

**THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN  
SOUTH AFRICAN LAW**

by

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## **DECLARATION**

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### **THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN SOUTH AFRICAN LAW**

I declare that the above dissertation is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

I further declare that I submitted the dissertation to originality checking software and that it falls within the accepted requirements for originality.

I further declare that I have not previously submitted this work, or part of it, for examination at Unisa for another qualification or at any other higher education institution.

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## SUMMARY

Section 37C of the Pension Funds Act 24 of 1956 regulates the distribution of retirement fund death benefits in South Africa. This thesis focuses on the distribution of the retirement fund death benefits that the pension fund is obliged to pay when a fund member dies while still in service, and it explores the discretionary powers granted to pension fund trustees to distribute these benefits. The fiduciary duties applicable to these trustees in distributing these benefits are also explored, as are the remedies that dependants and/or nominated beneficiaries may rely on because of wrongful distribution and other injustices. In addition, this thesis examines certain measures to protect pension funds and their trustees against liability.

The problem identified in the thesis is the haphazard application of the discretionary powers of pension fund boards (pension fund trustees) in distributing retirement fund death benefits to dependants and nominated beneficiaries in South Africa. How pension fund trustees are supposed to exercise their discretion is unclear, because the “guidelines” developed by the courts and the Pension Funds Adjudicator provide these trustees with insufficient direction. From the consideration of several recent cases and the Pension Funds Adjudicator’s determinations on the distribution of retirement fund death benefits, it is observed that the uncertainty they have caused, coupled with the conduct of “incompetent” pension fund trustees in some cases, has led to a high number of disputes or complaints by aggrieved dependants and nominated beneficiaries. Of further concern, on the other hand, are the challenges that these claimants face in protecting their rights when pension fund trustees distribute death benefits wrongfully.

The distribution of death benefits by pension fund trustees in the United Kingdom is compared with the equivalent distribution by pension fund management boards in Germany, to determine which lessons South Africa may learn from these two jurisdictions. Recommendations are then made for strengthening and improving the provisions of the Pension Funds Act on the distribution of retirement fund death benefits in South Africa. It is argued that pension fund trustees’ uncertainties in distributing retirement death benefits could be addressed by amending section 37C of the Pension Funds Act, and recommendations in this regard are provided.

**KEY TERMS:**

Distribution of retirement fund death benefits; equitable distribution of death benefits; beneficiaries; dependants; nominated beneficiaries; pension fund trustees; pension scheme trustees; retirement funds; pension funds; retirement fund death benefit; discretionary powers; fiduciary duties; corporate governance; setting aside death benefit distribution; Pension Funds Adjudicator; remedies for wrongful distribution of death benefits.

## OPSOMMING

Artikel 37C van die Wet op Pensioenfondse 24 van 1956 reël die verdeling van aftreefonds-sterftevoordele in Suid-Afrika. Hierdie tesis fokus op die verdeling van die aftreefonds-sterftevoordele wat die pensioenfonds verplig is om te betaal wanneer 'n lid van die fonds sterf terwyl hy of sy steeds in diens is, en dit verken die diskresionêre bevoegdhede wat aan pensioenfondstrustees verleen word om hierdie voordele te verdeel. Die fidusiêre pligte van toepassing op hierdie trustees in die verdeling van hierdie voordele word ook verken, insgelyks die remedies waarop afhanklikes en/of genomineerde begunstigdes kan staatmaak as gevolg van onregmatige verdeling en ander ongeregthede. Daarbenewens ondersoek hierdie tesis sekere maatreëls om 'n pensioenfonds en hul trustees teen aanspreeklikheid te beskerm.

Die probleem wat in die tesis geïdentifiseer is, is die lukrake toepassing van die diskresionêre bevoegdhede van pensioenfondsrade (pensioenfondstrustees) in die verdeling van aftreefonds-sterftevoordele onder afhanklikes en genomineerde begunstigdes in Suid-Afrika. Hoe pensioenfondstrustees veronderstel is om hul diskresie uit te oefen, is onduidelik, omdat die "riglyne" wat deur die howe en die Pensioenfondsberegter ontwikkel is, onvoldoende leiding aan hierdie trustees verleen. Die oorweging van verskeie onlangse sake en die Pensioenfondsberegter se bepalings rakende die verdeling van aftreefonds-sterftevoordele dui daarop dat die onsekerheid wat dit veroorsaak, gepaard met die optrede van "onbevoegde" pensioenfondstrustees in sommige gevalle, tot 'n hoë aantal geskille of klagtes deur verontregte afhanklikes en genomineerde begunstigdes gelei het. Aan die ander kant is daar ook kommer oor die uitdagings waarvoor hierdie eisers te staan kom om hul regte te beskerm indien pensioenfondstrustees sterftevoordele verkeerdelik verdeel.

Die verdeling van sterftevoordele deur pensioenfondstrustees in die Verenigde Koninkryk word vergelyk met die ekwivalente verdeling deur pensioenfondsbestuursrade in Duitsland, om te bepaal watter lesse Suid-Afrika uit hierdie twee regsgebiede kan leer. Aanbevelings word daarna gemaak om die bepalings van die Wet op Pensioenfondse rakende die verdeling van aftreefonds-sterftevoordele in Suid-Afrika te versterk en te verbeter. Daar word aangevoer dat

pensioenfondstrustees se onsekerhede met betrekking tot die verdeling van aftredesterftevoordele gehanteer kan word deur artikel 37C van die Wet op Pensioenfondse te wysig, en aanbevelings in hierdie verband word gemaak.

## MANWELEDZO

Khethekanyo 37C ya Mulayo wa Tshikwama tsha Phensheni wa 24 wa 1956 u langula u kovhekanywa ha mbuelo dza lufu dza tshikwama tsha u ya u awela Afrika Tshipembe. Thyesisisi heyi yo sedza kha u kovhekanywa ha mbuelo dza lufu dza tshikwama tsha u ya u awela tshi tea u badela musu muraḡo wa tshikwama a tshi lovha musu a tshi kha ḡivha kha tshumelo, na u wanulusa maanḡa a u nanga o ḡetshedzwaho thirasithii dza tshikwama tsha phensheni u kovhekanya mbuelo idzi. Mishumo ya muimeleli wa thundu ine ya shuma kha thirasithii idzi kha u kovhekanya mbuelo idzi yo dovha ya wanuluswa, sa dzilafho ḡine vhathu vha re nga fhasi havho na/ kana vhavhuelwa vho nangwaho vha nga ḡitika ngaḡo nga ḡḡhani ha u kovhekanywa ho khakheaho na huḡwe u shaya vhulamukanyi. U ḡadzisa kha zwenezwo, thyesisisi heyi i ḡola maḡwe maga u tsireledzo tshikwama tsha phensheni na thirasithii dzatsho kha zwithithisi.

Thaidzo yo topolwaho kha thyesisisi ndi u shumisa nga ḡḡila ya u shaya nzudzanyo ya maanḡa a u nanga bodo ya tshikwama tsha phensheni. (thirasithii ya tshikwama tsha phensheni) kha u kovhekanya tshikwama tsha u ya u awela tsha mbuelo dza lufu dza kha vhathu vha re nga fhasi havho na/ kana vhavhuelwa vho nangwaho Afrika Tshipembe. U ri thirasithii dza tshikwama tsha phensheni vha fanela u shumisisa hani u nanga havho a zwi khagala, ngauri “nyendedzi” dzo bveledzwaho nga khothe na Muhaḡuli wa Tshikwama tsha phensheni dzi ḡetshedza thirasithii avha ḡḡila i songo fhelelaho. U bva kha u dzhiela ḡḡha milandu minzhi ya zwino na thasululo dza Muhaḡuli wa Zwikwama zwa Phensheni kha u kovhekanya mbuelo dza lufu dza tshikwama tsha u ya u awela, ho sedzwa u pfi u sa khwaḡha he vha hu vhanga, zwo ḡangana na kushumele kwa “u sa kona” ha thirasithii dza tshikwama tsha phensheni kha miḡwe milandu, zwo livhisa kha tshivhalo tsha ḡḡha tsha phambano kana mbilaelo nga vhathu vha re nga fhasi havho na/ kana vhavhuelwa vho nangwaho vho vhaisalaho. Zwine zwa vhilaedzisa zwi tshi ya phanḡa, kha ḡiḡwe sia, ndi khaedu dzine vhathu vhane vha khou ita mbilo avha vha livhana nadzo kha u tsireledza ppanelo dzavho musu thirasithii dza tshikwama tsha phensheni dzi tshi kovhekanya mbuelo dza lufu nga ḡḡila yo khakheaho.

U kovhekanya mbuelo dza lufu nga thirasithii dza tshikwama tsha phensheni ngei United Kingdom zwi vhambedzwa na u khovhekanyo i linganaho nga bodo dza ndangulo ya tshikwama tsha phensheni ngei Germany, u ta uri ndi ngudo dzifhio dzine Afrika Tshipembe ji nga dzi guda kha maandalanga mavhili aya. Themendelo dzo itwa u khwaṭhisedza na u khwinisa mbetshelo dza Mulayo wa Zwikwama zwa Phensheni kha khovhekanyo ya tshikwama tsha u ya u awela tsha mbuelo dza lufu dza Afrika Tshipembe. Ho bulwa u pfi u sa khwaṭha ha thirasithii dza tshikwama tsha phensheni kha u kovhekanya mbuelo dza lufu dza u ya u awela zwi nga ambiwa nga hazwo nga u khwinisa khethekanyo 37C ya Mulayo wa Zwikwama zwa Phensheni, na u netshedza themendelo kha sia ili zwo netshedzwa.



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## **DEDICATION**

Dedicated to my wife, Patience Fhatuwani Sigwadi, and to my daughters, Lufuno and Tshinondiwa, and my son, Muthundinne.

## LIST OF ABBREVIATIONS AND TRANSLATIONS

(A)	Appellate Division of the Supreme Court of South Africa, Bloemfontein
AC	Appeal Cases (House of Lords and Privy Council), 1891 onwards (United Kingdom)
ACCA	Association of Chartered Certified Accountants, London
ACSR	Australian Corporations and Securities Reports (Australia)
<i>Actio legis Aquiliae</i>	The Aquilian action in delict for patrimonial loss
AD	Appellate Division, 1910–1946; Bloemfontein
<i>Ad hoc</i>	For a particular purpose
ADR	Alternative Dispute Resolution
<i>AHRLJ</i>	<i>African Human Rights Law Journal</i> (South Africa)
AIDS	Acquired Immune Deficiency Syndrome
<i>AktG</i>	<i>Aktiengesetz</i> (Stock Corporation Act) (Germany)
All ER	All England Law Reports (United Kingdom)
All SA	All South African Law Reports (South Africa)
ALR	Australian Law Reports (Australia)
<i>AltZertG</i>	<i>Altersvorsorgeverträge-Zertifizierungsgesetz</i> (Certification of Retirement Pension Contracts Act) ( <i>Gesetz über die Zertifizierung von Altersvorsorge- und Basisrentenverträgen</i> ) (Act on the Certification of Retirement and Basic Pension Contracts Act) (Germany)
<i>AmJCompL</i>	<i>The American Journal of Comparative Law</i> (United States of America)

App Cas	Law Reports, Appeal Cases (Second Series) (1875-1890) (United Kingdom)
ArbGG	<i>Arbeitsgerichtsgesetz</i> (Labour Court Act) (Germany)
ASSAL	<i>Annual Survey of South African Law</i> (South Africa)
<i>Audi alteram partem</i>	Hear the other side
<i>Aufsichtsrat</i>	Supervisory board (Germany)
AVmEG	<i>Altersvermögensergänzungsgesetz</i> (Retirement Savings Extension Act) (Germany)
AVmG	<i>Altersvermögensgesetz</i> (Retirement Savings Act) (Germany)
BaFin	<i>Bundesanstalt für Finanzdienstleistungsaufsicht</i> (Federal Financial Supervisory Authority, Bonn and Frankfurt)
BAG	<i>Bundesarbeitsgericht</i> (Federal Labour Court, Erfurt)
BAS	<i>Bundesamt für Soziale Sicherung</i> (Federal Office for Social Security, Bonn), since 1 January 2020
Batseta	Council of Retirement Funds for South Africa, Halfway House; “Batseta” means “advisory council” in Sepedi
BAV	<i>betriebliche Altersvorsorge</i> (Occupational pension funds (company pension funds)) (Germany)
<i>Beamtenversorgung</i>	The civil service scheme (Germany)
<i>beitragsorientierten Leistungszusagen</i>	Defined contribution schemes (Germany)

