left destitute by the member's death. Accordingly, section 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased as expressed in the latter's nomination form. It is only one of the factors that need to be considered for the distribution and allocation of the death benefit.

Pensions (2010) 15, 38–48. doi:10.1057/pm.2009.10

Keywords: distribution and payment; death benefit; section 37C of the Pension Funds Act

INTRODUCTION

The primary object of a pension fund organisation as defined in the Pension Funds Act read with the Income Tax Act is to provide benefits to members of retirement funds when they retire from employment upon reaching their retirement age. The reality is that a member

may die before he retires in which case the pension fund must pay the benefit to the member's dependants and nominees. Section 37C of the Act deals with the above scenario and prescribes to the board of management of a pension fund how it should deal with the member's interest in the fund where the above scenario arises.

OBJECT OF SECTION 37C

The distribution of benefits payable on the death of a member of a pension fund is regulated in terms of section 37C of the Act. The section

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was primarily introduced to ensure that death benefits are paid in accordance with the object of the Act and government policy. Section 37C(1) reads

Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of section 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner: ...

The object behind the section is to ensure that those persons who were dependent on the deceased member are not left destitute by the death of the member.¹ In order to achieve this, section 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased as expressed in the nomination form. For this particular reason, the death benefit subject to the exceptions outlined in section 37C is excluded from the estate of a deceased member, and placed under the control of the retirement fund. The board is not bound by the last testament of the deceased or the nomination form.² Although the deceased may have expressed an intention to benefit a certain nominated beneficiary in his nomination form, this does not necessarily imply that the whole amount of the benefit will in fact be awarded to him, because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit.³ The section 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.

Many complaints referred to the Adjudicator relate to the allocation of death benefits.

WHAT IS A BENEFIT FOR THE PURPOSES OF SECTION 37C?

While section 37C regulates the distribution of a death benefit, it does not regulate the nature, computation and value of a benefit. The term benefit is undefined in the Act. Thus, the value and computation of a benefit is determined by the rules of the fund.⁴

WHO IS A DEPENDANT?

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.

The Pension Funds Amendment Act 11 of 2007, which came into effect on 13 September 2007, defines a 'dependant' in section 1 as follows:

'dependant', in relation to a member, means—

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

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.

It is evident that the Act now recognises three classes of spouses, namely permanent life partners, spouses and civil union partners. It is also 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*,⁵ at paragraph 60, held that the different treatment of formally married spouses, on the one hand, and cohabitants in a permanent life partnership, on the other, for purposes of maintenance claims against the deceased’s estate is not unconstitutional. In my view, the same principle applies in the 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 – Paragraph (a)

Where the deceased is legally liable to maintain a person, such person will be regarded as a

dependant. The duty to maintain may arise as a result of a legal obligation, the common law or a statutory obligation.⁶

Dependants in respect of whom the member is legally liable for maintenance include a spouse and children who rely on the member for the necessities of life. 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.

There always exists a reciprocal duty of support between spouses as a direct consequence of marriage.⁷ Unlike in the case of a maintenance claim by a parent against children, a spouse’s claim is not restricted to the bare necessities of life. The duty of support can continue after the marriage has been ended by divorce.⁸ Normally, the order of divorce will specify the extent of support. Where a divorce order is available, the order should be perused carefully in order to determine the extent of maintenance.

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.

To recap, dependants that fall into this category are determined with reference to the relationship that they had with the deceased. The mere fact that a person is related is not sufficient to be taken into consideration for a death distribution. The person must prove that the deceased had a legal duty to support him.⁹

Non-legal dependants – Paragraph (b)

This sub-section deals with persons who were not legally dependent on the deceased member

for maintenance, and thereafter outlines three categories of non-legal dependants.

Section 1(b)(i) dependants – De facto dependants

Where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased (despite the deceased not having a legal duty to maintain) at the time of the member's death.

In order to constitute maintenance, the deceased needs to have made regular payments to the beneficiary who is claiming to be a factual dependant.¹⁰ Expressed differently, the payments should not have been once-off, and should have been made until the end of the deceased's life in order to constitute maintenance.

