
Original Article

Does freedom of testation supersede the powers of the board of trustees to allocate a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956?

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ABSTRACT This article outlines the procedures that are followed in the distribution and payment of death benefits. It further outlines the provisions of section 37C of the South African Pension Funds Act, 24 of 1956, which takes into account the wishes of the deceased in the nomination form when allocating a death benefit. It further highlights that the nomination of beneficiaries by the deceased in the nomination form does not mean that those beneficiaries will be entitled to all the benefit. The wishes of the deceased are only one of the factors. The crucial factor for allocation of benefits is dependency. Death benefits do not form part of the deceased's estates and are not subject to the common law of succession.

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INTRODUCTION

In 1976, the Pension Funds Act was amended to include section 37C, which deals with the

distribution and payment of death benefits.¹ This section provides guidelines on how death benefits must be distributed to the beneficiaries. These guidelines are contrary to freedom of testation. Freedom of testation dictates that when the deceased passes away, his assets must be distributed to the beneficiaries according to his wishes in his Last Will and Testament. On the

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other hand, section 37C stipulates that death benefits do not form part of the deceased's estate. In simple terms, death benefits are distributed and paid by the board of management of the pension fund organisation after considering various factors, the allocation must be fair and equitable and the board of management must not fetter their discretion by considering irrelevant factors and ignoring relevant factors. During the deceased's lifetime, section 37C stipulates that the deceased will be required to fill in the nomination form and nominate beneficiaries who will benefit upon his death. This nomination does not differ much from the Last Will and Testament. When death benefits are distributed, the wishes of the deceased in the nomination form are only one of the factors that need to be considered.

The freedom of testation is administered by the executor and the assets are distributed in accordance with the valid Last Will and Testament of the deceased. South Africans often confuse the nomination form and Last Will and Testament. They believe that if the deceased nominated X, for example, and allocated 100 per cent of the benefit to him, when he dies, he must receive all his benefit. This is not true, and this article will analyse the above scenario.

FREEDOM OF TESTATION

In terms of the law of succession, when a person dies, everything he owned falls into that person's estate.² The estate is administered by the executor. Once all of the debts and other obligations have been settled, everything that remains in the estate passes by inheritance to people qualified to succeed the deceased.³ If a person has left a will, the estate is inherited in accordance with the law of testate succession. The contents of a will are left mainly to the discretion of an individual testator. The reason for this is that under South African law, a high premium is placed on the principle of freedom of testation.

However, this freedom is not absolute. The testator's wishes will be carried out in the way he stipulated, except in as far as a particular provision is illegal, immoral, against public policy, vague or impossible to enforce.⁴ Freedom of

testation may, in certain respects, also be limited by common law⁵ or statute on both economic and social grounds. Legislation that limits freedom of testation is as follows. First, there is the Immovable Property (Removal or Modification of Restrictions) Act,⁶ which empowers the court to amend restrictions placed by a will on immovable property.⁷ The abovementioned Act further limits the number of successive *fideicommissaries* for which the testator could make provision to two.⁸ *Fideicommissum* is a legal process whereby a testator bequeaths a benefit to a particular beneficiary on the condition that, after a certain time period has lapsed or a condition has been fulfilled, such benefit must pass to another beneficiary.⁹

Second, there is the Trust Property Control Act,⁶ which authorises the court to amend the provision of the trust or even terminate the trust. The act defines 'trust' as an arrangement whereby the testator wishes to benefit a specific beneficiary but intends to place ownership and/or control of assets in another person.¹⁰ The law requires that for the trust to be valid, certain requirements must be satisfied, namely, intention of the testator,¹¹ availability of trust assets and identification of trust beneficiaries, and lawfulness of the trust.

Third, there is the Maintenance of Surviving Spouses Act,¹² which confers upon surviving spouses a right to claim maintenance from the estates of their deceased spouses if they are not able to support themselves financially. For example, in *Volks v. Robinson* the court decided that a survivor of a permanent intimate relationship has the right to claim maintenance from the deceased's estate.¹³

In *Minister of Education v. Syffrets*, the introduction of the equality clause both in the interim and final Constitution ensured that discrimination based on, *inter alia*, gender, religion, race and sex is eliminated from our constitutional order.¹⁴ This, obviously, has a huge impact on the law of succession, as the testator's wishes will only be executed in as far as they are consistent with the fundamental values that underpin the Constitution such as human dignity, equality and freedom. Put in another way, the

testator's wishes will only be enforced if they conform to the values mentioned above, and if they do not, the aggrieved party may challenge them on Constitutional grounds.

The relevant case wherein a provision in a testament was successfully challenged is that of *Minister of Education v. Syffrets*. The facts involved a Trust that was established in terms of the Will of the late Dr Scarbrow. The Trust awards bursaries to deserving students with limited or no means of the University of Cape Town. However, eligibility is restricted to persons who are of European descent, not of Jewish descent, and not female.

