



Legal Services

FINANCIAL SERVICES



ON THE SCALES 9 OF 2019

A round up of recent section 37C death benefits rulings

Section 37C of the Pension Funds Act (“the Act”) remains one of the most contentious provisions of the Act. In this publication we look at recent Pension Funds Adjudicator (“PFA”) determinations and High Court decisions on the distribution of section 37C death benefits.

Summary

- The *bloedige hand* principle (a person who unlawfully caused the death of another cannot benefit financially from such a death) applies to section 37C death benefits.
- The definition of spouse in the Act includes a permanent life partner, and a permanent life partner is a category of spouse in their own right.
- Permanent life partners are eligible to receive a spouse’s pension where the rules provide for spouses’ pensions.
- Anti-nominations have to be considered together with other factors and financial dependency on the deceased member remains the main consideration regardless of an anti-nomination.
- The 12 month period within which the trustees have to trace the beneficiaries starts from the date the fund is notified of the death.
- A marriage out of community of property does not preclude a spouse from receiving a death benefit.
- Where a deceased member was responsible for supporting elderly parents, the trustees must also consider the ability of the surviving siblings of the deceased member to determine the parents’ extent of dependency.

On the Scales is produced by Alexander Forbes Legal Services department to provide clients with information on employee benefits. The issues need to be carefully considered taking into account the specific circumstances of each of our clients.

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- A nominated beneficiary does not have to prove any financial dependency to be considered for a death benefit.

NA and Re Van Rhyn v UTI Flexi Retirement Fund- the PFA looked at whether the *bloedige hand* principle applies to section 37C death benefits

The complainants are the parents of the deceased member. They were unhappy with the board's decision to allocate 30% of the death benefit to the deceased's partner. The deceased lived with her partner and shared household expenses with him.

The complainants alleged that the deceased and the partner terminated their relationship two weeks before her death. They stated that the partner failed to prove his extent of dependency, as the deceased and the partner were no longer in a relationship when she died.

Shortly after her death the deceased's mother, was diagnosed with cancer. This meant that had the deceased not died, she would have been liable to maintain them given the drastic change in their circumstances. The deceased committed suicide and although the partner was not a suspect, there were pending investigations regarding the death of the deceased. The parents suspected that the partner was responsible for the deceased's death and also wanted an opportunity to prosecute the matter privately.

The Fund withheld the partner's benefit because of the pending investigations and paid the parents their portion of the benefit.

The PFA held that the "*bloedige hand*" (a person who unlawfully causes death of another is disqualified from benefiting financially from that death) applies to section 37C death benefits. The PFA found that funds should withhold benefits allocated to persons accused of unlawfully accused pending the finalisation of the court cases. The PFA ordered the Fund to re-investigate the extent of the beneficiaries' financial dependency on the deceased and pay the complainants their portion of the death benefits. The portion allocated to the spouse could be paid once he was found not guilty of the deceased's death.

MEJ Nel v Netcare 1999 Pension Fund- the PFA looked at whether a minor beneficiary's benefit can be withheld where the parents are responsible for the death of the member and would benefit indirectly from the minor child's share of the death benefit

The complainant is the sister of the deceased member. After the death of the deceased member, the entire death benefit was allocated to the minor child of the deceased's step daughter. The deceased member's step daughter and her boyfriend (parents of the minor child) were accused of the murder of the deceased member and his wife. The complainant was dissatisfied that the parents of the minor child would benefit through the benefit allocated to the minor child. She stated that the benefit should be allocated to the deceased's siblings.

The PFA held that payment to the minor child should not be withheld as he was dependent on the deceased. The PFA was persuaded by the fact that the death benefit would be paid to a trust and not directly to the implicated parents. However, in allocating the benefit to the minor child, the fund solely relied on an affidavit from the

deceased member's friend stating that the deceased and his wife intended to adopt the child. This factor did not establish dependency and the PFA could not accept the affidavit as fact.

The deceased's siblings also provided affidavits which were not taken into account. The PFA ordered the fund to investigate the extent of dependency for the minor child and the siblings. The minor child's benefit could be paid to the trust even through his parents were responsible for the deceased's death.

Comments: the PFA now makes it clear that the blooded hand principle applies to section 37C death benefit cases. Where a beneficiary is found guilty of murder of a member, such a beneficiary should not be allocated any portion of the death benefit. In cases where the investigations or court proceedings are still pending, the fund should withhold the beneficiary's benefit until such matter has been finalised.