Section 1(b)(ii) dependants – Spouses

This sub-section is applicable to those spouses in respect of whom there exists no statutory law in terms of which the marriage or union is recognised. Spouses who might be treated as dependants in terms of this sub-section include those married according to black customary law or in accordance with the tenets of any Asiatic religion, those who are staying in a monogamous homosexual relationship and cohabitees living as 'husband and wife'.

Cohabitation can be defined as a stable, monogamous relationship where a couple who do not wish or are not allowed to get married live together as spouses (see Hutchings and Delport¹¹). This definition includes people of the same sex living together in a stable, exclusive relationship (see Schweltnus¹²). Some authors regard cohabitation as a common law marriage, and sometimes a *de facto* marriage or permanent life partnership (see Sinclair¹³). It follows therefore that a common law spouse is a person of the opposite or same sex who is a partner in a common law marriage. In essence, there is no difference between a cohabitee and a common law spouse.

Section 1(b)(iii) dependants – Children

Any child of the deceased member whom he was not legally required to support and maintain will qualify as a dependant, for example financially independent major children of the deceased.¹⁴

Future dependants

This section covers persons whom the deceased was not legally liable to maintain at the time of his death. Nevertheless, such a person may qualify as a dependant, if he can show that the deceased would have become liable to maintain had he notionally been alive. Possible dependants in terms of this section might include parents¹⁵ 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.

NOMINEES

Contrary to popular belief, nominees are not by virtue of having being nominated entitled to a death benefit. The underlying objective of section 37C is to ensure that those who were dependent on the deceased are not left destitute by 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.¹⁶ The nomination must be in writing, the beneficiary must not be a dependant, and the nomination form must be directed to the fund.¹⁷

An estate or an artificial person cannot be a nominee. Apart from the specified exceptions, a death benefit cannot be paid into an estate.

THE 12-MONTH PERIOD

The board has 12 months within which to trace and identify the possible beneficiaries that might share in the benefit. If satisfied that it has taken all reasonable steps to trace and identify dependants, the board does not have to wait for the 12 months to lapse before making payment.¹⁸ There is also no duty on the board to make payment after the 12 months has lapsed, if the board is of the opinion that there is a need for further investigation.¹⁹ The duty to pay is not dependent on the expiry of the 12-month period,

but rather on whether the board is satisfied that it has investigated and considered the matter with due diligence, and is in a position to make an equitable allocation.²⁰

The 12-month period is only relevant insofar as payment to a nominee is concerned. A designated nominee will only be considered after the 12-month period has lapsed and the fund has not managed to trace a dependant. Any claim by a nominee before the 12 months has lapsed will be a premature claim.

The question as to whether the board acted properly under section 37C(1)(a) will therefore not necessarily be determined with reference to the time frame. The relevant question will always be whether the board took all necessary reasonable steps to identify and trace all possible dependants, so as to allow them to distribute the benefit in the most equitable manner.

An enforceable debt of a dependant entitled to share in a benefit does not arise when the 12-month period has lapsed, but rather when the board has taken a decision to distribute the benefit to the selected beneficiaries.

If the board of trustees has failed to comply with the Act and the beneficiaries therefore lodge a complaint with the Office of the Pension Funds Adjudicator, the Adjudicator may order the board of trustees to complete its investigation and distribute the benefit under section 37C, together with interest on it of 15.5 per cent from the date when the period of 12 months elapsed to the date of final payment within 6 weeks of the date of determination.²¹

DISTRIBUTION OF DEATH BENEFITS

Section 37C establishes a statutory hierarchy of beneficiaries entitled to share in the allocation of death benefits. Dependency will always be the overarching requirement in the allocation of the death benefits, keeping in mind that the objective of the section is to ensure that dependants of the deceased are not left destitute by his death. It is only once the search and identification of the possible beneficiaries is completed that the board will determine to whom to allocate a share of the benefit.

Distribution to dependants only – Section 37C(1)(a)

Section 37C(1)(a) regulates the payment to dependants only, and reads

If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants.

