Original Article

Examining the provision of pension death benefits to co-habitees or life partners under the South African Pension Funds Act of 1956

Received (in revised form): 2nd February 2010

Mtendeweka Mhango

is a senior lecturer of pension law at University of the Witwatersrand, School of Law. He studied government, history and the law at Morehead State University, Michigan State University College of Law, Wayne State University Law School and the University of Cape Town. Before becoming an academic, he worked as an Employer Advocate and Judicial Clerk in Detroit, Michigan. From 2008 to 2009, he acted as an advisor to the South African Pension Funds Adjudicator. He is currently reading for his PhD in pension law. His primary research interests are in the fields of pension law and constitutional law. His other interests are in the study of religion, culture and law.

ABSTRACT The purpose of this article is to reflect on the determination in *Chittenden* and demonstrate its significance to the emerging jurisprudence on South African pension law relating to death benefits. Although *Chittenden* dates back 5 years ago, it remains important to discuss it and others for the following reasons. First, there has been no academic treatment of the determination in *Chittenden* and others. Second, in light of the South African Constitutional Court decision in *Volks* a grey area has arisen in pension law, and requires some academic treatment of the determination in *Chittenden* and others. According to the interpretation of the Pension Funds Act by the former Adjudicator John Murphy, the board has the discretion to accord to same sex couples and co-habitees or life partners the same rights as are accorded to heterosexual married couples. Murphy's interpretation differs from that of the recently former Adjudicator Advocate Vuyani Ngalwana who, following the recent decision in *Volks* held that a person who could have married a deceased pension member but chose not to should not be given the rights of a spouse of a deceased member. These conflicting interpretations have a bearing on the two-prong dependency test as developed and applied by the Adjudicator. Lastly, in light of the changing societal views regarding non-traditional relationship like cohabitation and life partnerships, it is important to examine how the pension law is adapting to these changes through the application of the dependency test. I argue in this article that the dependency test relied upon in this determination, which has been applied by the Adjudicator since 1998, should be welcomed because it advances the legislatures' intent contained in the Pension Funds Act by requiring that death benefits payable by pension fund in the event of death of a pension member be distributed in accordance with a legislative scheme, which gives preference to need and dependency above the deceased pension member's freedom of testation. This article also argues that *Chittenden* (and others like it) is not undermined by *Van der Merwe v. Central Retirement Annuity Fund*, but remains good law in the framework of the distribution of death benefits to non-traditional couples.

Pensions (2010) 15, 226–237. doi:10.1057/pm.2010.6

Keywords: dependency; death benefits; spouse; Adjudicator; cohabitation; determination

Correspondence: Mtendeweka Mhango
University of the Witwatersrand, School of Law, Private Bag 3,
WITS 2050, South Africa.

INTRODUCTION

In 1976, the South African Pension Fund Act 24 of 1956 was amended to include section 37C.¹⁻⁴ This section regulates the payment of any benefit payable upon the death of a member of a pension fund organization. It overrides the freedom of testation and gives it to the board of management of a pension fund (herein as the board). Effectively, in terms of section 37C, the needs of dependants of the deceased pension member are the prime consideration in the decisions on how his or her pension savings should be distributed. The purpose was to prevent dependants of a deceased pension member from being left destitute and without financial support, hence the section gave the board the power to distribute death benefits to such dependants.⁵

To achieve this purpose, the legislature embraced an expansive definition of a dependant in the Pension Funds Act. This definition 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;
 - (iii) is a 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;⁶ (Chapter 1 (definitions provision) of the Pension Funds Act)

It is clear from the above definition that the Pension Funds Act creates three categories of dependants. The first is a legal dependant under subsection (a). The second is a factual dependant under subsection (b). The third is a future dependant under subsection (c).

The subsection (b) is the focus of this article. Under subsection (b), a person who is factually dependent on a pension member is considered a

dependant.⁷ The Pension Funds Adjudicator (Adjudicator), a statutory tribunal mandated to resolve all complaints involving pension funds organizations in a procedurally fair, economical and expeditious manner and whose decisions have the same effect as a civil judgment of any court of law,⁸ has adopted a two-prong dependency test to determine a factual dependant who may be considered in the distribution of death benefits. The question regarding the criteria used to determine who qualifies as a factual dependant is often one of the most contentious issues in South African pension law. In *Chittenden v. Escort Butchery Provident Fund and Another*,⁹ the Adjudicator relied on a previously formulated two-prong dependency test to address this issue. The inquiry under the test is whether the parties lived in a relationship of mutual dependence (involving an intimate or sexual and emotional bond) and shared a common household.