The applicants approached the court claiming an order, deleting provisions in the Will, in terms of empowering legislation and common law. First, section 13 of the Trust Property Control Act empowers the court to delete or vary any provision or make in respect thereof any order which the court deems just, including an order whereby particular trust property is substituted for other property, or an order terminating the trust. Second, common law prohibits bequests that are unlawful or immoral or contrary to public policy. The court has to strike a balance between two constitutional rights: the right to equality and the right to private ownership of property. The court relied on the decision of *Holomisa v. Argus Newspaper* 1996 (2) SA 588 (W) where the court held that *The value whose protection most closely illuminates the constitutional scheme to which we have committed ourselves should receive appropriate protection in that process.*

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

Freedom of testation is governed by the Wills Act.¹⁵ A will or testament is a legal declaration by which a person, the testator, names one or more persons to manage his estate and provides for the transfer of his property at death (my own emphasis).¹⁶ According to De Waal MJ, Schoeman MC and Wiechers NJ in *Law of Succession Student's Handbook*, 'A will is defined as

a unilateral declaration of the wishes of the person who drew it but is now dead (testator) in which he or she sets out the way his or her assets must be apportioned after his or her death to designated persons or institutions'.¹⁷ According to Kahn E and Hofmeyer G, 'A will is a declaration in a document executed in a manner required by law by the person making it, the testator, in regard to the devolution of the testator's property after his or her death'.¹⁸ A will is a document that formally sets out your wishes. In a will you can state who you want to leave your assets/money and belongings to, the amount you wish to leave each person, and also who will take care of the administration of your estate.

There are formalities for a valid will that are set out in the Wills Act¹⁹: it must be in writing; it must be signed by two witnesses who are of sound mind, over the age of 14 years, and who are not due to inherit anything from the will; it must be signed by the person who made the will in front of the two witnesses; if the will consists of more than one page, each page, other than the page on which it ends, is also signed by the testator; if the will is signed by the testator by the making of a mark or by some other person in the presence and by the direction of the testator, a commissioner of oaths must certify that he has satisfied himself as to the identity of the testator and that the will so signed is the will of the testator; and each page of the will, excluding the page on which his certificate appears, is also signed, anywhere on the page, by the commissioner of oaths who so certifies.

NOMINATION

Section 37C provides that the deceased is required to nominate a nominee on the nomination form who will benefit in case he dies.²⁰ Contrary to popular belief, nominees are not entitled to a death benefit simply by virtue of having being nominated. The underlying objective of section 37C is to ensure that those who were dependent on the deceased are not left destitute by the death of the member, notwithstanding the wishes of the deceased.²¹

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.²² The nomination must be in writing, the beneficiary must not be a dependant and the nomination form must be directed to the fund.²³

An estate or an artificial person cannot be a nominee. Apart from the specified exceptions, a death benefit cannot be paid into an estate.²⁴

SECTION 37C OF THE PENSION FUNDS ACT ('ACT')

Section 37C 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.²⁵ Section 37C places a duty on the board of management to distribute the death benefit. This section imposes three duties on the board of the pension fund: first, to identify the dependants and the nominees of the deceased member; second to effect a distribution among the said beneficiaries with reference to the various provisions of the section; and finally, to determine an appropriate mode of payment.²⁶

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.²⁷ The section 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.²⁸ 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.²⁹ 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.³⁰ Although the deceased may have expressed an intention to benefit a certain nominated beneficiary in the nomination form, this does not necessarily imply that the whole amount of the benefit will in fact be awarded to that beneficiary, because the deceased's intention, as contained in the nomination form, is only one of the factors taken into consideration when allocating a death benefit.

The duties of the board of management were cogently summarised in *Sithole v. ICS Provident Fund and Another*³¹ as follows:

When making an 'equitable distribution' amongst dependants the board of management has to consider the following factors:

- the age of the dependants,
- the relationship with the deceased,
- the extent of dependant,
- 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 potential

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.

Hussain J, in *Mashazi v. African Products Retirement Benefit Provident Fund*,³² held that:

Section 37 (sic) of the Act was intended to serve a social function. It was enacted to protect dependency, even the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37 (c) (i) (sic) specifically excludes the benefits from the assets in the estate of a member. Section 37 (c) (sic) enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The

contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.