<i>BetrAVG</i>	<i>Gesetz zur Verbesserung der betrieblichen Altersversorgung</i> (Occupational Pensions Act) (Germany)
<i>Betriebliche Altersvorsorge</i>	Employer-funded pension or occupational pension funds (Germany)
<i>Betriebsvereinbarung</i>	Occupational retirement pension provided by agreement (Germany)
<i>BetrRSG</i>	<i>Betriebsrentenstärkungsgesetz</i> (Company Pension Strengthening Act) (Germany)
<i>BfA</i>	<i>Bundesversicherungsanstalt für Angestellte</i> (Federal Insurance Agency for Salaried Employees) (Germany)
<i>BGB</i>	<i>Bürgerliches Gesetzbuch</i> (Civil Code) (Germany)
(BH)	Bophuthatswana High Court, Mafikeng
<i>Bona fide</i>	In good faith
BPLR	Butterworths Pension Law Reports (South Africa)
<i>Bund</i>	The German Federal State (Germany)
<i>BVerfG</i>	<i>Bundesverfassungsgericht</i> (Federal Constitutional Court, Karlsruhe)
(C)	Cape of Good Hope Provincial Division, Cape Town
(CA)	Court of Appeal of England and Wales, London
(CC)	Constitutional Court, Johannesburg
CCMA	Commission for Conciliation, Mediation and Arbitration, Johannesburg
Ch	Law Reports, Chancery Division (Third Series) (England)
(Ch)	Chancery Division of the High Court of England and Wales, London

ChD	Law Reports, Chancery Division (Second Series) (1875-1890) (England)
CILSA	<i>Comparative and International Law Journal of Southern Africa</i> (South Africa)
CISNA	Committee of Insurance, Securities and Non-Banking Financial Authorities of the Southern African Development Community (SADC)
CLJ	<i>The Cambridge Law Journal</i> (United Kingdom)
The Constitution / the Final Constitution / the 1996 Constitution / the South African Constitution	Constitution of the Republic of South Africa, 1996 (South Africa)
The Interim Constitution	Constitution of the Republic of South Africa Act 200 of 1993 (South Africa)
<i>Contra bonos mores</i>	Against good morals; in breach of the moral law
<i>Corpus Juris</i>	<i>Corpus Juris Civilis</i> (the Body of Civil Law): the reform of the law by Emperor Justinian I (527-565) in 528-529, and originally consisting of the Digest ( <i>Digesta</i> ), the Code ( <i>Codex</i> ), and the Institutes ( <i>Institutiones</i> )
Court <i>a quo</i>	The court whose decision is appealed
<i>Culpa</i>	Fault in the broad sense, or negligence in the narrow sense
(D)	Durban and Coast Local Division, Durban
DB	Defined Benefit
DC	Defined Contribution
DCGK	<i>Deutscher Corporate Governance Kodex</i> (German Corporate Governance Code) (Germany)

<i>De bloedige hand en neemt geen erffenis</i>	Directly translated, “the bloody hand does not take an inheritance” (Roman-Dutch law and South African law)
Delict	A person’s wrongful, culpable act causing harm to another; the delict of South African law corresponds to the tort of Anglo-American law
<i>Deutscher Bundestag</i>	The Parliament of the Federal Republic of Germany, Reichstag Building, Berlin
<i>Deutsche Rentenversicherung</i>	German Pension Insurance (Germany)
<i>Deutsche Rentenversicherung Bund</i>	German Federal Pension Scheme (Germany)
<i>Diligens paterfamilias</i>	The diligent head of a family
<i>Direktversicherung</i>	Direct insurance (Germany)
<i>Direktzusage</i>	Direct pensions or insurance / book reserve or direct pension promises (Germany)
Disgorgement	Giving up, under compulsion, a gain wrongfully made
<i>Dolus</i>	Intention
<i>Dolus eventualis</i>	Intention imputed because of an awareness of possibility (since the result, though not intended, is foreseen as a possibility)
DTI	Department of Trade and Industry (South Africa), Pretoria
DTIC	Department of Trade, Industry and Competition (South Africa), Pretoria
(ECJ)	European Court of Justice, Luxembourg City
The EEC Treaty	The Treaty of Rome (25 March 1957) establishing the European Economic

	Community (EEC) is the founding treaty of what became the European Union
Eq Cas Abr	Equity Cases Abridged (England)
(ECM)	Eastern Cape High Court, Mthatha
<i>Eingetragener Verein</i>	Registered association (Germany)
ER	English Reports, 1220–1866 (United Kingdom)
<i>EStG</i>	<i>Einkommensteuergesetz</i> (Income Tax Act) (Germany)
EU	European Union
EUECJ	Court of Justice of the European Union, Luxembourg City
<i>Eur Bus LR</i>	<i>European Business Law Review</i> (Netherlands)
EWHC	High Court of Justice, London
(FB)	Free State High Court, Bloemfontein
(FC, GD)	Federal Court, General Division (Australia)
<i>FinDAG</i>	<i>Gesetz über die integrierte Finanzaufsicht</i> (Financial Services and Integration Act) (Germany)
FSB	Financial Services Board, Pretoria
FSCA	Financial Sector Conduct Authority, Pretoria
FSRA	Financial Sector Regulation Act (South Africa)
GEPF	Government Employees Pension Fund, Pretoria
GG	<i>Government Gazette</i> (South Africa); <i>Grundgesetz für die Bundesrepublik Deutschland</i> (Basic Law for the Federal Republic of Germany; the German Constitution)
(GJ)	Gauteng Local Division, Johannesburg



<i>GmbHG</i>	<i>Gesetz betreffend die Gesellschaften mit beschränkter Haftung</i> (Limited Liability Companies Act) (Germany)
Goode Report	<i>Pension Law Reform: The Report of the Pension Law Review Committee, established on 08 June 1992</i> (United Kingdom)
(GP)	Gauteng Division, Pretoria
<i>Grundsicherung im Alter</i>	Social welfare benefits (Germany)
<i>GRV</i>	<i>gesetzliche Rentenversicherung</i> (Statutory Pension Insurance) (Germany)
(GSJ)	South Gauteng High Court, Johannesburg
<i>HGB</i>	<i>Handelsgesetzbuch</i> (Commercial Code) (Germany)
<i>Harv L Rev</i>	<i>Harvard Law Review</i> (United States of America)
HIV	Human Immunodeficiency Virus
(HL)	Judicial Committee of the House of Lords, London; its members, the Lords of Appeal in Ordinary (known as the Law Lords), exercised the judicial functions of the House of Lords until the Supreme Court of the United Kingdom was established in October 2009
HMRC	Her Majesty's Revenue & Customs, London
HR	Human resources
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i> (United Kingdom)
ICR	Industrial Cases Reports (England & Wales)
IDR	Internal Dispute Resolution
<i>IEEJ</i>	<i>International Educational E-Journal</i> (India)

IHT	Inheritance tax
<i>ILJ</i>	<i>Industrial Law Journal</i> (South Africa)
ILO	International Labour Organisation, Geneva
<i>Indignus</i>	Unworthy, undeserving
<i>In fraudem legis</i>	Conduct with the intention of evading the law
<i>In solidum</i>	Jointly and severally liable for the full amount
<i>Inter alia</i>	Among other things
<i>Intereconomics</i>	<i>Intereconomics: Review of European Economic Policy</i> (Germany)
<i>Intra vires</i>	Within the powers (or competence) of
IOPS	The International Organisation of Pension Supervisors, Paris
IRFA	Institute of Retirement Funds Africa, Johannesburg
IRLR	Industrial Relations Law Reports (United Kingdom)
<i>Jahrbücher für Nationalökonomie und Statistik</i>	Title of the journal is translated as <i>The Journal of Economics and Statistics</i> (Germany)
<i>JBL</i>	<i>Juta's Business Law</i> (South Africa)
JDR	Juta's Daily Reporter (South Africa)
<i>J Legal Educ</i>	<i>Journal of Legal Education</i> (United States of America)
JOL	Judgments Online (South Africa)
JSE	Johannesburg Stock Exchange, Sandton
<i>Kaufmänner</i>	Merchants (Germany)
King II, King II Report	King ME, King Committee on Corporate Governance and the Institute of Directors in Southern Africa <i>King Report on Corporate Governance for South Africa 2002</i>

King III, King III Report	King ME, King Committee on Corporate Governance and the Institute of Directors in Southern Africa <i>King Report on Governance for South Africa 2009</i>
King IV, King IV Report	King ME, King Committee on Corporate Governance and the Institute of Directors in Southern Africa <i>King IV Report on Corporate Governance for South Africa 2016</i>
Labour Relations Act	Labour Relations Act 66 of 1995 (South Africa)
(LAC)	Labour Appeal Court, Johannesburg, Cape Town, Durban, Gqeberha (formerly Port Elizabeth)
<i>Länder</i>	The constituent states or regions (Germany), sixteen in number
LC	Lord Chancellor, the senior Officer of State in England and the cabinet member in charge of court administration; until 2005, the presiding officer of the House of Lords, presiding judge of the Chancery Division, and head of the judiciary in England and Wales; since the Constitutional Reform Act 2005 the Lord Chancellor need not be a lawyer
(LC)	Labour Court, Johannesburg, Cape Town, Durban, Gqeberha (formerly Port Elizabeth)
<i>Leistungszusage</i>	Defined benefit pension (Germany)
<i>Lex Aquilia</i>	A Roman statute passed in 287 BC establishing the delict called <i>damnum injuria datum</i> , “loss wrongfully caused”

LJ	Lord (or Lady) Justice of Appeal (England and Wales); a judge of the Court of Appeal hearing appeals from the High Court of Justice, the Crown Court and other courts and tribunals
<i>Locus classicus</i>	Authoritative or leading case
<i>Locus standi</i>	Standing
LPartG	<i>Lebenspartnerschaftsgesetz</i> (Civil Partnership Act) (Germany)
LS	<i>Legal Studies</i> (United Kingdom)
Mac & G	Macnaghten and Gordon's Chancery Reports (England)
<i>Mala fide</i>	In bad faith
<i>Mala fides</i>	Bad faith
MLR	<i>The Modern Law Review</i> (United Kingdom)
Mizan LR	<i>Mizan Law Review</i> (Ethiopia)
MOI	Memorandum of Incorporation (South Africa)
<i>Mora ex re</i>	Default resulting from the expiry of the term set in the contract
<i>National Development Plan 2030</i>	National Planning Commission <i>Our Future: Make It Work: National Development Plan, 2030</i> (South Africa)
National Treasury Retirement Fund Reform 2004	National Treasury, Republic of South Africa <i>Retirement Fund Reform: A Discussion Paper</i> (December 2004)
National Treasury Social Security and Retirement Reform 2007	National Treasury, Republic of South Africa <i>Social Security and Retirement Reform: Second Discussion Paper</i> (February 2007)
(N)	Natal Provincial Division, Pietermaritzburg
NDP	<i>National Development Plan 2030</i> (South Africa)

<i>Nemo ex suo delicto meliorem suam conditionem facere potest</i>	No one can improve his condition by his own misdeed
NEST	National Employment Savings Trust (United Kingdom)
NHS	National Health Service, London
NIC	National Insurance Contributions (United Kingdom)
NLR	Natal Law Reports, 1879–1929 (South Africa)
(O)	Orange Free State Provincial Division, Bloemfontein
OECD	The Organisation for Economic Corporation and Development, Paris
OPAS	Occupational Pensions Advisory Service (United Kingdom), replaced by the Pensions Advisory Services (TPAS)
OPLR	Occupational Pensions Law Reports (United Kingdom)
<i>Oxf J Leg Stud</i>	<i>Oxford Journal of Legal Studies</i> (United Kingdom)
PAIA	Promotion of Access to Information Act (South Africa)
The PAJA / PAJA	Promotion of Administrative Justice Act (South Africa)
Par / pars	paragraph / paragraphs
PAYG	Pay-As-You-Go
Pen LR	Pensions Law Reports (United Kingdom)
<i>Pensions</i>	<i>Pensions: An International Journal</i> (United Kingdom)
The Pension Funds Act	Pension Funds Act 24 of 1956 (South Africa)

<i>Pensionsfonds</i>	Pension fund or funds (Germany)
<i>Pensionskassen</i>	Pension institution or staff pension insurance / pension insurance funds (Germany)
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (South Africa)
<i>PER</i>	<i>Potchefstroomse Elektroniese Regstydskrif (PER) / Potchefstroom Electronic Law Journal (PELJ)</i> (South Africa)
<i>Per se</i>	In itself
PF	Pension Funds Circular (South Africa)
PFA / (PFA) / the Adjudicator	Pension Funds Adjudicator, Pretoria
Pensions Ombudsman / the Ombudsman	The Pensions Ombudsman, London
PLA	Pension Lawyers Association of South Africa, Cape Town
PPF	The Pension Protection Fund (United Kingdom)
PPWAWU	Paper, Printing, Wood and Allied Workers Union, Johannesburg
<i>Präjudizienrecht</i>	Precedent (Germany)
<i>Prima facie</i>	Based on first impression; accepted as correct until proved otherwise
(QBD)	Queen's Bench Division of the High Court of England and Wales, London
<i>Quoad</i>	As regards
(RA)	Rhodesia Appellate Division of the High Court of Rhodesia, Salisbury
RBKC	The Royal Borough of Kensington and Chelsea, London