The purpose of this article is to reflect on the determination in *Chittenden* and demonstrate its significance to the emerging jurisprudence on pension law relating to death benefits. Although *Chittenden* dates back 9 years ago, it remains important to discuss it and others for the following reasons. First, there has been no academic treatment of the determination in *Chittenden* and others. Second, in light of the South African Constitutional Court’s decision in *Richard Gordon Volks NO v. Robinson and Others*,¹ a grey area has arisen in pension law, and requires some academic treatment of the determination in *Chittenden* and others. According to the interpretation of the Pension Funds Act by the former Adjudicator John Murphy, the board has the discretion to accord to same sex couples and co-habitees or life partners the same rights as are accorded to heterosexual married couples.¹⁰ Murphy’s interpretation differs from that of the recently former Adjudicator Advocate Vuyani Ngalwana who, following the recent decision in *Volks* held that a person who could have married a deceased pension member but chose not to should not be given the rights of a spouse of a deceased member.¹¹ These conflicting interpretations have a bearing on the two-prong dependency test as developed and applied by the

Adjudicator. Lastly, in light of the changing societal views regarding non-traditional relationship like cohabitation and life partnerships, it is important to examine how the pension law is adapting to these changes through the application of the dependency test.

I argue in this article that the dependency test relied upon in this determination, which has been applied by the Adjudicator since 1998, should be welcomed because it advances the legislatures' intent contained in the Pension Funds Act by requiring that death benefits payable by a pension fund in the event of death of a pension member be distributed in accordance with a legislative scheme, which gives preference to need and dependency above the deceased pension member's freedom of testation.¹² This article also argues that *Chittenden* (and others like it) is not undermined by *Van der Merwe v. Central Retirement Annuity Fund*, but remains good law in the framework of the distribution of death benefits to non-traditional couples.

A BRIEF DISCUSSION OF THE PURPOSE OF SECTION 37C

Section 37C was enacted and inserted into the Pension Funds Act in 1976. This section regulates the payment of any benefit payable upon the death of a member of a pension fund, and places a duty on the board to distribute the death benefit. The term pension fund is defined in the Pension Funds Act to mean a pension fund organization. The term pension fund organization is in turn defined in section 1 of the Pension Funds Act as 'any association established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members'.⁶

In addition, the language of section 37C(1) of the Pension Funds Act provides 'that regardless of the provisions of any other law, including the common law and notwithstanding the rules of a registered fund, any benefit payable upon the death of a pension member must be dealt with in terms of the scheme outlined in the Pension

Funds Act'.¹³ Section 37C therefore overrides the freedom of testation in relation to the benefits payable by the fund in the event of death of a pension member and gives the discretion to distribute such benefits to the board.¹⁴ The guiding principle is that neither do such assets form part of the deceased's estate nor do the provisions of the Interstate Succession legislation apply, but are required to be distributed in accordance with the statutory scheme, which gives preference to need and dependency above the pension member's choice.¹⁵ Effectively, in terms of section 37C of the Pension Funds Act, the needs of dependants override decisions on how one's pension savings should be distributed.

The policy underlying this social security measure is to ensure that the monies in respect of which the state allows major tax concessions should, in theory, be applied towards the benefit of the deceased member's surviving spouse, children and other dependants, thereby reducing the state's liability and promoting social protection.¹⁶ Therefore, the primary purpose of this section is to prevent dependants of pension members from being left without financial support, and hence it gave the board the power to implement this social security measure and minimize obligations of the state to support surviving dependants.¹⁷ Judge Hussain of the Johannesburg High Court in *Mashazi v. African Products Retirement Benefits Provident Fund* commenting on the purpose of Section 37C has also explained that:

Section 37C is a social protection type measure, [because] it places the benefit payable on a member's death under the control of the retirement fund with the discretion to pay it to the member's dependents in such proportions as it deems equitable, thereby reducing the states liability in this regard.¹⁸

Although the legislature's worthy intentions in enacting section 37C are admirable, the Adjudicator has critically commented that 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. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.¹⁹

The difficulties brought about by section 37C arise out of the three duties this section imposes on the board of management. The first of these duties is to identify the dependants of a member. The second duty is to effect an equitable distribution of the benefits among the beneficiaries, and the third is to determine an appropriate mode of payment. In the discussion that follows, this article will focus on the first duty imposed on the board, which is to identify potential dependants.²⁰

THE FACTS

The issue arising for determination before the Adjudicator in *Chittenden* was whether Cindy Gillitt (Cindy), whose relationship with the deceased pension member was terminated and had moved out of the shared home before the member's death, was a factual dependant of the deceased pension member in terms of the definition of dependant in the Pension Funds Act.

The deceased member was employed by Estcourt Butchery until August 1997 when he fell ill. He never recovered from this illness and died of cardio-respiratory arrest on 24 August 1998. Before his death, the deceased was a member of the Escourt Butchery Provident Fund (first respondent). On 3 May 1997, he nominated Cindy as a beneficiary in respect of any proceeds payable in terms of the pension fund rules. He and Cindy shared a household and its expenses, and in a correspondence with the fund's administrators, he referred to her as his common law wife. In a letter to the fund, dated 25 July 1998, he nominated Cindy and wrote that 'so as to make the matter completely clear I would hereby state that any monies due to me

from yourselves upon my death would be made payable to Cindy with whom I have been living over the past years and whom I think of as my common law wife'.²¹ In his will, the member had referred to Cindy as his fiancée, and according to the testimony of the landlord of the home they shared, the two had lived together as an engaged couple.

