

A legal analysis on the distribution and payment of the special pensions under the Special Pensions Act, 69 of 1969

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TABLE OF CONTENTS

	Page
ABSTRACT	III
DECLARATION BY SUPERVISOR	IV
DECLARATION BY STUDENT	V
DEDICATION	VI
ACKNOWLEDGEMENTS	VII
LIST OF ABBREVIATIONS	VIII
TABLE OF STATUTES	IX
TABLE OF CASES	X

ABSTRACT

The South African government has paid compensation in a form of special pension to individuals who have been exposed to certain types of hardship and suffering caused by the governments or their predecessors. This compensation is described as 'the appreciation or sense of guilty of society towards those people on whom the government has rightfully or wrongfully and at any rate disproportionately inflicted damage'. Government have been prepared to pay compensation to the following persons: former enemies, victims of war, victims of harmful compulsory vaccination measures, persons who had sacrificed their jobs and education in the process of overturning oppressive governments establishing democratic government; and persons whose basic human rights had been violated by governments or their predecessors. These persons have sacrificed their lives either in exile or within South Africa fighting for South Africa to be democratic. These persons must prove that they served their respective political organisations for a period of five years or above or they were banished or restricted in certain area or imprisoned or sentenced.

DECLARATION BY SUPERVISOR

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

Signed-----

Date-----

Adv. Lufuno Tokyo Nevondwe

November 2012

DECLARATION BY STUDENT

I, **Mbedzi Ndivhuhweni Innocent** 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-----

Mbedzi Ndivhuhweni Innocent

November 2012

DEDICATION

This dissertation is dedicated to my dear parents, my father Mbedzi Thattheni Jackson, my mother Mbedzi Mutshinye Litshani, my sister Mbedzi Sharon and not forgetting my late friend Mmbambadzeni Lawrence Mulibana.

Thank you mom and dad for giving me the gift of life and love. You will always be my source of inspiration and strength. To Mmbambadzeni, rest in peace friend and keep watching me at all times.

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First and foremost my profound gratitude goes to God for the gift of life, wonderful parents, brothers and amazing sisters that he gave me. If it was not for God's will none of my achievements would have been possible.

Secondly to my family members Mbedzi Marubini Calvin, Mbedzi Sharon and friends, Adv. Nicholas Matloga, Mugwagwa Tshilidzi, Lisivha Mashudu, for your guidance and support in all my endeavors.

Even though I may not always show it and at times take you for granted, know that I am always thankful for the support you gave me.

The support I got from my supervisor Adv. L.T, Nevondwe. Thank you for your invaluable comments, advice and guidance. May God be with you at all times.

LIST OF ABBREVIATIONS

1. ANC	African National Congress.
2. AZANLA	Azanian Liberation Army.
3. APLA	Azanian Peoples Liberation Army.
4. AZAPO	Azanian Peoples Organisation.
5. COSATU	Congress of South African Trade Unions.
6. DG	Director General.
7. DM	Deputy Minister.
8. DRC	Democratic Republic of Congo.
9. HOD	Head of Department.
10. MEC	Members of Executive Council.
11. MK	Umkhonto we Sizwe.
12. NSF	Non Statutory Force Service.
13. PAC	Pan Africanist Congress of Azania.
14. SADC	South African Development Community.
15. SPA	Special Pension Administration.
16. SPAB	Special Pension Appeal Board.
17. SPB	Special Pension Board.
18. SPRB	Special Pension Review Board.
19. SOE	State-Owned Entities.
20. SIU	Special Investigative Unit.

TABLE OF STATUTES

1. Basic Conditions of Employment Act.
2. Criminal Procedure Act 51 of 1977.
3. Constitution of the Republic of South Africa Act 108 of 1996.
4. Constitution of the Republic of South Africa Act 200 of 1993.
5. Customary Marriages Act 120 of 1998.
6. Demolition Act 99 of 1996.
7. Divorce Act 70 of 1979.
8. Government Employees Pension Law, 1996.
9. Intelligence Services Act, 2002 (Act 65 of 2002);
10. Labour Relations Act 66 of 1995.
11. Maintenance Act 99 of 1998.
12. Social Assistance Act 3 of 2004.
13. Pensions Funds Act 24 of 1956.
14. Special Pensions Act 69 of 1996.
15. South African Citizenship Act, 49 of 1949.
16. Special Pensions Amendment Act 75 of 1998.
17. Special Pensions Amendment Act 21 of 2003.
18. Special Pensions Amendment Act 27 of 2005.

TABLE OF CASES

1. *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46(CC).
2. *Haira & Another v Booysen & Another* 1992 (4) SA 69 (A) at 93B-C).
3. *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd & Another* 1988 (3) SA 132 (A) at 152-D; *Central Retirement Annuity Fund* (2003) 3 BPLR 4460 (PFA).
4. *Nieuwenhuizen v SAB Staff Provident Fund & Another* (2000) 12 BPLR 1413 (PFA).
5. *Reyneke v Reyneke* 1990 (3) SA 927(E).
6. *Smith v Mutual and Federation Insurance Co Ltd* 1998 (4) SA 626 (C).
7. *Pinchin v Santam Insurance Co Ltd* 1963 (2) SA 254 (W).
8. *Road Accident Fund v Mtate*, SCA Case Number 332/4.

TABLE OF CONTENTS

CHAPTER 1: INTRODUCTION AND BACKGROUND	1
1.1. Introduction.	1
1.2. Statement of the research problem	3
1.3. Literature review	5
1.4. Aims and objectives of the study	9
1.5. Research methodology	9
1.6. Scope and limitations of the study	10
CHAPTER 2: LEGISLATIVE FRAMEWORK FOR SPECIAL PENSION	11
2.1. Introduction.	11
2.2. The 1998 amendments	11
2.3. The 2003 amendments	12
2.4. The 2005 amendments	12
2.5. The 2008 amendments	13
2.6. The right to special pension	14
2.7. Disqualifying criteria	17
2.7.1. Citizenship	17
2.7.2. Time barring	18
2.7.3. Receipt of any pension or benefit	21
2.8. Special Pensions Adjudication Institutions	25

2.8.1. Special Pensions Appeal Board (“Appeal Bopard”)	25
2.8.1.1. Establishment and appointment of Appeal Board	25
2.9. Right to appeal against Special Pensions Board decision	27
2.10. Reintegration measures of the ex-combatants	28
2.11. Conclusion	30
CHAPTER 3: DEPENDANTS FOR SPECIAL PENSION	31
3.1 Introduction.	31
3.2. Categories of dependants	31
3.2.1. Legal dependants	31
3.2.2. Non-legal dependants	33
3.2.3. Future dependants	34
3.2.4. Spouses in civil marriages	37
3.2.5. Children and parents relationship	37
3.2.6. Grandchildren and grandparents relationship	38
3.2.7. Brothers and sisters relationship	39
3.3. Right survivor’s lump sum benefit	39
3.4. Allocation of benefits of specialpensions	41
3.5. Allocation of survivor’s benefits	41
3.6. Survivor benefits on deathg of a pensioner and funeral benefits	41
3.7. Right to lump sum benefits	42

3.8. Right to monthly pension	42
3.9. Allocation of equal shares in benefits for survivors	43
3.10. Funeral benefits	44
3.11. Table for payments and calculations of special pensions benefit	45
3.12. Funeral benefits payable for special pensions	48
CHAPTER 4: CONCLUSION AND RECOMMENDATIONS	47

CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study.

The Special Pensions Act (Act) ¹ gave effect to section 189 of the Interim Constitution.² Essentially the Act provides for payment to those who were involved in the liberation struggle and who on that account lost the opportunity to provide for a pension before 2 February 1990. More specifically the Act provides for the payment of special pensions to persons and survivor lump sum to their eligible dependants who made sacrifices or served the public interest in establishing non-racial democratic constitutional order and as a result was unable or prevented from providing for a pension for at least five years prior to 2 February 1990.³ These persons include members of any armed or military force not established by or under any law and which is under the authority and control of, or associated with and promotes the objectives of a political organisation.⁴

When the former Deputy Minister of Finance (“the DM”), Marcus G who is now a Governor of the South African Reserve Bank, introduced the Act in parliament she stated that *“the Act reflected the pain and anguish, torture and deprivations that so many people experienced under the apartheid ills, misfortunes and hardships caused by the apartheid years, the*

¹Act, 69 of 1996.

²Act, 200 of 1993.

³Thipa Incorporated Attorneys, Special Pensions Manual, p1.