Reg	Regulation
<i>Riester plan</i>	Riester pension introduced in 2002 and named after the former Minister of Labour and Social Affairs, Walter Riester (Germany)
Rule <i>nisi</i>	A rule or order upon condition that is to become absolute unless cause is shown to the contrary
<i>Rürup plan</i>	Plan named after the economist Bert Rürup; a tax-privileged form of private retirement provision (Germany)
<i>RVAGAnpG</i>	<i>RV-Altersgrenzenanpassungsgesetz</i> (RV Age Limit Adjustment Act) (Germany)
S / ss	Section / sections
SA	South African; South African Law Reports
SABC	South African Broadcasting Corporation SOC Ltd, Johannesburg
SADC	Southern African Development Community, Gaborone
<i>SAJHR</i>	<i>South African Journal on Human Rights</i> (South Africa)
<i>SALJ</i>	<i>South African Law Journal</i> (South Africa)
<i>SA Merc LJ</i>	<i>South African Mercantile Law Journal</i> (South Africa)
SARS	South African Revenue Service, Pretoria
SASSA	South African Social Security Agency, Pretoria
SC	Session Cases (Scotland)
(SCA)	Supreme Court of Appeal, Bloemfontein
<i>SGB</i>	<i>Sozialgesetzbuch</i> (Social Code) (Germany)

<i>SGB VI</i>	<i>Sozialgesetzbuch Sechstes Buch (VI)</i> (Social Security Code Sixth Book) (Germany)
<i>SGB XII</i>	<i>Sozialgesetzbuch SGB XII Sozialhilfe</i> (Social Code Twelfth Book “Social Assistance”) (Germany)
SI	Statutory Instrument (United Kingdom; Botswana)
<i>Soc Sec Bull</i>	<i>Social Security Bulletin</i> (United States of America)
<i>Stell LR</i>	<i>Stellenbosch Law Review</i> (South Africa)
<i>Stiftung</i>	Foundation (Germany)
<i>Stipulatio alteri</i>	Contract for the benefit of a third party
<i>Sui generis</i>	The only one of its kind
(SWA)	High Court of South-West Africa, Windhoek
The Registrar	The Registrar of Pension Funds, Pretoria
The Tribunal	Financial Services Tribunal, Pretoria
(T)	Transvaal Provincial Division, Pretoria
<i>Tarifverträge</i>	Collective agreements on the provision of occupational retirement pensions (Germany)
TCF	Treating Customers Fairly (South Africa)
TPAS	The Pensions Advisory Services, London
TPR	The Pensions Regulator, Brighton
TS	Reports of the Supreme Court of the Transvaal, 1902–1910
<i>TSAR</i>	<i>Tydskrif vir die Suid-Afrikaanse Reg /</i> <i>Journal of South African Law</i> (South Africa)
<i>Uberrima fides</i>	Utmost good faith
<i>Ubi jus, ibi remedium</i>	Where there is a right there is a remedy
UK	The United Kingdom of Great Britain and Northern Ireland



(UKSC)	The Supreme Court of the United Kingdom, London; under the Constitutional Reform Act 2005 (c.4), the court assumed the judicial functions of the House of Lords and is headed by the President
<i>Ultra vires</i>	Beyond the scope of [its] powers
UN	United Nations, New York City
<i>UNSWLJ</i>	<i>University of New South Wales Law Journal</i> (Australia)
<i>Unterstützungskassen</i>	Support funds (Germany)
USA	The United States of America
<i>UTLJ</i>	<i>University of Toronto Law Journal</i> (Canada)
VAG	<i>Versicherungsaufsichtsgesetz</i> (Insurance Supervision Act) (Germany)
V-C	Vice-Chancellor (England and Wales): from 1971 to October 2005, the head of the Chancery Division of the High Court; since October 2005, the title is Chancellor of the High Court
<i>Vorstand</i>	Management board (Germany)
VVG	<i>Versicherungsvertragsgesetz</i> (Insurance Contract Act) (Germany)
(W)	Witwatersrand Local Division, Johannesburg
<i>Waisenrente</i>	Orphan or dependent children's pension (Germany)
(WASC)	Western Australia Supreme Court, Perth
<i>Wash U Global Stud LR</i>	<i>Washington University Global Studies Law Review</i> (United States of America)
(WCC)	Western Cape High Court, Cape Town

Wednesbury test for unreasonableness	This test is named after <i>Associated Provincial Picture Corporation Houses Ltd v Wednesbury Corporation</i> [1948] 1 KB 223 (CA) especially at 233-234
<i>Witwen-/Witwerrente</i>	Statutory widow's or widower's pension (Germany)
WLR	Weekly Law Reports (United Kingdom)
<i>Yale LJ</i>	<i>Yale Law Journal</i> (United States of America)
ZAFSHC	Free State High Court, Bloemfontein
ZAGPHC	North Gauteng High Court, Pretoria
ZAGPJHC	South Gauteng High Court, Johannesburg
ZAGPPHC	North Gauteng High Court, Pretoria
ZAWCHC	Western Cape High Court, Cape Town
ZVersWiss	<i>Zeitschrift für die gesamte Versicherungswissenschaft (Journal for General Insurance Science)</i> (Germany)

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## CHAPTER 1

### INTRODUCTION

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1	INTRODUCTION
2	RETIREMENT FUNDS IN THE SOUTH AFRICAN ECONOMIC AND SOCIAL CONTEXTS
3	THE RESEARCH QUESTION: THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS
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*Few pension fund matters are more contentious than the allocation and distribution of death benefits, which is one of the most common causes of pension disputes in the courts and before the Pension Funds Adjudicator.<sup>1</sup>*

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<sup>1</sup> Phillips “SCA Ruling on Death Benefits for Dependents” (4 July 2019) available at <https://www.bowmanslaw.com/insights/banking-and-financial-services-regulatory/sca-ruling-on-death-benefits-for-dependants> (last accessed on 30 June 2021).

# 1 INTRODUCTION

The law governing South African retirement funds has been continuously reviewed for the past fifteen years or so.<sup>2</sup> One area of the law being scrutinised is the distribution of retirement fund death benefits<sup>3</sup> (hence “death benefits”). This distribution is regulated by the Pension Funds Act 24 of 1956 (hence “the Pension Funds Act”), in force for more than 63 years.<sup>4</sup> Since the passing of the Constitution of the Republic of South Africa, 1996 (hence “the Constitution”), and the readmission of South Africa into the international community after the end of apartheid, it became inevitable that all South African laws, including the Pension Funds Act, must reflect the values enshrined in the Constitution<sup>5</sup> and be able to deal with challenges facing the country and the retirement fund industry in the new South Africa.<sup>6</sup> This thesis focuses on those challenges that relate to the distribution of retirement fund death benefits.

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<sup>2</sup> See the National Treasury, Republic of South Africa *Retirement Fund Reform: A Discussion Paper* (December 2004) available at <http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf> (last accessed on 30 June 2021) (hence the “National Treasury *Retirement Fund Reform 2004*”); and National Treasury, Republic of South Africa *Social Security and Retirement Reform: Second Discussion Paper* (February 2007) available at [http://www.treasury.gov.za/documents/national%20budget/2007/Social%20security%20and%20retirement%20reform%20paper.pdf\\_\(last%20accessed%20on%2030%20June%202021\)](http://www.treasury.gov.za/documents/national%20budget/2007/Social%20security%20and%20retirement%20reform%20paper.pdf_(last%20accessed%20on%2030%20June%202021)) (hence the “National Treasury *Social Security and Retirement Reform 2007*”). *Retirement Fund Reform 2004* dealt with the payment of benefits on death at 46-47, especially in par 3.18.3.2 where it was stated that the difficulties evident in s 37C of the Pension Funds Act should be minimised in the new legislation. Although this recommendation was made in 2004, as of June 2021 there is still no new legislation to address the difficulties posed by s 37C of the Pension Funds Act.

<sup>3</sup> See par 8.1 below for the definition of “retirement fund” in the thesis.

<sup>4</sup> The Pension Funds Act 24 of 1956 was enacted to provide, among other things, for regulating private sector pension funds operating in South Africa. The provisions of the Pension Funds Act apply only to pension funds registered in accordance with it. Section 37C was inserted into the Act in 1976, 45 years ago, by s 24 of the Financial Institutions Amendment Act 101 of 1976. See Chapter 2, n 26, where a brief history of s 37C of the Pension Funds Act is discussed. See also Chapter 2, n 25 below, where it is stated that the pension fund industry is regulated with several pieces of legislation regulating different retirement funds. The distribution of death benefits that are payable in other retirements funds that are not regulated by the Pension Funds Act is made in accordance with the provisions of the relevant applicable legislation, and not s 37C of the Pension Funds Act. But the focus of this study is on the provisions of s 37C of the Pension Funds Act.

<sup>5</sup> See Chapter 2, pars 5.1, 5.2, and Chapter 3, pars 2.1.4, 2.1.6, and 4.3, where the provisions of the relevant sections of the Constitution are discussed. The Constitution confers basic rights on every person under the Bill of Rights.

<sup>6</sup> Some challenges in the distribution of death benefits result from economic, legal, and social circumstances. See Chapter 2, par 2.3, where the challenges that arise because of culture, demographics, history, and socio-economic conditions are briefly discussed. These challenges impede the efficient distribution of retirement fund death benefits in the country.

The death benefits are distributed under the relevant provisions of the Pension Funds Act<sup>7</sup> and the rules of the particular retirement fund.<sup>8</sup> This controversial, complicated, slow process is often perplexing for retirement fund members, dependants, and nominated beneficiaries,<sup>9</sup> and sometimes even for pension fund trustees, whose competence and knowledge of retirement fund matters at times are also questionable.<sup>10</sup> The financial hardships and emotions that follow the passing of a retirement fund member intensify the complexity and challenges faced by pension fund boards (hence “the boards” or “pension fund trustees” or “the trustees”) in distributing the death benefits to dependants and nominated beneficiaries. The high number of pension disputes about the distribution of death benefits that reach the South African courts and the Pension Funds Adjudicator (hence “the Adjudicator”) show the difficulties that the trustees experience in distributing death benefits.<sup>11</sup>

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<sup>7</sup> The relevant provision that applies to the distribution of a death benefit is s 37C of the Pension Funds Act. This section is discussed in Chapter 3, pars 1, and 2.

<sup>8</sup> See Chapter 3, par 4.4, where pension fund rules are discussed.

<sup>9</sup> See Chapter 3, par 1, where the complexity of s 37C of the Pension Funds Act is highlighted.

<sup>10</sup> See par 8.5 below for the definition and meaning of “pension fund boards” and “pension fund trustees” in the context of this thesis. See King ME, King Committee on Corporate Governance and the Institute of Directors in Southern Africa *King IV Report on Corporate Governance for South Africa 2016* (Institute of Directors in Southern Africa Sandton 2016) available at [https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA\\_King\\_IV\\_Report\\_-\\_WebVersion.pdf](https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf) (last accessed on 22 July 2021) (hence the “King IV Report” or “King IV”). King IV at 11 under “Glossary of Terms” defines “competence” as possessing the skills and attributes and exhibiting the conduct that are used to define and measure suitability for certain roles and functions. The legal status of King IV is that of set of voluntary principles and leading practices. See also Chapter 2, par 6.4, where the appointment and the competency of pension fund trustees are discussed; and Chapter 3, par 5.4.5, where King IV is discussed. See also, for example, the National Treasury *Preservation, Portability and Governance for Retirement Funds* Technical Discussion Paper C for public comment (National Treasury 21 September 2012) available at [http://www.treasury.gov.za/comm\\_media/press/2012/Preservation%20portability%20and%20governance%202021%20Sept%202012%20.pdf](http://www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%202021%20Sept%202012%20.pdf) (last accessed on 30 June 2021) at 6, stating that “the role of trustees is an important aspect of pension fund governance. However, it is widely acknowledged that many trustees may lack the competence and necessary skills to make investment and management decisions consistent with the best interest of beneficiaries”.