Shortly before his death, on 2 August 1998, the member nominated his mother, the complainant Marjorie Chittenden to receive all his pension benefits. The deceased pension member wrote in his letter of notification to the first respondent that 'I wish it to be known that I am not living with or supporting Cindy in any way whatsoever and wish that the beneficiary of the provident fund be my mother who is my sole support and supporter'.²² Cindy, who was employed before and after the deceased's death, was no longer able to maintain her standard of living without the financial support of the deceased, and was compelled to move out of their shared home and moved in with her mother.

In November 1998, the board of the first respondent held a meeting to discuss the distribution of the deceased's death benefit. After considering all the evidence, they concluded that Cindy was in fact dependent on the deceased pension member for maintenance upon his death and accordingly fell within the definition of factual dependant under the Pension Funds Act. As a result, the board decided to divide the benefit of R48 000, which became available for distribution upon the deceased pension member's death, equally between the complainant and Cindy.

The complainant lodged a complaint with the Adjudicator in terms of section 30A of the Pension Funds Act disputing the first respondent's distribution of the death benefit to Cindy. She argued that Cindy was not factually or financially dependent on the deceased pension member at the time of his death and thus does not fall within the definition of dependant. She contended that the fact that Cindy and the deceased pension member may jointly have occupied a flat and presumably shared the rent and other household expenses does not mean that the deceased pension member was maintaining

her. The complainant also contended that the fact that Cindy was employed during her relationship with the deceased and is still employed showed that she had the ability to support herself and therefore could not be classified as a dependant in terms of the definition in the Pension Funds Act.

The first respondent in turn argued, first, that the member acknowledged Cindy in his correspondence with the first respondent as his common law wife, which was proof that he was committed to the relationship, which went beyond merely living together and likely involved an emotional and sexual bond. Second, the first respondent noted that the member also acknowledged Cindy as his fiancée in his will, which they argued gave them reason to believe that the couple would have married had the member not died.

THE DECISION

The Adjudicator ruled that Cindy fell within the definition of a dependant and therefore was entitled to be considered in the distribution of the death benefit. The Adjudicator commenced his analysis by acknowledging that section 37C (1)(b) ordinarily governs the distribution of death benefits in which there is only a nominee and no dependants. This section provides 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 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.²³

The Adjudicator explained that, on the basis of the above section, if the complainant (being the

only nominee) could show that Cindy was not factually dependant on the deceased, and the board of the first respondent was not able to trace any other dependants of the deceased within 12 months after his death, the board would be obliged to distribute the benefits in terms of the above section.²¹ This would have resulted in the complainant being entitled to the entire benefit to the exclusion of Cindy.²⁴ Therefore, according to the Adjudicator, the crux of this determination lay in the meaning of the term dependant as defined in the Pension Funds Act.

Previously, the Adjudicator, in *Van der Merwe and Others v. Southern Life Association and Another*,²⁵ applied a purposive and contextual interpretation of a dependant in the Pension Funds Act and held that the purpose of the legislature, in enacting this provision, was to broaden the category of persons entitled to share in death benefits by including persons involved in relationships, which the law traditionally does not accept as constituting legal dependency. From this case, the Adjudicator formulated a two-prong dependency test to determine factual dependency. The first question under this test is whether the parties lived in a relationship of mutual dependence, and secondly whether the parties ran a shared common household. According to the Adjudicator, the first prong of the test is qualified by the requirement that mutual dependency must involve, among other things, an emotional and intimate or sexual bond.²⁶

In applying the two-prong dependency test to the factual circumstances in *Chittenden*, the Adjudicator found that, on the evidence, the deceased and the second respondent lived in a relationship of mutual dependence in which they had an emotional and intimate bond, and ran a shared common household. The Adjudicator also found that the deceased and Cindy lived together for a period of 2.5 years, and ruled that this was sufficient time for a state of mutual dependence to develop. In relation to the contradictory letters written by the deceased member to the first respondent, first on the 25 July 1998 and second on 2 August 1998, the Adjudicator ruled that these letters were unreliable as evidence of