⁴Nevondwe L and Tshoose IC, A legal analysis of the distribution and payment of special pensions under the South African Special Pensions Act, Pensions an International Journal, Vol. 16, No. 4, November 2011, p225. The Umkhonto we Sizwe (MK), Poqo, Azanian Peoples Liberation Army (APLA), Azanian Liberation Army (AZANLA) were military wings of African National Congress (ANC), Pan Africanist Congress of Azania (PAC) and Azanian Peoples Organisation (AZAPO).

provisions of the Act were aimed at addressing the dire needs that these people may experience in their old age".⁵

The former DM of Finance, Mr.Moleketi J said that "the passing of the Special Pensions Act in 1996 was indeed a historical event and unique in its foundation and probably the first and only of its kind in the world. We are proud of the progress our country has made with the implementation of this dispensation".

On a comparative note, the above statement resonates well with the speech echoed by Canadian Prime Minister, Sir Robert Borden,⁶ as Canadians prepared for the battle of Vimy Ridge in 1917. He offered his commitment, by stating that:

"You can go into this action feeling assured of this, and as the head of the government. I give you this assurance, that you need have not fear that the government and country will fail to show just appreciation of your service to the country in what you are about to do and what you have already done. The government and the country will consider it their first duty to prove to the returned men it's just an appreciation of the inestimable value of the service rendered to the country; and no man, whether he goes back or whether he remains in Flanders, will have just to reproach the government for having broken faith with the men who won and the men who died".

The Constitution further required that an Act of Parliament shall prescribe: the qualifications of a beneficiary entitled to receive a special pension; the conditions for the

⁵Nevondwe L, Pensions payable to the veterans of the struggle under the Special Pensions Act, Pension Lawyers Association Conference, 26-28 February 2012, available online, <http://www.pla.org.za>.

⁶Sir Robert L, Borden, quoted by Robert Fair, MP, House of Commons, Debate, 14 June 1994, 3816.

granting thereof and the manner of determination of the amount of such pension, taking into account all relevant factors, including, inter alia, any other remuneration or pension received by such beneficiary. In pursuance of the above mentioned constitutional mandate , the Act provides for special pensions to be paid to persons who have made sacrifices, suffered financial deprivation or served in the public interest during the liberation struggle, in the course of establishing a non-racial democratic constitutional order in South Africa while serving fulltime in a banned or restricted political organisation and as a consequence of such activity were unable to or prevented from providing for pensions, for a significant period.

1.2. Statement of the research problem.

It must be borne in mind that the Act was enacted to give effect to section 189 of the Interim Constitution and is meant for those people who have sacrificed their lives for South Africa to be a non-racial, non-sexism, supremacy of the Constitution⁷ and the rule of law which is built on the following core values, social justice, human dignity and equality. Even though the Act made it clear by outlining the categories or groups of persons who are eligible to get special pension in section 189(1),⁸ people are trying by all means to forge documents so that they can be able to qualify for special pensions. Others go to the extent of faking biography and lied under oath in their affidavit in the quest to receive pension. There are also reported cases of corruption within the Special Pensions Administration (SPA). There are other officials who were caught and labelled as corrupt by Special Investigative Unit (SIU) report.

⁷South African Constitution Act, 108 of 1996.

⁸Section 189(1).

The other challenges in the special pension administration is that the Act has prescribed that those who were 35 years of age or older on 31 December 1996 was supposed to have all applied for special pensions on or before 31 December 2006. For those who are between 30 and 35 years of age, they were expected to lodge their special pensions claim on or before 31 December 2010. For those who have not yet lodged their claim, their claim is prescribed in terms of the Act and they cannot lodge a claim. This poses a problem since the majority of special pension's claimants are not aware of their rights in terms of the Act and some even today 16 years after the Act was promulgated have not yet lodged their claim.

The other challenge with the special pensions is that for you to qualify you must have serve your respective organisation full-time for a period of five years or arrested or imprisoned for a period of five years or longer for an offence which was committed with a political objective. You must also have been restricted or banished for a period of five years or longer. All these activities mentioned above, need to have happened prior 2 February 1990. In this period, you must prove that you were unable to provide for your pension. This presents a challenge since some of the receipts of special pensions occupies influential positions in the society and some went to the extent of becoming presidents of the country, cabinet ministers, Director Generals (DG), Premiers, Members of Executive Council (MEC), judges, Head of Departments (HOD), Chief Executive Officers of State-Owned Entities (SOE), Police Commissioners, leaders of state institutions supporting constitutional democracy, entrepreneurs, and others not mentioned. In their careers after 1994, they have earned a living and made a generous pension which compensate for their time which has been lost when they were engaging

in the liberation struggle for South Africa to be a democratic society. Some are now millionaires and billionaires.

The awarding of special pensions to these categories of persons defeat the purpose of special pensions, since it is meant for those who cannot provide for themselves. Special pensions are a social security measure aimed at assisting those who find themselves in destitute or in poverty.

The other challenge is the processing of applications for special pensions. It takes a long time to process special pensions. Other claimants have since died waiting for the pension. This process was meant for last for a short period from 31 December 1996. It has been in existence for sixteen years now.

The other challenge with special pensions is the fact that those who are below the age of 30 years are not eligible and these categories of persons have participated in the liberation struggle and sacrifices their education at a very young age.

1.3. Literature review.

Section 1(1) of the Act provides as follows:

“A person who made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic of South Africa, has the right to a pension in terms of this Act if that person-

- (a) was at least 30 years of age on the commencement date; and
- (b) was prevented from providing for a pension because, for a total or combined period of at least five years prior to 2 February 1990, one or more of the following circumstances applied:

- (i) That person was engaged full-time in the service of a political organisation.
- (ii) That person was prevented from leaving a particular place or area within the Republic, or from being at a particular place or in a particular area within the Republic, as a result of an order issued in terms of a law mentioned in Schedule 1 of this Act.
- (iii) That person was imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1 of this Act, or that person was imprisoned for any offence committed with a political objective.”

On an ordinary interpretation, it thus appears as there are five separate requirements that must each be satisfied for a person to have a right to a pension in terms of section 1(1). First, the person must have made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order. Second, the person must be a citizen, or be entitled to be a citizen of South Africa. Third, the person must have been at least 30 years of age on the commencement date. Fourth; the person must have been prevented from providing for a pension. Fifth, the reason that the person was prevented from providing for a pension must have been that for at least five years prior to 2 February 1990, one or more of the following circumstances set out in section 1(1)(b) of the Act applied, that is the person was engaged full-time in the service of a political organization; the person was prevented from leaving, being at or being in a particular place or area within the Republic as a result of an order issued in terms of a law mentioned in Schedule 1; the person was imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1; or the person was imprisoned for any offence

committed with a political objective.

Scholars like Nevondwe L and Tshoose IC are of the opinion that special pensions is described as the appreciation or sense of guilty of society towards those people on whom the government has rightfully or wrongfully and at any rate disproportionately inflicted damage.⁹ Government have been prepared to pay compensation to those have been exposed to certain types of hardships and suffering caused by the apartheid government. They go further to say that using the special pensions fund legislation is a good way because it constructs analysis of the scope of the coverage of the special pensions fund system, and the beneficiaries entitled to the compensation under the Act. They also recommended that the role played by South Africa for looking after the families of the war dead while making benefits generally available to the veterans, and their families.

These two authors are of the view that the purpose of the Act is to compensate those who were involved in the liberation struggle and who, on that account, lost the opportunity to provide for a pension before 2 February 1990 for a period of at least 5 years. It also seeks to compensate the surviving spouses and dependants of such persons. A reading of the Act as a whole reveals that the object of the Act is to provide financial support to persons involved in the liberation struggle, not in general, but specifically in their old age. A person must have been unable to provide for a pension for at least 5 years before 2 February 1990 in order to qualify. The requirement in terms of the Act that a person must have been at least 30 years or older on 1 December 1996

⁹Nevondwe L and Tshoose IC, A legal analysis of the distribution and payment of special pensions under the South African Special Pensions Act, *Pensions an International Journal*, Vol. 16, No. 4, November 2011, p224.

is precisely to ensure that only those who would not have been in a position to make provision for their old age would qualify for a special pension. If a person was younger than 30 years on this date, the assumption is that, despite a person ' s contribution to the liberation struggle, he or she was young enough to still make provision for retirement.

The Special pension disqualifies certain persons from receiving a benefit including those who have been convicted of a serious crime and those who subsequent to contributing to the liberation struggle, undermines effort to establish a non-racial democratic order.¹⁰ It also disqualifies those who are not citizens and those who have lodged their applications for special pensions after the closing date being the 31 December 2006 and 31 December 2010.

