Original Article

Cohabitation: A nightmare on the allocation and distribution of death benefits in terms of section 37C of the South African pension funds Act 24 of 1956

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ABSTRACT The South African pension funds benefits are part of social security, as stipulated in Section 27 of the Constitution, an initiative that is a mechanism that enables people to escape destitution. The criterion for entitlement of death benefits in terms of Section 37C of the Pension Funds Act is dependency. The primary purpose of Section 37C is to protect those who were financially dependent on the deceased during his lifetime. In effect, Section 37C overrides the freedom of testation of the deceased. The Act protects cohabitants who might have spent their entire life together so that in case of death of one of them the other one can share on the death benefit provided by the fund on the condition that they were depending on each other for maintenance.

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INTRODUCTION

In 1976, the Pension Funds Act 24 of 1956 (the Act) was amended effective from the 1 August 1976 to include Section 37C.¹ This section regulates the payment of any benefit payable upon the death of a member of a

pension fund organisation as defined in Section 1 of the Act.

As the cases before the Pension Funds Adjudicator (the Adjudicator) reveal, there is an increasing tendency among many South Africans to live together as husband and wife without observing the formalities of a legal marriage as prescribed in the Marriage Act,² Recognition of Customary Marriages Act,³ Civil Union Act⁴ or the tenets of a religion.⁵

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The primary purpose of Section 37C is to protect those who were financially dependent on the deceased during his lifetime.⁶ In effect, Section 37C overrides the freedom of testation of the deceased. It therefore serves as a statutory limitation to freedom of testation in terms of the law of succession. Thus, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in his nomination form, it does not necessarily imply that the whole amount of the benefit will in fact be awarded to such a nominated beneficiary 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.⁷ It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.⁸

In exercising their discretion, trustees are required to consider relevant factors and ignore irrelevant facts. Further, the trustees are required to exercise that discretionary power properly and not fetter their discretion.⁹ What the Act does not prescribe, however, are the factors to be taken into account in exercising that discretion. The import of this is that the trustees are given an unfettered discretion to determine which dependant will share in the benefit, to the point of granting a nil benefit to other dependants. The rider is, of course, always that the board must exercise its discretion properly by considering relevant factors and ignoring irrelevant ones. In *TWC and Others v Rentokil Pension Fund and another*¹⁰ and *Sithole v ICS Provident Fund and Another*,¹¹ the following guidelines were set out:

'the fund should have regard to a basket of factors including (but not limited to):

- the age of the parties;
- the relationship with the deceased;
- the extent of the dependency;
- the wishes of the deceased;
- the financial affairs of the dependants; and
- the future earning potential and prospects of the dependants'.

COHABITATION

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.¹² This definition includes people of the same sex living together in a stable, exclusive relationship.¹³ Some authors still use the more traditional definition that limits the term cohabitation to two people of the opposite sex living together.¹⁴

Since the coming into operation of the Civil Union Act, marriage is no longer a relationship between a man and women only to the exclusion of all other persons.¹⁵ Civil Union Act defines civil union or marriage as the voluntary union of two persons who are both 18 years of age or older, which is solemnized and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this Act to the exclusion while it lasts of all others.¹⁶ Some writers refer to cohabitation as living together, shacking-up, *de facto* marriage, quasi-marriage, common-law marriage, domestic partnership or private marriage.¹⁷

The content of a cohabitative relationship can be distinguished from marriage only by the fact that the couple is not legally married to each other. The term does not include non-sexual relationships (for example, a brother and sister living together), relationships where the couple have only occasional sexual intercourse with no intention of establishing a family unit or relationships where more than two partners live together. Although the requirements set for cohabitation differ in different legal systems and the different statutes within the legal systems, three elements seem essential for the creation of a factual cohabitative relationship, namely, a sexual relationship between the couple, a factual cohabitative relationship and a measure of durability and stability of the relationship. A further element, namely, a sense of responsibility for each other, is emphasised in some instances to prove the existence of a cohabitative relationship.

In South Africa, there is no 'law of cohabitation' regulating cohabitation in the same sense as there is a law of husband and wife. Cohabitation is, therefore, not a recognised

legal relationship.¹⁸ The fact of cohabitation does, however, have certain legal consequences and certain legislation defines 'spouse' so as to include a partner in a cohabitative relationship.¹⁹

DOES A COHABITEE QUALIFY TO BENEFIT IN TERMS OF SECTION 37C OF THE PENSION FUNDS ACT 24 OF 1956

The question is whether a cohabiting partner qualifies as a dependant in terms of Section 1 of the Pension Funds Act. In response to this question, a regard is given to the definition of a dependant, which reads 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, including a party to a customary union according to Black law and custom, or to a union recognised as a marriage under the tenets of any Asiatic religion;
 - (iii) is the child of the member, including a posthumous child, an adopted child and an illegitimate child
- (c) A person in respect of whom the member would have become legally liable for maintenance had the member not died.

This definition was changed by the Pension Funds Amendment Act,²⁰ which came into effect on 13 September 2007. It now reads 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'

A *spouse* is in turn defined as follows:

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.

In series of Constitutional Court and Supreme Court of Appeal decisions, the conventional meaning of 'spouse', being a party to a heterosexual marriage, which has been formally registered in terms of the Marriage Act,² has been extended to include alternative forms of partnership. The ambit of the concept has been broadened to include a monogamous Muslim marriage,²¹ and a same-sex permanent life partnership.²² It has not yet extended to include cohabitees.