showing the true nature of the deceased pension member's relationship with Cindy. Instead, the Adjudicator placed great reliance on the statements in the member's will and in the landlord's affidavits, and held that Cindy probably fell within the definition of a factual dependant, and therefore was entitled to be considered in the distribution of the benefit in terms of section 37C(i)(b) of the Pension Funds Act. It is important to emphasize the correctness in law of the holding by the Adjudicator. Section 37C imposes three statutory duties on the board. See, *Mashego v SATU National Provident Fund & Another* [2007] 1 BPLR 229 (PFA). The first of these duties is to identify the circle of potential beneficiaries of a deceased member. The second duty is to effect an equitable distribution of the benefits amongst the beneficiaries, and the third is to determine an appropriate mode of payment. See, Mtendeweka Mhango & Ntombizozuko Dyani, *The Duty to Effect An Appropriate Mode of Payment to Minor Pension Beneficiaries Under Scrutiny in Death Claims* 12 *Potchefstroom Electronic Law Journal* (2009)(discussing the third duty of the board and its problems). As a result, a person who is identified as a beneficiary is only entitled to be considered by the board in the distribution phase of the scheme. Put differently, a person who is identified as a potential beneficiary does not get an automatic entitlement to the death benefit itself, but receives an entitlement to be considered by the board in its application of the overall legislative scheme in section 37C. The reason is that the board after identifying a person as a beneficiary has a further duty to distribute the benefits in an equitable manner. Equity may demand that a beneficiary should be excluded from receiving the benefits because other dependants are more deserving on account of any of the following factors: the age of the beneficiary; the relationship with the deceased; 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. See, *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA). This is then followed by the application of the last duty, which as indicated

earlier, is to determine an appropriate mode of payment. It is for these reasons that the Adjudicator's holding in *Chittenden* (that Cindy was entitled to be considered in the distribution of the benefits pursuant to section 37C) should be understood and welcomed as good law.

DISCUSSION

The *Chittenden* determination is significant for demonstrating how a tribunal, such as the Adjudicator, can utilize the purposive and contextual tools of interpretation to give meaning to a remedial statute such as the Pension Funds Act. According to Ian Currie and Johan de Waal, purposive interpretation is 'aimed at bringing out core values that underpin the listed fundamental rights in an open and democratic society and then to favour the interpretation of a provision that best supports those values'.²⁷ They go on to say that 'purposive interpretation tells us that after we have identified the purpose of a right in a statute we should be able to ascertain the scope of a statutory right'.²⁸ Furthermore, Currie and de Waal argue that the meaning of words depends on the context in which they are used;²⁹ that the provision of a statute must be read in context in order to ascertain their purpose. Accordingly, they argue that the wider sense of context is the historical and political setting of a constitution or for our purposes a statute.³⁰ Therefore, the 'purposive and contextual approach to interpretation inevitably requires a value judgment to be made about which purpose is important and protected by a statute and which is not'.³¹

After applying these interpretive tools and exercising the inevitable value judgement, the *Chittenden* determination rightly concludes that the legislature did not intend to restrict the definition of a dependant to persons involved in relationships, which the law traditionally accept as constituting legal dependency, but instead to broaden the category of persons to include other non-traditional relationships. It, therefore, gives effect to the true purpose of section 37C, which is to serve a social protection function and protect dependency, even over the wishes of the

deceased.¹⁸ This is especially important today given that non-traditional relationships outside marriage (such as cohabitation and life partnerships) have come to be increasingly accepted in our society.³² The Adjudicator also correctly applies the dependency test formulated and first applied in *Van der Merwe v. Southern Life Association and Another*. There is no need to restrict the distribution of death benefits to traditionally recognized relationships when couples, for all practical purposes, live as husband and wife.

In addition to clarifying definitional difficulties of a dependant, *Chittenden* further highlights the difficulties in applying the dependency test. The Adjudicator's application of this test can be criticized in that it did not clearly apply all the facts to the test. On the question of establishing emotional and intimate bond, the Adjudicator relied on speculative facts and made certain inferences that because the couple had lived together for 2.5 years, they probably had an emotional and intimate bond at the time of the deceased pension member's death. The Adjudicator arguably should have specifically investigated the existence of every element of the test before concluding whether the dependency test was established. Despite this criticism, I submit that the dependency test should be welcomed.

OTHER IMPORTANT DETERMINATIONS

The Adjudicator has, on a number of occasions in which the question of factual dependency was at issue, looked beyond the speculative facts or inferences of the parties' relationship and analysed the true nature of the relationship between the parties.

In *Van der Merwe v. Southern Life Association and Another*,³³ the Adjudicator had to determine whether the Mrs Petronella Annette du Toit (the second respondent), who had cohabited with the deceased member at the time of his death, was a factual dependant of the deceased member. The Adjudicator held as follows:

section 37C has the progressive aim of recognising that modern society is tolerant of relationships

besides the nuclear family arrangements sanctioned by the common law. The true test of dependency in terms of section 1(b)(i) is whether the parties had demonstrated a mutual dependence and ran a shared and common household. On the facts, the second respondent was indeed dependant on the deceased, notwithstanding that she did not require financial contribution from the deceased in order to survive.³⁴