The Act also provides for three types of benefits, namely, a lump sum benefit, a monthly benefit and a funeral benefit. Prior to the 2008 amendment, only a lump sum benefit was payable to a surviving spouse or a dependant. However the effect of the 2008 amendment is that a monthly pension in addition to a lump sum benefit is now payable to surviving spouse and dependants. Benefits are calculated with reference to a qualifying period which is defined in the Act.¹¹

¹⁰Thipa Incorporated Attorneys, Special Pensions Manual 2011, 3.

¹¹ Ibid.

1.4. Aims and objectives of the study.

The study is aimed at analysing the current ways of distributing and payment of the special pensions to the categories or groups of people who deserve it.

It will also analyse the provisions of the Interim Constitution which have entrenched special pension rights and whether the courts are applying them correctly when they pass judgments which concern the violation of these rights. The study will also assess the progress on the implementation of special pension's rights by government.

This study will further assess whether there is a need to develop new policies and legislations on special pensions. This study will benefit students who are studying law, political science and Social Security Law. It will also benefit National Treasury, Parliament, Special Pensions Administration (SPA), civil society organisations, Public Protector, Department of Defence and Military Veterans and other stakeholders whose mandate relate to the operation of special pensions.

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 distribution and payment of special pensions. 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 limitations of the study.

This study consists of four interrelated chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two deals with the legislative framework for special pension. Chapter three deals with the dependants for special pension. Chapter four deals with conclusions drawn from the whole study and make some recommendations.

CHAPTER TWO: LEGISLATIVE FRAMEWORK FOR SPECIAL PENSIONS

2.1. Introduction.

Statutes and regulations are not renowned for being user-friendly.¹² The Special Pension Act¹³ is no exception. The Act was enacted and came into force on 31 December 1996. Since its inception in 1996, the Act has been amended four times. These amendments were passed in 1998, 2003, 2005 and 2008 respectively. These amendments primarily increased benefits, extended access to benefits and addressed technical and implementation difficulties.

2.2. The 1998 amendments¹⁴

Prior to the 1998 amendment, a pensioner who qualified for a benefit was entitled to receive a pension payable monthly commencing on the first day of the month during which that person attained the age of sixty. The 1998 amendment however stipulated that the pension became payable on the first day of the month during which that person attained the age of thirty-five. The 1998 amendment also extended the right to a special pension to persons who suffer from terminal diseases.¹⁵

¹²Thipa Incorporated Attorneys, Special Pensions Manual 2011, 2.

¹³Act, 69 of 1996.

¹⁴Act, 75 of 1998.

¹⁵Nevondwe L, Legal analysis of the distribution and payment of special pensions under the South African Special Pensions Act, 69 of 1996, Law Week Conference, 29th August to 2nd September 2011, University of Limpopo (Turfloop Campus).

2.3. The 2003 amendments¹⁶

Prior to the 2003 amendment, the designated institution, National Treasury could not consider applications received after the closing date. However the 2003 amendment authorizes the designated institution to condone late applications in certain circumstances. The Act calls for the dissolution of the Special Pensions Board and remove the requirement that one of the member of the Review Board must be an Actuary.

2.4. The 2005 amendments¹⁷

The 2005 amendment introduced a monthly pension (in addition to the survivor's lump sum) for surviving spouses or orphans of pensioners. It also introduced funeral benefits for pensioners, surviving spouses and orphans. The 2005 amendment further provided for the dissolution of the Special Pensions Board and Special Pensions Review Board and made room for the National Treasury to be responsible for administering the Act.

The Minister of Finance was furthermore empowered to designate another department, government component or public entity to administer the Act in the place of National Treasury should this be deemed appropriate. The 2005 amendments also provided for the lapsing of part 1 of chapter 1 of the Act for pensions and survivor lump sums on 31 December 2006, that is, the closing date for all new late applications was now 31

¹⁶Act, 21 of 2003.

¹⁷Act, 27 of 2005.

December 2006 and no new applications could be considered or condoned after this date.

2.5. The 2008 amendments¹⁸

Prior to the 2008 amendment, the Act provided that only persons thirty-five years and older on 1 December 1996 were entitled to a pension. The rationale for the age qualification was that the Act intended to make provision for pensions to persons whose ability to make provision for a pension was impacted by their full-time involvement in the struggle for democracy. It was parliament's view that persons under the age of thirty-five still had sufficient opportunity to obtain employment and to make provision for a pension. However, it transpired that significant numbers of younger persons had not secured adequate alternative livelihoods.

The effect of 2008 amendments was that the right to a pension was extended to persons who were 30 years or between 30 and 35 years on 1 December 1996. The revised criteria was informed by the fact that in qualifying for a pension an applicant would have had to have been at least nineteen in 1985. The 1985 date relates to the existing requirement that a person must have been prevented from providing for a pension for a total or combined period of at least five years prior to 2 February 1990.¹⁹

Applications for this category must be made by 31 December 2010. The amendments also extended the monthly pension and funeral benefit to surviving spouses and

¹⁸Act, 13 of 2008.

¹⁹Nevondwe L, Legal analysis of the distribution and payment of special pensions under the South African Special Pensions Act, 69 of 1996, Law Week Conference, 29th August to 2nd September 2011, University of Limpopo (Turfloop Campus).

orphans of persons who received a survivor's lump sum benefit only in terms of the Act. Prior to this amendment surviving spouses and orphans of persons who received a lump sum because of the death of a person during the struggle were not entitled to a monthly pension-only to a lump sum.

The amendment also extended the monthly pension and funeral benefit to the surviving spouses and orphans of persons who were thirty but under thirty-five on 31 December 1996 but who had died prior to the date on which the amendment took effect. The amendment also calls for the establishment of the Special Pension Appeal Board (SPAB) which replaces the Special Pension Review Board (SPRB) .²⁰

2.6. The right to special pension.

A person who made sacrifices or served the public interest in establishing a non-racial, democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic of South Africa, has the right to a pension in terms of the Act if that person²¹-

- was at least 30 years of age on the commencement date of the Act, 1996²²
- was prevented from providing for a pension because, for a total or combined period of at least five years prior to 2 February 1990, one or more of the following circumstances applied²³:

²⁰Choma HJ and Nevondwe LT, *Socio-Economic Rights and Financial Planning in South Africa* (2010), p316.

²¹Section 1(1) of the Act.

²²Section 1(1) (a).

²³Section 1 (1) (b).

- that person was engaged full-time in the service of a political organisation.²⁴
- that person was prevented from leaving a particular place or area within the Republic, or from being at a particular place or in a particular area within the Republic, as a result of an order issued in terms of a law mentioned in Schedule 1(3) of this Act.²⁵
- that person was imprisoned or detained in terms of any law or for any crime mentioned in Schedule 1 of this Act, or that person was imprisoned for any offence committed with a political objective.²⁶

In determining whether a person committed an offence with a political objective, the designated institution must consider the following factors:

- the person's motive in committing the offence;²⁷
- the context within which the offence was committed and, in particular, whether the offence was committed in the course of a political uprising or political event;²⁸
- the nature and gravity of the offence;²⁹
- the effect of the commission of the offence on a political opponent, State property, State personnel, private property or individuals;³⁰
- whether the offence was committed as part of a programme, or with the approval of an organisation which promoted a non-racial democratic constitutional order³¹

²⁴ Section 1(1)(b)(i).

²⁵ Section 1(1)(b)(ii).

²⁶ Section 1(1)(b)(iii).

²⁷ Section 1(2)(a).

²⁸ Section 1(2)(b).

²⁹ Section 1(2)(c).

³⁰ Section 1(2)(d).

- the relationship, proximity and proportionality of the offence and the political objective pursued in its commission; and³²
- whether the offence was committed without-
 - personal gain; or
 - personal malice.³³

A person who made sacrifices or served the public interest in establishing a non-racial democratic constitutional order and who is a citizen, or entitled to be a citizen, of the Republic, has a right to a pension in terms of the Act if that person was prevented from providing for a pension because, prior to 2 February 1990, that person suffered a permanent and total disability arising out of the full-time service in the political organisation or his detention or imprisonment.³⁴

A person has the right to a survivor's lump sum benefit in terms of the Act if that person is a surviving spouse, or if there is no surviving spouse, the surviving dependant, of a person who-

- made sacrifices or served the public interest in establishing a non-racial democratic constitutional order;³⁵
- was a citizen, or entitled to be a citizen, of the Republic;³⁶
- is not disqualified in terms of section 1(8); and³⁷

³¹ Section 1(2)(e).

³² Section 1(2)(f).