<sup>11</sup> The Pension Funds Adjudicator’s *Annual Report 2017-2018* at 5 states that the Adjudicator’s Office received a record number of complaints in the 2017/2018 financial year from 9 794 aggrieved parties. The Report at 6 adds that complaints relating to the distribution of lump sum death benefits were the second highest number of complaints finalised by the Adjudicator in that financial year. The Pension Funds Adjudicator *Annual Report 2017-2018* is available at [https://www.pfa.org.za/Publications/AnnualReports/Annual\\_Report\\_2017\\_-\\_2018.pdf](https://www.pfa.org.za/Publications/AnnualReports/Annual_Report_2017_-_2018.pdf) (last accessed on 30 June 2021). The Pension Funds Adjudicator’s *Annual Report 2018/19* at 7 also states that there are persistent challenges that have been prevalent in the past few years: non-compliance with s 13A of the Pension Funds Act on payment of contributions and s 37C of the Pension Funds Act on death benefit lump sum payments, delays in the payment of benefits to beneficiaries, lack of adequate documentation and records management, and poor quality or

## 2 RETIREMENT FUNDS IN THE SOUTH AFRICAN ECONOMIC AND SOCIAL CONTEXTS

### 2.1 *The inadequacy of the State's social grants*

Occupational retirement funds underpin the South African social context. They constitute one of South Africa's three pillars for ensuring the provision of retirement funding and social security to its people.<sup>12</sup> Retirement funding in South Africa, as in most other countries, rests on three pillars: the first one comprising social pensions or social grants provided by the State to qualifying recipients,<sup>13</sup> the second taking the form of occupational retirement funds, and the third the form of retirement annuities.<sup>14</sup>

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delayed responses by the funds to the Office of the Pension Funds Adjudicator. It also states that all these challenges, especially in the current economic conditions, affect pension fund members' welfare, and at times, their right to human dignity. The Pension Funds Adjudicator *Annual Report 2018/19* is available at <https://www.pfa.org.za/Publications/AnnualReports/Annual Report 2018 - 2019.pdf> (last accessed on 30 June 2021). The Pension Funds Adjudicator *Annual Report 2019/20* at 4 states that the Office of the Pension Funds Adjudicator received 11 179 complaints in the 2019/2020 financial year. This Report (2019/2020) adds (at 4) that although the number of complaints was slightly less than the year before in 2018/2019 financial year (11 399), it "remains high and points to systemic inefficiencies that are a reality for ordinary members of retirement funds". The Pension Funds Adjudicator's Annual Report (2019/2020) is available at <https://www.pfa.org.za/Publications/AnnualReports/Annual Report 2020.pdf> (last accessed on 30 June 2021).

<sup>12</sup> Retirement funds are one of the three pillars (mechanisms or tiers) that the South African State uses to realise its social mandate of reducing or ending destitution and poverty in old age among retirement fund members and their dependants when the fund member dies in service. See Chapter 2, par 5, for the meaning and discussion of "social security".

<sup>13</sup> Besides older person's grants, there are other social grants (non-contributory) that are granted to individuals who qualify in terms of citizenship or need (by means test) and other stated requirements. These include disability grants, war veterans' grants, child support grants, social relief of distress, grants-in-aid, and foster care grants. Beneficiaries of these grants qualify because of various criteria, including age, poverty, and disability. See the Social Assistance Act 13 of 2004 for detailed provisions governing these grants. See generally Manamela *System* for a discussion of the South Africa's occupational retirement system.

<sup>14</sup> The role that a pillar plays differs from one country to another, depending on the social circumstances of a country, because various countries in developing their social systems (including pension systems) respond to their local cultures and the nature of dependency among their people. See Chapter 2, par 2.3 for a discussion of the South African socio-political history, demographics, and culture. People count on the State to attain retirement income, either directly by social security payments or indirectly by safeguarding the value of pensions promised by employers, to help make this desire becomes a reality. See in this regard Schuh *Pension Regulation* at 1. The discussion of the South African retirement funding structure shows that the retirement system follows the three-pillar or tier model as canvassed by the World Bank and the Organisation for Economic Co-operation and Development (OECD). The system has three pillars: the older person's grant (the first pillar), occupational retirement funds (the second pillar), and retirement annuities (the third pillar). See in this regard World Bank *Averting the Old Age Crisis* at 15-16. See also Shilton *Gifts* at 3, stating that both the World Bank and the OECD see their models as serving three general purposes: Pillar 1 addresses poverty relief, Pillar 2 is

This thesis focuses on the distribution of retirement fund death benefits in the private pension funds' sector. These funds in the private sector fill a social vacuum in South Africa's retirement funding structure, as explained by the discussion of the State's social grants, such as older person's grants. This discussion also elucidates the social and economic issues underlying the importance of occupational retirement funds and the manner of distributing retirement fund death benefits in South Africa.<sup>15</sup> Recipients of the State's social grants need make no financial contribution to qualify for the grant.<sup>16</sup> These grants are funded from the State's coffers and take the form of pay-as-you-go ("PAYG"): the taxes of current workers are used to pay the grants to those who qualify.<sup>17</sup> The social grants provide a basic income to people who meet the requirements of the Social Assistance Act 13 of 2004.<sup>18</sup>

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directed at basic income (or consumption) smoothing across the life course, and Pillar 3 provides vehicles supporting individual choices to defer immediate consumption during their working lives to obtain a higher standard of living in retirement. See n 114 below for a brief explanation of the OECD.

<sup>15</sup> In other words, the discussion of the older person's grants merely provides a background against which the distribution of retirement fund death benefits is analysed.

<sup>16</sup> In occupational retirement funds and retirement annuities, individual persons play an active role in contributing money to funds to have some form of income at retirement, while in older person's grants the individual does not contribute.

<sup>17</sup> See Rusconi *System* at 5, stating that "pay as you go is a retirement system under which the cost of benefits is met from other sources of income, like general tax revenue, rather than by building a fund in advance". See also George *Analysis* at 42, stating: "Under the PAYG scheme the state taxes the current generation of workers and uses the proceeds to pay pensions to the retired generation. PAYG is thus a simple tax-transfer scheme". One of the deficiencies of the PAYG scheme was pointed out by Hasselmann *Politics* at 4 as follows: "As unemployment and early retirement grew, those paying into the system, and thereby supporting the current retirees, began to shrink at an ever increasing rate". For more discussion of PAYG see World Bank *Averting the Old Age Crisis* at 87.

<sup>18</sup> The means test considers a person's income and assets to determine whether that person qualifies for the grant, as well as the amount. To qualify for an older person's grant in 2021, a recipient may not earn more than R86 280 a year or have a combined household income of R172 560 a year. See in this regard South African Government "Old Age Pension" available at <https://www.gov.za/services/social-benefits-retirement-and-old-age/old-age-pension> (last accessed on 20 July 2021). The applicant's resources and income are considered before an application can be approved. The older person's grant covers qualifying people who have reached the retirement age but do not qualify to receive pensions (or to those who receive minimal pensions below the amounts set for the means tests) from occupational retirement funds. The means test can discriminate against savers rather than spenders in that those who save money for their retirement may have a steady income on retirement that makes them exceed the financial limit set to qualify for an older person's grant. That might create disincentives for saving for potential recipients of the grant. In this regard see Johnson *Essays* at 141. In the 2013 Budget Speech (27 February 2013) at 16 it was proposed that "the old age grant means test should be phased out by 2016, accompanied by offsetting revisions to the secondary and tertiary rebates. All citizens over a designated age will be eligible for the grant, which will simplify its administration and address the disincentive to save that arises from the present means test". See Gordhan P *Budget Speech, 2013* (National Treasury Pretoria 2013), <http://www.treasury.gov.za/documents/national%20budget/2013/speech/speech.pdf> (accessed



The older person's grant provides a safety net for people who are not in formal employment and cannot afford to save in the occupational retirement funds and retirement annuity fund.<sup>19</sup> Without the State's intervention, these people cannot financially fend for themselves and their dependants at retirement.<sup>20</sup> Recognising that these people are systematically disadvantaged as regards financial security at retirement, the Government addresses this concern by providing the older person's grant.<sup>21</sup> The grant is a major source of income for the aged in South Africa, helping to address the needs of the elderly to alleviate poverty among them and their dependants.<sup>22</sup>

The State and its provincial departments are supposed to distribute older person's grants to the recipients but usually outsource this function to other institutions or agencies.<sup>23</sup> In South Africa, these grants are non-contributory. Nor are they hereditary: dependants and the surviving spouse or spouses do not inherit basic pension rights, for the older person's grant lapses when the pensioner dies.<sup>24</sup> As a

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on 30 June 2021). As of June 2021, the means test is still being used to determine eligibility for the older person's grant in South Africa.

<sup>19</sup> State older person's grants aim to cover people who would otherwise have no income at retirement.

<sup>20</sup> See George *Analysis* at 41 and 42, referring to Fazeli *Impact*, stating that if the market system cannot perform certain necessary functions required for economic and social stability, the role of the State is then to correct the imperfections of the market mechanism.

<sup>21</sup> See Nevondwe March/May 2009 *Today's Trustee* 38 at 39, stating that social security thus meets people's basic needs when their income stream has stopped or has been disrupted or was never adequately developed. Thus, the effort to encourage people to belong to private occupational retirement funds and save for their retirement should always be mindful of the need for social pensions (older person's grant) to cover those who are not employed or those who are employed but do not earn enough to save for their pensions. This observation is echoed by McKenna *Planning* at 137, stating: "It is important to recognize that not everyone has or will ever have sufficient funds to defer for retirement. Individual efforts are not substitutes for a strong Social Security and private pension system for many people". See also Nevondwe 2010v *Pensions* 38 at 45.

<sup>22</sup> Mbatha *Implementation* at 58 observes that for most African pensioners, an older person's grant constitutes the largest income they ever receive in their lives, and it is shared with other family members. The economic circumstances of the recipients of older person's grants and their families make this sharing inevitable. Although Mbatha made this observation 30 years ago, the older person's grants are still the chief source of income in South Africa. According to Statistics South Africa, social grants are the second most important source of income after salaries in South Africa. As of 2019, more than 17 million South Africans, one in five, rely on these grants provided by the State. See in this regard Ngatane "Social Grants Second-Most Important Source of Income in SA – Stats SA" available at <https://ewn.co.za/2019/05/28/social-grants-second-most-important-source-of-income-in-sa-stats-sa> (last accessed on 22 July 2021).

<sup>23</sup> Such as the South African Social Security Agency (SASSA).

<sup>24</sup> State older person's grants are not linked to any employment history, and no contribution is needed. In other words, the State social pension in South Africa is not paid out of a fund to which recipients have contributed, but it is financed by the State. It covers a wide range of needs and

result, the dependants and surviving spouse(s) need to qualify on their own to receive an older person's grant or any other social grant.

The State and the recipients of the social grants, including the older person's grant, face two challenges. First, the grants are inadequate and can be relied on only for the barest subsistence.<sup>25</sup> Secondly, the State has concerns over the long-term costs and sustainability of unfunded social pensions or grants.<sup>26</sup> As these grants are not contributory, the State may have to devise ways of generating more money to sustain their payment, such as by raising taxes. The perpetual increment of taxes is unsustainable in the long term, though, making it unlikely that everyone in a country like South Africa can depend on the social grants as their sole source of income on retirement or their breadwinner's death. Those who can afford to do so therefore need to find alternative means of securing income in retirement or for their dependants or other beneficiaries who outlive them. As a result, many people who are employed or used to be employed look forward to their occupational retirement funds to support them in retirement or their dependants if they die while still in service. Some people also use retirement annuities to augment their savings for similar purposes.<sup>27</sup> For these reasons, the State encourages<sup>28</sup> and ensures the

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can embrace the recipient's entire lifespan. For example, the older person's grant is paid to men and women from the age of 60 years until they die. There are a few instances that may lead to the suspension or lapsing of the grant, such as where the circumstances of the recipient change (suspension); or the recipient passes away or is admitted to a state institution (lapsing). See in this regard South African Government "Old Age Pension" available at <https://www.gov.za/services/social-benefits-retirement-and-old-age/old-age-pension> (last accessed on 20 July 2021).

<sup>25</sup> See Goodall and King *Tax* par 15.6.

<sup>26</sup> The number of social grant recipients in South Africa has increased from about 4 million in 1994 to more than 18.2 million in December 2020. This number also includes about 3.5 million recipients of older person's grants. See in this regard South African Social Security Agency "Statistical Reports: Fact Sheet: Issue No. 21 – December 2018" available at <http://www.sassa.gov.za/index.php/statistical-reports> (last accessed on 30 June 2021); and South African Social Security Agency, Strategy and Business Development, Monitoring and Evaluation "Ninth Statistical Report: Payment System" (December 2020) available at [https://www.sassa.gov.za/statistical-reports/Documents/Social Grant Payments Report - December 2020.pdf](https://www.sassa.gov.za/statistical-reports/Documents/Social%20Grant%20Payments%20Report%20-%20December%202020.pdf) (last accessed on 20 July 2021). The largest amount that a recipient of an older person's grant receives in 2021 is R1 890 per month for a person over the age of 60 and R1 910 for a beneficiary older than 75. See in this regard South African Government "Old Age Pension" available at <https://www.gov.za/services/social-benefits-retirement-and-old-age/old-age-pension> (last accessed on 20 July 2021). When the number of people qualifying for the social grant increases and the number of tax-paying workers decreases, less money is available to the State to continue paying money to the grant recipients.

<sup>27</sup> See Chapter 2, par 3, and n 105 for a discussion of retirement annuities.

