

**THE LAWS REGULATING BENEFICIARY FUNDS IN SOUTH AFRICA: A
CRITICAL ANALYSIS**

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ABSTRACT

This mini-dissertation evaluates the laws regulating beneficiary funds in South Africa. A beneficiary fund is a fund established for the purposes of accepting lump sum death benefits awarded in terms of Section 37C of the Pension Funds Act (the Act) to a beneficiary (dependant or nominee) on the death of a member, which are not paid directly to that beneficiary or to a trust nominated by the member, or to the member's estate or to the guardian's fund. This replaces the previous payments to trusts and a fund can now only pay to a trust if the trust was nominated by the member, a major dependant or nominee; a person recognised in law or appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of a minor or incapacitated major dependant or nominee. Any association of persons or business carried on under a fund or arrangement established with the object of receiving, administering, investing and paying benefits, referred to in section 37C on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds is a beneficiary fund and must be registered by the Financial Services Board and approved. Beneficiary funds were introduced as a result of the amendments to the Pension Funds Act into the Financial Services Laws General Amendment Act, 22 of 2008. The beneficiary funds were introduced with stronger regulatory framework. They have sufficient governance, reporting requirements and conduct annual audits.

DECLARATION BY SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe**, hereby declare that this mini-dissertation by **Mangammbi Mafanywa Jeffrey** for the degree of Master of Laws (LLM) in Labour Law be accepted for examination.

Signed-----

Date-----

Adv. Lufuno Tokyo Nevondwe

DECLARATION BY STUDENT

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

Signed-----

Date-----

Mangammbi Mafanywa Jeffery

DEDICATION

I dedicate this mini-dissertation to my mother, Takalani Mavis Mangammbi who believed in me throughout my academic life and sacrificed so much for me to be where I am today. Her perseverance and faith kept me going and motivated, and I hope and strive to make you proud mama.

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LIST OF ABBREVIATIONS

1. BF Beneficiary Fund
2. FSB Financial Services Board
3. PAYE Pay As You Earn
4. FICA Financial Intelligence Centre Act

TABLE OF STATUTES

1. Pension Funds Act, 24 of 1956.
2. Financial Services Laws General Amendment Act, 22 of 2008.
3. Income Tax Act, 58 of 1962
4. Trust property Control Act, 57 of 1988
5. Taxation Laws Amendment Act, 2009
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CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study

Modern pension funds owe their existence largely to the industrial revolution and the social and technological advances that have since taken place. Although pensions had been paid in one form or another for hundreds of years prior to these advances, particularly in Europe,¹ employees tended to work throughout their lives, and in infirmity were cared for by their extended family unit or by the local community.

The industrial revolution saw a major change in the nature of society and the start of mass urbanization. Industrial employers took over the role of work and sustenance provider, and the village and family unit was gradually broken down.

As time went on, employers needed to strive for business efficiency and productivity which led to a shorter effective working life, and it was not too long before the more socially conscious employers recognized a need to make provision for those employees who had given them good service but had become too old to keep up with the physical pressures of work in a factory. Later, as competition among employers for skilled employees became a factor, those socially conscious employers who were known to provide some form of provision for their retired employees were able to attract better and more qualified

¹ For example, retiring generals were often given gifts of land or cash by way of payment for loyal service, and the servants of landed gentry were often rewarded in a similar fashion when they were no longer able to carry out their duties effectively.

employees, so the provision of basic pensions began to expand as a means of attracting and retaining good employees.

In the early days, development in South Africa tended to follow that in the United Kingdom. Pensions were initially paid out of current earnings, but as their coverage widened and they were increasingly demanded by long-serving skilled employees, prudent employers started to look for ways of pre-funding these expectations. It is interesting to note that the internationally recognized normal retirement age of 65 was first introduced in Germany.²

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

²Statistics at the time indicated that the average life-span of a male worker was 66 years. The benevolent Germans decided, therefore, that all male employees (very few women worked full-time in those days, if at all) would retire on reaching age 65 so that they had one year remaining to enjoy themselves and put their personal affairs in order, before they died. Therefore, the cost of providing pensions was relatively low as those few who actually retired rarely survived much longer.

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

In 1956, the South African Government introduced what is generally recognized to be the world's first ever Pension Funds Act³ ("the Act") designed specifically to regulate the business of pension funds.⁴

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

Since then, with the incredible advances in information technology and the growth of available investment vehicles, including the opening of international investment channels, pension funds have become highly sophisticated. This has led to a proliferation of new types of funds, including umbrella funds administered

³ Act 24 of 1956.

⁴At that time, and for several years thereafter, other countries relied mainly on trust law and various other legal principles, including, of course, the very powerful conditions imposed in their income tax acts.

by professional sponsors and open to voluntary participation by any employer, on behalf of its employees, and preservation funds which cater for the “parking” of the retirement funding assets of individual members until they retire or decide to transfer them to another fund.

Currently, society world-wide, is on the move again, and employment patterns are changing even more rapidly. Naturally, with changes in social patterns and working conditions come changes in retirement provision, and it is likely that we will see the effects of these changes sooner rather than later in pension funds. We may even find that the pension fund spawned by the industrial revolution gives way to something quite different, and is discarded into the history books. Meantime, attempts are being made by the South African Government, among others, to catch up with current social change and the ever increasing demands of consumer protection and good governance, by re-writing the Act in terms of today’s needs for tomorrow’s society.⁵

A beneficiary fund is a fund established for the purposes of accepting lump sum death benefits awarded in terms of Section 37C of the Pension Funds Act (the Act) to a beneficiary (dependant or nominee) on the death of a member, which are not paid directly to that beneficiary (or his/her recognized care giver or guardian in the case of a minor), or to a trust nominated by the member, or to the member’s estate or to the guardian’s fund.⁶ This replaces the previous payments

⁵ See National Treasury *Retirement Fund Reform – a discussion paper* December 2004.

⁶ The object of the beneficiary fund is to receive, administer, invest and pay benefits on behalf of and to beneficiaries who become members of the fund.

to trusts and a fund can now only pay to a trust if the trust was nominated by the member, a major dependant or nominee; a person recognised in law or appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of a minor or incapacitated major dependant or nominee. Any association of persons or business carried on under a fund or arrangement established with the object of receiving, administering, investing and paying benefits, referred to in section 37C on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds is a beneficiary fund and must be registered by the Financial Services Board (FSB) and approved.⁷

Beneficiary funds were first mooted by the then Finance Minister Trevor Manuel in March 2007 following the Fidentia scandal which arose from glaring gaps in the regulation of umbrella trusts, which traditionally operated under the jurisdiction of the Master of the High Court. The aim was to beef up the regulation and supervision of beneficiaries' assets in order to avoid future losses, improve the protection of beneficiaries, and ensure that the trustees of trusts adhere to their fiduciary duties.⁸ Beneficiary funds were introduced by the Financial Services General Laws Amendment Act⁹ particularly section 15(2)(a) which

⁷Liberty Corporate, All you need to know of retirement funding (2012), p10-11.

⁸Nevondwe L, Section 37C of the Pension Funds Act, 24 of 1956: A social security measure to escape destitution, Insurance and Tax Journal, Vol.26. No.23,p19. See also Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, De rebus, June 2009, p47.

⁹Act, 22 of 2008.

came into effect on 1 November 2008 and the beneficiary funds came into operation with effect from 1 January 2009.¹⁰

These funds are governed by the Pension Funds Act 24 of 1956. Since 1 January 2009, death benefit payments need, by law, to be made into a beneficiary fund. When a member of a retirement fund dies, leaving children behind who are not yet 18, the trustees of the retirement fund have a duty to establish who the member's dependants are. They then have to decide how best to divide up and allocate the death benefit.¹¹

If a spouse has been left behind and is financially competent, it makes sense to pay the funds to him or her to manage on behalf of the minor children. If the surviving spouse as guardian is not financially competent to manage the minor dependants' money, the trustees have the option to pay it into a beneficiary fund. But if both parents are deceased and the children are cared for by a caregiver, the trustees will consider paying the funds into a beneficiary fund. This is because the chances are that there will be a different caregiver at some stage (for example, a grandmother may die and someone else will take over).¹²

Beneficiary funds are mainly umbrella funds, which mean that they serve multiple

¹⁰Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, De rebus, June 2009, p47. See also Nevondwe L, Beneficiary funds, Insurance and Tax Journal, June 2009, p8 -13.

¹¹Gould G, What are beneficiary funds? Mail and Guardian online, 17 March 2011, accessed on 9 November 2012.

¹²*Ibid.*

retirement funds of different companies. They are properly regulated by the Act and members have recourse to the Pension Funds Adjudicator.¹³

Since the 2008 amendments to the Pension Funds Act, the beneficiary funds were introduced with stronger regulatory framework. They have sufficient governance, reporting requirements and conduct annual audits.¹⁴ This regulatory framework will prevent the scandals like Fidentia scandal and misuse of funds as the case in the trust funds. Beneficiary funds are aimed at protecting the funds of widows and orphans.