³³ Section 1(2)(g)(i) and (ii).

³⁴ Section 1(3)(iii) of the Act.

³⁵ Section 2(1)(a).

³⁶ Section 2(1)(b).

- either has died but, had he or she survived, would have qualified in terms of section 1, based on the circumstances at the time of death; or died prior to 2 February 1990 while he or she was imprisoned or detained for any crime or in terms of any law mentioned in Schedule 1 of this Act; or died prior to 2 February 1990 while he or she was actively engaged in, and from causes arising out of, full-time service to a political organisation; or disappeared prior to 2 February 1990 while he or she was actively engaged in efforts attempting to establish a non-racial democratic constitutional order, and has been presumed in law to be dead.³⁸

The surviving spouse or dependant of a deceased person who would have been a qualifying pensioner had that person survived, is entitled to receive a single lump sum amount equal to twice the annual pension that would have been payable to that person had he or she survived until the commencement date.³⁹

2.7. Disqualifying criteria.

2.7.1. Citizenship.

There are a number of disqualifying criteria in terms of the Act. Therefore, on receipt of an application, a determination should be made at the outset whether or not the applicant is disqualified. The applicants need to be South African citizens or entitled to the citizenship for their applications to be considered by the designated institution.

³⁷ Section 2(1)(c).

³⁸ Section 2(1)(d)(i),(ii),(iii) and (iv).

³⁹ Section 2(2)(a).

According to the South African Citizenship Act⁴⁰ (“the Act”) there are three ways in which a person can be a citizen:

- By birth;
- By descent; and
- By naturalization

Citizenship by birth and descent are legal rights for anyone who can prove the facts of birth and parentage. Citizenship by naturalization is not a legal right. It can be granted or refused by the Minister of Home Affairs at his or her discretion. In terms of the Act a child born in South Africa to parents where one was either a South African citizen or a South African permanent residence holder at the time of the child’s birth, will be a South African citizen by birth in the case of births from October 1995, when the Act came into operation. The position before that (October 1995) was governed by the South African Citizen Act⁴¹, which contained a wide range of different requirements over the years. To determine a person’s claim to South African citizenship in respect of births in that era requires the designated institution to exam the repealed South African citizenship Act.

2.7.2. Time Barring.

The Special Pensions Act makes provision for a cut-off date by which certain applications must be received. These cut off dates must be adhered to strictly.

⁴⁰Act, 88 of 1995. This Act makes provisions for the acquisition, loss and resumption of South African Citizenship.

⁴¹Act, 49 of 1949.

In respect of application made under Part 1 of the Act (the over 35 years of age category), a certified application form must have been submitted to the Special Pensions Board (it is now called the designated institution) on or before 31 November 1997. Initially the Review Board (it has since been replaced by Special Pension Appeal Board) had the discretion to condone late applications. This position changed in 2003 when the Act was amended. The Review Board was stripped of this power, and in its stead the Review Board was granted the discretion to condone any request for review received after the prescribed period of 60 days in which applicants were required to submit their request for review.

The Special Pensions Board was granted the power to condone any late application if the Board is satisfied that, for reasons beyond the control of the applicant, the application could not be submitted on or before the closing date (31 November 1997). This was the legal position for late applications submitted to the Special Pensions Board received after 31 November 1997 but before 31 December 2006.

In 2005 the Special Pension Amendment Act was enacted to amend the Act to provide for the following:

- The lapsing of Part 1 of the Act on 31 December 2006,
- the Minister was granted the power, In terms of Section 27, to dissolve the Board 60 days after the lapsing of Part 1 of the Act and upon such dissolution the Head of Pensions Administration in the National Treasury is responsible for the performance of all functions of the Board in terms of the Act; and

- the Minister was also granted the power, in terms of Section 28 (6) and (7) read together, to dissolve the Review Board within a period of 90 days after dissolving the Board, in terms of section 27 (1), and upon such dissolution of the Review Board the Minister would be responsible for the performance of all the functions of the Review Board

Both the Board and the Review Board were dissolved in February 2007 and in May 2007 respectively. The Act also provided in section 29 (3) that “Any power, function or duty conferred, assigned or imposed upon the Minister by this Act, may be delegated or assigned by the Minister, in writing, to any officer in the Public Service, but the delegation or assignment of such power, function or duty does not divest the Minister of that power, function or duty”.

The Minister exercised his right to delegate his responsibilities for the performance of all the functions of the Review Board to “an officer in the Public Service” as stipulated in Section 29 (3) of the Act.

The Act was again amended in 2008 to, inter alia, regulate the administration of the Act by the creation of Special Pension Appeal Board in the place of the Review Board, and further to transfer the powers and capacities of the Board to a Designated Institution as defined in the Act.

The Special Pensions Board was tasked with the responsibility of deciding in each case submitted after 31 November 1997 whether the reasons for the delay were indeed not attributable to any fault on the part of the applicant. This is still the position for matters which were submitted before 31 December 2006 but have not been adjudicated on by the Delegated Authority.

The cut-off date for all late applications (over 35) is 31 December 2006, the rationale for this cut-off date is that it marks a period of 10 years since the promulgation of the Act giving this category of applicants ample time within which to have applied. No late applications (over 35) can be received by the Special Pensions Administration because Part 1, which grants the right to a special pensions (over 35), had lapsed on 31 December 2006.

Any application made under Part 1AA of the Act⁴² (between 30 and 35 years of age category) must be submitted on or after 11 January 2009 but before 31 December 2010 and there is also no provision for condonation in respect of these applications because Part 1AA, which grants the right to a special pensions between 30 and 35 years of age category), will lapse on 31 December 2010.

2.7.3. Receipt of any other pension or benefit.

⁴²Special Pensions Amendment Act, 13 of 2008.

The Special Pensions Act provides that a person's right to a special pension ceases on the day on which that person's right to a pension is recognised in terms of Government Employee Pension Law⁴³ or in terms of the rules of any other employee pension or provident or scheme⁴⁴. Section 30A provides for the recognition of pensionable service of former members of non-statutory forces or services. According to this section any former member of a non-statutory force or service may in accordance with the rules of the Government Employee Pension law apply to the Government Employee Pension Fund to have any service as a member of a non-statutory force or service recognised as pensionable service.

For purposes of understanding section 30A, it must be noted that non-statutory force Service' ("NSF Service"), is defined as the period between the date on which a former member of a non-statutory force or service joined his or her respective former forces or services (as reflected on his or her service certificate) and the date of their taking up employment, or entering into an agreement with or their attestation into the employer (the government), provided that such service will only be recognised for the period after the former member of a non-statutory force or service attained the age of sixteen years, so that service prior to the age of sixteen years will not be regarded as NSF Service. In the case of a beneficiary of a former member of a non-statutory force or service, NSF Service means the period of NSF Service of the former member of a non-statutory force or service through whom the beneficiary is entitled to a benefit in terms of the Government Employee Pension Fund;

⁴³Section 3A. This Law has been enacted in 1996.

⁴⁴Section 14(4) of the Government Employees Pension Law, 1996.

If former member of a non-statutory force or service receives or has received any benefit in terms of the Special Pensions Act or the Demobilisation Act,⁴⁵ other than a benefit received as a dependant, the benefit payable by the Government Employee Pension Fund shall be reduced in accordance with the rules of the Government Employee Pension law.

This section applies to a particular class of persons, a former member of a non-statutory force or service, the Government Employee Pension Law defines a former member of a non-statutory force or service as:

(a) any former member of Umkhonto we Sizwe or the Azanian People's Liberation Army-

(i) who entered into an agreement for appointment with the Department of Defence or the South African Police Service on or before 31 March 2002; and (ii) whose name, in the case where a person entered into an agreement for appointment with the Department of Defence, appears in the certified personnel register or personnel list contemplated in section 224 (2) (c) of the Constitution of the Republic of South Africa, 1993 (Act 200 of 1993);

(b) any former member of Umkhonto we Sizwe or the Azanian People's Liberation Army or of the former Department of Intelligence and Security of the African National Congress or of the former Pan Africanist Security Services of the Pan Africanist Congress of Azania-

⁴⁵Act, 99 of 1996.