J Swanepoel v Eskom Pension and Provident Fund - the PFA looked at whether a permanent life partner is eligible to receive a spouse's pension

The complainant is the deceased's son. After the death of the deceased, a lump sum death benefit was allocated to the deceased's son. A monthly pension became payable to the deceased's permanent life partner. The complainant was unhappy that a monthly pension was paid to the deceased's permanent life partner. The complainant stated that the permanent life partner was not nominated as a beneficiary by the member.

The Fund stated that the monthly pension was payable in terms of the rules of the fund. The rules provided for payment of a monthly pension to a "widow" and an eligible child. In terms of the rules, the pension was only payable to an eligible child under the age of 21 or to a child incapable of supporting himself due to a physical or mental incapacity. The complainants and his brothers did not qualify under the definition of eligible child in the rules.

The deceased's permanent life partner was a spouse as defined in the Act and therefore qualified as a legal dependent. The complainant argued that the rules defined "widow" as a spouse of a marriage and the permanent life partner did not qualify as a "widow", as she was not a spouse of a marriage.

The PFA stated that the rules of the Fund also defined "spouse" as including a permanent life partner. Therefore the word "spouse" in the definition of "widow" in the rules also included a permanent life partner. The fund was correct in paying a widow's pension to the permanent life partner. The matter was dismissed.

Makgopa v PPS Retirement Annuity Fund - the PFA looked at whether the definition of spouse in the Act includes a permanent life partner

The deceased was married to his spouse in terms of customary law. The marriage was annulled after the deceased's death. The fund allocated 60% of the death benefit to the customary spouse. Two of the deceased's daughters were allocated 20% each.

One of the daughters lodged a complaint stating that the fund allocated 60% to the customary wife despite the marriage having been annulled. Furthermore, that due to the annulment of the customary marriage, the spouse was never legally married to the deceased and should not be considered a spouse or dependent.

The PFA held that the definition of a spouse in the Act includes a permanent life partner, a spouse in terms of the Marriages Act, or Recognition of Customary Marriages Act or a civil union partner in terms of the Civil Unions Act. Even though the marriage was annulled, the PFA considered the fact that the customary spouse and the deceased lived together and shared a common house hold since 1988 until the death of the member in 2014. The parties lived together as husband and wife. The PFA found that the fund was correct to classify the customary spouse as a legal dependent. The parties were in a permanent life partnership and therefore she qualified as spouse as defined in the Act. The complaint was dismissed.

Comments: a permanent life partnership is a category of spouse in terms of the Act. Where the rules provide for a spouses' pension, a permanent life partner would be eligible to receive such a benefit.

SB Makhubele v Rand Water- PFA looked at whether beneficiaries can be excluded from the receiving a death benefit because of an anti-nomination

The deceased member's benefit was allocated to two of his major children to the exclusion of another major son and his major step daughter. The complainant, the deceased's step daughter was dissatisfied that the fund did not allocate any portion of the death benefit to her.

In terms of the nomination form, the deceased stated that the fund should not allocate any portion of his death benefit to his step daughter and major son because their behaviour disturbed him during his lifetime.

The PFA held that the absolute test in issues relating to the distribution of death benefits is whether or not a party was dependent of the deceased. The excluded beneficiaries were employed and not financial dependent on the deceased.

The PFA further stated that another important consideration is the relationship the party had with the deceased member. The nomination in this case indicated that the relationship between the deceased member and the excluded beneficiaries (including the complainant) was strained. The fund considered financial dependency, anti-nomination and other factors in reaching their decision. The PFA dismissed the matter and held that the fund correctly distributed the benefit as the excluded beneficiaries did not prove any financial dependency on the deceased.

Comment: an anti-nomination can be considered as a factor which proves the nature of the relationship between the excluded beneficiary and the deceased member. However, financial dependency is one of the important determining factors which has to be used in allocating death benefits. An anti-nomination has to be used in conjunction with other factors.

Masindi v Chemical Industries National Provident Fund– the High Court had to look at when the 12 month period to trace beneficiaries starts

The complainant was married to a deceased member of the fund who died on 25 November 2013. She lodged a High Court application for an order instructing the fund to pay the death benefit which became available after the death of the member. She requested the court to order that the death benefit together with interest calculated from the date of the member's death be paid to her attorney's trust account.

The fund acknowledged that the complainant was entitled to the death benefit but objected to paying the death benefit to the complainant's attorney's trust account or paying the interest claimed by the complainant.

The court referred to section 37A (1) of the Act, which provides that a member's or beneficiary's benefit in the fund cannot not be ceded, pledged or attached save for the instances provided by the Act.

A fund is permitted to make a third party payment in terms of section 37A (4) in instances where the member or beneficiary is unable to open a bank account. In this instances the complainant could not prove that she was not able to open a bank account. Therefore the court could not make an order to pay the death benefit to the attorney's trust account as such an order would not be in line with section 37A(4)(a).