1.2 Statement of the research problem

Beneficiary funds idea was first mooted in 2007 by the Minister of Finance as a vehicle to provide benefits to the beneficiaries who are still minors. The trust funds were designed to achieve this objective. Since its inception, the trust funds have created problems in this area. The most recent scandal is the popular case which is referred as a Fidentia scandal where a prominent person called Arthur Brown misuse trust funds worth millions of rands which were meant to benefit minor beneficiaries to cover their basic needs which includes amongst others, clothing, food, accommodation's, school fees, books allowance and etcetera.

Normally payment to the trust funds happened when a member of a pension fund dies before he reached a retirement age. Death benefits would be payable in terms of the rules of the pension fund. The distribution of benefits payable on the

¹³*Ibid.*

¹⁴ Peacock B, Beneficiary funds bring peace of mind, Times Live Online, 8 January 2012, accessed on 9 November 2012.

death of a member of a pension fund is regulated in terms of section 37C of the Act. 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.¹⁵ In order to achieve this, section 37C overrides the freedom of testation and the board of management is not bound by the wishes of the deceased as expressed in the nomination form.

For this particular reason, the death benefit subject to the exceptions outlined in section 37C is excluded from the estate of a deceased member, and placed under the control of the retirement fund. The board is not bound by the last testament of the deceased or the nomination form.¹⁶ Although the deceased may have expressed an intention to benefit a certain nominated beneficiary in the nomination form, it does not necessarily imply that the whole amount of the

¹⁵Nevondwe L, Is the distribution of death benefits under the Pension Funds Act 24 of 1956 constitutional” (2008) Vol 15 Part 4 *Juta Business Law Journal*, p164.

¹⁶*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.

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 benefit¹⁷.

Section 37C of the Act regulates the payment of death benefits to the trust fund. When benefits are paid to the trust fund, these benefits would be governed by the Trust Property Control Act¹⁸ which is administered under the Department of Justice and Constitutional Development. This Act is administered by the Master of the High Court. The Office of the Master is not well resourced and has a shortage of qualified personnel who will handle the trust fund. These put the administration of trusts at risk and affect the investment of this vehicle. These vehicle is meant to invest the monies belong to the disadvantaged children, those who are below the age of 21.

Beneficiary funds are now regulated under the Pension Funds Act and they must now have the rules of the fund which needs to be registered by the FSB. They have benefits of taxation. Those who are aggrieved by the operation, distribution and payment of beneficiary funds have recourse to lodge their complaints to the Office of the Pension Funds Adjudicator which will conciliate and adjudicate the complaints immediately. The trust funds are not governed by the Pension Funds Act and in case of aggrieved party, that person needs to be lodged the complaint

¹⁷ *Mashazi v African Products Retirement Benefit Provident fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C. In this case, the court held that section 37C of the Pension Funds Act, 24 of 1956 is aimed at protecting dependency, even over the clear wishes of the deceased and the fact that the distribution did not strictly follow the nomination form *in casu* is not a ground for review.

¹⁸ Act, 57 of 1988.

to the Office of the Public Protector which has a workload of cases and which might even take time for the case to be resolved.

The regulation of the beneficiary funds by the FSB as a regulator also comes with challenges. There are reported cases which were reported in the past which singled out the inefficient and the weaker regulation on the side of the FSB. These challenges will need the FSB to strengthen their capacity and enforcement of beneficiary funds laws.

1.3. Literature review

In 2008, the definition of “pension fund organization” in section 1 of the Act was amended to create a new type of fund known as a beneficiary fund. This fund is defined in section 1 of the Act as “a fund referred to in paragraph (c) of the definition of “pension fund organization”. Paragraph (c) in turn defines a pension fund organization as ... “any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits, referred to in section 37C on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds”.¹⁹

In terms of the above definitions, a beneficiary fund is a special fund that only receives, invests and administers benefits payable in terms of section 37C of the Act on behalf of beneficiaries. These benefits are paid into a beneficiary fund by trustees of pension and provident funds in terms of section 37C(2)(a) of the Act for the benefit of deceased members’ beneficiaries, particularly minor

¹⁹Thipa Incorporated, Payment of a death benefit from a beneficiary fund, 2012, <http://www.thipainc.co.za>, accessed on 9 November 2012.

beneficiaries. In terms of section 37C(2) of the Act, payment into a beneficiary fund is deemed to be payment to the beneficiary concerned.²⁰

According to Nevondwe only section 37C death benefits (approved benefits) payable by a registered fund for the benefit of a dependant or nominee may be paid to a beneficiary fund. This can be for a minor or major if considered appropriate by the retirement fund trustees. The regulator (FSB) main purpose in creating a new legal vehicle, the Beneficiary Fund, was to offer greater protection to dependants of lump sum benefits under the Pension Funds Act.²¹

The beneficiary funds require the fund to perform the annual audit, the board to have independent trustee representation, the fund must report to FSB annually on financial statements, fund rules are registered and approved by the FSB, section 13B administrator licence, fund is FICA exempt and the fund has administration agreement with administrator setting out duties and service standards.²²

Nevondwe further opined that the objective of the beneficiary fund is to receive lump sum death benefits from transferor funds (approved funds) and administer them for the benefit of the beneficiary fund member (dependant). Approved funds include transfers from other registered beneficiary funds and trusts.²³

The application of section 37C on the benefit payable from a beneficiary fund would unfortunately mean that the benefit originally paid into a beneficiary fund in terms of section 37C of the Act would be subjected to the same uncertain and onerous process prescribed in that section. Whilst the primary objective of this section is to protect dependants of the deceased member, it places a very onerous burden on the board and it is difficult to implement. In *Dobie NO v*

²⁰*Ibid.*

²¹Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, De rebus, June 2009, p47.

²²*Ibid.*

²³*Ibid.*

National Technikon Retirement Pension Fund,²⁴ the Pension Fund Adjudicator said “One thing is certain about section 37C, it 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.”²⁵

According to Hanekom *et al* the investment income earned by the beneficiary fund will be tax-exempt and all benefit payments made to the beneficiary will be free of tax. The beneficiary fund appears to be a clear winner in the case of higher amounts. In respect of lower benefit amounts, it attracts absolutely no tax at any of the three points at which tax could possibly arise. As the lump sum death benefit increases, tax calculated in terms of the retirement / death table will reduce the net benefit received, but there is no tax on the income or benefit payments. Payments to a parent or a family trust will be less because the investment income is taxed in the beneficiary’s hands. To do a more holistic comparison, one should take the costs of the beneficiary fund, trust and/or investment selected by the parent into account as well. Despite the latest amendments to the basis of taxation, beneficiary funds remain an exciting and tax-efficient new development, offering practical solutions with increased protection for minor dependants.²⁶

According to Gould beneficiary funds are governed by the Pension Funds Act.²⁷ Since 1 January 2009, death benefit payments need, by law, to be made into a beneficiary fund. When a member of a retirement fund dies, leaving children behind who are not yet 18, the trustees of the retirement fund have a

²⁴[1999] 9 BPLR 29 (PFA).

²⁵Thipa Incorporated, Payment of a death benefit from a beneficiary fund, 2012, <http://www.thipainc.co.za>, accessed on 9 November 2012.

²⁶Hanekom K and Hoffman L, Tax status of beneficiary funds revisited, <http://www.simekaconsult.co.za>, online.

²⁷Act, 24 of 1956.

duty to establish who the member's dependants are. They then have to decide how best to divide up and allocate the death benefit.²⁸

Lastly according to Choma and Nevondwe, the objective of beneficiary funds is to receive lump sum death benefits from transferor funds (approved funds) and administered them for the benefit of the beneficiary fund member (dependants). Approved funds include transfer from other registered beneficiary funds and trusts.²⁹

1.4. Aims and objectives of the study

The aim of the study is to interpret the legal framework regulating beneficiary funds in South Africa and the amendments in the Pension Funds Act which calls for the establishment of beneficiary funds. This study will ensure that beneficiary funds legislative framework is known to the members of the pension funds and their beneficiaries so that in case of death, they will know how section 37C of the Pension Funds Act operates. This study will educate not only members of the respective pension funds but also the members of the pension funds industry. This study will benefit law, accounting, economics and actuarial students. Especially those who are studying Insurance Law, Pension Law, Social Security Law and Actuarial science. It will also benefit attorneys, advocates, economist, accountants, chartered accountants, actuaries, consultants, financial planners and advisors, civil servants, non-governmental organisations, state-owned entities, government departments, state institutions, scholars, educators, analysts and bankers and other institutions or professions which has not mentioned here.

It will also assist those young and emerging academics who are intending to the study in the similar topic to bring insight into their programmes.

²⁸Gould G, What are beneficiary funds? Mail and Guardian online, 17 March 2011, accessed on 9 November 2012.

²⁹Choma HJ and Nevondwe LT, Socio-Economic Rights and Financial Planning in South Africa (2010), p241.

1.5. Research methodology

The research methodology used in this study is qualitative as opposed to quantitative. This research is library based and reliance is on library materials such as textbooks, reports, legislations, regulations, case laws and articles. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis was employed. A legal comparative method was applied to find solutions, especially an investigation on the way forward for beneficiary funds. The study established the development of legal rules, the interaction between law and social justice, and proposed solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts were analysed and arguments based on discourse analysis were developed. A literature and case law survey of the constitutional prescriptions and interpretation of statutes were done.