The Adjudicator's decision was based on the one-on-one interview with the second respondent, from which it concluded that the second respondent had lived with and had an intimate relationship with the deceased member for a period of 9 years before his death, and that they bought a house together and shared household expenses and developed a mutual dependence. The Adjudicator was also convinced by the fact that countless adult citizens in South Africa live together in mutual dependency without the formalities of marriage, and reasoned that the true intention of paragraph (b)(i) of the definition of a dependant in the Pension Funds Act is to grant the board the discretion to accord to unmarried couples the same rights as legally married couples. The Adjudicator argued that such an interpretation would be in keeping with the spirit of the Bill of Rights, which the Adjudicator is obliged to promote in terms of sections 7(2) and 39(1)(a) of the constitution. In particular, the Adjudicator pointed out that section 9 of the Constitution provides, *inter alia*, that neither the state nor any person may unfairly discriminate directly or indirectly against anyone on the grounds of marital status. It is undoubtedly clear that the Adjudicator's interpretation of the Pension Funds Act was designed to comply with the instruction in section 39(1) of the constitution. This section provides that 'when interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'. Section 7(2) compliments the latter provision by requiring the state, of which the Adjudicator is part pursuant to section 239 of the constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights.

In the matter of *Fourie v. Central Retirement Annuity*,³⁵ the Adjudicator likewise had to determine whether Mrs Nieuwenhuis, the mother of the deceased and also the second respondent, qualified as a factual dependant. In this case, the complainant objected to the decision of the management committee, which was entrusted with the payment of benefits according to the rules of the retirement annuity fund, to award death benefits to Mrs Nieuwenhuis on the basis that because there had been no intimate relationship between the complainant and the deceased member during the last 3 years of the deceased's life, the complainant did not qualify as a dependant of the deceased. The real issue, then, was that which the Adjudicator ignored: whether a person who previously lived with a deceased member in a relationship of mutual dependence, involving an intimate and emotional bond, and ran a shared common household for a period of 9 years, but who break this relationship and maintain a friendship without being intimate, qualifies as a dependant under the Pension Funds Act. Put another way, the question was whether intimacy can be the determining factor as to whether or not a person qualifies as a dependant under the Pension Funds Act.

The facts in *Fourie v. Central Retirement Annuity* were as important as the law that developed. In this matter, the complainant had been in a gay relationship with the deceased for 9 years. During this period, the couple had lived together in a relationship of mutual dependence involving an emotional and intimate bond and had run a shared common household. The deceased had battled with alcoholism and become dependent on tranquilizers. Throughout this period, the complainant supported the deceased emotionally and financially. Owing to his addiction, the deceased had to take unpaid leave, and the complainant took out a loan of R15 000 to support the deceased, although he was not earning a salary. In 1996, the couple parted amicably and the deceased moved in with his mother, whom he supported using the money he received after taking early retirement in the same year. They remained friends, and the

complainant continued to support the deceased emotionally until his death. Before his death, the deceased named the complainant as his sole heir under his will.

The Adjudicator upheld the decision by the management committee, in particular, 'that in light of there being no intimate relationship between the deceased and the complainant (apart from being friends), the complainant did not fall within the definition of dependant. On the other hand, the management committee found, and the Adjudicator agreed, that Mrs Nieuwenhuis was in fact dependant on the deceased at the time of his death and, by virtue of being the only dependant in terms of the Pension Funds Act, was awarded the entire benefit.

In *Swanepoel v. Central Retirement Annuity Fund and Another*,³⁶ a similar situation transpired. In this case, the complainant was the mother of the deceased. She challenged the decision of the first respondent, Central Retirement Annuity Fund, to award the deceased's death benefits to the girlfriend and second respondent. According to the Adjudicator's finding, the second respondent was engaged to and lived with the deceased in a house registered in the name of the deceased. The couple were planning to get married in March 2000 in Mauritius. They had booked their wedding plans with a travel agency and had already paid a deposit. The deceased had also paid a R1000 deposit for an engagement ring and used the second respondent's personal loan account to pay the balance of R4000. Since the deceased's death she became solely responsible for the payment of these accounts. Immediately before his death, the deceased had made an application to have the second respondent registered on his medical aid.

On the basis of these facts, the Adjudicator concluded that the second respondent and the deceased lived together as man and wife and contributed jointly to each other's maintenance; that they were mutually dependent on each other at the time of his death. The latter conclusion did not end the Adjudicator's analysis in this matter; the next question for the Adjudicator was whether mutual dependence qualified the second respondent as a dependant

of the deceased in terms of the definition of a dependant in the Pension Funds Act. According to the Adjudicator, the question is whether the second respondent falls under the category of a dependant envisaged in paragraph (b)(i) of the definition by virtue of being a person in respect of whom the deceased member was not legally liable for maintenance but who was in the opinion of the board, upon the death of the member, in fact dependant on the member for maintenance, in the sense that she was mutually dependant on the deceased? In addressing this question, the Adjudicator employed the two-prong dependency test and concluded that 'in this case it is clear that the parties were cohabiting at the time of the deceased's death and although the deceased did not maintain the second respondent, they demonstrated a mutual dependence and ran a shared common household'.³⁷ Hence, the Adjudicator held that the second respondent is a dependant of the deceased and is entitled to the benefit in terms of the policy.