Section 37C is a curious provision. Ordinarily, people have freedom of testation, which means that they can determine how their assets are to be distributed after their death. However, in terms of section 37C, benefits payable by a pension fund upon the death of a member do not automatically form part of the deceased member's estate and thus exclude a member's freedom of testation.³³

The provisions of the Intestate Succession Act³⁴ also find no automatic application of the death benefit when the member dies without completing a valid will.³⁵

In terms of s37C, whether or not a nomination form exists, benefits payable to the dependants and nominees of a deceased member are paid by the fund in the proportions deemed equitable by the board of trustees of the fund. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. The wife and children of the deceased qualify for consideration as dependants whether or not they are also nominated by the member, and any nomination made cannot exclude the others from consideration. The expressed wishes of the deceased member in the nomination form where he nominates X would be but one factor to be taken into account. It is equally incumbent upon the trustees to take account of the needs of the beneficiaries and the degree of the dependency that exists.

S37C is an example of how freedom of testation may be limited on social grounds. The crucial requirement for consideration in the allocation of the death benefit by the board of management is dependency. If you are depending on the deceased for maintenance or support, you are entitled to be considered for death benefit whether or not you have been nominated by the deceased member in the nomination form.

The wishes of the deceased are often expressed in the nomination form or the will.³⁶ 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.³⁷ However, this 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.³⁸

In *Moir v. Reef Group Pension Plan*,³⁹ 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 and 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.

CONCLUSION

The distribution of the deceased's estate is regulated by the Wills Act of 1957, whereas the deceased's provident benefit is regulated by section 37C of the Pension Funds Act, 24 of 1956. The fact that you have been nominated to receive a benefit in the deceased's Last Will and Testament does not empower the Board of Trustees to consider you in the distribution and payment of the benefit in terms of the Act. You can only be considered if the deceased member has nominated you in a valid nomination form. Even if you have been nominated alone, this does not mean that you are entitled to 100 per cent of the benefit. The crucial factors will always be dependency and the six factors that have been mentioned in Sithole's case.

REFERENCES AND NOTES

- 1 Section 24 of Act, 101 of 1976. This Act came into operation on 1 August 1976.
- 2 Manamela, T (2005) Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956. *Sa Mercantile Law Journal* 17(3): 290.
- 3 On the principle of freedom of testation and related problems, see Hahlo, H.R. (1959) The case against freedom of testation. *Sa Mercantile Law Journal* 76: 435, Widow's claim to maintenance out of deceased husband's estate (1962) *SALJ* 79: 361, The sad demise of the Family Maintenance Bill 1969 (1971) *SALJ* 88: 201; Rowland CJ Freedom of testation in South Africa (1970) 11 (2) *Codicillus* 4 and Mellet Freedom of testation – Part 2 (1971) 12 (2) *Codicillus* 57.
- 4 See note no 1 at p. 290.
- 5 The common law limitation on freedom of testation includes unlawfulness, *contra bonos mores* (against good morals), impracticably or vague, or impossibility of the enforcement of provisions in a will.
- 6 Act 57 of 1988.
- 7 *In Ex parte Stranack* 1974 2 SA 692 (D) the testator left the use and enjoyment of his home to his wife together with successive *fideicommissaries*. The beneficiary, after being entitled to the property, applied for an order authorising him to sell the property free of the conditions contained in the will. The court acknowledged the existence of *fideicommissum* but granted the order to remove conditions.
- 8 Section 6 reads as follows: '(1) Any *fideicommissum* created after the commencement of this Act by any will or other instrument in respect of immovable property in favour of more than two successive *fideicommissaries* shall, notwithstanding the terms of such will or instrument, be limited to two successive *fideicommissaries*. (2) If in terms of any disposition made by will or other instrument after the commencement of this Act any immovable property or any undivided share in immovable property becomes vested in any fiduciary (other than a fiduciary without a beneficial interest) subject to *fideicommissum* purporting to be in favour of more than two successive *fideicommissaries*, such immovable property or undivided share, or any undivided share therein, shall, notwithstanding the terms of such will or instrument, when it vests in the second successive *fideicommissary*, vest in, and be transferred to, such *fideicommissary* free of the *fideicommissum*'.
- 9 De Waal and Schoeman – Malan.
- 10 Section 1 of the Trust Property Act of 1988.
- 11 *In re Estate Grayson* 1937 AD 96, *Ex parte Bruton* 1970 4 SA 154 (E).
- 12 Act 27 of 1990. This Act defines 'survivor' as surviving spouse in a marriage dissolved by death.
- 13 Also in *Daniels v. Campbell* the court recognised a surviving spouse married according to Muslim rites to be 'spouse' entitled to claim for maintenance in terms of Maintenance of Surviving Spouses Act.
- 14 Section 9 of Act 108 of 1996.
- 15 Act 7 of 1953.
- 16 BK & M Attorneys summarise the definition of a will as follows in their website: A will is a voluntary statement of intention by a person, in terms of which the person regulates issues such as the determination of an executor, funeral proceedings, guardianship and the distribution of his/her property and assets after his/her death.
- 17 See De Waal, M.J. Schoeman, M.C. and Wiechers, N.J. (1966) *Law of Succession Students Handbook*. Cape Town: Juta & Co Ltd, p. 4.
- 18 Kahn, E. and Hofmeyer, G. (2001) *The Law of Succession in South Africa*, 2nd edn, 34.
- 19 Section 2 of the Wills Act. Cape Town: Juta & Co Ltd.
- 20 In terms of section 37C of the Pension Funds Act ('the Act'), the first of many duties on a board of management of a pension fund organisation is to establish the dependants and nominees of the deceased member. A nominee is undefined in the Act. However, where a beneficiary has been nominated by the member, it is obvious that the nomination must be in writing and must be a person who is not a dependant of the member, and the nomination form must be addressed to the fund.
- 21 Jeram, N. (2005) *Introduction to Pension Law Manual*, (unpublished) 37.
- 22 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 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.
- 23 *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, and as a result the ordinary contractual principles apply.
- 24 In light of section 37C creating a specific scheme in terms of which benefits are to be distributed, the next enquiry, which has not yet received much judicial attention, is whether a pension fund member may nominate his estate as a beneficiary. In *Martin v. Beka Provident Fund* [2000] 2 BPLR 196 PFA the member had nominated his estate as the sole beneficiary of his benefit. Hereafter, the member died without completing a valid will, and his father, being the sole intestate heir, stood to inherit the entire lump sum if it was distributed to the estate. The Adjudicator was of the view that the estate cannot be a nominee and stated: '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 ... not form part of the assets in the estate of such a member ...'. In my view therefore, a nomination of a member's estate as his beneficiary ought not to carry any weight at all in the trustees' considerations. 'The benefits are only payable to the estate when the deceased was not survived by both the dependent and nominees'. The Adjudicator further commented: 'In my view the weight attached to the deceased's "wishes" as the Board interpreted them, has clouded the Board's judgment in assessing the complainant as a dependant. While the Board would have been obliged to bring into consideration any nomination of a person as beneficiary, the nomination of the "estate" as beneficiary may not be treated in the same way as other nominations, since the Act refers only to nominees who are dependants and nominees who are not dependants, and an estate cannot be either'. (See also *Muir v. Mutual & Federal Pension Fund* [2002] 9 BPLR 3864 (PFA) at 3872A-1.).
- 25 Hanekom, K. and Marx, G.L. (2005) *The Manual on South African Retirement Funds and Other Employee Benefits*, Durban: Lexis Nexis, p. 184.
- 26 See footnote no. 14 at p. 184. See also Nevondwe, L.T. (2007) Is the distribution of death benefits under the Pension Funds Act