1.6. Scope and limitation of the study

Chapter one deals with introduction which lays down the foundation. While chapter two deals with legislative framework regulating beneficiary funds. Chapter three deals with the taxation of beneficiary funds. Chapter four deals with section 37C of the Pension Funds Act: death benefits. The last chapter deals with conclusions drawn from the whole study and suggest some recommendations.

CHAPTER TWO: LEGISLATIVE FRAMEWORK REGULATING BENEFICIARY FUNDS

2.1 Introduction

Beneficiary funds were first mooted by the then Finance Minister Trevor Manuel in March 2007 following the Fidentia scandal which arose from glaring gaps in the regulation of umbrella trusts, which traditionally operated under the jurisdiction of the Master of the High Court. The aim was to beef up the regulation and supervision of beneficiaries' assets in order to avoid future losses, improve the protection of beneficiaries, and ensure that the trustees of trusts adhere to their fiduciary duties.³⁰ Beneficiary funds were introduced by the Financial Services General Laws Amendment Act³¹ particularly section 15(2)(a) which came into effect on 1 November 2008 and the beneficiary funds came into operation with effect from 1 January 2009.³²

These funds are governed by the Pension Funds Act 24 of 1956. Since 1 January 2009, death benefit payments need, by law, to be made into a beneficiary fund. When a member of a retirement fund dies, leaving children behind who are not yet 18, the trustees of the retirement fund have a duty to establish who the member's dependants are. They then have to decide how best to divide up and allocate the death benefit.³³

If a spouse has been left behind and is financially competent, it makes sense to pay the funds to him or her to manage on behalf of the minor children. If the surviving spouse as guardian is not financially competent to manage the minor

³⁰Nevondwe L, Section 37C of the Pension Funds Act, 24 of 1956: A social security measure to escape destitution, *Insurance and Tax Journal*, Vol.26. No.23, p19. See also Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, *De rebus*, June 2009, p47.

³¹Act, 22 of 2008.

³²Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, *De rebus*, June 2009, p47. See also Nevondwe L, Beneficiary funds, *Insurance and Tax Journal*, June 2009, p8 -13.

³³Gould G, What are beneficiary funds? *Mail and Guardian online*, 17 March 2011, accessed on 9 November 2012.

dependants' money, the trustees have the option to pay it into a beneficiary fund. But if both parents are deceased and the children are cared for by a caregiver, the trustees will consider paying the funds into a beneficiary fund.

This is because the chances are that there will be a different caregiver at some stage (for example, a grandmother may die and someone else will take over).³⁴ Beneficiary funds are mainly umbrella funds, which mean that they serve multipleretirement funds of different companies. They are properly regulated by the Act and members have recourse to the Pension Funds Adjudicator.³⁵

Since the 2008 amendments to the Pension Funds Act, the beneficiary funds were introduced with stronger regulatory framework. They have sufficient governance, reporting requirements and conduct annual audits.³⁶ This regulatory framework will prevent the scandals like Fidentia scandal and misuse of funds as the case in the trust funds. Beneficiary funds are aimed at protecting the funds of widows and orphans.

2.2 Legislative framework

In 2008, the definition of “pension fund organization” in section 1 of the Act was amended to create a new type of fund known as a beneficiary fund. This fund is defined in section 1 of the Act as “a fund referred to in paragraph (c) of the definition of “pension fund organization”. Paragraph (c) in turn defines a pension fund organization as ... “any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits, referred to in section 37C on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds”.³⁷

³⁴*Ibid.*

³⁵*Ibid.*

³⁶ Peacock B, Beneficiary funds bring peace of mind, Times Live Online, 8 January 2012, accessed on 9 November 2012.

³⁷³⁷Thipa Incorporated, Payment of a death benefit from a beneficiary fund, 2012, <http://www.thipainc.co.za>, accessed on 9 November 2012.

In terms of the above definitions, a beneficiary fund is a special fund that only receives, invests and administers benefits payable in terms of section 37C of the Act on behalf of beneficiaries. These benefits are paid into a beneficiary fund by trustees of pension and provident funds in terms of section 37C(2)(a) of the Act for the benefit of deceased members' beneficiaries, particularly minor beneficiaries. In terms of section 37C(2) of the Act, payment into a beneficiary fund is deemed to be payment to the beneficiary concerned.³⁸

Therefore, it appears that on the death of a beneficiary in respect of whom a benefit had been paid into the beneficiary fund the provisions of section 37C will apply. This is because, firstly, with effect from 1 January 2009, a beneficiary fund is required to be registered in terms of the Act in order for such fund to receive benefits from a pension or provident fund. Secondly, a beneficiary under the beneficiary fund falls within the definition of a "member" in section 1 of the Act.³⁹

Section 37C specifically provides that a benefit payable upon the death of a member a pension or provident may not form part of the estate of the deceased member other than the limited instances outlined in the section itself. Such circumstances are set out in Sections 37C(1)(b) and (c) of the Act. These provisions make it clear that there are only three sets of circumstances in which the benefit payable from a registered fund on the death of a member is to be paid to the executor of such member's estate after the member's death. One is where no dependant is found and the deceased member died without having nominated any beneficiary (based on section 37C(1)(c)).

In this instance, the benefit must be paid to the executor or if no inventory has been filed with the Master of the High Court, the benefit is paid into the Guardian's Fund. The second instance is where the estate of the deceased member is found to be insolvent, where no dependant is found, and the

³⁸*Ibid.*

³⁹*Ibid.*

deceased member had nominated a beneficiary who was not a dependant (based on section 37C(1)(b)). The third one, which is also based on section 37C(1)(b) is where the deceased member has nominated a beneficiary to receive a portion of the benefit in which case the remaining balance of the benefit will be paid into the estate.⁴⁰

Section 37C seeks to ensure that those who were dependent on the deceased member are not left destitute by that latter's death.⁴¹ To achieve this object, section 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased as expressed in the nomination form. For this 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.⁴²

The board is not bound by the deceased's will or nomination form.⁴³ So 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.⁴⁴ For the deceased's intention as contained in the nomination form is only one of the factors considered when allocating a death benefit.⁴⁵ The section essentially imposes three primary duties on the board of management:

⁴⁰Ibid.

⁴¹ See Nevondwe L 'Is the Distribution of Death Benefits under the Pension Funds Act 24 of 1956 Constitutional?' (2008) Vol 15 *Juta's Business Law* 164.

⁴²Nevondwe L, Section 37C of the Pension Funds Act, 24 of 1956: A social security measure to escape destitution, *Insurance and Tax Journal*, Vol.26. No.23, p4.

⁴³*Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); *Kaplan & Another v Professional Executive Retirement Fund & Others* [2001] 10 BPLR 2537 (SCA). The will or nomination form is one of the factors taken into account by the board of management when they decide on an equitable distribution.

⁴⁴Manamela T 'Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956' *SAMLJ* Vol. 17 (2005) 276. 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* Vol. 15 No. 1 (2010) 39.

⁴⁵*Mashazi v African Products Retirement Benefit Provident Fund* op cit note 43 at 3705J-3706C. Here the Court held that s 37C of the Act is aimed at protecting dependency, even over the clear wishes of the deceased and the fact that the distribution did not strictly follow the nomination form in this case was not a ground for review.

- to identify the dependants and nominees of the deceased member;
- to effect an equitable distribution of the benefit amongst the beneficiaries; and
- to determine an appropriate mode of payment.⁴⁶

The application of section 37C on the benefit payable from a beneficiary fund would unfortunately mean that the benefit originally paid into a beneficiary fund in terms of section 37C of the Act would be subjected to the same uncertain and onerous process prescribed in that section. Whilst the primary objective of this section is to protect dependants of the deceased member, it places a very onerous burden on the board and it is difficult to implement. In *Dobie NO v National Technikon Retirement Pension Fund*,⁴⁷ the Pension Fund Adjudicator said “One thing is certain about section 37C, it 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.”⁴⁸

Only section 37C death benefits (approved benefits) payable by a registered fund for the benefit of a dependant or nominee may be paid to a beneficiary fund. This can be for a minor or major if considered appropriate by the retirement fund trustees. The regulator (FSB) main purpose in creating a new legal vehicle, the Beneficiary Fund, was to offer greater protection to dependants of lump sum benefits under the Pension Funds Act.⁴⁹

⁴⁶Nevondwe L, Section 37C of the Pension Funds Act, 24 of 1956: A social security measure to escape destitution, Insurance and Tax Journal, Vol.26. No.23, p4.

⁴⁷[1999] 9 BPLR 29 (PFA).

⁴⁸Thipa Incorporated, Payment of a death benefit from a beneficiary fund, 2012, <http://www.thipainc.co.za>, accessed on 9 November 2012.

⁴⁹Nevondwe L, The creation of beneficiary funds in terms of section 15(2)(a) of the 2008 Financial Services Laws General Amendment, De rebus, June 2009, p47.