On the basis of this foregoing analysis, it is clear that the Adjudicator applies the dependency test in the determination of factual dependants. However, this analysis also highlights some inconsistency in the application of this test. In some cases, such as in *Fourie v. Central Retirement Annuity*³⁸ and *TWC and Others v. Rentokil Pension Fund and Another*,³⁹ the Adjudicator appears to stress the complainant's strong showing that they (the complainant and the deceased pension member) had a relationship of mutual dependence involving an intimate and emotional bond. In these cases, the Adjudicator appears to have taken an extra step to require a showing and identification of evidence of an intimate and emotional bond or at least evidence creating a reasonable inference of the same. In other cases, for example in *Swanepoel v. Central Retirement Annuity and Another*, the Adjudicator appears to ignore the question of the existence of an intimate and emotional bond between the parties in the analysis.⁴⁰ No mention, either by a reasonable inference or actual evidence, is made about the true nature of the relationship between the second respondent and the deceased. The

problem with this kind of inconsistency is that it creates ambiguities in the law, which make it difficult for lawyers to advise clients on the likelihood outcome of their claims.

As illustrated in *Fourie v. Central Retirement Annuity*, the complainant in that case failed to qualify to be considered in the distribution of benefits solely because his relationship with the deceased did not involve an intimate or sexual bond. This is despite the fact that there were facts to suggest that the complainant had continued to have an emotional bond with the deceased and, like the second respondent in *Swanepoel*, had taken out a loan to the benefit of the deceased and after his death was solely responsible for its repayment. Therefore, I submit that the Adjudicator should consistently apply the dependency test to remove any ambiguities that may have been created in some of the cases that have been discussed here, and others.

As mentioned elsewhere, the decision in *Volks* has given rise to a grey area in the law particularly as it relates to factual dependants. As a result, the law is ambiguous. This ambiguity is because of the conflicting interpretation of the Bill of Rights in the South African Constitution between Murphy and Ngalwana.⁴¹ In light of the Constitutional Court decision in *Volks*, Ngalwana reversed the previous determination by his predecessor Murphy regarding co-habitees. In his ruling, Ngalwana explained that:

Section 39 of the Constitution of the Republic of South Africa 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 [subsection (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 [subsection (b)(ii)]. In [*Volks*], 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 [subsection (b)(ii) of the Pension Funds 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.⁴²

On the basis of this ruling, a potential beneficiary who was not married to the deceased member, but had a relationship of mutual dependence and ran shared and common household, will not qualify as a dependant by virtue of being regarded as a spouse for purposes of subsection b(ii) as previously held by Murphy in *Van der Merwe v. Southern Life Association and Another*. Instead, such potential beneficiary may only qualify as a dependant under the provisions of subsection b(i) of the Pension Funds Act,⁴³ and can demonstrate factual and financial dependence.⁴⁴ In my view, Murphy's interpretation, which is that the board has the discretion to accord to same sex couples and co-habitees the same rights as are accorded to heterosexual married couples, should be welcomed because the leitmotif of the Pension Funds Act is to broaden the category dependants to share in death benefits to include persons who may otherwise not be considered as legal dependents. In other words, Murphy's view properly acknowledges that the Pension Funds Act is a remedial legislation, which should be liberally construed to grant similar rights to same sex couples and co-habitees as are accorded to heterosexual married couples. I submit that this was the intent of the legislature and should be welcomed. What is more is that Ngalwana may have erred in his interpretation of the decision *Volks*. In *Volks*, the Constitutional Court was tasked to decide constitutionality of the Maintenance of Surviving Spouses Act 27

of 1990, in which they had to determine the meaning of spouse in that legislation. It held that it was constitutionally permissible for the Maintenance of Surviving Spouses Act 27 of 1990 to discriminate on the basis of marital status in the provision of maintenance benefits by not recognizing the plaintiff, a cohabitee who could have married the deceased but chose not to, as a spouse. Put differently, *Volks* represents the proposition that it is constitutionally permissible for an Act of Parliament to discriminate on the basis of marital status against a cohabitee or life partner by not extending the rights of a spouse to them.⁴⁵ It is my view that this decision is limited to the interpretation of the word spouse in the context of the Maintenance of Surviving Spouses Act and not the Pension Funds Act, and such interpretation has no effect on the expansive definition of a dependant adopted by the legislature in the Pension Funds Act. Therefore, I submit that *Van der Merwe v. Central Retirement Annuity Fund* was wrongly decided.