- 24 of 1956 constitutional? *Juta Business Law Journal* 15(4): 165, See also²⁷.
- 27 See also Nevondwe, L.T. (1956) 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): 38–39.
- 28 Lufuno, T.N. (2008) Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional. *Juta Business Law Journal* 15(4): 164.
- 29 Nevondwe, L.T. The distribution and payment of a death benefit: A closer look at section 37C of the Pension Funds Act, 24 of 1956, Pension Funds Amendment Act, 11 of 2007 and section 15(2) of the Financial Services Laws General Amendment Act, 22 of 2008'; this article has been accepted for publication in the South African Mercantile Law Journal.
- 30 *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.
- 31 [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25.
- 32 [2002] 8 BPLR 3703 (W) at 3705J–3706B.
- 33 Khumalo, S. (2008) Section 37C and 37D of the Pension Funds Act. A paper presented at Unisa Pension Law Seminar, 16 July 2008, p. 1.s.
- 34 Act 81 of 1987.
- 35 See *Mthethwa v. Whirlpool Provident Fund* PFA/KZN/560/04/CN 11 November 2004 (unreported).
- 36 Section 37C of the Pension Funds Act, 24 of 1956 is a curious provision. Ordinarily, people have freedom of testation – which means that they can determine how their assets are to be distributed after their death. However, in terms of section 37C, benefits payable by a pension fund upon the death of a member do not automatically form part of the deceased member's estate and so exclude a member freedom of testation. The provisions of the Intestate Succession Act 81 of 1987 also find no automatic application to the death benefit where the member died without completing a valid will (see *Mthethwa v. Whirlpool Provident Fund*, PFA/KZN/560/04/Z/CN (unreported), to find this determination visit www.pfa.org.za under the heading 2004 determinations.
- 37 See the following cases: *Van Zeler v. Sanlam Marketers Fund and Others* [2003] 2 BPLR 4420 (PFA) at 4426A–G, *Nieuwenhuizen v. SAB Staff Provident Fund & Another* [2000] 12 BPLR 1413 (PFA) at 1419 D – G and *Kaplan & Another v. Professional & Executive Retirement Fund & Others* [2001] 10 BPLR 2537 (A) at 2539I–J.
- 38 *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 from 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.
- 39 [2000] 6 BPLR 629 (PFA).