The beneficiary funds require the fund to perform the annual audit, the board to have independent trustee representation, the fund must report to FSB annually on financial statements, fund rules are registered and approved by the FSB, section 13B administrator licence, fund is FICA exempt and the fund has administration agreement with administrator setting out duties and service standards.⁵⁰

The objective of the beneficiary fund is to receive lump sum death benefits from transferor funds (approved funds) and administer them for the benefit of the beneficiary fund member (dependant). Approved funds include transfers from other registered beneficiary funds and trusts.⁵¹

2.3 Governance of beneficiary funds

Beneficiary funds must comply with Regulation 28 of Pension Fund Act (prudential investment guidelines). It must have an investment policy in place. Beneficiary funds must adopt the principles of governance as set out in PF130 issued by the Financial Services Board and also has a code of conduct; an investment policy statement; a communication policy; and a performance assessment tool for trustees.

The governance of private pension plans and funds involves the managerial control of the organizations and how they are regulated, including the accountability of management and how they are supervised. The basic goal of pension fund governance regulation is to minimize the potential agency problems, or conflicts of interest, that can arise between the fund members and those responsible for the fund's management, and which can adversely affect the security of pension savings and promises. Good governance goes beyond this basic goal and aims at delivering high pension fund performance while keeping costs low for all stakeholders. Good governance can have many positive side

⁵⁰*Ibid.*

⁵¹*Ibid.*

effects such as creating trust amongst all stakeholders, reducing the need for prescriptive regulation, and facilitating supervision.

Good pension fund governance can also be conducive to more effective corporate governance of the companies that they invest in, as well-managed pension funds are more likely to seek value for their investments via a more active shareholder policy. Good governance also needs to be ‘risk-based’. For example, the more sophisticated the investment strategy the pension fund adopts, the stricter the governance oversight required; or the more complex the administrative arrangements of the plan, the tighter operational oversight needs to be.⁵²

Policymakers around the world have robustly debated the efficacy of a retirement fund governance model which relies heavily on the expertise of pension fund trustees. In a financial world of increasing complexity that demands high levels of expertise, it is widely believed that many trustees may lack the competence to make investment decisions consistent with the best interest of beneficiaries (members).⁵³ Another problem is conflicts of interest in the way that trustees discharge their duties to the beneficiaries of the fund.⁵⁴

In 2007, the FSB issued a Pension Funds Circular 130 on good governance for retirement funds. Circular 130 requires that trustees put in place a documented code of conduct, an investment statement, communication strategy to members, and have a performance appraisal system for trustees. It also obliges new board members to receive comprehensive training and all board members to be trained on a continuing basis. Although the circular extensively covers elements relevant to the sound operation, conduct, duties and obligations of boards of trustees, it is not enforceable. The non-enforceability might be a concern because the industry

⁵²Stewart F and Yermo J, Pension fund governance, challenges and potential solutions, 2008, OECD Working papers on Insurance and Private Pensions No.18, p5.

⁵³ G.L. Clark, E. Caerlewy-Smith and J.C. Marshall. (2005) *Pension fund trustee competence: decision-making in problems relevant to investment practice*.

⁵⁴National Treasury, Preservation, portability and governance for retirement funds, a discussion paper published on 21 September 2012, p25.

and trustees might voluntarily adhere to the circular. It is Government's view that Circular 130 should be legally enforceable by the Registrar of Pension Funds, and therefore attain the status of a regulation that would be rigorously applied and complied with by boards of trustees.⁵⁵

The FSB has also launched an online education programme, known as the Trustee Toolkit, for the development and education of retirement fund trustees. The Toolkit is voluntary and may also serve as a useful reference for trustees, administrators of retirement funds, and anyone interested in retirement fund governance and management. The Toolkit is structured along the lines of the Pension Funds Circular 130 (that is, governance by the board, governance of operations of funds, and management of stakeholder relationships), thus reinforcing the importance of good governance.⁵⁶

2.4 Adjudication of complaints relating to beneficiary funds

The adjudication of pension funds complaints rest with the Pension Funds Adjudicator. The Adjudicator has jurisdiction to deal with complaints relating to the administration of beneficiary funds. In terms of section 30D(3) of the Pension Funds Act, the main object of the Office of the Pension Funds Adjudicator is to dispose of complaints in a procedurally fair, economic and expeditious manner. The definition of complaint in the Act requires the complaint to relate to a fund. The beneficiary fund falls within the definition of a pension fund organisation.

A complaint must be lodged within three years of the act or omission that gave rise to the complaint.⁵⁷ If the three year period has expired, the Adjudicator may not investigate the complaint.

There is a good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Section 30I(1).

issue. As Didcott J explained in *Mohlomi v Minister of Defence*⁵⁸ in paragraph [11]:

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interest of justice. They protract the disputes over the rights and obligations are sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

Similarly, it was held in *Vandeyar v UTICO Staff Pension Fund*⁵⁹ that the purpose of section 30I(1) of the Act is to ensure finality and certainty in pension fund affairs and to promote efficiency by an incentive for the prompt enforcement of complaints: “all legal systems accept that the operation of obligations should be limited by requiring enforcement with a reasonable period of time”.

⁵⁸ 1997 (1) SA 124 (CC)

⁵⁹ [2000] 3 BPLR 332 (PFA).

CHAPTER THREE: TAXATION OF BENEFICIARY FUNDS

3.1 Taxation of beneficiary funds

Pension funds are the most widely used retirement planning tool, mainly because of the tax concessions applicable to pension funds and their members.⁶⁰ Section 37A(1) of the Pension Funds Act⁶¹ (the Act) prohibits the alienation of pension benefits in any form whatsoever. However, the Act⁶² provides that a registered fund may deduct from a benefit which becomes due to a member or beneficiary, in terms of the rules, any amount due by the member in terms of the Income Tax Act.⁶³

It is an internationally accepted principle that the right of the state to secure prompt performance of pecuniary obligations to it is paramount.⁶⁴ This is because taxation is the means by which the state raises the necessary funds to govern from day to day and provide the necessary services and facilities to its citizens. The state thus requires the maintenance of a stable and predictable collection of taxes.⁶⁵ This in turn requires that it is empowered not only to act against dishonest or recalcitrant taxpayers, but also to avoid any delays in the collection of taxes.

⁶⁰ Metz Paying less tax made simple (2008) 147.

⁶¹ Act, 24 of 1956.

⁶² Section 37D(1)(a).

⁶³ Act, 58 of 1962.

⁶⁴ Shrosbree L, Taxation of pension benefits from approved pension funds, LLM dissertation, UCT.

⁶⁵ Nevondwe L, Recent legislative framework of the taxation of pension benefits, Insurance and Tax Journal, Vol 24 No. 4, December 2009, p 41.

The provisions in the Income Tax Act permitting deduction for tax from pension benefits are designed to ensure that the pension benefit of a taxpayer cannot be placed beyond the reach of the Commissioner for the South African Revenue Services (SARS) and further that a speedy recovery of the amount of tax due in respect of that pension benefit is achieved through administrative means.⁶⁶

Transfers to the beneficiary fund, are tax-exempt – receipt of transfer not subject to section 14 of the Pension Funds Act. Vesting in the beneficiary takes effect on date of transfer into the beneficiary fund. Payment to beneficiary is part of gross income and taxed in terms of PAYE scale.

Fund withholds tax in terms of the Fourth Schedule of the Income Tax Act.⁶⁷ Majority of payments to beneficiaries are below PAYE threshold and therefore no tax withheld. Tax implications on individual members of the pension fund will differ in respect of decision to pay to a beneficiary fund. This will be a relief to the beneficiary whom majority of them are found to be poor since they will have lost the breadwinner.

The investment income earned by the beneficiary fund will be tax-exempt and all benefit payments made to the beneficiary will be free of tax. The beneficiary fund appears to be a clear winner in the case of higher amounts. In respect of lower benefit amounts, it attracts absolutely no tax at any of the three points at which tax could possibly arise. As the lump sum death benefit increases, tax calculated

⁶⁶ Shrosbree L, *op cit.*

⁶⁷ Act, 58 of 1962.

in terms of the retirement / death table will reduce the net benefit received, but there is no tax on the income or benefit payments.

Payments to a parent or a family trust will be less because the investment income is taxed in the beneficiary's hands. To do a more holistic comparison, one should take the costs of the beneficiary fund, trust and/or investment selected by the parent into account as well. Despite the latest amendments to the basis of taxation, beneficiary funds remain an exciting and tax-efficient new development, offering practical solutions with increased protection for minor dependants.⁶⁸

The Revenue Laws Amendment Act⁶⁹, introduced a special tax regime in respect of benefits paid to and from beneficiary funds, such as:

- Transfers of death benefits to beneficiary funds : tax free
- Investment growth within a beneficiary fund : exempt from tax
- Benefit payments by the beneficiary fund: taxed at marginal rates.

Minors will pay no tax on benefits transferred directly from retirement funds into beneficiary funds. While the monies are in the fund, they will be tax-exempt except for income and capital payments and amounts paid upon termination.⁷⁰

⁶⁸Hanekom K and Hoffman L, Tax status of beneficiary funds revisited, <http://www.simekaconsult.co.za>, online.

⁶⁹2008

The Taxation Laws Amendments Act of 2009 states that, (a) the lump sum death benefits will be taxed on transfer to beneficiary funds; and (b) benefits payments by beneficiary funds will not be taxed.