Furthermore, in enacting section 37C, the legislature recognized the different categories of relationships and chose to grant them same rights. For example, a factual dependant is granted the same rights as a legal dependant and the Adjudicator has held that the board should not prefer legal dependants over factual dependants or treat them differently in terms of the rights that accrue to each.⁴⁶ Arguably, the legislature contemplated that a deceased pension member could be left with more than one spouse, either in the traditional sense of marriage or non-traditional sense of cohabitation, life partnership or *de facto* spouse, but that each had to be accorded the same rights when it came to the distribution of death benefits. Therefore, I submit that Murphy's interpretation in *Van der Merwe v. Southern Life Association and Another* should be welcomed and that *Van der Merwe v. Central Retirement Annuity Fund* does not undermine *Chittenden*, which remains good law because they are consistent with the legislative intent in the Pension Funds Act, and can be reconciled with the decision in *Volks*.

CONCLUSION

To conclude, *Chittenden* is an extremely important determination in its approach to the interpretation of factual dependants, which sets a commendable example. Its application of a purposive and contextual interpretation to the definition of dependant in the Pension Funds Act is also to be welcomed.

However, its application of the dependency test, which suggests that any couple, who live in a relationship of mutual dependence and run a common household, is in a relationship involving an emotional and intimate or sexual bond, is incorrect and should not be followed because it is speculative. It is not based on the facts as may exist in a particular circumstance, but rather on speculation. Furthermore, *Chittenden* confirms that the Pension Funds Act is a remedial statute, which should be liberally construed by courts and tribunals to give effect to its purpose of enhancing social protection. On a substantive matter, *Chittenden* demonstrates that to qualify as factual dependant, a surviving girlfriend or boyfriend, who seeks benefits, should be able and willing to disclose that their relationship with the deceased member involved an intimate and emotional bond over and above showing mutual financial dependence and the running of a shared household.

REFERENCES

- 1 2005 (6) BCLR 446 (CC).
- 2 See *Martins v. Beka Provident Fund* [2000] 2 BPLR 196, 213 (PFA); and *Van der Merwe and Others v. Southern Life Association and Another* [2000] BPLR 321, 330 (PFA).
- 3 South African pension fund refuse to grant benefits to surviving life partners or co-habitees on the basis of the precedent established in *Maritz v. Absa Group Pension Fund*, PFA/GA/1387/00/KM (unreported) and *Van der Merwe v. Central Retirement Annuity Fund*, (2005) 5 BPLR 463 (PFA).
- 4 See *Dobie NO v. National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA); *Martin v. Beka Provident Fund* [2000] 2 BPLR 196 (PFA); *Mashazi v. African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); Manamela (below note 5 at 278–279).
- 5 For a discussion of the purpose and rationale of section 37C, see, for example, Manamela, T. (2005) 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* 15: 276–279.
- 6 Chapter 1 of the Pension Funds Act 24 of 1956.
- 7 See *Martin v. Beka Provident Fund* [2000] BPLR 196 (PFA).
- 8 Sections 30D and 30O of the Pension Funds Act 24 of 1956. See also, Marx, G. and Hanekom, K. (2007) *The Manual on South African Retirement Funds and Other Employee Benefits*, Durban: LexisNexis, pp. 176.
- 9 [2001] 5 BPLR 2001 (PFA).
- 10 See *Martins v. Beka Provident Fund* [2000] 2 BPLR 196, 213 (PFA); and *Van der Merwe and Others v. Southern Life Association and Another* [2000] BPLR 321, 330 (PFA).
- 11 South African pension fund refuse to grant benefits to surviving life partners or co-habitees on the basis of the precedent established in *Maritz v. Absa Group Pension Fund*, PFA/GA/1387/00/KM (unreported) and *Van der Merwe v. Central Retirement Annuity Fund*, (2005) 5 BPLR 463 (PFA).
- 12 See *Dobie NO v. National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA); *Martin v. Beka Provident Fund* [2000] 2 BPLR 196 (PFA); *Mashazi v. African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); Manamela (above note 5 at 278–279).
- 13 See *Sithole v. ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) (in which the Adjudicator set aside the board's decision because the board relied on customary law instead of section 37C to distribute the benefits, and ruled that section 37C specifically takes precedence over any law, which includes customary law); *Jacobs v. Central Retirement Annuity Fund* [2001] 1 BPLR 1488 (PFA) (held that the fact that the second respondent has lodged a claim against the estate in terms of the Maintenance of Surviving Spouses Act has no bearing on the payment of death benefits arising out of the rules of a pension fund. This payment is exclusively regulated by section 37C regardless of any other law or rules of a fund); and *Matene v. Noorberg Group Life Assurance Scheme* [2001] 2 BPLR 1604 (PFA). See also, Marx and Hanekom (above note 8 at 176).
- 14 See Wood-Bodley, M.C. (2007) Freedom of Testation and the Bill of Rights: *Minister of Education v. Syffrets Trust Ltd. South African Mercantile Law Journal* 124: 687–702, (discussing the freedom of testation under South African law).
- 15 *Dobie NO v. National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA); *Mthiyane v. Fedsure Life Assurance Ltd and Other* [2001] 7 BPLR 2230 (PFA).
- 16 See *Mashazi*, 8 BPLR 3703 (W); and *Van de Berg v. Durban Pension* [2003] 3 BPLR 4518 (PFA); *Musgrave v. Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA). See also Marx and Hanekom (above note 8 at 177).
- 17 *Musgrave v. Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA). For a discussion of the purpose and rationale of section 37C, see also, Manamela (above note 5 at 276–279).
- 18 *Mashazi*, 8 BPLR at 3705.
- 19 *Dobie NO*, 9 BPLR at 41F–J.
- 20 Although acknowledging the worthy intentions of the legislature to advance the interests of dependants in remote rural areas, the Adjudicator has noted that there is a legitimate concern about the practical difficulties of tracing such dependants. *id.*
- 21 *Chittenden*, 5 BPLR at 2005.
- 22 *id.*
- 23 Section 37C(1)(b) of the Pension Funds Act 24 of 1956.
- 24 *id.*
- 25 *Van der Merwe and Others v. Southern Life Association and Another*, 3 BPLR at 329–331.
- 26 *Chittenden*, 5 BPLR at 2002–2005.
- 27 Currie, I. and de Waal, J. (2005) *The Bill of Rights Handbook*, 5th edn., Cape Town: Juta, pp. 148–149.