Where the deceased is survived only by dependants and no nominees, the board must allocate and effect an equitable distribution among them. When exercising their discretion, the board needs to consider the following factors:²²

(a) *The wishes of the deceased*

The wishes of the deceased are often expressed in the nomination form or the will. Insofar as the latter is concerned, pension fund benefits are expressly excluded from the deceased's estate. As for nominated beneficiaries, they are often under the erroneous belief that by virtue of them being nominated by the deceased member, they are entitled to the benefit. This, however, is not the case, as section 37C was enacted to protect dependency over the clear wishes of the deceased. The content of the nomination form is merely one of the factors taken into consideration by the trustees in the exercise of their discretion.²³

In *Moir v Reef Group Pension Plan*,²⁴ the complainant and the deceased member were divorced in 1984, but continued to live together as husband and wife until the member's death in March 1997. The deceased completed a nomination form wherein he nominated his brother as the sole beneficiary. The fund awarded the entire benefit to the brother on this basis. The complainant, a *de facto* spouse, lodged a complaint objecting to the distribution.

The Adjudicator accepted the complainant, as a *de facto* dependant held that the board fettered its discretion by blindly following the nomination form without considering any of the other factors. Accordingly, the Adjudicator

concluded that the distribution was not equitable, because the board fettered its discretion by solely basing its distribution on the nomination form.

(b) The financial status of the dependants, including their future earning potential²⁵

The financial status of each dependant will allow the board to determine the reasonable maintenance needs of the various dependants.

In *van Vuuren v Central Retirement Annuity Fund and another*,²⁶ 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 husband and wife relationship. The fund awarded the death benefit in equal shares to the widow and the *de facto* spouse. The *de facto* spouse 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 take into consideration the fact 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...'.²⁷

(c) The ages of the beneficiaries

This factor plays an important role in determining the length of time a beneficiary will need to be maintained.

In *Motsoeneng v AECI Pension Fund and another*,²⁷ the deceased was survived by five minor children (two of them from a relationship with another woman) and his widow. The respective ages of the children were 17, 13, 10, 6 and 3. The board resolved to award each of the children 20 per cent of the benefit. The widow, mother of three minors, lodged a complaint. The Adjudicator found that the fund had fettered its discretion by not taking into account the respective ages of the minor children and the different needs of a 3-year-old minor as opposed to a 17-year-old minor.

(d) The relationship with the deceased

In *Karam v Amrel Provident Fund*,²⁸ 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 them being estranged from each other, the deceased nominated her son as sole beneficiary and sole heir, but revoked this later. 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 are gainfully employed, their relationship with the deceased becomes a critical factor.

(e) The extent of dependency

The extent to which a dependant was dependent on the deceased can be a significant factor.

In *Robinson v Central Retirement Annuity Fund*, the Adjudicator found that the fund exercised their discretion improperly for failing to take into account the fact that the deceased was required in terms of a divorce order to pay for the reasonable maintenance needs of the complainant, a minor child.

(f) The amount available for distribution

The amount available for distribution is always a critical factor. It is often the case, especially where there is more than one dependant, that the amount for distribution is not sufficient to ensure that all share in it. This may force the board to award a dependant an amount less than his reasonable maintenance needs, or even to exclude certain dependants. This being the case, the amount available for distribution is a factor that will have to be taken into account by the board of management.

Distribution to nominees only – Section 37C(1)(b)

Section 37C(1)(b) governs the distribution to nominees, and reads

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 the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the

benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

A distribution to nominees will only take place where the deceased member is not survived by any dependants and the deceased has completed a valid nomination form. Payment of the benefit to a nominee is subject to the following conditions:

- No dependants have been traced and identified by the board;
- The 12-month period has lapsed;
- The deceased has completed a valid nomination form in which the person nominated is not a dependant; and
- The aggregate assets of the deceased member's estate should exceed the aggregate debts of the estate.

Where the deceased member has only allocated a certain percentage of the benefit to a nominated beneficiary, that nominee will only be entitled to the portion specified. The remainder of the benefit will be paid into the estate in terms of section 37C(1)(c).²⁹

Distribution to nominees and dependants – Section 37C(1)(bA)

The distribution to dependants and nominees forms the subject matter of several complaints before the Adjudicator. This distribution is regulated by section 37C(1)(bA), which reads

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.