In respect of the above, another question will be: Does a cohabiting partner qualify as a dependant in terms of Section 1 of the Act? From the definition, there are three classes of dependants, namely, legal dependants, non-legal dependants and future dependants. The cohabiting partner will qualify as a non-legal dependant or the so-called factual dependant or *de facto* dependant as she cannot qualify as legal dependant because she is not a spouse.

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 dependant on the deceased at the time of the deceased member 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 that recognise their union.

The previous Adjudicator Professor John Murphy made a determination in the matter between *Musgrave v Unisa Retirement Fund*,²³ where the complainant was excluded from the distribution and payment of the death benefit solely because she was a cohabitee. The Adjudicator held that the complainant qualifies as a factual dependant in terms of Section 1 of the Act and she was supposed to have been considered for the benefit in terms of Section 37C of the Act.

In 2009, the current Adjudicator handed an important ruling with regard to the cohabitees in the matter between *Hlathi v University of Fort Hare Retirement Fund & Others*,²⁴ where she 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 11 of 2007, which came into force and effect on 13 September 2007, the definition of a spouse also include 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.

There is a third case relating to cohabitation, which was determined by then Adjudicator Advocate Vuyani Ngwalana in *Van der Merwe v*

Central Retirement Annuity Fund and Another,²⁵ in which he stated 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 reference to the Marriage Act, Civil Union Act, Black law and custom and Asiatic religion.

In *Volks NO v Robison and Others*,²⁶ 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 cohabitees and it includes same-sex marriages.²⁷

CONCLUSION

It is important for people who are staying together as husband and wife to formalise their marriage or to register their marriage so that in case one of them passes away the question of receiving death benefits will not be a nightmare, let alone the distribution of the death estates by the Master of the High Court in case the deceased died intestate.

We are fortunate in South Africa because pension funds are 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 adequately developed.²⁸ The Act also protects cohabitees who might have spent their entire life together so that in case of death of one of them the other can have a share on the death benefit. Currently, there is no statutory law that recognises cohabitation relationship as a marriage similar to the common-law marriage.

REFERENCES AND NOTES

- 1 Section 24 of Act 101 of 1976.
- 2 Act 25 of 1961.
- 3 Act 120 of 1998.
- 4 Act 17 of 2006.
- 5 See *Hlathi v University of Fort Hare Retirement Fund & Others* PFA/EC/9015/2006(unreported), *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 [PFA], *Van der Merwe v Central Retirement Annuity Fund and Another* [2005] 5 BPLR 463 (PFA).
- 6 See Tukishi Manamela 'Chasing Away the Ghost in Death Benefits: A Closer Look at Section 37C of the Pension Funds Act 24 of 1956' (2005) Vol.15 SA Mercantile Law Journal 276.
- 7 See *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J–3706C).
- 8 See Marx, G.L. and Hanekom, K. (2007) Manual on South African retirement funds and other employee benefits, 1, Lexis Nexis, Durban, 175.
- 9 See *Sithole v ICS Provident Fund and Another* [2004] 4 BPLR 430 (PFA).
- 10 [2000] 2 BPLR 216 (PFA) at 224 H–225C.
- 11 [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25.
- 12 Hutchings and Delpoit 'Cohabitation: A responsible approach' 1992 De Rebus 121–122; Thomas 'Konkubinaat' 1984 THRHR 455.
- 13 See Hutchings and Delpoit 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 Obiters 134.
- 14 See Sinclair *The Law of Marriage* 1996 268. See also Nevondwe, L. 'The distribution and payment of a death benefit in terms of section 37C of the South African pension funds act, 24 of 1956. *Pensions an International Journal* 15(1): 41.
- 15 Cronjé and Heaton South African Family Law (1999).
- 16 Section 1. The South African Constitution particularly Section 9 stipulates that everyone is equal before the eyes of the law and all people must enjoy equal benefit of the law. The State may not unfairly discriminate either directly or indirectly against anyone on the grounds of sexual orientation.
- 17 Hutchings and Delpoit *op cit* 122. Sinclair *op cit* 267. See also Nevondwe, *ibid.*, p. 41.
- 18 Hahlo 'The Law of Concubinage' 1972 SALJ 321.
- 19 See the Insolvency Act 24 of 1936, Compensation for Occupational Injuries and Diseases Act 130 of 1993 and Domestic Violence Act 116 of 1998.
- 20 Act 11 of 2007.
- 21 *Daniels v Campbell N.O. and Others* [2004] 6 BPLR 5743 (CC).
- 22 *Satchewell v President of the Republic of South Africa and Another* [2004] 1 BPLR 5333 (CC) and *Fourie and Another v Minister of Home Affairs and Another*, as yet reported judgment of the Supreme Court of Appeal, judgment dated 30 November 2004.
- 23 [2000] 4 BPLR 415 [PFA].
- 24 PFA/EC/9015/2006(unreported).
- 25 [2005] 5 BPLR 463 (PFA).
- 26 Case No. CCT 12/04.
- 27 Nevondwe, *Ibid.*, p. 40.
- 28 See Lufuno Nevondwe, *Is the distribution of death benefits under the Pension Funds Act, 24 of 1956 constitutional* JBL Volume 15 Part 4, p166), Lufuno Nevondwe, *Living together is okay* (2009) Today Trustees 19 and Kobus Hanekom, *Manual on South African Retirement Funds and other Employee Benefits*, Volume 1, page 181.