(i) who entered into an agreement for appointment with the National Intelligence Agency or the South African Secret Service between 1 January 1995 and 31 March 2004; and

(ii) whose name appears on the certified personnel register or personnel list contemplated in section 224 (2) (c) of the Constitution of the Republic of South Africa,⁴⁶ or the personnel list defined in section 1 of the Intelligence Services Act, 2002 (Act 65 of 2002);

(c) any former member of Umkhonto we Sizwe or the Azanian People's Liberation Army or of the former Department of Intelligence and Security of the African National Congress or of the former Pan Africanist Security Services of the Pan Africanist Congress of Azania who entered into an agreement for appointment with any component of the employer other than those referred to in paragraphs (a) and (b) on or before 31 March 2002;

(d) notwithstanding section 5 (Section 5 deals with persons excluded from membership of the Government Employee Pension Fund), any former member of Umkhonto we Sizwe or the Azanian People's Liberation Army or of the former Department of Intelligence and Security of the African National Congress or of the former Pan Africanist Security Services of the Pan Africanist Congress of Azania who was never admitted as a member of the Government Employee Pension Fund by virtue of the fact that that person concluded a short-term employment contract with the employer; and

(e) any person contemplated in paragraph (a), (b) or (c) who has been paid the benefits owing to that person by the Fund upon cessation of his or her membership, but who would have been entitled to an additional or greater benefit had his or her service as a member of a non-statutory force or service been taken into account.

⁴⁶Act, 200 of 2003.

Whether or not an applicant is entitled to a pension from Government Employees Pensions Fund or any other retirement fund should also be ascertained at the outset. If so, he and she is disqualified in terms of the Special Pensions Act. However note that an applicant who qualifies in terms of 1; 2 or 6D of the Special Pensions Act may receive payments in terms of the Social Assistance Act⁴⁷ or the Military Pensions Act.⁴⁸

2.8. Special Pensions Adjudication Institutions.

Prior to the Special Pension 2005 amendment,⁴⁹ the administration of the Act was a duty incumbent on the Special Pensions Board and Review Board which has been replaced by Special Pensions Appeal Board and the Designated Official or the Chief Adjudicator who replaces the Special Pension Board. The Chief Adjudicator is appointed by the designated institution with the involvement of the Minister of Finance. However the administration of the Act is now the responsibility of the National Treasury and the Minister of Finance.

2.8.1. Special Pensions Appeal Board (“Appeal Board”).

2.8.1.1. Establishment and appointment of Appeal Board.

⁴⁷Act, 13 of 2004.

⁴⁸Section 14(1) of the Act. This Act was enacted in 1976.

⁴⁹Special Pensions Amendment Act, 27 of 2005.

An Appeal Board was established in 2008 in terms of the amendment to the Special Pensions Act and must consist of three members appointed by the *Minister*.⁵⁰ The members must be competent persons, and must include at least one person that is an advocate or attorney with at least 10 years' experience in the practice of law as the chairperson.⁵¹ A member of the Appeal Board is appointed for a period of three years and is eligible for reappointment upon expiry of the member's term of office.⁵²

A member of the Appeal Board may resign by giving three months' written notice to the Minister.⁵³ The Minister may terminate the period of office of a member of the Appeal Board if the performance of the member is unsatisfactory; or if the member, either through illness or for any other reason, is unable to perform the functions of office effectively.⁵⁴

The Minister may terminate the period of office of all members of the Appeal Board, if the performance of the Appeal Board is unsatisfactory.⁵⁵ In the event of the dismissal of all the members of the Appeal Board, the Minister may appoint persons to act as caretakers until competent persons are appointed.⁵⁶ The Minister must appoint a

⁵⁰ Section 8AA(1) of the Special Pensions Amendment Act, 13 of 2008. See also Nevondwe and Tettey, *opcit*, 46.

⁵¹ Section 8AA(2)

⁵² Section 8AA(3)

⁵³ Section 8AA (4)

⁵⁴ Section 8AA (5). See also Nevondwe L and Tettey J, *The role of the Pension Funds Adjudicator and Special Pension Tribunals*, Insurance and Tax, Vol. 25 No 3, September 2010, 46.

46.

⁵⁵ Section 8AA(6).

⁵⁶ Section 8AA(7).

temporary replacement member for an appeal, if before or during an appeal it transpires that any member of the Appeal Board—

(a) has any direct or indirect personal interest in the outcome of that appeal; or

(b) will, due to illness, absence from the Republic or for any other bona fide reason, be unable to participate or continue to participate in that appeal.⁵⁷

2.9. Right to appeal against Special Pensions Board decision.

Any *applicant* who disagrees with any decision of the *Board* may appeal that decision by sending a written notice in the form determined by the *designated institution* to the Appeal Board within 60 days of the date of the decision.⁵⁸ An appeal under shall take place on the date and at the place and time fixed by the Appeal Board.⁵⁹

The Appeal Board may for the purposes of an appeal—

(a) summon any person who, in its opinion, may be able to give information for the purposes of the appeal or who it believes has in his or her possession or custody or under his or her control any document which has any bearing upon the decision under appeal, to appear before it at a time and place specified in the summons, to be questioned or to produce that document, and may retain for examination any document so produced;

(b) administer an oath to or accept an affirmation from any person called as a witness at the appeal; and

⁵⁷ Section 8AA(8).

⁵⁸ Section 8(1).

⁵⁹ Section 8(2).

(c) call any person present at the appeal proceedings as a witness, and interrogate such person and require such person to produce any document in his or her possession or custody or under his or her control, and such person shall be entitled to legal representation at his or her own expense.⁶⁰

The procedure at the appeal shall be determined by the chairperson of the Appeal Board.⁶¹ The Appeal Board may confirm, set aside or vary the relevant decision of the *designated institution*. A decision of a majority of the members of the Appeal Board shall be a decision of that board. A decision of the Appeal Board must be in writing, and a copy thereof must be made available to the appellant and the *designated institution*. A decision of the Appeal Board is final.⁶²

2.10. Reintegration measures of the ex-combatants.

Reintegration refers to the process of facilitating the transition of former combatants to civilian life, which allows ex-combatants to adapt productively within both economy and society. The word 'process' implies that reintegration is not a one-off event, but that it is ongoing with changes and improvements along the way.⁶³ The word 'facilitate' is central to the definition because it moves away from a top-down approach which views demobilized soldiers as passive objects of reintegration.

⁶⁰ Section 8(3).

⁶¹ Section 8(4).

⁶² See also Nevondwe and Tetey, *Opcit*, 47.

⁶³ Mogapi N "Reintegration of Soldiers: The Missing Piece" (2004) Vol.2, No.3 *Intervention*, 223-225; Malan M "Peacebuilding in Post- Conflict South Africa: The Need for a Comprehensive Demobilisation and Remobilisation Programme "(1996) Vol.5, No.4 *African Security Review*; United Nations, 'Disarmament, demobilisation and reintegration of ex-combatants in a peacekeeping environment: principles and guidelines' (Manual, Department of Peacekeeping Operations, New York, 2000), 15.

Reintegration is meant to provide an enabling environment for transition to civilian life. Demobilized soldiers are responsible for making choices and determining their destiny within this environment. The phrase 'transition to civilian life' as used here takes into consideration the fact that demobilized soldiers do not necessarily have an in-depth knowledge of the civilian life they are about to enter. 'In certain situations, after the ending of the war, villages from which soldiers or guerrilla fighters came sometimes no longer exist In several countries, many combatants have no memory of the pre-war times; they have never known "peace".' It is thus necessary to implement reintegration programmes, which are 'assistance measures provided to former combatants that would increase the potential for their and their families' economic and social reintegration into [civilian] society'.⁶⁴

The provision of reintegration programmes is central to the soldiers' transition to civilian life because in most cases former combatants lack appropriate job skills. However, even when guerrilla combatants possess skills, reintegration is made difficult by other factors. Former combatants tend to have little or no experience in the labour market, having taken up arms at an early age. 'They also tend to have an imperfect understanding of the state of the economy. Consequently, former combatants often have unrealistic assumptions about civilian life and thus require a period of adjustment to assess their personal situation and opportunities.' In general, it is the lack of

⁶⁴Mashike L "Age of Despair: The Uninterrupted Forces of South Africa" (2008) *African Affairs* 434-435; N. Ball, 'Demobilizing and reintegrating soldiers: lessons from Africa' in Krishna Kumar (ed.), *Rebuilding Societies after Civil War: Critical roles for international assistance* (Lynne Rienner Publishers, London, 1997) 86.

adequate assistance enabling them to reintegrate into civilian society that is the main source of combatants' grievances.⁶⁵

2.11. Conclusion.

The amendments are important because they extended the monthly pension and funeral benefits to the surviving spouses and orphans of the persons who were 30 years of age but under the age of 35 years on 31 December 1996 but who had died prior to the date on which the amendment took effect.⁶⁶ The Act as originally drafted provided for three levels of pension after the age of 60 dependant on the age as at 1 December 1996. In the 2008 amendment people who were aged 30 to 50 in December 1996 were allowed to migrate to the 50 to 65 category once they attained the age of 50 and for persons in the 50 to 65 category on 1 December 1996 to migrate to the 65 and older category once they attained the age of 65. All these amendments are important in that they allowed people who were eligible for the pension to access their pension by allowing them to migrate to the older age so as they could access their pension.