3.2 Tax table: Retirement & Death Benefits

Lump Sum Benefit	Tax Liability
Up to R315 000	0%
R315 000-R600 000	Taxed at 18% of the amount above R300 000
R600 001- R900 000	Taxed at R54 000+ 27% of the amount above R600 000
R900 001 and above	Taxed at R135 000 + 36% of the amount above R9000 000

⁷⁰ "Tax status of beneficiary funds revisited", Simeka Consultants, (Kobus Hanekom & Lance Hoffman), February 2009.

CHAPTER FOUR: SECTION 37C OF THE PENSION FUNDS ACT: DEATH BENEFITS

4.1. Introduction

In 1976, the Pension Funds Act ('the Act')⁷¹ was amended to include section 37C.⁷² This section regulates the payment of any benefit payable upon the death of a member of a pension fund organisation. The primary object of a pension fund organisation as defined in the Act read with the Income Tax Act⁷³ is to provide benefits to members of retirement funds when they retire from employment on reaching their retirement age. If a member dies before he retires, the pension fund must pay the benefit to his dependants and nominees. This scenario is dealt with by s 37C of the Act, which prescribes to the board of management of a pension fund how it should deal with the member's interest in the fund.

⁷¹Act, 24 of 1956

⁷²Mhango MO 'An examination of the accurate application of the dependency test under the Pension Funds Act 24 of 1956' South African Mercantile Law Journal (SAMLJ) Vol. 20 (2008) 126.

⁷³Act, 58 of 1962.

4.2. The objects of section 37C of the Act

Section 37C regulates the allocation of benefits payable on the death of a member of a pension fund, and was introduced primarily 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 section seeks to ensure that those who were dependent on the deceased member are not left destitute by that latter’s death.⁷⁴ To achieve this object, s 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased as expressed in the nomination form. For this reason, the death benefit subject to the exceptions outlined in s 37C is excluded from the estate of a deceased member and placed under the control of the retirement fund.

⁷⁴ See Nevondwe L ‘Is the Distribution of Death Benefits under the Pension Funds Act 24 of 1956 Constitutional?’ (2008) Vol 15 *Juta’s Business Law* 164.

The board is not bound by the deceased's will or nomination form.⁷⁵ So 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.⁷⁶ For the deceased's intention as contained in the nomination form is only one of the factors considered when allocating a death benefit.⁷⁷ The section essentially imposes three primary duties on the board of management:

- to identify the dependants and nominees of the deceased member;
- to effect an equitable distribution of the benefit amongst the beneficiaries; and
- to determine an appropriate mode of payment.

Many complaints referred to the Adjudicator concern the allocation or distribution, non-payment and computation of death benefits.⁷⁸

⁷⁵*Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); *Kaplan & Another v Professional Executive Retirement Fund & Others* [2001] 10 BPLR 2537 (SCA). The will or nomination form is one of the factors taken into account by the board of management when they decide on an equitable distribution.

⁷⁶Manamela T 'Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956' SAMLJ Vol. 17 (2005) 276. 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* Vol. 15 No. 1 (2010) 39.

⁷⁷*Mashazi v African Products Retirement Benefit Provident Fund* op cit note 43 at 3705J-3706C. Here the Court held that s 37C of the Act is aimed at protecting dependency, even over the clear wishes of the deceased and the fact that the distribution did not strictly follow the nomination form in this case was not a ground for review.

⁷⁸ See *Nzimande v South African Retirement Annuity Fund*, Case Number: PFA/GA/10490/2007/LTN (unreported), this determination was signed by the Pension Funds Adjudicator in October 2007. See *Ntsane v Municipal Employees Pension Fund & Another* [2007] 2 BPLR 241 (PFA); *Mangxiki v Mine Workers Provident Fund & Another* [2002] 5 BPLR 3450 (PFA); *Van Rooyen v ICS Pension Fund & Another* [2004] 10 BPLR 6168 (PFA); *Khambule v Telkom Retirement Fund* [2003] 10 BPLR 5214 (PFA); *Mohatla v Metal Industries Provident Fund* [2004] 6 BPLR 5797 (PFA); *Matseke & Another v NTI Provident Fund & Others* [2003] 6 BPLR 4788 (PFA); *Dyas v CTS Provident Fund & Another* [2003] 3 BPLR 4448 (PFA); *Gravett v Allianz Pension Fund* [2002] 11 BPLR 4033 (PFA); *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA).

4.3. What is a benefit for the purposes of s 37C?

Section 37C regulates the allocation of a death benefit but not its nature, computation and value. The Act does not define the term 'benefit'. So the rules of the fund determine the value and computation of a benefit.⁷⁹

4.4. Who is a dependant?

From a reading of s 37C in its entirety, it is clear that dependants are favoured over nominees in the allocation phase. Under s 37C(1) the board has a duty to take all reasonable steps to trace and locate the dependants of the deceased member. What constitutes a reasonable investigation by the board will differ from case to case. The mere fact that a person qualifies as a dependant does not entitle him to the entire benefit, but only to be considered by the board in the allocation phase. The Act defines a 'dependant' in s 1 as follows:

'(a) a person in respect of whom the member is legally liable for maintenance;

(b) a person in respect of whom the member is not legally liable for maintenance, if such person-

(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;

⁷⁹*Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA); *Gravett v Allianz Pension Fund* supra note **Error! Bookmark not defined.**

(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;'

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

4.4.1. Legal dependants

A person is regarded as a legal dependant if the deceased is legally liable to maintain that person.⁸⁰ This duty may arise as a result of a legal obligation, the common law or a statutory obligation.⁸¹

Dependants in respect of whom the member is legally liable for maintenance include a spouse⁸² and children⁸³ who rely on the member for the necessities of

⁸⁰ See *Dijane v Tiger Oats Provident Fund* [2003] 6 BPLR 4773 (PFA); *Dyas v CTS Provident Fund & Another* supra note **Error! Bookmark not defined.**; *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA); *Mkaba v SA Breweries Staff Provident Fund* [2002] 3 BPLR 3209 (PFA); *Zikhali & Another v Metal Industries Provident Fund & Another* [2002] 5 BPLR 3494 (PFA); *Khutswane v Malbak Group Pension & Another* [2000] 12 BPLR 1354 (PFA); *Oosthuizen Obo Breed v Mercedes Benz of South Africa Pension Fund & Another* [2000] 11 BPLR 1284 (PFA).

⁸¹ At common law a duty to maintain will arise where the following three requirements are met:

- The relationship between the parties is such that it imposes a duty of support.
- The person claiming support is unable to maintain himself or herself.
- The person from whom support is requested has capacity to support (*Reyneke v Reyneke* 1990 (3) SA 927 (E)).

⁸² *Lekhozi v Auto Worker's Pension Fund* [2004] 5 BPLR 5714 (PFA).

life.⁸⁴ Marriage gives rise to a reciprocal duty of support⁸⁵ between spouses. A spouse's claim, unlike a parent's maintenance claim against children, is not restricted to the bare necessities of life. This duty of support can continue after the marriage ends in divorce,⁸⁶ and the extent of the support will then usually be specified in the divorce order. A member is legally obliged to maintain an ex-spouse where a court has made such an order against the member. This obligation will survive the member's death if a settlement agreement is made an order of court. So this former spouse will qualify as a legal dependant.⁸⁷

The common law imposes a duty on a parent of a dependant child to support that child. This duty survives a parent's death. In *Governing Body, Gene Louw Primary School v Roodtman*⁸⁸ the Court said that a court order simply regulates the parents' common-law duty parents to support a dependant child.

⁸³ The duty of support will normally end once the child reaches the age of majority, but may continue until the child becomes self-supporting, provided that the parents have the means to continue to support the child until he becomes self-supporting.

⁸⁴ Necessities of life include food, accommodation, medical care and education (s 15(2) of the Maintenance Act 99 of 1998).

⁸⁵ Maintenance includes food, clothing, medical and dental care and whatever else is reasonably required.

⁸⁶ Section 7(1) of the Divorce Act 70 of 1979. In *Lombard v Central Retirement Annuity Fund* supra note 80 the complainant divorced the deceased in 1999. During the divorce proceedings the complainant did not ask for maintenance and it was also not contained in the divorce order, which incorporated the settlement agreement. The settlement agreement stated at the time that the deceased member should be liable for the complainant's reasonable medical expenses. The Adjudicator found that although the order stated that no maintenance was sought, the rest of the order clearly related to another aspect of maintenance (medical expenses). So the Adjudicator found that the deceased member was legally liable for the complainant's maintenance, though limited, and that the complainant should be treated as a dependant under s 1(1)(a).

⁸⁷ Khumalo S 'Unpacking the Definition of Death Benefit "Dependants" in the Pension Funds Act' (2008) 11(3) *Pensions World South Africa* 34.

⁸⁸ 2004 (1) SA 45 (C).

A parent, grandparent and grandchild can also qualify as a dependant. Like parents, children with the means to do so have a reciprocal duty to maintain their parents. But the parents must prove the need or necessity for support⁸⁹ and cannot merely allege the existence of a parent-child relationship.