In respect of the interest calculated from the date of death to date of payment, the court stated that section 37C of the Act provides that if a fund becomes aware of or traces dependants within 12 months of the death of a member, the benefit will be paid to such dependant.

The court found that the fund could only comply with the above provision once notified of the death. The member's employer should have notified the fund of the death of the member but did not do so. Therefore, the 12 month period only started after the fund was notified of the death, which was on 26 April 2016. The court found that the complainant was not entitled to interest.

Comment: the 12 months which the trustees have within which to trace beneficiaries only starts running once a fund has been notified of the death of the member.

M Marks-Bayman v RCL Foods Pension Fund- the PFA had to determine whether a marriage out of community of property precludes a spouse from receiving a death benefit

The deceased was married out of community of property to his spouse. Upon the death of the deceased, 55% of the death benefit was allocated to his minor son (2), 7% to a minor daughter (15), 21%, to the step child (11), 7% to the grand daughter (10) and 10% to the spouse (28). The deceased member's ex-spouse and mother of one of the minor children lodged a complaint with the PFA. She was dissatisfied with the allocation as the deceased's step daughter was allocated a higher benefit than her child. She was also dissatisfied that the deceased's spouse was allocated a benefit despite being married out of community of property.

The PFA held that the fact that the deceased's spouse was married to the deceased out of community of property did not exclude her from the definition of spouse in the Act. The PFA found that despite the granddaughter and the

step-daughter not being the deceased's children, they nevertheless still qualified as factual dependents. The trustees should take into account the ages of the beneficiaries as it determines the length of period over which the beneficiary will need to be maintained.

The grandchild and the step child were one year apart, but the trustees allocated three times more to the step child than the granddaughter and the deceased minor daughter who was only four years older. The PFA stated that the allocation by the board was not fair as it failed to take age into account. The PFA ordered the trustees to reduce the benefit allocated to the minor son and the step daughter and increase the benefit of the minor daughter and the granddaughter.

Comment: a spouse married out of community of property is a spouse as defined in the Act and should be considered a legal dependent.

MP Mahlangu v Gauteng Building Industry Provident Fund- the PFA had to determine on whether a nominee need to prove financial dependency before being considered for an allocation

The complainant is the sister of the deceased member. Upon the member's death the fund allocated the entire death benefit to the deceased's mother. The complainant submitted that she was financially dependent on the deceased and that she was nominated to receive 80% of the death benefit in terms of the deceased member's nomination form. She further submitted that the deceased's mother was married and that she was not living with them for 12 years and returned home shortly before the deceased's death.

The fund argued that the complainant could not prove her financial dependency on the deceased and that the fund could not locate the nomination form relied on by the complainant. Furthermore, the fund stated that there was no legal obligation on the deceased to support the complainant. There was a legal obligation to support his mother as she was financially dependent.

The PFA held that there is a reciprocal duty of children to support their parents and that in such a claim the parent must demonstrate the need for such financial support. The deceased's mother therefore qualified as a legal dependent. However, the fund could not provide proof of the deceased's mother's expenses and extent of dependency.

Furthermore, the fund merely relied on affidavits in this regard. The fund was ordered to investigate the deceased's mother's extent of dependency.

The PFA stated that although the beneficiary nomination form could not be located by the fund, the deceased's benefit statement reflected this nomination made by the deceased.

The complainant was a nominee and that a nominee need not prove their financial dependency. The entitlement of a nominee flows from the nomination form, not financial dependency. The PFA ordered the fund to re-investigate the matter and include the complainant as a nominated beneficiary.

T v University of KwaZulu Natal Pension Fund—the PFA looked at the duty of support to elderly parents

The complainant, the deceased member's permanent life partner, was the only nominee. The deceased member was also survived by her mother and siblings. The fund's investigations focused on whether or not the complainant qualified as a permanent life partner. The PFA held that the permanent life partner was a nominee and therefore did not have to prove his status as a permanent life partner or that he was financially dependent.

The PFA further held that the fund failed to prove that the mother of the deceased was dependent on her. There was no evidence regarding the deceased's mother's finances then and into the future. There was also no evidence of the extent of the siblings' obligation and ability to support the mother. The PFA held that all the siblings carried the obligation to support their mother. The fact that the deceased had no children and the siblings did was not enough to shift the financial responsibility to the deceased. The fund was ordered to reconsider the allocation.

Comment: a nominee need not provide proof of financial dependency. The nomination is enough for a nominee to receive an allocation. When considering the extent of dependency for an elderly parent, the siblings obligation to support the elderly must also be considered, the obligation must not rest entirely on the deceased member.

If you need more information, please contact your consultant.