<sup>28</sup> The State urges employees to take part as members in retirement funds by providing tax subsidies on pension contributions.

existence of private sector occupational retirement funds and retirement annuity funds to avoid a situation in which the population is over-reliant on the State's social grants.<sup>29</sup> This is done to achieve the State objective of ensuring that a large part of the population is self-sufficient on retirement and that dependants continue to receive financial support when a fund member dies while still in service.<sup>30</sup>

## 2.2 *The significance of occupational retirement funds in South Africa*

Occupational retirement funds address the State's concerns over the long-term costs and sustainability of unfunded social pensions such as the older person's grant. These funds also ensure that employees or retirement fund members receive adequate income at retirement from expected high rates of return on retirement contributions and do not rely on the older person's grant.<sup>31</sup> And these funds enable employers to deal with the financial needs of their ageing and retiring workforce.<sup>32</sup> These funds thus respond mainly to the needs of employees, pensioners, and families when they require the financial support most — in old age when a fund member dies, or for surviving dependants and nominated beneficiaries where a fund member dies before reaching the retirement age.<sup>33</sup> The death of a fund member often deprives the dependants and nominated beneficiaries of their breadwinner.

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<sup>29</sup> The challenge of people who are over-reliant on state pensions is not unique to South Africa; for the past few decades it has also become the case in some developed countries. See Lomax *Pension Policy* at 1, stating that public pension schemes are under intense scrutiny in many industrialised nations with particular concern for limiting the burden of retirement pensions on public coffers. See also Schofield *Private Pension* at 25, stating: "In encouraging the private system with incentives, the hopes were that coverage would continue to expand and widely supplement the social security benefits of more retirees". See also in this regard n 60 below.

<sup>30</sup> See par 2.4 below, where the objectives for establishing retirement funds are discussed.

<sup>31</sup> See in this regard Disney and Johnson *Pension Systems* at 19.

<sup>32</sup> See National Treasury *2013 Retirement Reform Proposals for Further Consultation*, a document released by the Treasury with the 2013 Budget Speech on 27 February 2013 and available at <http://www.treasury.gov.za/documents/national%20budget/2013/2013%20Retirement%20Reforms.pdf> (last accessed on 23 July 2021) at 1, stating: "It is becoming ever clearer that employers which take greater responsibility for the overall financial well-being of their workers, including through the design of their retirement funds, reap rewards of a more stable and happier work force".

<sup>33</sup> Most terms of employment contracts set a retirement age, but the same applies to pension funds; their rules normally show the age at which a member will qualify to receive retirement benefits.

### 2.3 The role of retirement funds in the South African economy

Retirement funds are critical to the South African economy.<sup>34</sup> Employers and employee-members' contributions to a retirement fund constitute a substantial part of the total savings in South Africa.<sup>35</sup> This fact implies that a significant percentage of wealth in South Africa is held in retirement funds under the control of pension fund trustees.<sup>36</sup> So, besides providing income to the member in old age or to surviving beneficiaries of a fund member who dies while still in service, retirement funds provide large sums of money for investment in various asset classes.<sup>37</sup> These investments significantly affect the economy because South Africa has a large private fund sector comprising occupational pension funds.<sup>38</sup> Pension funds hold a significant percentage of share ownership in South African companies.<sup>39</sup> Indeed,

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<sup>34</sup> See Thomas *Ownership* at 10-11, stating that retirement funds and long-term insurance companies manage a substantial fraction of household wealth in South Africa. Together, these institutions provide an important channel through which long-term domestic savings are directed to sectors of the economy that require capital, including private-sector companies, public corporations, and government. Institutional investors are also an important mechanism for the international investment of household savings.

<sup>35</sup> As at 31 March 2018, the Financial Sector Conduct Authority (FSCA) reported that there were 5 118 registered retirement funds in South Africa, of which 1 608 were active funds (a fund with members for whom it receives contributions and/or pays benefits). These had about 14.7 million members and R2 431 billion in asset value. See the Financial Sector Conduct Authority *Annual Report 2018* at 1 (under Key Achievements) and at 43. The report is available at <https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202018.pdf> (last accessed on 30 September 2020). As at 31 March 2019, the FSCA reported that there were over 5 000 registered retirement funds (with only around 25 per cent of retirement funds regularly receiving contributions and/or paying benefits). The combined value of their assets was over R4 trillion: Financial Sector Conduct Authority *Annual Report 2018/2019* available at <https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202018-19.pdf> (last accessed on 20 July 2021) at 58. As at 31 March 2020, the FSCA reported that there were 5 124 registered retirement funds in South Africa, of which 1 452 were active funds. These had about 17.5 million members. See in this regard the Financial Sector Conduct Authority *Annual Report 2019-2020* available at [https://www.fsca.co.za/Annual Reports/FSCA Annual Report 2019-2020.pdf](https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202019-2020.pdf) (last accessed on 30 June 2021) at 89.

<sup>36</sup> See Chapter 2, par 6.4 for a discussion of pension fund boards and their board members.

<sup>37</sup> See in this regard George *Analysis* at 77. See also the Mouton *Committee Report* at 7, stating that contractual savings from retirement funds are a major source of the capital that finances government, local authorities, deposit-taking institutions, and, through equity investments, public companies.

<sup>38</sup> National Treasury *Social Security and Retirement Reform 2007* par 20 states that "the coverage rate for formal-sector employees is estimated to be in the region of 60 per cent. This is comparatively high, even relative to countries with compulsory participation, and it reflects the extent to which membership of an occupational fund is accepted as an obligatory condition of employment". See n 35 above, where the numbers of registered retirement funds and those of fund members in South Africa are stated.

<sup>39</sup> See Schussler "The Capitalist Wealth of South Africans" (*Moneyweb*, 25 July 2014) available at <http://www.moneyweb.co.za/uncategorized/the-capitalist-wealth-of-south-africans/> (last accessed on 30 September 2020), reporting that South Africans own 40 per cent of the Johannesburg Stock Exchange (JSE) via pension funds and unit trusts. See also the Ad Hoc

South Africa's pension fund sector is, relative to the size of the economy, among the largest in the developing world.<sup>40</sup> The ratio of pension fund assets to gross domestic product (GDP) in South Africa from 2000 to 2015 was about 89 per cent.<sup>41</sup> Besides serving the obvious purpose of retirement funds, which is to provide income at retirement or when a fund member dies while still in service, as well as increasing the country's long-term savings,<sup>42</sup> occupational retirement funds also perform other functions such as helping foster financial and capital market development and economic growth.<sup>43</sup> The discussion above emphasises that occupational retirement funds are essential to the South African economy and the financial and social well-being of retirement fund members and their dependants.

#### 2.4 Societal objectives in the establishment of retirement funds

One day, most employees will reach an age when it becomes impossible to keep working and receiving an income for themselves or they will die and leave their dependants without financial support. To prevent this unfortunate outcome, the employer creates retirement funds as part of its employment contract with the employee. Employees enrol in retirement funds as members, and both the fund members and the sponsoring employer pay certain contributions to the fund to benefit the employees.

The State is responsible for improving its people's socio-economic well-being by applying its power to develop and nurture viable private sector occupational retirement funds.<sup>44</sup> And the State owes a constitutional obligation to South African

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Committee on Corporate Governance *A South African Parliamentary Response to the APRM (African Peer Review Mechanism) Questionnaire: Corporate Governance* February 2006 at <http://www.issafrica.org/AF/RegOrg/nepad/aprm/saparrep/part4.pdf> (last accessed on 30 December 2020) at 10, stating that the sheer size of the shareholding by institutional actors in the financial services sector is huge and relates to the size and sophistication of the South African financial services industry.

<sup>40</sup> See Malherbe and Segal *South Africa* at 189.

<sup>41</sup> See in this regard The GlobalEconomy.com "South Africa: Pension Fund Assets to GDP" at [https://www.theglobaleconomy.com/South-Africa/pension\\_funds\\_assets/](https://www.theglobaleconomy.com/South-Africa/pension_funds_assets/) (last accessed on 11 September 2020).

<sup>42</sup> See *OECD Guidelines on Pension Fund Asset Management* at 2 in par 1, stating that pension funds also play a key social role in channelling retirement contributions to finance retirement benefits.

<sup>43</sup> See in this regard Chang *Risk Management* at 26. See Thomas *Ownership* at 11, stating that institutional investors are a crucial component of the local equity market, providing capital to listed companies and a liquid market for the trading of shares and other financial instruments.

<sup>44</sup> See George *Analysis* at 42.

society to alleviate poverty with all the means available.<sup>45</sup> Its social grants and the private sector occupational retirement funds help alleviate poverty. The State provides social grants to people who would otherwise not have any income. And the State complements these grants by compelling pension fund trustees in the private sector to distribute occupational retirement fund death benefits according to section 37C of the Pension Funds Act.<sup>46</sup>

The National Treasury of the Republic of South Africa states that the broad objectives of a retirement policy include encouraging individuals to provide adequately for their retirement and the needs of their dependants.<sup>47</sup>

The objective of establishing retirement funds is also visible from the definition of a “pension fund organisation” in section 1 of the Pension Funds Act and the definitions of a “provident fund” and a “retirement annuity fund” in section 1 of the Income Tax Act 58 of 1962 (hence “the Income Tax Act”). The Pension Funds Act defines a “pension fund organisation” as follows:

- (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members; or
  - (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates **or for dependants of such persons upon the death of those persons**; or
  - (c) any association of persons or business carried on under a scheme or arrangement established with the object of receiving, administering, investing and paying benefits that became payable in terms of the employment of a member on behalf of beneficiaries, payable on the death of more than one member of one or more pension funds,
- and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a), (b) or (c) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any

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<sup>45</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 states: “Everyone has the right to have access to ... social security, including, if they are unable to support themselves and their dependants, appropriate social assistance”. Section 27(2) of the Constitution compels the State to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights”. See also n 5 above in this regard and Chapter 2, par 5.2, where the objectives of section 37C of the Pension Funds Act are discussed.

<sup>46</sup> See Chapter 3, pars 1 and 2 for a discussion of s 37C of the Pension Funds Act.

<sup>47</sup> See in this regard National Treasury *Retirement Fund Reform 2004* at 4.

benefits provided for in its rules, whether or not it continues to admit, or collect contributions from or on behalf, of members [my emphasis].

The Income Tax Act 58 of 1962 sets provident funds and retirement annuity funds certain requirements. Before approving or disapproving such a fund for that particular year of assessment, the South African Revenue Service (SARS) Commissioner should be satisfied — for a provident fund (see section 1(i) of the definition of “provident fund” in that Act) — that this fund

is a permanent fund *bona fide* established solely for the purpose of providing benefits for employees on retirement date or solely for the purpose of **providing benefits for the dependants or nominees of deceased employees** or deceased former employees or solely for a combination of such purpose... [my emphasis].

And for a retirement annuity fund (under paragraph (a) of the definition of a “retirement annuity fund” in section 1 of that Act), the Commissioner must be satisfied that the fund

is a permanent fund *bona fide* established for the sole purpose of providing life annuities for the members of the fund **or annuities for the dependants or nominees** of deceased members [my emphasis].<sup>48</sup>

The definitions above make it clear that the main objective of establishing a retirement fund is to provide employees with a platform to save money during their working years and to use the accumulated money to provide themselves with income on retirement or for their dependants and nominated beneficiaries if that fund member dies in service. As for retirement policy and the objective of pension funds, the National Treasury of the Republic of South Africa<sup>49</sup> and the Pension Funds Act both state the potential recipients of the death benefit as only the *dependants* of the members. By contrast, the Income Tax Act refers to both the *dependants and the nominees* of the members.

In *TEK Corporation Provident Fund and Others v Lorentz*,<sup>50</sup> the Supreme Court of Appeal confirmed that the object of a fund is to provide retirement and other benefits

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<sup>48</sup> The objective of a pension fund organisation is also described in s 1 of the Income Tax Act 58 of 1962 under the definitions of a “provident fund” and “retirement annuity fund” where it is required before the SARS Commissioner must approve or disapprove this fund for that particular year of assessment.

<sup>49</sup> See in this regard the National Treasury *Retirement Fund Reform 2004* at 4.

<sup>50</sup> 1999 4 SA 884 (SCA).

for employees and former employees of employers in the event of death. Retirement fund benefits should be earmarked for nothing else than the benefit of a fund member at retirement or his or her dependants if that fund member dies in service.<sup>51</sup>

The preceding discussion shows that occupational retirement funds influence economic development<sup>52</sup> and poverty reduction.<sup>53</sup> The trustees therefore need to understand the importance and objectives of establishing retirement funds in South Africa.<sup>54</sup> This understanding will assist them when they have various choices in exercising their discretion to distribute retirement fund death benefits to potential beneficiaries. The trustees must be able to choose options aligned with realising the State's objectives in the establishment of retirement funds.<sup>55</sup> It is submitted that the employer,<sup>56</sup> the employee, and the State share a common primary objective in the establishment of retirement funds: they all wish to ensure that employees can provide for themselves and their dependants when a fund member retires or dies.<sup>57</sup>

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<sup>51</sup> Par 15.

<sup>52</sup> See par 2.3 above, where the role that retirement funds play in the economy is discussed. Retirement fund benefits are key to the financial security of employees on retirement and for their dependants and other beneficiaries in some cases such as death. In this respect, see National Treasury *Social Security and Retirement Reform 2007* in par 23, stating: "Social security and retirement funding arrangements can be thought of as organised around two complementary objectives. The first is assurance of a basic standard of living and prevention of destitution in old age, or in circumstances of unemployment or incapacity, which relies partially or fully on *redistributive* measures. The second is about encouraging saving to provide for income replacement in the event of death or incapacity, and after retirement from the workplace, through long-term *insurance* arrangements. These two objectives can be pursued through separate or integrated schemes, in various ways, and there is considerable variation internationally in the balance between these aspects" [original italics].