Subject to the same requirements, a reciprocal duty of support also exists between grandparents and grandchildren. So a grandchild can be treated as a dependant if he can prove that he depended on his grandparents. Correspondingly, the same applies to the grandparents.

A duty of support also arises between brothers and sisters. But the claimant will have to prove that he was indigent and in fact depended on the deceased sibling during his lifetime.

To recap, dependants that fall into this category are determined with reference to their relationship with the deceased. The mere fact that a person is related is not sufficient to be considered for a death allocation. The person must prove that the deceased had a legal duty to support him.⁹⁰

4.4.2. Non-legal dependants

⁸⁹ Parents will have to prove on a balance of probabilities that they are indigent and cannot support themselves, and that the deceased was able to or did contribute to their maintenance (*Smith v Mutual and Federal Insurance Co Ltd* 1998 (4) SA 626 (C); *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA)).

⁹⁰ In *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA) the deceased member was survived by his two sisters and no other dependants. The deceased did not complete a nomination form. The Adjudicator rejected the complainants' argument that by virtue of their relationship with the deceased alone they were paragraph (a) dependants.

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

Where there is no duty of support, a person might still be a dependant if the deceased contributed to the maintenance of that person in some way. The person claiming to be a factual dependant will have to prove that he was dependent on the deceased (despite the latter's not having a legal duty of maintenance) when the member died. To constitute maintenance, payments should have been made regularly⁹¹ by the deceased to the beneficiary claiming to be a factual dependant. They should not have been once-off but should have been made until the deceased died.

Section 1(b)(ii) applies also to cohabitees. 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.⁹² This definition includes people of the same sex living together in a stable, exclusive relationship.⁹³ Some

⁹¹ *Govender v Alpha Group Employees Provident Fund & Another (2)* [2001] 8 BPLR 2358 (PFA).

⁹² Hutchings and Delpont "Cohabitation: a responsible approach" 1992 De Rebus 121-122; Thomas "Konkubinaat" 1984 THRHR 455. According to Keezer, *The Law of Marriage and Divorce*, cohabitation means the dwelling or living together of a man and wife. According to Cronjje and Heaton, *South African Family Law*, page 227, cohabitation refers to the two partners who are living together outside marriage in a relationship which is analogous to or has most of the characteristics of a marriage.

⁹³ See Hutchings and Delpont 121-122; Thomas 455; Schwellnus *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 Schwellnus "The Legal position of Cohabitees in the South African Law" 1995 *Obiter* 134. See also Nevondwe L. "Cohabitation versus section 37C of the Pension Funds Act, 24 of 1956 Insurance and Tax Journal Vol. 24 No.2 (2009) 9.

authors still use the more traditional definition that limits the term cohabitation to two people of the opposite sex living together.⁹⁴

A person qualify as a factual dependant if there is no duty of support on the part of the deceased's 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's member death. A person can also qualify as a factual dependant if both the deceased's member and cohabiting partner were staying together as husband and wife but there are no statutory laws which recognise their union.⁹⁵

In *Musgrave v Unisa Retirement Fund*⁹⁶, 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 Pension Funds Act and she was supposed to have been considered for the benefit in terms of section 37C of the Act.⁹⁷

In *Hlathi v University of Fort Hare Retirement Fund & Others*⁹⁸, the Adjudicator held that a permanent life partner of a deceased member, who has successfully proved that she had an inter-dependant relationship with the deceased member

⁹⁴ See Sinclair *The Law of Marriage* 1996 268.

⁹⁵ See footnote 23.

⁹⁶[2000] 4 BPLR 415 [PFA].

⁹⁷Nevondwe L 'Living together is ok' Today Trustees (2009) 39.

⁹⁸ PFA/EC/9015/2006(unreported).

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,⁹⁹ 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.

In *Van der Merwe v Central Retirement Annuity Fund and Another*,¹⁰⁰ the Adjudicator ruled that:

“Section 39 of the Constitution of the Republic of South Africa Act 108 of 1996 (‘the Constitution’) provides in section 39(2) that when interpreting any legislation, every tribunal must promote the spirit, purport and objects of the Bill of Rights contained in

⁹⁹Act 11 of 2007

¹⁰⁰[2005] 5 BPLR 463 (PFA).

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 co-habitee, 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 co-habitees. 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*¹⁰¹, 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.

Section 1(b)(iii) applies to any child¹⁰² of the deceased member whom he was not legally required to support and maintain qualifies as a dependant. An example would be a financially independent major child of the deceased. This result depends on the facts before the Board of Trustees.¹⁰³

4.4.3. Future dependants

Section 37C covers persons whom the deceased was not legally liable to maintain at the time of his death. Such a person may still qualify as a dependant if he can show that the deceased would have become liable to maintain had he

¹⁰¹ Case No. CCT 12/04

¹⁰² ‘Child’ includes a posthumous child, an adopted child and an illegitimate child.

¹⁰³ *Lobeko v Central Retirement Annuity Fund*, Case Number: PFA/GA/14345/2007/CMS, unreported, this case was signed by the Pension Adjudicator in 2007. It concerned the alleged failure by the trustees to pay a benefit arising out of the death of the deceased. The complainant, a major son of the deceased, was aggrieved by the failure of the fund trustees to apportion part of the death benefit to him. The fund trustees explained, among other things, that the complainant was gainfully employed and that the deceased was not responsible for the complainant’s maintenance at the time of his death. The trustees decided to apportion the entire death benefit to the surviving spouse of the deceased on the ground of her dependence on the deceased during his lifetime. After examining the rules and the applicable law, the Adjudicator concluded that the fund trustees’ decision in awarding the death benefit was legally sound.

notionally been alive. Possible dependants in terms of this section might include parents¹⁰⁴ who are not legally dependent on the deceased for maintenance at the time of his death, engaged couples, and parties intending to marry.

4.5. Nominees

Nominees are not entitled to a death benefit by virtue of having being nominated. The term 'nominee' is not defined in the Act. For a beneficiary to claim to be a nominee there must be a valid nomination form.¹⁰⁵ The nomination must be in writing, the beneficiary must not be a dependant, and the nomination form must be directed to the fund.¹⁰⁶ An estate or an artificial person cannot be a nominee. Apart from the specified exceptions, a death benefit cannot be paid into an estate.

4.6. The twelve-month period

The board has twelve months in which to trace and identify the possible beneficiaries that might share in the benefit. If satisfied that it has taken all reasonable steps to trace and identify dependants,¹⁰⁷ the board need not wait for the twelve months to lapse before making payment. Nor is it obliged to pay after

¹⁰⁴ See *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA).

¹⁰⁵ The importance of classifying a beneficiary correctly as either a dependant or nominee is important, for it will affect how the payment will be made and whether it will be made in terms of s 37C(1)(a) or (b). One of the more obvious distinctions between the sections is that in terms of subs (1)(a), the payment of a benefit to a dependant does not depend on the assets of the estate exceeding its liabilities, whilst payment in terms of subsection (b) to a nominee requires the assets of the estate to exceed the liabilities of the estate.

¹⁰⁶ In *Kruger v Central Retirement Annuity Fund* [2002] 7 BPLR 3634 (PFA) the Adjudicator took the view that the nomination was similar to a contract, and so the ordinary contractual principles applied.

¹⁰⁷ The duty to trace and identify dependants rests on the fund, which should take all reasonable steps to identify the dependants. There is no duty on a dependant to come forward and prove that he is a dependant (*Mthiyane v Fedsure Life Assurance Ltd & Others (2)* [2002] 5 BPLR 3460 (PFA)).

the twelve months have lapsed if it considers that further investigation is needed.¹⁰⁸ The duty to pay depends not on the expiry of the twelve-month period but on whether the board is satisfied that it has investigated and considered the matter with due diligence and can make an equitable allocation.¹⁰⁹

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

Whether the board acted properly under s 37C(1)(a) will thus not necessarily be determined with reference to the time frame. The relevant question will always be whether the board took all the reasonable steps necessary to identify and trace all possible dependants so as to allow it to distribute the benefit in the most equitable manner. An enforceable debt of a dependant entitled to share in a benefit does not arise when the twelve-month period has lapsed, but when the board has taken a decision to distribute the benefit to the selected beneficiaries.

If the board of trustees failed to comply with the Act and the beneficiaries therefore lodge a complaint with the Office of the Pension Funds Adjudicator, the adjudicator may order the board of trustees to complete its investigation and distribute the benefit under s 37C, together with interest on it of 15,5 per cent

¹⁰⁸ But it does not mean that the board can delay in its decision. If the board fails to take a decision in time without good reason, this will amount to maladministration giving rise to a claim for delictual damages for any quantifiable loss suffered.

¹⁰⁹ *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA).

from the date when the period of twelve months elapsed to the date of final payment within six weeks of the date of determination.¹¹⁰

4.7. Allocation of death benefits¹¹¹

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

4.7.1. Allocation to dependants only (s 37C(1)(a))

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

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

¹¹⁰ See *Nzimande v South African Retirement Annuity Fund* supra note **Error! Bookmark not defined.**

¹¹¹ In *Kowa v Corporate Selection Retirement Fund & Another* PFA/GA/14151/2007/SM (unreported) the Adjudicator ruled as follows with respect to the principle on distribution of death benefits: the board of trustees have a legislative duty to identify the beneficiaries of a deceased member. The board has discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. In exercising those powers the board must give proper consideration to relevant factors and exclude irrelevant ones. The board must not fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

If the deceased is survived only by dependants and no nominees, the board must allocate and effect an equitable distribution among them. When exercising its discretion the board needs to consider six factors:¹¹²

- the wishes of the deceased;
- the financial status of the dependants, including their future earning potential;
- the ages of the beneficiaries;
- the relationship with the deceased;
- the extent of dependency; and
- the amount available for distribution.