- 28 *id.*
- 29 *id.* at 153–158.
- 30 Justices Antonin Scalia and Clarence Thomas have expressed displeasure with judicial reliance on legislative history to interpret statutes in any circumstances. Their position is twofold: legislative history as evidence of legislative intent is a fiction, not reality, and the meaning of laws should be available to all, and apparent on the face of the statute, not hidden in historical materials, which only lawyers and historians may be able to find. The majority of the United States Supreme Court, however, reflects the traditional view that legislative history is a tool to aid in determining the meaning of statutory language. See Sherman, M. (1991) The use of legislative history: A debate between Justice Scalia and Judge Breyer. *Admin Law News* 16: 1, 13; see also, Funk W. (2001) Administrative Procedure and Practice 152.
- 31 Currie and de Waal (above note 27 at 149).
- 32 See *Richard Gordon Volks NO*, 6 BCLR at 513.
- 33 *Van der Merwe*, 3 BPLR at 329.
- 34 *id.* at 329–330.
- 35 [2001] BPLR 1580 (PFA).
- 36 [2001] 6 BPLR 2153 (PFA).
- 37 *id.* at ¶ 15.
- 38 *Fourie v. Central Retirement Annuity*, 2 BPLR at 1583.
- 39 [2000] 2 BPLR 216 (PFA).
- 40 For a discussion of some aspect of the two-prong dependency test, see Manamela (above note 5 at 282).
- 41 The Adjudicator has the power to set aside a decision of the board of trustees of a pension fund or a rule of a pension fund, which he or she considers to be inconsistent with the Constitution and not justified in terms of section 36(1) of the Constitution of South Africa. See *Maltman v. Natal Joint Municipal Pension Fund (Superannuation) and Another* [2005] 4 BPLR 314 (PFA); and *Sinatra v. Germiston Municipal Retirement Fund* [2004] 4 BPLR 360 (PFA). However, it remains an open question whether the Adjudicator has authority to order substantive redress with regard to a decision of the board of trustee, which it finds to be inconsistent with the Constitution. With regard to a rule of a pension fund, which the Adjudicator declared to be inconsistent with the Constitution, the prevailing view is that the Adjudicator has the authority to order substantive redress. See, Annual Report of the Adjudicator (2005) at 62–65, available at <http://www.pfa.org.za/sitesmart/uploads/files/371227CE-6DA1-418E-990A-9E28F188AE86.pdf>.
- 42 *Van der Merwe*, 5 BPLR at ¶ 13. See also *Kotiah v. Toyota SA Provident Fund* (PFA) Case No PFA/KZN/3283/05/KM dated 9 June 2006 (unreported).
- 43 *Van der Merwe*, at ¶ 14. Numerous Pension Funds in South Africa, including the University of Witwatersrand Retirement Fund, specifically define the term spouse to clarify the matter for its members and potential beneficiaries. See also the Pension Funds Amendment Act 11 of 2007, which amended the term dependant by defining a spouse to include a spouse as ‘a person who is the spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act 68 of 1998, or the Civil Union Act 17 of 2006’. *id.*
- 44 *Van der Merwe*, at ¶ 16.
- 45 Wildenboer, L. (2005) Marrying domestic partnerships and the constitution: A discussion of *Volks NO v. Robinson* 2005 5 BCLR 446 (CC). *South African Public Law* 20: 459–467, (discussing the decision in *Richard Gordon Volks v. Ethel Robinson*).
- 46 See *Seagull and Others v. Lifestyle Retirement Annuity Fund* [2001] BPLR 1519 (PFA).