<sup>53</sup> Section 37C of the Pension Funds Act regulates the payment of death benefits to dependants and nominated beneficiaries of the deceased fund member. The financial need of the potential recipient of such benefits is one of the factors that the pension fund trustees consider in exercising their discretion in making an equitable distribution. See Chapter 3, par 3, where the equitable distribution of death benefits is discussed.

<sup>54</sup> See *Sebola v Johnson Tiles (Pty) Ltd and Others* 2002 3 BPLR 3242 (PFA) at 3242, where the Adjudicator stated that the object of a pension fund is to provide pension benefits to its members to put them in a position to provide for themselves financially when employment ceases.

<sup>55</sup> See Chapter 2, par 6.4 where the role of pension fund trustees in this regard is discussed. Rusconi *Feasibility Study* at 22-23 argues that policymakers should have only two primary objectives when designing a retirement system. The first objective is to encourage citizens to save, and the second is redistribution, which is done by allocating resources to look after the poor.

<sup>56</sup> A sponsoring employer establishes a retirement fund for the benefit of its employees as well as ensuring that pension contributions are collected and paid to the relevant fund for the benefit of the employee.

<sup>57</sup> See *Shilton Gifts* at 13, stating that there is consensus that retirement income systems function as forms of insurance directed at pooling and sharing the risks of welfare loss in retirement. The cover that a pension fund provides take the form of various benefits, such as retirement income when a member reaches retirement age, or a death benefit where a member dies before



The interpretation and application of retirement fund rules<sup>58</sup> and any laws, including section 37C of the Pension Funds Act, that govern the distribution of retirement fund death benefits, by pension fund trustees, the courts, and the Adjudicator should align with the stated objectives of establishing retirement funds.<sup>59</sup>

### 3 THE RESEARCH QUESTION: THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS

This thesis focuses on occupational retirement funds as one of the most important components of the South African retirement funding structure and social security system,<sup>60</sup> particularly the distribution of retirement fund death benefits. Yet research shows that the proceeds of retirement funds provide financial security to only a few members of these funds and their dependants.<sup>61</sup> The inadequacy of retirement fund benefits to provide financial security continuously and sustainably to fund members,

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reaching retirement age or a disability benefit in a case in which a member is incapacitated before reaching retirement age, or a withdrawal benefit on termination of the member's contract of employment. Retirement funds are thus necessitated by the fact that employees should have sufficient income at retirement or be able to maintain themselves financially if they become incapacitated to the point that they cannot keep working, or to provide income for their dependants and other beneficiaries when a member of a fund dies before retirement. See also in this regard *Joint Municipal Pension Fund and Another v Grobler and Others* 2007 5 SA 629 (SCA) par 11.

<sup>58</sup> See *Sebola v Johnson Tiles (Pty) Ltd and Others* 2002 3 BPLR 3242 (PFA), where the Adjudicator held that a pension fund rule that conflicts with the recognised purpose of a pension fund or that has been formulated for an illegitimate purpose is *ultra vires* and unconstitutional (at 3242). See Chapter 3, par 4.4.2, where the principle of *ultra vires* is discussed.

<sup>59</sup> See Downie *Essentials* at 7, stating that the critical point is that the fund should be used first to provide retirement to members and death benefits to their dependants. Only once that goal has been satisfied may consideration be given to using the resources of a retirement fund for other forms of benefit for their families and their community benefits.

<sup>60</sup> Many pension systems around the world are reducing unfunded public provision (social pensions) and increasing the institution of private sector occupational pensions. The change is driven by cost increases and adverse demographic circumstances. See in this regard Disney and Johnson *Pension Systems* at 1. One of the countries reforming their pension systems to encourage the use of funded occupational pensions is Germany. The study of German pension law is in Chapter 5 of this thesis.

<sup>61</sup> There are several reasons for this: many South Africans do not save or leave it too late in their careers to save enough for retirement. Other people cash in their pension savings when changing jobs, or take lump sums in provident funds on retirement, or have informal or irregular employment making it difficult to save or to belong to a retirement fund. See in this regard the National Treasury "Social Security and Retirement Reform Questions and Answers" (dated 21 February 2007) available at <http://www.treasury.gov.za/documents/national%20budget/2007/Q&A%20Social%20security%20and%20retirement%20reform.pdf> (last accessed on 19 December 2020). In principle, the preservation of pension and death benefits should be encouraged. Yet there are certain challenges such as a lack of other sources of income for fund members or people who lose their jobs or those who lose their breadwinners which must be addressed in the country to enhance the efficiency with which benefits are preserved.

dependants, and nominated beneficiaries puts a huge strain on the social pensions or grants provided by the State. Indeed, this state of affairs goes against the objectives of the State in the establishment of occupational retirement funds.<sup>62</sup> So the State has an interest in encouraging workers to save money for their retirement income or to ensure the financial security of their dependants should the member die before retirement.<sup>63</sup> Besides the intention of the State to encourage its workers to save for their retirement, workers need to be reassured that if they put money aside for securing income at retirement or providing for their dependants should the fund member die before retirement,<sup>64</sup> this money will be available when needed and will be distributed efficiently and fairly.<sup>65</sup> In reality, for some people, retirement fund benefits may be the only form of savings for themselves and their dependants. So the protection and correct distribution of retirement benefits are in the interests of all stakeholders, including fund members, dependants, nominated beneficiaries, employers, and the State.<sup>66</sup> The distribution must align with the State's objective of establishing retirement funds: that is, to serve as a secure source of income for fund members and their dependants<sup>67</sup> and satisfy retirement fund rules and applicable laws, including the Constitution.<sup>68</sup>

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<sup>62</sup> See par 2.4 above, where the societal objectives in the establishment of retirement funds are discussed. See also McKenna *Planning* at 15, stating that unless people understand the need to plan adequately for their retirement years, they may find themselves living in poverty and placing a larger burden on society to provide a minimal base for their existence.

<sup>63</sup> If all South Africans were, through occupational pension funds, to provide for their own financial support in retirement or for their dependants should a fund member die before retirement, the burden on the State and the taxpayer to provide social benefits in the form of older person's grants or other State social grants would be reduced significantly.

<sup>64</sup> Retirement benefits are usually paid when a member reaches retirement age, but if, unfortunately, a member dies before then, the death benefit often becomes payable. See Rusconi *System* at 125, stating: "In many of the developed countries with multi-pillar systems, explicit provision for death and disability is not made by the State but is an established part of occupational or collective arrangements. [As a result,] disability and survivor benefits are very rarely excluded from pension arrangements and they form an explicit part of nearly all second-pillar mandatory individual account systems".

<sup>65</sup> See IR Focus *A Management Model for Pension Funds: Conference Issue August 2008* at 47, quoting Anne-Marie Dalton stating that "the Government needs to build up confidence in the pensions system. This is particularly true after the number of scandals that have broken".

<sup>66</sup> A retirement benefit is often one of the most valuable possessions that an employee has for ensuring his or her financial independency on retirement or a source of income for his or her dependants should the employee die in service.

<sup>67</sup> See in this regard the *OECD Guidelines on Pension Fund Asset Management* at 9 par 1.

<sup>68</sup> In other words, the distribution of death benefits should be fair, and pension fund trustees must not discriminate against potential beneficiaries because of colour, race, gender, sex, pregnancy, marital status, ethnic or social origin, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. See also in this regard Hanekom *Manual* at 109. See also

This thesis critically considers the laws on the distribution of retirement fund death benefits. The focus is trained on retirement funds regulated by the Pension Funds Act. The main question which this thesis attempts to address relates to the role that pension fund trustees play in the distribution of retirement fund death benefits in South Africa and whether the current legal regime (section 37C of the Pension Funds Act) is conducive to their (the trustees') efficient performance of their mandate as well as the realisation of the social purpose of legislation. In order to answer the main question, the following ancillary questions are posed:

- Which powers do pension fund boards (pension fund trustees) have in distributing retirement fund death benefits?<sup>69</sup>
- Which factors do these trustees consider when distributing the death benefits under section 37C of the Pensions Funds Act?<sup>70</sup>
- Which duties apply to these funds and trustees in distributing these benefits,<sup>71</sup> and which consequences do they face for not performing their duties?<sup>72</sup> And do retirement funds and their boards have measures for protecting themselves against liability for wrongful distribution?<sup>73</sup>

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Currie and De Waal *Bill of Rights* at 227-236 for a brief discussion of the listed grounds of discrimination.

<sup>69</sup> See Chapter 3, par 4, where the sources of pension fund trustees' powers are discussed. It is necessary to understand how pension fund trustees exercise their discretionary powers to distribute the death benefits and what the sources of their powers are.

<sup>70</sup> See Chapter 3, par 3, where the equitable distribution of death benefits (factors considered by trustees) is discussed.

<sup>71</sup> See Chapter 3, par 5, where the duties of pension fund trustees are discussed.

<sup>72</sup> See Chapter 3, par 6, where the liability of pension funds and/or their trustees is discussed. In other words, what are the consequences of wrongful distribution and what remedies do the pension fund and the pension fund members' beneficiaries have against the pension fund trustees for breach of duties? What rights do aggrieved dependants and nominated beneficiaries have for the wrongful distribution of death benefits?

<sup>73</sup> See Chapter 3, par 7, where the measures available to retirement boards and their trustees are discussed. If the key objectives of establishing retirement funds are to ensure financial security and the alleviation of poverty for a fund member on retirement or for the dependants of a member who dies in service, the question is whether the provisions of s 37C of the Pension Funds Act, in its current form, are efficient in realising the State's objectives. Put differently, the question is whether the State's objectives are not defeated or hindered by the current manner of allocating benefits on the death of the retirement fund member; modes of paying death benefits to dependants and beneficiaries; and the competency, duties, and liability of pension fund boards and their members.

- How does section 37C measure up to the equivalent provisions of the laws of the United Kingdom and Germany,<sup>74</sup> and is there scope to improve and enhance the South African pension laws on the distribution of retirement fund death benefits?<sup>75</sup>

This thesis discusses the existing legislation and its backdrop (the development of a pension system in South Africa and the social factors that directly or indirectly influence the distribution of retirement fund death benefits in South Africa).<sup>76</sup> The thesis thus aims to:–

- analyse the distribution of retirement fund death benefits in South Africa under section 37C of the Pension Funds Act;
- analyse pension fund trustees' discretionary powers in distributing death benefits regulated by the Pension Funds Act;<sup>77</sup>
- identify the challenges that these trustees face;<sup>78</sup>
- determine whether South Africa may derive relevant lessons from the United Kingdom, Germany, and international organisations;<sup>79</sup> and
- recommend improvements to the South African system or process.<sup>80</sup>

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<sup>74</sup> See Chapter 4, par 5 and Chapter 5, par 7 in this regard for the discussion of the distribution of death benefits in the United Kingdom and Germany, respectively.

<sup>75</sup> See Chapter 6, where suggestions and recommendations for improving the efficiency of death benefits distribution are discussed.

<sup>76</sup> See in this regard Chapter 2, par 2.3, where the social factors that directly or indirectly influence the distribution of retirement fund death benefits in South Africa are discussed.

<sup>77</sup> See in Chapter 3, where the provisions of s 37C of the Pension Funds Act are analysed.

<sup>78</sup> One of the main challenges facing pension fund trustees in South Africa when distributing retirement fund death benefits is that the law lacks clear provisions on what is meant by "equitable distribution" of death benefits. This phrase, "equitable distribution of death benefits", appears in s 37C of the Pension Funds Act. See in this regard Chapter 3, pars 2 and 3 for a full analysis of this phrase.

<sup>79</sup> This thesis considers recommendations and guidelines of international institutions such as the World Bank, the OECD, the International Organisation of Pension Supervisors (IOPS). South Africa's FSCA is a member of the IOPS. The aim of this thesis is to determine whether there are any lessons for South Africa to be learned from the United Kingdom, Germany, and other international organisations (such as the World Bank and the OECD) on distributing retirement fund death benefits.

<sup>80</sup> See in Chapter 6, where recommendations for improving the distribution of death benefits are made.

#### 4 THE SIGNIFICANCE OF THIS THESIS

Although occupational retirement funds form an essential component of the retirement funding structure in South Africa,<sup>81</sup> the law on retirement benefits has not received the necessary attention. Pension funds law, traditionally viewed as a part of general public law or labour law, is evolving into a discipline in its own right.<sup>82</sup> Despite this recent development, few legal scholars have conducted detailed research on the distribution of retirement fund death benefits in South Africa. Extensive legal research is thus required.<sup>83</sup>

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<sup>81</sup> Pension law is a unique area of law which involves people's life savings. See in this regard Khumalo "Jurisprudential Role Played by the Pension Funds Adjudicator in South African Law" (Pension Lawyers Association Conference 5 March 2006) available at <https://www.pensionlawyers.co.za/wp-content/uploads/2018/10/08-Adv.-Sandile-Khumalo-Paper.pdf> (last accessed on 23 July 2021) at 48.