The same factors that are applicable with an allocation involving dependants only will equally apply.

Only nomination forms completed on or after 30 June 1989 will be valid for consideration in terms of this section. The proviso that the aggregate assets must exceed the aggregate liabilities applicable to the payment of a benefit payable to nominees only is not applicable.

Distribution to the deceased estate – Section 37C(1)(c)

Payment to the estate is outlined in section 37C(1)(c), which reads

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, 1965 (Act 66 of 1965), into the Guardian's Fund.

The general rule expressed in section 37C(1) that the benefit does not form part of the estate¹ is subject to three exceptions. The fund can only pay a benefit into the deceased's estate on the existence of one of the following three scenarios:

- The fund has not discovered any dependants and there is a nominated beneficiary, but

the deceased's estate's liabilities exceed its assets; or

- The deceased member has no dependants and did not designate a nominee in writing; or
- The deceased has designated a nominee only to receive a portion of the benefit, and the remaining balance must be paid to the estate.³⁰

MODES OF PAYMENT

Another instance where the board can incur the wrath of complainants is with regard to the method selected when making payment to beneficiaries. The modes of possible payment are dealt with by sections 37C(2), (3) and (4), which read

- (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.

Payment to beneficiaries can be made in one of the methods or a combination thereof.

PAYMENT TO A MINOR

The board has three options insofar as payment to a minor is concerned. It may either pay the benefit in installments to a guardian or make a lump sum payment to the guardian or pay the benefit into a trust for the benefit of the minor. The various options may be summarised as follows:

- If the board considers it appropriate, installment payments may be made to the guardian for the benefit of the minor. When the minor attains the age of majority, the full benefit becomes payable to him.
- The board may also make a lump sum payment to the guardian on behalf of the minor. There are, however, various risks associated with making payment directly to the guardian, namely
 1. the money might be usurped by the creditors of the guardian,
 2. the guardian might use the money for other purposes,
- The board can, if appropriate, pay the money into a trust for the benefit of the minor beneficiary.³¹ Payment of the benefit to the trust is deemed to be payment to the beneficiary.

PAYMENT TO A MAJOR BENEFICIARY

- Payment to a major can be made in installments provided the beneficiary has agreed thereto in writing.³²

- The agreement between the beneficiary and the board can be cancelled by either party on written notice not exceeding 90 days.
- The balance of the benefit shall be payable to the beneficiary on the cancellation of the agreement.

PAYMENT TO A TRUST OR THE GUARDIANS FUND

Section 37C(2) of the Act provides that the payment of a benefit payable upon a member's death to a trustee as defined in the Trust Property Control Act 57 of 1998 for the benefit of a dependant or nominee will be deemed to be a payment to such a dependant or nominee.

The effect of this provision is that a fund is absolved of its responsibility once a payment is made to a trust because that is deemed to be a payment to the beneficiary concerned. This has proved problematic because in certain cases payments have been made to trusts or trustees who do not have proper governance structures in place to the prejudice of beneficiaries.

This has prompted intervention from the legislature and the Financial Services General Laws Amendment Act 22 of 2008, which came into operation with effect from 1 November 2008. This Act no longer recognises the payment of a benefit payable upon a member's death to a trust as constituting a payment to the beneficiary. It only recognises the payment of the said benefit to a beneficiary fund or guardians and caregivers as a payment to the beneficiary.

The Pension Funds Act stipulates that

for the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act No. 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.

This provision has been changed by the new Act (Financial Services General Laws Amendment Act), Section 15(2)(a), which provides that

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 subparagraph (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; and
- (b) the insertion after subsection (4) of the following subsection:
- ‘(5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund’.

CONCLUSION

A death benefit is a part of social security, which is a mechanism that enables people to escape destitution. Social security thus meets people's basic needs when their income stream has stopped or has been disrupted, or has never been adequately developed.