The 2008 amendments was also a good amendment since it extends the beneficiaries of special pensions. It also catered for those who were between 30 to 34 years of age at the commencement date of the 31 December 1996.

⁶⁵Mogapi (n 60 above) 434-435.

⁶⁶Thipa Incorporated Attorneys Special Pensions Manual 2011,6.

CHAPTER THREE: DEPENDANTS FOR SPECIAL PENSION.

3.1. Introduction.

The definition of a dependant in terms of the Special Pensions Act reads as follows:

‘dependant’ to mean an applicant in respect of whom a deceased person-

- (a) was legally liable for maintenance
- (b) was not legally liable for maintenance, if the applicant-
 - (i) was at the time of the death of the deceased in fact dependant on the deceased for maintenance
 - (ii) is the spouse of the deceased, including a party to customary union or a union recognized as a marriage under any Asian religion
 - (iii) is a child of the deceased, including a posthumous child, an adopted child and a child born out of wedlock or
- (c) would have become legally liable for maintenance, had the deceased not died;

The definition of “dependent” in the Act creates three categories of dependants. The first category requires a person to have been dependant on the deceased for maintenance, where such dependency arises out of legal duty to maintain. The second category refers to persons who were not legally dependants on the deceased for maintenance but who meet one of the three possible criteria. The third category refers to a person, in respect of whom the deceased would have become legally liable for maintenance, had he or she not died.

3.2. Categories of dependants.

3.2.1. Legal dependants.

A person is regarded as a dependant if the deceased is legally liable to maintain that person. This duty arises as a result of a legal obligation, the common law or a statutory obligation.⁶⁷

Dependents in respect of whom the member is legally liable for maintenance include a spouse and children⁶⁸ who rely on the member for the necessities of life.⁶⁹ Marriage gives rise to a reciprocal duty of support⁷⁰ 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,⁷¹ 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. These obligations 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.

The common law imposes a duty on a parent of a dependent child to support that child. This duty survives parent's death. In *Governing Body, Gene Louw Primary School v*

⁶⁷At common law a duty maintain will arise where the following three requirements are met:

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

⁶⁸The duty of support will normally end once the child reaches the age of majority, but may continue until the child becomes self-supporting.

⁶⁹Necessities of life include food, accommodation, medical care and education (s 15 (2) of the Maintenance Act 99 of 1998).

⁷⁰Maintenance includes foods, clothing, medical and dental care and whatever else is reasonably required.

⁷¹Section 7 (1) of the Divorce ACT 70 of 1979. In *Lombard v Central Retirement Annuity Fund* (2003) 3 BPLR 4460 (PFA). The complainant divorced the deceased in 1999. During the divorce proceedings the complainant did not ask for maintenance and it was 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 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).

*Roodtman*⁷² the court said that a court order simply regulates the parent's common law duty parents to support a dependant child. A parent, grandparent and grandchild can also qualify as a dependant. Like parents, children with the means to prove the need or necessity for support⁷³ 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 distribution. The person must prove that the deceased had a legal duty to support him.

3.2.2. Non legal dependants.

Non-legal dependants are those persons who were not legally dependant on the deceased member for maintenance, and it then outlines categories of such dependants. Where there is no duty of support, a person might still be a dependant if the deceased contributed to the maintenance of the person in way. The person claiming to be a

⁷²2004 (1) SA 45 (C).

⁷³Parents will have to prove on a balance of probabilities that they are indigent and cannot support themselves, and that the deceased was liable to or did contribute to their maintenance (*Smith v Mutual and Federation Insurance Co Ltd* 1998 (4) SA 626 (C)).

factual dependant will have to prove that he was dependant 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 regularly by the deceased to the beneficiary claiming to be a factual dependant. They should not have been one-off but should have been made until the deceased died.

The question which often asked is whether a cohabiting partner qualifies as a dependant for the purpose of special pension? The answer to this can be that the cohabiting partner will qualify as a non-legal dependant or the so-called "factual dependant". Clearly, she (assuming the person is female) cannot qualify as legal dependant because she is not a spouse of the claimant or deceased.

3.2.3.Future dependants.

In terms of the definition of the dependant, any person in respect of whom the deceased would have become legally liable for maintenance, had he or she not died is regarded as a dependant. This section pulls into the ambit of a "dependant" a person whom the deceased was not legally liable to maintain but would have qualified as a legal dependant had the deceased not died.⁷⁴

For example, where the applicant is the mother of the deceased, who was not dependant on the deceased for maintenance at the time of his death, if the applicant can show that subsequent to the date of death, she required financial, medical and other support and that the deceased, had lived, would have become legally liable to

⁷⁴Thipa Incorporated Attorneys, opcit 72.

maintain her in terms of the legal duty arising out of the child-parent relationship, then she would qualify as a future dependant.⁷⁵

This section covers persons whom the deceased was not legally liable to maintain at the time of his death. Nevertheless, such a person may qualify as a dependant, if he can show that the deceased would have become liable to maintain had he notionally been alive. Possible dependants in terms of this section might include parents⁷⁶ that are not legally dependent on the deceased for maintenance at the time of his death, engaged couples, parties intending to marry and posthumous children. Those children who will have depended on the deceased had the deceased not died. This includes the posthumous child wherein there is a dispute over paternity.

The problematic problem which South Africa faces is whether the child who is alleged to be fathered by the deceased is entitled to receive a death benefit before the paternity tests are done. In the case of the child born out of wedlock, the child will be classified as a *de facto* dependant since paternity tests have not been conducted. This child if born alive will be classified as an *ex lege* dependent if there is a proof that the deceased's member is fathering the child and that can only be proved if paternity tests have been done. Even if the deceased was not legally liable to maintain at the time of his death. Nevertheless, such a child qualify as a dependant, if it can be shown that the deceased would have become liable to maintain had he notionally been alive

⁷⁵Thipa Incorporated Attorneys, *opcit*, 72.

⁷⁶ See *Wellens v Unsgaard Pension Fund* [2002] 12 BPLR 4214 (PFA).

According to South African law, since paternity tests have not yet been done in this matter, the law presumed that the deceased is the father of the child, unless the DNA tests or the so called paternity tests provides otherwise. Furthermore, if you have a child with someone other than your husband, that child will still be deemed your husband's child until proven otherwise. In law this is called the *pater est quem nuptiae demonstrant* presumption, which literally means that marriage indicates paternity. Your husband will be regarded as the father of your children for all purposes, until he can prove otherwise by way of a paternity test.

In *Pinchin and Another v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), Hiemstra J held that:

"I hold that a child does have an action to recover damages for pre-natal injuries. This rule is based on the rule of the Roman Law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit the rule to the law of property and to exclude it from the law of delict. "

It is important to emphasise the principle of nasciturus fiction in this matter with regard to the child. The mother of the child was pregnant when the deceased passed away and the child was still a foetus by then and he was not dependant on the deceased since his rights were in abeyance and the moment he born alive, those rights started to exist.⁷⁷

⁷⁷See *Road Accident Fund v Mtati*, SCA Case Number 332/04.

3.2.4. Spouses in civil marriage.

Spouses have a reciprocal duty of support.⁷⁸ This duty exists whether the marriage has been concluded in or out of community of property. Maintenance includes food, clothing, medical and dental care and whatever else is reasonably required and it is not restricted to the bare necessity of life. The scope of the duty is determined with reference to the parties' social position, financial means, standard of living and standing in the community.⁷⁹

3.2.5. Children and parents relationship.

Children have a duty to maintain their parents provided that the parents are indigent and the children have the necessary means to do so.⁸⁰ In the claim for maintenance based on the child-parent relationship the parent must demonstrate the necessity for support and not merely the relationship alone. Whilst the requirements assessing whether the child has the necessary means to maintain the parent are fairly simple, the requirement of parental indigence is somewhat more complex. It is said that to be indigent means to be in extreme need or want whereas to be poor means having few things or nothing. Therefore if a person pleads indigence, it is not sufficient to show that he lives on very little or nothing.

What he must show is there exists an extreme need or want for the basic necessities of life. The courts' approach has been to confine the concept of indigence to the basic concept of indigence to the basic human requirements such as food, clothing,

⁷⁸Maintenance includes food, clothing, medical and dental care and whatever else is reasonably required.