4.7.1.1. The wishes of the deceased¹¹³

The wishes of the deceased are often expressed in the nomination form or the will.¹¹⁴ As regards the will, pension fund benefits are expressly excluded from the deceased's estate. Nominated beneficiaries often under the mistaken impression that they are entitled to the benefit because the deceased member nominated them. But this not so, because s 37C was enacted to protect dependency over

¹¹² See *Sithole v ICS Provident Fund & Another* [2000] 4 BPLR 430 (PFA) in pars 24, 25.

¹¹³ See *Kowa v Corporate Selection Retirement Fund*, Case Number: PFA/GA/14151/SM, unreported. This determination was signed by the Adjudicator in 2007.

¹¹⁴ Section 37C of the Act 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 this provision excludes a member's freedom of testation. Nor does the Intestate Succession Act 81 of 1987 govern the death benefit if the member died intestate (*Mthethwa v Whirlpool Provident Fund* PFA/KZN/560/04/Z/CN (unreported)).

the clear wishes of the deceased. The content of the nomination form is merely one of the factors considered by the trustees in the exercise of their discretion.¹¹⁵

In *Moir v Reef Group Pension Plan*¹¹⁶ the complainant and the deceased member were divorced in 1984 but continued living together as husband and wife until the member died in March 1997. The deceased completed a nomination form nominating his brother as the sole beneficiary. The fund awarded the entire benefit to the brother on this basis. The complainant, a de facto spouse, objected to the distribution.

The Adjudicator, treating the complainant as a de factodependant, held that the board had fettered its discretion by blindly following the nomination form without considering any of the other factors. So the Adjudicator concluded that the distribution was not equitable, because the board fettered its discretion by basing its distribution solely on the nomination form.

¹¹⁵*Mashazi v African Products Retirement Benefit Provident Fund* op cit note 43. In *Bushula v SATAWU National Provident Fund & Others* PFA/WE/11742/2006/LN (unreported), the complainant was dissatisfied with the decision of the board of trustees to exclude him from the distribution and payment of the death benefit even though the deceased nominated him as a beneficiary who was to receive 10 per cent upon his death in his will. The Adjudicator ruled that the mere nomination by the deceased in his nomination form or in his will did not necessarily mean that the nominee was automatically entitled to a portion of a death benefit. This was only one of the factors taken into account in the allocation of the death benefit.

¹¹⁶[2000] 6 BPLR 629 (PFA).

4.7.1.2. The financial status of the dependants,¹¹⁷ including their future earning potential¹¹⁸

The financial status of each dependant will allow the board to determine the reasonable maintenance needs of the various dependants. In *Van Vuuren v Central Retirement Annuity Fund & Another*¹¹⁹ the deceased member was survived by his widow from whom he was separated but not divorced. He was also survived by a de factospouse with whom he lived in a relationship of husband and wife. The fund awarded the death benefit in equal shares to the widow and the de factospouse. The latter was also the sole beneficiary of a life insurance policy taken out by the deceased. The Adjudicator held that the distribution of the death benefit was not equitable, because the board failed to consider that the de factospouse was the sole beneficiary under the life insurance policy. The Adjudicator held further that 'any receipt of a cash benefit directly impacts on the financial status and future earning capacity of the dependant.

4.7.1.3. The ages of the beneficiaries

This factor plays an important role in determining the length of time that a beneficiary will need to be maintained. In *Motsoeneng v AECI Pension Fund & Another*¹²⁰ the deceased was survived by five minor children (two of them from a relationship with another woman) and his widow. The children were aged 17,

¹¹⁷ Whenever this factor is considered, it is advisable for the board of management to look at the liquidation and distribution account prepared by the executor of the deceased estate. This will indicate how and to whom all the deceased's assets were distributed (*Van Vuuren v Central Retirement Annuity Fund & Another* [2000] 6 BPLR 661 (PFA)).

¹¹⁸ *Brummelkamp v Babcock Africa (1997) Pension Fund & Another* [2001] 4 BPLR 1811 (PFA).

¹¹⁹ *Supra* note 117.

¹²⁰ [2003] 1 BPLR 4260 (PFA).

13, 10, 6 and 3 respectively. The board resolved to award each of the children 20 per cent of the benefit. The widow, the mother of three minors, lodged a complaint. The Adjudicator found that the fund had fettered its discretion by not considering the respective ages of the minor children and different needs of a 3-year old as opposed to a 17-year old.

4.7.1.4. The relationship with the deceased

In *Karam v Amrel Provident Fund*¹²¹ the deceased was survived by her major son and a close friend, whom she nominated as a beneficiary. Both of them were financially independent. The deceased and her son were estranged from each other up to her death. Before they became estranged, the deceased nominated her son as sole beneficiary and sole heir, but later revoked the nomination. The fund awarded the entire benefit to the nominee. The Adjudicator confirmed the decision of the fund and held that where dependants are mature adults and gainfully employed, their relationship with the deceased becomes a critical factor.

4.7.1.5. The extent of dependency

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

In *Robinson v Central Retirement Annuity Fund*¹²² the Adjudicator found that the fund exercised their discretion improperly for failing to consider that the deceased

¹²¹ [2003] 9 BPLR 5098 (PFA).

¹²²[2001] 10 BPLR 2623 (PFA).

was required by a divorce order to pay for the reasonable maintenance needs of the complainant, a minor child.

4.7.1.6. The amount available for distribution

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

4.8. Distribution to nominees only (s 37C(1)(b))

Section 37C(1)(b) governing the distribution to nominees reads:

‘If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of

such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.¹²³

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

- the board have not traced and identified any dependants of the deceased member;
- the twelve-month period has lapsed;
- the deceased has completed a valid nomination form in which the person nominated is not a dependant; and
- the aggregate assets of the deceased member's estate exceed its aggregate debts.

If the deceased member has allocated only a certain percentage of the benefit to a nominated beneficiary, that nominee will be entitled only to the portion specified. The remainder of the benefit will be paid into the estate under s 37C(1)(c).¹²⁴

¹²³ So if a deceased member has nominated a person who is not a dependant and the board has not become aware of or traced a dependant within the twelve-months period, the board is obliged to distribute the benefit to that nominee on the expiry of twelve months (see Manamela T, Chasing Away the Ghost in Death Benefits: A Closer Look At Section 37C of the Pension Funds Act 24 of 1956' (2005) 17 *SA Merc LJ* 286).

¹²⁴ *Krishnasamy & Others v ABI Pension Fund* [2004] 2 BPLR 5471 (PFA).

4.9. Distribution to nominees and dependents (s 37C(1)(bA))

The distribution to dependants and nominees forms the subject-matter of several complaints before the Adjudicator.¹²⁵ This distribution is regulated by s 37C(1)(bA), which reads:

'If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.'

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

¹²⁵ See *Karam v Amrel Provident Fund* supra note 121; *Phashe & Others v Metro Group Retirement Fund* [2003] 9 BPLR 5123 (PFA); *Schoeman v Rentemeester Pensioenfonds* [2003] 9 BPLR 5145 (PFA); *Bukashe & Another v Umthunzi Provident Fund* [2003] 5 BPLR 4635 (PFA); *Kruger v Central Retirement Annuity Fund* supra note 106; *Morgan v SA Druggists Provident Fund & Another* [2001] 4 BPLR 1886 (PFA); *Kipling v Unilever SA Pension Fund* [2001] 8 BPLR 2377 (PFA); *Diergaardt v KVV-Voorsorgfonds* [2001] 11 BPLR 2703 (PFA).

4.10. Distribution to the deceased estate (s 37C(1)(c))

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

‘If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of [section 9](#) of the Estates Act [66 of 1965](#), into the Guardian’s Fund.’

The general rule in s 37C(1) that the benefit does not form part of the estate¹²⁶ allows three exceptions. The fund can only pay a benefit into the deceased’s estate if on the existence of one of the following three scenarios:

- the fund has not discovered any dependants and there is a nominated beneficiary, but the deceased’s estate’s liabilities exceed its assets;
- the deceased member has no dependants and did not designate a nominee in writing; or
- the deceased has designated a nominee only to receive a portion of the benefit, then the remaining balance must be paid to the estate.¹²⁷

¹²⁶*Matlakane v Royal Paraffin Provident Fund* [2003] 6 BPLR 4785 (PFA).

¹²⁷*Jacobs NO v Central Retirement Annuity Fund & Another* [2001] 1 BPLR 1488 (PFA).

4.11. Modes of Payment

Another instance in which the board can incur the wrath of complainants is with regard to the method of payment to beneficiaries. The modes of possible payment are dealt with by ss37C(2), (3) and (4), which read:

(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988 (Act [57 of 1988](#)), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(4)(a) Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that –

- (i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and
- (ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.'