<sup>82</sup> See *Manzini v Metro Group Retirement Funds and Another (1)* 2001 12 BPLR 2808 (PFA) at 2820, par 51, where it is stated that pension institutions have a social purpose since they take part in enforced saving of remuneration from employment. This step secures future income for their members, thus lessening the burden on society or the State to support these persons (the members and their dependants).

<sup>83</sup> Given the economic and social importance of occupational retirement funds in South Africa, the considerable number of retirement funds, and the substantial number of pension fund members and their dependants who rely on pension funds when the fund member retires or dies, occupational retirement funds merit a special study. See in this regard *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 42 (see Chapter 3, par 1, where *Dobie NO* is also discussed), where the Adjudicator, in 1999, called for the revision of s 37C of the Pension Funds Act. He encouraged the appropriate State organs to respond speedily and in accordance with the values and principles governing public administration set in Chapter 10 of the Constitution and s 195 of the Constitution, requiring public administration to be accountable and that "[people's] needs must be responded to, and the public must be encouraged to participate in policy-making". According to the Adjudicator, the revision of s 37C of the Pension Funds Act is the hope of the pension fund industry. Although this observation by the Adjudicator was made more than 20 years ago, the challenges that pension fund trustees face over s 37C of the Pension Funds Act are still prevalent today. The High Court in *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019), made a similar observation about the challenges that pension fund trustees face in distributing retirement fund benefits in terms of s 37C of the Pension Funds Act (par 33). See also Chapter 3, par 2.2, and n 122, where the *Kim* judgment is discussed.

A vast literature in the form of articles has examined the distribution of retirement fund death benefits in South Africa (see, for example, Chapter 3, n 160 in this regard). There is still a scarcity of full research at a doctoral level regarding the distribution of retirement fund death benefits. Dr Karin Lehmann recently completed a doctoral thesis at the University of Cape Town entitled *The Distribution of Retirement Fund Death Benefits: An Analysis of the Equitability and Constitutionality of Section 37C of the Pension Funds Act 24 of 1956* available at <https://open.uct.ac.za/handle/11427/33760> (last accessed on 13 September 2021). Although dated (September) 2020 (see the title page and the declaration page (ii)), this thesis was published on the University of Cape Town website on 25 August 2021, at a time when my thesis was being edited for submission and it was too late to consider Dr Lehmann's arguments in my thesis. Her thesis focuses on the constitutionality of section 37C, whereas mine not only focuses on the constitutional question but also identifies other factors that in my view contribute to pension fund trustees' not being able to maximise the efficiency of the section. My thesis approach is of a comparative nature including the legal regimes of Germany and the United

Through section 37C of the Pension Funds Act, the statutory framework seeks to supply income to the dependants of a deceased pension fund member, in other words, to achieve a social objective. At the same time, the effectiveness of the section as interpreted by the pension fund trustees warrants an assessment from an academic point of view.<sup>84</sup> So this thesis finds gaps in the formulation and interpretation of the section, thus making suggestions to improve the effectiveness of this section in South Africa. The concluding Chapter 6 proposes reforms to close the identified gaps and repair the weaknesses that may prompt the inconsistent interpretation of section 37C and the high number of disputes before the courts and the Adjudicator.<sup>85</sup>

Another purpose of the thesis is to make the law accessible to a broader range of the population, including dependants, nominated beneficiaries, pension fund trustees, fund members, administrators, and retirement benefit advisers. It is hoped that the research undertaken will clarify the distribution of retirement fund death benefits and provide solutions to the challenges faced by pension fund trustees and other role-players in the retirement funds industry.<sup>86</sup>

The main aims of the investigation include the following:

- to describe the existing laws on distributing death benefits in South Africa;

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Kingdom in trying to find solutions for challenges that face pension fund trustees in South Africa regarding the distribution of retirement fund death benefits. Considering the importance of the topic and various attempts by policymakers to improve the efficiency of the distribution process by amending section 37C of the Pension Funds Act, I submit that the relevant policymakers and the public at large can only benefit from the availability of various views based on comparative research at the highest level, in doctoral studies. The issues identified and suggestions made in both my research and that of Dr Lehmann will add to the debate, with the ultimate objective of improving how retirement death benefits are distributed in South Africa.

<sup>84</sup> See in Chapter 3, where the provisions of s 37C of the Pension Funds Act are analysed.

<sup>85</sup> See in Chapter 6, par 5, where suggestions and recommendations for improving the distribution of retirement fund death benefits are made.

<sup>86</sup> The recommendations that this thesis makes provide policymakers with added options and help create awareness of current and future issues in the distribution of retirement fund death benefits. The thesis also offers policymakers insights which will help to improve the distribution of retirement fund death benefits, to ensure that the intended recipients (the dependants and/or nominated beneficiaries) receive those benefits.

- to create awareness of the challenges faced by pension fund boards in distributing death benefits, particularly under section 37C of the Pension Funds Act;<sup>87</sup>
- to explain the duties and responsibilities of pension fund trustees in distributing death benefits;<sup>88</sup>
- to help retirement fund members, dependants, and nominated beneficiaries to recognise and appreciate their rights to death benefits and how they can enforce these rights.<sup>89</sup> Pension fund trustees must appreciate the consequences of failing to comply with their duties, such as facing legal claims by retirement fund members and potential beneficiaries for wrongful distribution of death benefits;
- to highlight how the South African law on distributing retirement fund death benefits compares with the law in other comparative jurisdictions, such as the United Kingdom and Germany, on the specific issues under discussion in this thesis;<sup>90</sup>

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<sup>87</sup> Specific problems for pension fund trustees, pension lawyers, pension administrators, and financial advisers arise in the distribution of retirement fund death benefits in terms of s 37C of the Pension Funds Act. These problems are exacerbated by financial illiteracy among fund members and their dependants; pension fund trustees that do not heed the rules of their funds and applicable laws; inadequate record-keeping of members' and beneficiaries' personal details by funds and their administrators (leading to unclaimed benefits); sponsoring employers who fail to pay, or delay paying, over their employees' pension fund contributions to the relevant retirement funds (s 13A of the Pension Funds Act); and pension fund members who do not fully disclose all their dependants in the beneficiary nomination form.

<sup>88</sup> See in this regard Chapter 3, par 5, where the duties of pension fund trustees are discussed. Pension fund trustees (boards) direct, control, and oversee the operations of pension funds in South Africa. Pension fund trustees are guided in this regard by applicable laws, including the provisions of the Pension Funds Act, and by the rules of their pension funds (see s 7C(1) of the Pension Funds Act). The sole responsibility for the distribution of retirement fund death benefits vests in the pension fund boards (trustees) (see s 37C(1) of the Pension Funds Act in this regard). See also Chapter 2, par 6.4, where the delegation of powers by pension fund trustees is discussed, and Chapter 3, par 4, where the sources of pension are discussed.

<sup>89</sup> See Chapter 3, par 6, where the liability of pension funds and of trustees is discussed. It is clear from case law and the Adjudicator's determinations that the lack of understanding of retirement fund matters, including applicable laws, in particular s 37C of the Pension Funds Act, on the part of fund members, dependants, nominated beneficiaries, and pension fund trustees contributes to many disputes over the distribution of retirement fund death benefits.

<sup>90</sup> See Chapter 4, par 5 and Chapter 5, par 7, where the distribution of retirement fund death benefits in the United Kingdom and Germany, respectively, is discussed.

- to contribute to the available legal literature on pension law in general and on the distribution of death benefits in South Africa in particular; and, finally,
- to produce new knowledge to add to the existing body of knowledge in general and on the distribution of death benefits in South Africa in particular.

The research undertaken is thus significant as it adds to the limited legal literature available on the distribution of death benefits in South Africa. And the thesis contributes to the existing knowledge of pension funds law in general in providing the reader with an insight, from a comparative perspective, into the legal principles on the distribution of death benefits in South Africa and the role that pension fund trustees play in this regard.

It is vital that pension fund boards, bestowed with the powers and burdened with the duties of distributing death benefits, should understand and appreciate their decisions on allocating death benefits under section 37C of the Pension Funds Act.<sup>91</sup> For their decisions may mean the difference between financial survival and destitution for legitimate dependants of the deceased fund member.

Section 37C of the Pension Funds Act makes a commendable difference in alleviating poverty among the dependants of the deceased pension fund member.<sup>92</sup> But the high number of disputes between beneficiaries and the funds<sup>93</sup> shows that

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<sup>91</sup> See Chapter 3, pars 4 and 5, where pension fund trustees' sources of power and their duties are discussed.

<sup>92</sup> See in this regard *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41, where the Adjudicator observed that one admirable aspect of s 37C of the Pension Funds Act is its worthy intention to protect dependants who do not reside in the same vicinity as the deceased member. The Adjudicator gave the example of migrant labourers working in the urban areas with dependants in remote rural areas, and recognised that, by imposing a duty on pension fund trustees to trace dependants, the section advances such persons' (migrant labourers and others') interests. It is submitted that if the migrant labourers (the fund members) work in urban areas, but their dependants live in rural areas and are required to prove financial dependency before they can be allocated a death benefit, this outcome defeats the good intentions of s 37C of the Pension Funds Act. Dependants who struggled to get any kind of maintenance from the fund member when the latter was still alive are also likely (perhaps even more so) to struggle to prove financial dependency. At the same time, a factual dependant who was maintained by the fund member, even though the fund member had no legal obligation to do so and had also no intention to support that factual dependant forever, is likely to be able to prove financial dependency and thus be allocated the death benefit. It is suggested that a legal dependant who is still a minor should not need to prove any financial dependency in order to be allocated the death benefit. See Chapter 3, par 2.2.1, where factual dependants and legal dependants are discussed. See in this regard Chapter 6, par 5.9, where a process for distribution of death benefits to potential beneficiaries is proposed.

<sup>93</sup> See in this regard n 11 above.



there is still room to enhance the effectiveness of the section and provide clarity on pension fund trustees' discretionary powers in distributing retirement fund death benefits. Despite the high number of disputes, the discretion afforded to the trustees, together with the interpretational challenges, should not be viewed as detracting from the objective of section 37C to alleviate poverty among the dependants of a deceased pension fund member. This section was enacted with the legislative intention to achieve the social objective of ameliorating this poverty. An analysis of case law and the Adjudicator's determinations shows that this objective sometimes fails. Section 37C should be improved to provide and sustain much-needed financial support for the dependants of the deceased fund member.

## **5 THE LITERATURE REVIEW**

The research for this thesis includes both primary and secondary sources. The primary sources consist of legislation (including national constitutions) and judicial decisions (both binding and persuasive authorities).<sup>94</sup> Secondary sources include all the materials (published and unpublished) relating to the distribution of retirement fund death benefits in South Africa and the two selected foreign countries: the United Kingdom and Germany. These materials include books, papers, reports, journal articles, newspaper articles, and internet resources. Reference is made to a variety of literature on social security and labour law, including research conducted by various international bodies dealing with social security and labour law.<sup>95</sup>

## **6 THE RESEARCH METHODOLOGY**

Research methodology provides a systematic way of solving a problem. It is a science for studying how research is to be performed and aims to provide a work plan for the research. The research may be qualitative or quantitative, or even both.<sup>96</sup>

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<sup>94</sup> Here judicial decisions include case law and determinations of the Pension Funds Adjudicator in South Africa and in those of the two comparative jurisdictions in this thesis, the United Kingdom and Germany.

<sup>95</sup> For example, research conducted by international organisations such as the International Labour Organisation (ILO), the World Bank, and the OECD plays a crucial role in promoting principles governing the field of social security, including pension law.

<sup>96</sup> Quantitative research is based on the measurement of quantity or amount, while qualitative research is concerned with qualitative phenomena involving quality. See in this regard Rajasekar

This study involves a comparative analysis of laws regulating the distribution of retirement fund death benefits in South Africa and other two selected jurisdictions: the United Kingdom and Germany.<sup>97</sup> These two countries follow different approaches to funding occupational retirement for their elders. This thesis focuses on how these two jurisdictions deal with pension fund trustees' challenges in distributing death benefits identified in Chapter 3 below. Chapter 6 then examines whether these two jurisdictions provide South Africa with lessons in improving the efficiency of distributing retirement fund death benefits and aligning those benefits with the objectives of their establishment.

A comparative legal approach is appropriate for this investigation to assess how the South African legal provisions on distributing retirement fund death benefits measure up against the United Kingdom and German equivalents and determine whether and how the South African legal provisions may be improved.<sup>98</sup> In other

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S, Philominathan P and Chinnathambi V "Research Methodology" (14 October 2013) available at <https://arxiv.org/pdf/physics/0601009.pdf> (last accessed on 30 June 2021) at 5.