⁷⁹Thipa Incorporated Attorneys, opcit 68.

⁸⁰Thipa Incorporated Attorneys opcit, 68.

accommodation and medical attention. Note however that it has been argued that the test adopted by our courts is too rigid in respect of indigence and that the test for maintenance in respect of this relationship should be the same as that which applies to the person's child relationship.

3.2.6. Grandchildren and grandparents relationship.

Grandchildren and grandparents have a reciprocal legal duty of support provided the usual requirements of need and ability to provide are met.⁸¹ However note that a person must claim from more immediate relative first. So for example if the grandparent's child is still alive, that would be the first point of call.

3.2.7. Brothers and sisters relationship.

There is a reciprocal duty of support between brothers and sisters, including half-brothers and sisters.⁸² The extent of maintenance is not entirely clear and appears to be payable at the discretion of the presiding officer. This duty is not as extensive as the duty of a parent to maintain his or her child and appears to be restricted to only when the claimant is indigent. In summary dependants are determined with reference to the relationship they had with the deceased and thereafter whether certain factual conditions have been met. Assuming these requirements are met, the various persons

⁸¹Thipa Incorporated Attorneys, 69.

⁸²Ibid.

referred to the above qualify as dependants and are entitled to be considered for survivor's benefits in terms of the Special Pensions Act.⁸³

3.3. Right to survivor's lump sum benefit.

Section 2 of the Act provides that a person has the right to a survivor's lump sum benefit in terms of this Act if that person is a surviving spouse, or if there is no surviving spouse, the surviving dependant, of a person who-

(a) made a sacrifice or served the public interest in establishing a non-racial democratic constitutional order;

(b) was a citizen, or entitled to a citizen, of the Republic;

(c) is not disqualified in terms of section 1(8); and

(d) either has died but, had he or she survived, would have qualified in terms of section 1, or based on the circumstances at the time of death;

(i) or died prior to 2 February 1990 while he or she was imprisoned or detained for any crime or in terms of any law mentioned in Schedule 1 of this Act;

(ii) or died prior to 2 February 1990 while he or she was actively engaged in, and from causes arising out of full-time service to a political organisation;

⁸³Para (a).

(iii) or disappeared prior to 2 February 1990 while he or she was actively engaged in efforts attempting to establish a non-racial democratic constitutional order, and has been presumed in law to be dead.⁸⁴

2(a) the surviving spouse or dependant of a deceased person who would have been a qualifying pensioner had that person survived, is entitled to receive a single lump sum amount equal to twice the annual pension that would have been payable to that person had he or she survived until the commencement date.

(b) the surviving spouse or dependant of a deceased or missing person referred to in subsection 1(d) (ii) (iii) or (iv) is entitled to receive a single lump sum equal to twice the annual pension that would have been payable to a pensioner whose qualifying period equalled-

(i) the total or combined length of time that the deceased or missing person spent prior to 2 February 1990 in any of the circumstances listed in section 1(1) (b) plus;

(ii) the length of time between the date of that the deceased or missing person died or disappeared and 2 February 1990; or

(iii) a period of five years.

3, A person referred to in this section who would be eligible for a survivor's benefit is disqualified from receiving that benefit of that person-

(a) either actively engaged in actions calculated to undermine the efforts to establish a non-racial democratic constitutional order;

(b) or has been convicted of a crime committed after 2 February 1990

⁸⁴Section 24(4) gives the board the power to apply on behalf of an applicant for presumption of death order in cases where no such order has previously been made.

3.4. Allocation of benefits for special pension.

A person who qualifies for a *benefit* under both sections 1 and section 2, or for more than one *benefits* under section 2 or 3—

(a) must be granted the *benefit* that is most advantageous to that person; and

(b) may not be granted any other *benefit* under either section 1 or 2.

3.5. Allocation of survivor's benefits.

If a deceased person is survived by more than one spouse, each of whom qualifies for a survivor's benefit in terms of this Act, the Board must determine the proportion of the survivor's benefit that is to be paid to each qualifying spouse; but the total benefits for all the surviving spouses must not exceed the benefit that would have been payable had there been only one surviving spouse.

If a deceased person is not survived by a spouse, but is survived by more than one dependant, each of whom qualifies for a survivor's benefit in terms of this Act, the Board must determine the proportion of the survivor's benefit that is to be paid to each qualifying dependant; but the total benefits for all the surviving dependants must not exceed the amount of the benefit that would have been payable had there been only one surviving dependant.

3.6. Survivor benefits on death of a pensioner and funeral benefits.

A *pensioner* referred to in section 1 whose monthly *pension* payments had already begun by 31 December 2006 will begin before or on 31 December 2010, may not be granted any *benefit* other than a funeral *benefit* under this Part.

3.7. Right to lump sum benefits.

Subject to section 6E of the Act, upon the death of a *pensioner* a surviving *spouse* or, if there is no surviving *spouse*, a surviving *dependant* of that *pensioner*, is entitled to receive a lump sum payment equal to twice the annual amount that was payable to that *pensioner* immediately before the date of death.

3.8. Right to monthly pension.

Subject to section 6E of the Act, upon the death of a *pensioner* a surviving *spouse* of that *pensioner* is entitled to receive a monthly *pension* equal to 50% of the *pension* that was payable to that *pensioner* immediately before the date of his or her death for the remainder of the surviving *spouse's* life; or where there is no surviving *spouse*, a *dependant* who becomes an *orphan* is entitled to receive a monthly *pension* equal to the 50% of the *pension* that was payable to that *pensioner* immediately before the date of his or her death— until the *orphan* reaches the age of 18; or until the orphan reaches the age of 23, if the orphan is a full-time student; or for the remainder of the *orphan's* life, if the *orphan* suffers from a permanent and total disability on the date of the *pensioner's* death.

When the first monthly payment is made to a surviving *spouse* or *orphan* in terms of this section, the *Minister* must include a lump sum covering all the *pension* payments due to that person from the date of the death of the *pensioner* to the date of that first payment.

Subject to section 6E of the Act, from the date on which the Special Pensions Amendment Act, 2008, takes effect— a surviving *spouse* of a *pensioner* referred to in the Act who died prior to the date on which the Special Pensions Amendment Act, 2008, takes effect, is entitled to receive a monthly *pension* equal to 50% of the *pension* that would have been payable to that *pensioner* immediately before the date of his or her death for the remainder of the surviving *spouse's* life; a surviving *spouse* referred to in section 2 who received a *survivor's* lump sum *benefit* is entitled to receive a monthly *pension* equal to 50% of the *pension* that would have been payable to the deceased person who would have been a qualifying *pensioner* had that person survived until the *commencement date*; where there is no surviving *spouse*, a *dependant* who became an *orphan*, is entitled to receive the monthly *pension* that would have been payable to a surviving *spouse* in terms of paragraph (a) or (b)— until the *orphan* reaches the age of 18; or until the *orphan* reaches the age of 23, if the *orphan* is a full-time student; or for the remainder of the *orphan's* life, if the *orphan* suffers from a permanent and total disability on the date of *such pensioner's* death.

3.9. Allocation of equal shares in benefits for survivors.

If a *pensioner* is survived by more than one *spouse* or, if there are no surviving *wives*, by more than one *dependant* or *orphan*, each of whom qualifies for a lump sum *benefit* or a monthly *pension* or both, the *designated institution* must allocate an

equal share of the lump sum *benefit* and the monthly *pension* to each qualifying *spouse*, *dependant* or *orphan*, as the case may be, but the total *benefits* for all the surviving *wives*, *dependants* or *orphans* must not exceed the *benefit* that would have been payable had there been only one surviving *wife*, *dependant* or *orphan*.

If a *pensioner* referred to in section 6D (3) was survived by more than one *wife* or, if there are no surviving *wives*, by more than one *orphan* or *dependant*, each of whom qualifies for a monthly *pension*, the *designated institution* must allocate an equal share of the monthly *pension* to each qualifying *wife*, *dependant* or *orphan*, as the case may be, but the total *benefits* for all the surviving *wives*, *dependants* or *orphans* must not exceed the *benefit* that would have been payable had there been only one surviving *wife*, *dependant* or *orphan*.

3.10. Funeral benefits.

A funeral *benefit* as set out in Schedule 4 is payable to—a *pensioner* on the death of his or her *wife* or *child*; a surviving *wife* upon the death of a *pensioner* or *child* of a deceased *pensioner*; a surviving *wife* upon the death of a child of a *pensioner* referred to in the Act.