Social insurance usually protects the income of people who are vulnerable to certain

contingencies that threaten their income-earning capacity, such as illness and old age. Social assistance aims at making sure that those who are poor do at least gain access to a minimum income in order to satisfy their basic needs. Under the South African Constitution Act 108 of 1996, everyone has the right to social security (section 27 of the Constitution), which includes the right to be allocated a death benefit if the requirements of section 37C of the Pension Funds Act are meant.

It is clear that the government had good intentions with section 37C. It serves to ensure that each dependant receives a portion of the benefit in accordance with what the Board of Trustees of the pension fund deems equitable. The extent of the loss of support as a result of the death of a member of the fund depends on his or her earnings and age, the number and age of the dependants, the extent of support provided for each dependant, and the period for which this support would have been continued.

I am of the opinion that section 37C of the Pension Funds Act needs to be amended in future to also serve as the guidelines to the Board of Trustees to provide them with steps that need to be followed in order for them to distribute and pay the death benefit in an equitable manner.³³ Section 37C does not provide steps that need to be followed; it only addresses the scenarios and also what happened from one scenario to the other.

REFERENCES AND NOTES

- 1 Lufuno Tokyo Nevondwe. (2008) Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional. *Juta Business Law Journal* 15(4): 164.
- 2 *Mashazi v African Products Retirement Benefit Provident Fund* (2002) 8 BPLR 3703 (W), *Kaplan and Another v Professional Executive Retirement Fund and Others* (2001) 10 BPLR 2537 (SCA). The testament or nomination form is one of the factors taken into account by the board of management when they decide on an equitable distribution.
- 3 *Mashazi v African Products Retirement Benefit Provident fund* (2002) 8 BPLR 3703 (W) at 3705J–3706C. In this case, the court held that section 37C of the Pension Funds Act 24 of 1956 is aimed at protecting dependency, even over the clear wishes of the deceased and the fact that the distribution did not strictly follow the nomination form *in casu* is not a ground for review.
- 4 *Ellis NO v Lifestyle Retirement Annuity Fund* (2001) 5 BPLR 2021 (PFA) and *Gravett v Allianz Pension Fund* (2002) 11 BPLR 4033 (PFA).
- 5 (2005) 2 BPLR101 (CC).
- 6 At common law a duty to maintain will arise where the following three requirements are met: (a) The relationship between the parties is such that it imposes a duty of support. (b) The person claiming support is unable to maintain himself/herself. (c) The person from whom support is requested must have capacity to support (*Reyneke v Reyneke* 1990(3) SA 927 (E)).
- 7 Maintenance again is inclusive of food, clothing, medical and dental care and whatever else is reasonably required.
- 8 Section 7(1) of the Divorce Act 70 of 1979. In *Lombard v Central Retirement Annuity Fund* (2003) 3 BPLR 4460 (PFA), the complainant divorced the deceased in 1999. During the divorce proceedings the complainant did not ask for maintenance and it was so contained in the divorce order, which incorporated the settlement agreement. The settlement agreement stated at the time that the deceased member will be liable for the complainant's reasonable medical expenses. The Adjudicator found that although the order states that no maintenance was sought, the rest of the order clearly relates to another aspect of maintenance, namely medical expenses and consequently found that the deceased member was legally liable for the complainant's maintenance albeit limited and that the complainant should be treated as a subsection 1(a) dependant.
- 9 In *Mokele v SAMWU National Provident Fund* (2002) 12 BPLR 4175 (PFA), the deceased member was survived by his two sisters and no other dependants. The deceased did not complete a nomination form. The complainant's argument was that by virtue of their relationship with the deceased alone they were paragraph (a) dependants and were rejected by the Adjudicator.
- 10 *Govender v Alpha Group Employees Provident Fund and Another* (2) (2001) 8 BPLR 2358 (PFA).
- 11 Hutchings, S. and Delport, H.J. (1992) Cohabitation: A responsible approach. *De Rebus*: 121–122.
- 12 Schweltnus, T. (1994) The Legal Implications of Cohabitation in South Africa – A Comparative Approach, p. 10.
- 13 Sinclair, J.D. (1996) *The Law of Marriage*, p. 267.
- 14 'Child' includes a posthumous child, an adopted child and a child born out of wedlock.
- 15 See *Wellens v Unsgaard Pension Fund* (2002) 12 BPLR 4214 (PFA).
- 16 The importance of classifying a beneficiary correctly as either a dependant or nominee is important, as it will have an impact on the manner in which payment will be made and whether it will be made in terms of section 37C (1)(a) or (b). One of the more obvious distinctions between the sections is that, in terms of subsection (1)(a), payment of a benefit to a dependant is not dependent on the assets of the estate exceeding its liabilities, while payment in terms of subsection (b) to a nominee requires the assets of the estate to exceed the liabilities of the estate.
- 17 In *Kruger v Central Retirement Annuity Fund* (2002) 7 BPLR 3634 (PFA), the Adjudicator adopted the view that the nomination is similar to a contract, as a result the ordinary contractual principles apply.
- 18 The duty to trace and identify dependants rests on the fund. The fund should take all reasonable steps to identify the dependants. There is no duty on a dependant to come forward and prove that he is a dependant. See *Mthiyane v Fedsure Life Assurance Ltd and Others* (2) (2002) 5 BPLR 3460 (PFA).
- 19 It does, however, not mean that the board can be dilatory in its decision. If the board, without good reason, fail to take a decision timeously, it will amount to maladministration,