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

4.11.1 Payment to a Minor

For paying a minor, the board has three options: instalments to a guardian, a lump-sum payment to the guardian,¹²⁸ or into a trust for the minor's benefit.

These options may be summarised as follows:

- If the board considers it appropriate, instalment payments¹²⁹ may be made to the guardian for the benefit of the minor. When the minor attains the age of majority, the full benefit becomes payable to him.
- The board may also make a lump-sum payment to the guardian on behalf of the minor. But there are risks associated with this method:
 - the money might be usurped by the creditors of the guardian;
 - the guardian might use the money for other purposes.
- The board can if appropriate pay the money into a trust for the benefit of the minor beneficiary.¹³⁰ Payment in this way is deemed to be payment to that beneficiary.

¹²⁸ Before the board deprives the guardian of the right fully to control and administer the moneys on behalf of the minor child, there must be grounds in fact and law for doing so (*Ramenyelo v Mineworkers Provident Fund* PFA/GA/228/02/NJ (unreported)).

¹²⁹ Instalment payments may be made if the board ensures that the interest rate is reasonable and that the investment return earned by the fund is earned on the capital amount (s 37C(3)).

In *Mabuza v Mine Workers Provident Fund*¹³¹ the complainant was the brother of a member of the respondent pension fund who had died leaving five children. A death benefit became payable on the death of the deceased. As the children were being cared for by the mother of the complainant and the deceased, the fund decided to pay the deceased's mother R19 346 while the balance was placed in a trust for the benefit of the deceased's minor children.

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

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

¹³⁰ Section 37C(2) of the Act provides the board with the option to make payment into a trust.

¹³¹[2008] 1 BPLR 39 (PFA).

The Adjudicator further held that s 37C(2)(3) of the Act regulated the mode of payment of a benefit to a minor dependant or nominee. A benefit paid to a minor was usually paid to the minor's guardian. The payment of the minor child's benefit to his legal guardian should be done in the ordinary course of events unless there were cogent reasons for depriving the guardian of the duty to take charge of his minor child's financial affairs and the right to decide how the benefit due to that minor should be used in the latter's best interests. The Adjudicator also held that here the board of trustees placed the remaining amount of the death benefit in trust without investigating the ability of the deceased's mother to administer the financial affairs of the minor children. The board fettered its discretion by failing to investigate this ability. Finally, the Adjudicator referred the matter to the board for a fresh exercise of its discretion.

4.11.2 Payment to a major beneficiary

Payment to a major can be made in instalments if the beneficiary has agreed to this in writing.¹³² The agreement between the beneficiary and the board can be cancelled by either party on written notice not exceeding 90 days. On such cancellation, the balance of the benefit is payable to the beneficiary.

¹³² The agreement must disclose the amount of the payments, intervals of payment, interest rate including any other important terms and conditions (s 37C(4)(a)).

CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusions

It is important to point out that the Financial Service Laws General Amendment, which was promulgated on 1 January 2009 to amend section 37C of the Act, has introduced a new concept of Pension fund organisation known as beneficiary fund. Accordingly, the beneficiary fund is a pension fund organisation which is regulated under the Act.

The reasons why beneficiary funds were introduced is because there has been mismanagement and abuse of death benefits allocated to minors and widows by pension funds, held in trust, by trust funds.

For the moment, the beneficiary fund has not replaced the Trust Fund and payment of a benefit due to a beneficiary made by a fund into a trust fund is still regarded in terms of section 37C as payment to the beneficiary. Similarly, benefits held in trust by trust funds will still have to be distributed in accordance with their original mandate. Therefore, the responsibility of choosing a beneficiary fund over a trust fund and the safety accorded to beneficiaries of each institution lies with board of trustees of the transferor fund.¹³³

History dictates that trust funds are not managed properly and there are not approved by the FSB. Complainants or aggrieved persons does not have a

¹³³Nevondwe L, Beneficiary funds, Insurance and Tax Journal, June 2009, p8 -13.

recourse to lodge their complaint to the Office of the Pension Funds Adjudicator over trust fund issues which makes them to be more frustrated and not knowing where to seek assistance. If you have a complaint regarding the governance, operations and payment to beneficiary funds, you can now lodge a complaint to the Pension Funds Adjudicator which was not the case in the trust fund.

The aim of beneficiary fund was to beef up the regulation and the supervision of beneficiaries assets in order to avoid future losses, again was to improve the protection of beneficiaries and ensure that trustees of trusts adhere to the fiduciary duties. In other words beneficiary was introduced to improve all the mistake done by the umbrella trust, it came as a solution and its aim is to be better situation than the previous one.

For the moment beneficiary fund has not yet replaced trust funds. Payment to trust is still recognised under section 37C of the Pension Funds Act. The responsibility of choosing a beneficiary fund over the trust and the safety accorded to beneficiaries of each institution lies with the board of trustees of the transferor fund. The beneficiary fund is a good change for the industry.

I believe that even though, the trust fund itself has over the years received a lot of bad press, the idea behind putting monies into an appropriate investment vehicle are still quite valid in the current South African setup. Beneficiary funds are now better suited to handle the challenges that are currently faced in our industry, to the benefit of all parties involved.

These move taken by National Treasury and Financial Services Board to ensure better protection of minors' assets provide peace of mind for retirement fund trustees and beneficiary alike. It is a good tool for everyone and offers more security and protection for the monies reserved and invested.

The introduction of beneficiary funds is a positive indicator since the payment of minor beneficiaries benefits were not properly regulated by the Trust Property Control Act. Because of the heavy load of work reserved and assigned for the Master of the High Court, the shifting of the minors benefits from the Master of High Court to the beneficiary fund is a good initiative and it deserve to be applauded. This regulation under the Pension Fund Act ensures the proper governance and administration.

The government intention on the creation of beneficiary fund was clearly to protect those who could not be protected by the former laws. This imposed lot of regulations to ensure that the security is strengthened, e.g. Regulation 28, which is a good mechanism to follow and include the investment of the money in the fund.

I fully concur with the conditions of section 13B of registering the beneficiary fund in order to be liable and accept to the fiduciary duties that they owe to the members and beneficiaries.

The beneficiary funds resulted in having more advantages to minor beneficiaries, since it offers protection and supervision which guards against any mismanagement of funds. Although it seem as the fund is taking away the common law right which provides for guardians to register the financial affairs of minor children, the beneficiary funds does not change the principle of the guardian taking control of the minors' financial affairs but ratherSection 37C essentially imposes three primary duties on the board of management, namely to identify the dependants and nominees of the deceased member; to effect an equitable distribution of the benefit among the beneficiaries; and to determine an appropriate mode of payment.¹³⁴

It is evident that this section was enacted to serve a social function by protecting the dependants of the deceased from destitution. This also has the effect of minimising the state's liability to support the dependants of the deceased through social assistance programmes. The government clearly had good intentions with section 37C because the death benefits are put under the control of the trustees to distribute equitably amongst the dependants of the deceased.¹³⁵

5.2. Recommendations

On the basis of this study investigation, the following recommendations are made as far as beneficiary funds are concerned:

¹³⁴*Mashego and Others v SATU National Provident Fund and another* [2007] 2 BPLR 229 at paragraph 5.3. See Nevondwe LT, The distribution and payment of a death benefit in terms of section 37C of the South African Pension Funds Act, 24 of 1956, *Pensions and International Journal* Palgrave Macmillan Publishers, UK Volume 15, issue 4, November 2010, 39.

¹³⁵ See Manamela T, *op cit*, at 292.

- In terms of death benefit distribution the board should first consider direct payment of the benefit to the guardians in case of minor beneficiaries before other alternative avenues can be considered like payment to beneficiary funds.
- Service providers must play enormous important social role and need to exercise their fiduciary duty to ensure that fraud does not occur within beneficiary funds.
- Service providers must ensure that there are proper policies in place and awareness built into work processes, without the need of having such processes on additional costs burdened to the members
- The beneficiary fund needs to improve risk measure to combat rising fraud within funds at consumer level.
- Beneficiary funds must be obliged to offer counselling sessions for the beneficiaries who have just turned 18 because an 18 year old in South Africa is not financially mature enough to invest or use large sums of money responsibly. The beneficiary funds must conduct an educational road show as example. The reality of social and educational circumstances is always catching up with beneficiaries. The age of majority of 18 years cannot a good age since at the age of 18, the beneficiary is still attending school.
- The government must reverse the age of majority from 18 back to 21 as an exemption for the fast growing financial sector for the purpose of Pension Funds Act. The number of 18 year old with a good education and ability to make sound financial or business decision is very low. This extra

three years could give the young people time to think carefully and be more mature on how to use lump sum payouts.

- All beneficiary funds or service provider should be in position of guardian financial skills assessment guide to check the capacity of person in managing money before they give lump sum to the individual. this assessment is operational at Fairheads Benefit Services so it must be in all service provider
- Regulation 28 should encourage the responsible investment in order to reduce and oppose the human rights violations. It is also fundamental to a healthy, profitable scheme. The government must compel investors to approach their investment decision with greater level of attention, transparency and responsibility.

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