Any *dependant* who becomes an *orphan* upon the death of a *pensioner* or surviving *wife* of a deceased *pensioner*, or any *dependant* who becomes an *orphan* upon the death of a surviving *wife* of a *pensioner* referred to in the Act.

3.11. Table for payments and calculations of special pensions benefits.

<i>Age Category as at 1 December 1996</i>	<i>Current Age</i>	<i>Annual pension amount in Rands payable as at 1 April 1995</i>
At least 30 but younger than 50	Younger than 50	6 000
	Older than 50	12 000 plus 1 200 for each year of service exceeding 5 years, not exceeding a total amount of 30 000
At least 50 but younger than 65	Younger than 65	12 000 plus 1 200 for each year of service exceeding 5 years, not exceeding a total amount of 30 000
	Older than 65	24 000 plus 1 200 for each year of service exceeding 5 years, not exceeding a total amount of 42 000
65 and older		24 000 plus 1 200 for each year of service exceeding 5 years, not exceeding a total amount of 42 000. Where years of service exceed 25 years, a fixed amount of 84 000

3.12. Funeral benefits payable for special pensions.

Pensioner	R7 500
Surviving spouse of pensioner	R7 500
Child	R3 000

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS.

The special pension is a non-contributory fund and is a unique in its nature and it differs from the normal pension funds. The South African special pension is regulated by the Special Pensions Act and its administration falls under the Ministry of Finance. To date, cadres or comrades who sacrifices their lives so that South Africa can become democratic has benefited and those who had since passed away, their beneficiaries had benefited.

Special pension cannot replace the lives of those who had died, but it can offer at least little consolation to the survivors. The last call for applications for special pension has ended on 31 December 2010. It is not yet clear if more applications can still be made after deadlines. This is a good policy of the government and it shows that it cares for its people.

Special pension is a social security measure and it strengthens section 27 of the Constitution⁸⁵ which provides that “everyone has the right to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”.⁸⁶ The state has the obligations to develop legislations and policies aimed at realizing this right.⁸⁷ To date, the South African government had developed legislations on special pensions in 1996, the same year when the Constitution was promulgated.

⁸⁵Act, 108 of 1996.

⁸⁶Section 27 (1) (c) of the Constitution.

⁸⁷Section 27 (2) of the Constitution.

As a point of departure, there is a need for government policies on the Special Pensions Fund to reintegrate the ex-combatants into the labour markets, and secondly to empower them with training.⁸⁸

This dissertation recommends that the Special Pensions Act needs to be amended to remove the cut-off date for lodging of complaints. The Act must afford the opportunity those who qualify for special pensions to lodge their complaints. The Act needs to empower the SIU to investigate cases of corruptions on special pensions and mandate the National Prosecuting Authority to have successful prosecutions in these cases.

South Africa come from a long history of struggle in demand for amongst others, adequate housing, health care, food, water, hospitals, schools, social security and a clean environment.⁸⁹The objects of section 27 of the Constitution should be understood as a way of assisting those who are unable to provide for themselves and their families.

Social security provisioning is important in the fight against chronic poverty in South Africa. A large proportion of the population falls outside the economic mainstream, and given their limited employment probabilities, they are often unlikely to gain from economic growth and new employment opportunities. For this portion of society, welfare grants are an important source of income. The rapid expansion of the social security net between 2000 and 2006 undoubtedly had a strong impact on poverty in South Africa, and though the precise poverty implications are still difficult to determine, the fact that most of the social welfare programmes are means tested suggests that the beneficiaries

⁸⁸Mogapi; N. (2004) Reintegration of Soldiers: the missing piece. *Intervention* 2 (3) : 223-225.

⁸⁹ Sandra Liebenberg and Karrisha Pillay, *Socio-Economic Rights in South Africa*, 190, see also, Nevondwe L.T, “A Critical Analysis on the Judicial Enforcement of Socio-Economic Rights”, LLM dissertation, University of Venda (Unpublished), P 1.

are largely poor households. Today a sizable share of the population relies on welfare transfers as their primary or secondary source of income.

Poor children, older people and people with disabilities are protected by a safety net, but there are many structurally unemployed workers, particularly unskilled workers, single parent households, who face protracted impoverishment. Social security is one of the many mechanisms for poverty alleviation and poverty prevention, but it should be implemented with other developmental welfare strategies in addition to income transfers to target the causes and manifestations of poverty. Safety net programmes for the poor must be conceptualised within a broader poverty reduction strategy which addresses issues of human, social and economic capital.

However, the poverty rate still remains high and many feel that social security provisioning should be expanded further. There are those, however, who question the sustainability of further expanding social security provisioning. Any situation in which a small portion of the population is asked to finance welfare payments for a relatively large portion of the population can be untenable.

The inclusion of socio-economic rights in the Constitution must be viewed in the context of the fundamental changes to South Africa's legal system which facilitated the transition of democracy through the inclusion of human dignity, freedom and equality. This struggle had deep roots in the anti-apartheid struggle, and was carried forward in the negotiating process primarily by the liberation movements in conjunction with a vibrant civil society campaign. Until the rich and the powerful learn to be able to talk to

the poor with respect it is surely inevitable that government policies and practices will be experienced as (and revealed to be) premised on a fundamental rejection of the poor.⁹⁰

Apart from the requiring their implementation, the Constitution enables enforcement of socio-economic rights creating avenues of redress through which complaints that the state or others have failed in their constitutional duties can be determined and constitutional duties can be enforced. In this sense, constitutional socio-economic rights operate reactively. They are translated into concrete legal entitlements that can be enforced against the state and society by poor and otherwise marginalized to ensure that appropriate attention is given to their plight.⁹¹

South Africa is the economic hub of the entire Africa. It is also a member of the African Union and Southern African Development Community (SADC). Currently, the country is overcrowded by legal and illegal migrant nationals from surrounding and neighboring countries like Lesotho, Swaziland, Zimbabwe, Afghanistan, Somalia, DRC, Libya, Nigeria, Liberia, etc. who are forced by civil wars and other economic and political hardships which push them to leave their respective countries in order to seek asylum. It must be emphasized that these aliens are also accorded the same constitutional rights equally to citizens.

The questions which still remain in many people's minds are whether South Africa is heading towards a social welfare state? Is our current social security system capable

⁹⁰ Bishop Rubin Phillip, "*No Room for the Poor in our Cities?*" Para6. An article published in the Abahlali Base Mjondolo's website accessed on 2011/12/22 at <http://abahlali.org/node/4874>.

⁹¹See Danie Brand *et al Socio-Economic in South Africa*, 2005 ABC Press Cape Town.

enough to assist and protect the poor people who were politically, socially and economically marginalized by the brutal and apartheid system which its scars are still visible even today? In this case though seems obvious, it is submitted that corruption and maladministration seems to suffocate the purpose.

Maladministration and corruption is still a challenge in our social security system and it is therefore deeply felt that these tendencies are against the democratic fundamental values of the Constitution.⁹² Accordingly it leads to violation of the constitutional right to social security. The country's media almost daily highlights corruption from different government departments from national offices to the local governments. With the current democratic dispensation in our country regarding the policy of openness and transparency as enshrined in the Constitution helps the public to know all corruption activities by government officials and other social services providers. This makes the public to become aware about these corruption activities. On a daily basis, there are continuous marches by the residents in many local governments complaining about poor service delivery which corruption is also a cause. The list of corrupt government officials is long and becomes common.⁹³

I therefore recommend that we have a strong policy that will strictly prevent government officials to engage in government businesses (procurement). Corrupt officials must be fired and be prevented to work in the public sector or any business which is linked to the

⁹²Human dignity, equality and freedom.

⁹³ See for example, Professor Njabulo Ndebele in his city press column dated 1st April 2011 saying: "corrupt concealment becomes the primary mechanism by which corruption in general spreads throughout the body politic. The impact on state governance is severe. Corruption becomes a principle of solidarity. It feeds and maintains solidarity. The political party thus infected becomes its *raison d'être*, lived but never declared, condemned generally, never specifically and threatened but never rooted out.

public sector. Furthermore better trained police officials who can investigate crimes are needed. Institutions such as public protector must be protected and be given more power and resources.

The final recommendations are that the government of the Republic of South Africa has done the great job by establishing the Special Pensions Fund because it also assisting people who are unable to support themselves. In case where the member of the special pensions fund dies before getting the benefit, his or her dependants or surviving spouse can receive the benefit on his behalf. Since the special pension is part and parcel of social assistance, it is assisting in eradicating poverty in those who cannot support themselves. It should also be noted that special pension is meant for those who have sacrificed their lives for South Africa to gain democracy, therefore no person other the persons specified in the Act.

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