- giving rise to a claim for delictual damages if any quantifiable loss was suffered.
- 20 *Dobie NO v National Technikon Retirement Pension Fund* (1999) 9 BPLR 29 (PFA).
 - 21 See *Nzimande v South African Retirement Annuity Fund PFA/GA/10490/2007/LTN* (unreported).
 - 22 See *Sithole v ICS Provident Fund and Another* (2000) 4 BPLR 430 (PFA), paragraph 24 and 25.
 - 23 *Mashazi v African Products Retirement benefit Provident Fund* (2002) 8 BPLR 3703 (W). See also *Bushula v SATAWU National Provident Fund and Others PFA/WE/11742/2006/LN* (unreported), where the complainant was dissatisfied with the decision of the board of trustees to exclude him in the distribution and payment of the death benefit despite the fact that the deceased nominated him as a beneficiary who was to receive 10 per cent upon his death in his Last Will and Testament. In this matter, the Adjudicator ruled that the mere fact that 'you have been nominated by the deceased in his nomination form or in his Will and Testament does not necessarily mean that you are automatically entitled to a portion of a death benefit'. This is only one of the factors taken into account in the allocation of the death benefit.
 - 24 *Brummelkamp v Babcock Africa (1997) Pension Fund and Another* (2001) 4 BPLR 1811 (PFA) (2000) 6 BPLR 661 (PFA).
 - 25 Whenever this factor is considered, it is advisable for the board of management to look at the liquidation and distribution account prepared by the executor of the deceased estate. This will give an indication of the manner of distribution of all the deceased's assets and to whom it was given – See *Ván Vuuren v Central Retirement Annuity Fund and Another* (2000) 6 BPLR 661 (PFA). See *Brummelkamp v Babcock Africa (1997) Pension Fund and Another* (2001) 4 BPLR 1811 (PFA).
 - 26 (2000) 6 BPLR 661 (PFA).
 - 27 (2003) 1 BPLR 4260 (PFA).
 - 28 (2001) 10 BPLR 2623 (PFA).
 - 29 *Krishnasamy and Others v ABI Pension Fund* (2004) 2 BPLR 5471 (PFA).
 - 30 *Jacobs NO v Central Retirement Annuity Fund and Another* (2001) 1 BPLR 1488 (PFA).
 - 31 Instalment payments may be made provided that the board ensures that the interest rate is reasonable and that the investment return earned by the fund is earned on the capital amount – Section 37C(3).
 - 32 The amount of the payments, intervals of payment, interest rate including any other important terms and conditions must be disclosed in the agreement (Section 37C(4)(a)).
 - 33 There are various cases that have been lodged in the Office of the Pension Funds Adjudicator that seeks assistance from the Adjudicator to review the decision of the board of trustees, which ignored factors that need to be taken into account, which are crucial when one is allocating a death benefit in terms of Section 37C.