<sup>97</sup> See generally Gordley 1995 *AmJCompL* 555. The question is whether the distribution of retirement fund death benefits in South Africa conforms or compares to international standards or to the standards of other developing or developed countries. See IR Focus *Management Model* at 1, stating that although global standards are a good yardstick for measuring progress, our policymakers must be mindful of the peculiarity of the issues facing South Africans every day. Although the jurisdictions selected for the comparative review do not include any South African Development Community (SADC) member states, reference is made in this thesis to legislative frameworks in Botswana, Eswatini, and Malawi that directly apply to the regulation of the distribution of retirement death benefits in these countries. The legislative frameworks of these three countries are relevant — when viewed in the light of the Protocol on Finance and Investment adopted by the SADC member states pursuant to the SADC Treaty on 18 August 2006. The broad objective of the Protocol on Finance is to "foster harmonisation of the financial and investment policies of the state parties in order to make them consistent with the objectives of SADC". One of the institutions set up, pursuant to the Protocol on Finance, is the Committee of Insurance, Securities and Non-Banking Financial Authorities of SADC (CISNA). One of the objectives of CISNA is: "Harmonising legislation to ensure consistency and adherence to international regulatory standards and best practice" ("Capital Markets" (*Southern African Development Community*) available at <https://www.sadc.int/themes/economic-development/finance/capital-markets/> (last accessed on 16 June 2021)).

<sup>98</sup> See Fombad 2018 *J Legal Educ* at 989, stating that "comparative legal research exposes the researcher to a wide range of legal principles, institutions, values, models, and approaches to dealing with problems. It is impossible to fully appreciate the strengths and weaknesses of one's national law or its approach to dealing with a specific problem in isolation of how similar problems are dealt with in other countries. Comparative legal research provides the researcher with an opportunity to discover and understand how other legal systems or institutions deal with a problem; why a particular approach has been adopted; how it compares with his or her legal system; and what lessons can be drawn from this to enable the design of a better system. By scrutinising and understanding the different conditions and historical circumstances that may have influenced a particular approach to problem-solving, the researcher will then be better placed to appreciate which doctrines, policies, institutions and other practices can be copied and which cannot".

words, the aim is to ascertain whether these foreign equivalents offer possible solutions to resolving unclear South African legal principles.<sup>99</sup> The discussions in the comparative chapters highlight the similarities and differences between the South African retirement funding structure and those of the United Kingdom and Germany and the significance of such differences.<sup>100</sup> Shortcomings in the South African law on the distribution of retirement fund death benefits are shown, and recommendations are provided to address them.<sup>101</sup>

Furthermore, the research method adopted in the thesis is qualitative<sup>102</sup> and follows a descriptive, comparative approach.<sup>103</sup> In other words, although the legal system of South Africa is critically analysed, the legal systems of the United Kingdom and

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<sup>99</sup> See in this regard Havenga *Fiduciary Duties* at 4, n 27, citing Venter *et al Regsnavorising* Chapter 8 on the different objectives of comparative legal studies. Fombad 2018 *J Legal Educ* at 990 states that comparative legal research enables research students, as well as others, such as legal practitioners, judges, legislators, and policymakers, to become aware of other legal options which could be used to enrich national law. See also Cassim *Critical Analysis* at 27, n 55, stating that there are two approaches to comparative law: macro-comparison and micro-comparison. A macro-comparison is a study of two or more entire legal systems (for example, English law and German law) while a micro-comparison is a comparison of specific areas of law or aspects of two or more legal systems (for example, the distribution of retirement fund death benefits) (Zweigert and Kötz *Introduction* at 5). Fombad 2018 *J Legal Educ* at 994 states that “in spite of the distinction made between macro-comparison and micro-comparison, the dividing line between them is not clear-cut and very often they merge with or complement each other”. A comparative legal approach gives one the opportunity to stand back from one’s own legal system and look at it more critically; in addition, such an approach may also provide a warning of possible difficulties and may offer suggestions for further developments. See in this regard Wilson *Comparative Legal Scholarship* at 87 and Cassim *Critical Analysis* at 27, n 55.

<sup>100</sup> According to Zweigert and Kötz, “the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation, simply because the different systems of the world can offer a greater variety of solutions than could be thought up in a lifetime by even the most imaginative jurist who was corralled in his own system ... it extends and enriches the ‘supply of solutions’ and offers the scholar of critical capacity the opportunity of finding the ‘better solution’ for his time and place” (Zweigert and Kötz *Introduction* 15). See Eberle 2009 *Wash U Global Stud LR* at 471-472, stating that “comparative law is a quest for the exotic, the different, the other. It examines the dimensions and forms of law and culture outside the normal ken of one’s visage in the hope that one can gain new and different perspectives on law, culture, and patterns of order. Equally important, comparative law ultimately focuses back on local culture: it asks, by comparison, is our culture better or worse; in what way; and if so, what is to be done? The real aim of a comparative law is to offer insight and perspective so that we are better equipped to reflect critically about ourselves and our own legal culture”.

<sup>101</sup> One of the aims of comparative law is to discover which solution of a problem that emerges from a proper evaluation of the materials under comparison is the best. See Chenwi *Death Penalty* at 13.

<sup>102</sup> Some of the characteristics of qualitative research are that it is non-numerical and descriptive, applies reasoning, and uses words.

<sup>103</sup> Paris *Comparative Method* at 15, referring to Kamba 1974 *ICLQ* 485, stating that the descriptive phase or method “aims at explaining the legal norms, concepts and institutions in the legal systems compared, and can extend to explaining the socio-economic problems in the legal systems compared, and can extend to explaining the socio-economic problems and the legal solutions provided by these systems”.

Germany are not critically analysed, and the investigation of those two countries is comparative and descriptive.<sup>104</sup> A descriptive approach is necessary because the principal research methodology employed in the thesis is a literature review. The jurisdictions with which the South African position is compared, the United Kingdom and Germany,<sup>105</sup> are also, like South Africa, both member states of the United Nations (UN) and the International Labour Organization (ILO) and thus bound by the same international laws.

In addition, the specific reasons for the choice of these two jurisdictions are explained below:

### 6.1 *The United Kingdom*

The discussion paper published by the South African National Treasury, *Retirement Fund Reform* (December 2004), refers to various legal systems, including that of the United Kingdom.<sup>106</sup> This reference shows the confidence of the South African legislature in that legal system. And it indicates that developments there are likely to influence the reform of South African law.

Although pension funds in South Africa, unlike the system in the United Kingdom, are no longer set up as trusts,<sup>107</sup> pension fund trustees in South Africa do have duties (the fiduciary duty, and the duty of care and skill) that are based mainly on the law of trusts.<sup>108</sup> In the United Kingdom, pension fund trustees are subject to English trust law comprising, among other things, the trust deed, the rules, the

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<sup>104</sup> Eberle 2009 *Wash U Global Stud LR* at 485 states that “comparative law has much to offer as a window into alternative solutions for pressing policy issues. It can be quite useful to look outside our borders to see if other perspectives can usefully shed light on core policy questions. Illuminating alternative views on important policy issues can, in turn, force a healthy reassessment of and dialogue on these issues. We need comparative law to take on these broader missions”.

<sup>105</sup> See Chapters 4 and 5 for more specific reasons justifying the choice of these two jurisdictions as a comparative study.

<sup>106</sup> See in this regard the National Treasury *Retirement Fund Reform 2004*, for example, in pars 5.1, 9.2, and in the bibliography listed in it.

<sup>107</sup> See in this regard Chapter 2, par 2.2, discussing the origin of occupational pension funds in South Africa. The legal status of pension funds in the United Kingdom is discussed in Chapter 4, par 3.

<sup>108</sup> See in this regard Chapter 3, par 5, discussing the duties of pension fund trustees in South Africa.

Trustee Act 2000, the Pensions Acts, and the general case law on trusts.<sup>109</sup> What is more, English law substantially influenced the development of South African trust law.<sup>110</sup>

Case law and the determinations of the Pension Schemes Ombudsman in the United Kingdom are considered because of their comparative significance for decisions by the South African courts and rulings by the Adjudicator on the distribution of retirement fund death benefits.<sup>111</sup>

The United Kingdom, like South Africa, is a member of the Commonwealth. English law has much influence in Commonwealth countries, including South Africa.

Lastly, in the United Kingdom, there has been a major change in the nature of employer pension provisions over the past few years, as introduced by the Pensions Schemes Act 1993, the Pensions Schemes Act 1995, the Pensions Act 2004, the Finance Act 2004, the Pensions Act 2007, the Pensions Act 2008, the Pensions Act 2011, the Pensions Act 2014, the Pension Schemes Act 2015, the Pension Schemes Act 2017, and the Pension Schemes Act 2021.<sup>112</sup> These developments may prove informative as South Africa embarks on the reform of its retirement law.

## 6.2 Germany

The legal system of Germany is selected as an example of a member state of the European Union. Some countries in the European Union, such as the Netherlands and Germany, are seen as having mature and efficient retirement funding structures. Indeed, pension funds are considered to have originated in Germany. So

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<sup>109</sup> See Ngalwana "Legal Pitfalls in Pensions" 2006-06-1 *Moneyweb Reports* [www.moneyweb.co.za](http://www.moneyweb.co.za) (last accessed on 30 June 2021).

<sup>110</sup> See in this regard *Stander and Others v Schwulst and Others* 2008 1 SA 81 (C) par 48, confirming that the development of trust law in South Africa was substantially influenced by the English law. See also Dewar *et al Practical Guide* at 124-125, stating that English law played an important role in the development of trust law in South Africa, since South African law was modelled on its English counterpart. However, the authors note that English law has persuasive and not binding authority in South African law, and where English principles conflict with our law, they will not be followed by South African courts. The United Kingdom pension law may at best be used as guidance. See also Hanekom *Manual* at 2, stating that the South African pension provision development largely followed developments in the United Kingdom.

<sup>111</sup> See, for example, in *Stander and Others v Schwulst and Others* 2008 1 SA 81 (C) par 48, where the court recognised the influential role that English and Commonwealth case law play in South Africa with regard to trust law.

<sup>112</sup> See Chapter 4 below, par 1, where pension laws in the United Kingdom are discussed.

the reforms of the German retirement funding structure may influence several aspects of the South African law on pension funds.<sup>113</sup>

The German retirement system provides some lessons on improving the retirement system (including the distribution of retirement fund death benefits) in South Africa.<sup>114</sup>

The importance of this comparative study of the two legal systems (the United Kingdom and Germany) becomes apparent in Chapter 6, which concludes this thesis. The comparative study helps inform suggestions for improving the South African law on distributing retirement fund death benefits.<sup>115</sup> In this regard, it must be noted that the Bill of Rights contained in Chapter 2 of the Constitution authorises courts to consider foreign law when interpreting the Bill of Rights.<sup>116</sup> Although ideas may be borrowed from the jurisprudence of other countries, it is just as clear that heavy reliance will still have to be placed on South Africa's unique circumstances and that the Constitution must be used as the primary form of reference.

## **7 THE STRUCTURE OF THE THESIS AND AN OVERVIEW OF THE CHAPTERS**

The thesis comprises six chapters arranged as follows:

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<sup>113</sup> It remains to be seen how the British vote to exit the European Union (Brexit) and its subsequent exit on 1 February 2020 will affect its laws, especially those on pension funds.

<sup>114</sup> Germany and the United Kingdom are both member states of the OECD. South Africa is one of the many non-member countries with which the OECD has working relationships besides its 34 member countries. On 16 May 2007, the OECD Council at Ministerial level adopted a resolution to strengthen co-operation with South Africa. In this way, South African policymakers gain access to OECD expertise and good policy practices. This information is available at Organisation for Economic Co-operation and Development "South Africa and the OECD" <https://www.oecd.org/southafrica/south-africa-and-oecd.htm> (last accessed on 20 July 2021). The OECD is an international body that promotes policies to improve the social and economic well-being of people around the world. It provides a forum for governments to work together, share experiences, and seek solutions to common problems. Even though South Africa is not a member of the OECD, the body's proposals should be considered in reforming our retirement laws to bring them into line with international trends and in finding solutions to our challenges in distributing retirement fund death benefits.

<sup>115</sup> See Fombad 2018 *J Legal Educ* at 990, stating: "Comparative legal research plays three main roles in facilitating the enactment of legislation and, more generally, law reform. One role is that a study of the experience of other systems of law is valuable in indicating to what extent foreign institutions or solutions could act as a guide in developing new rules or solutions or modifying or abolishing existing ones. A second advantage is that it acts as a guide with respect to the technique of drafting or formulating new legislation. Finally, the experience from the study of foreign legal systems may also provide useful guidance as to the practicability and enforceability of any proposed new law."

<sup>116</sup> In terms of s 39(1)(c) of the Constitution.

**Chapter 1** is the introductory chapter. This one introduces the research topic and the aims of the thesis. It provides both background information on and the context or setting of the research problem. It also explains the importance of undertaking this research and the research method used to attain the research objectives.

**Chapter 2** includes a brief historical and general background to occupational retirement funds in South Africa. To understand pension fund trustees' role in distributing retirement fund death benefits and exercising their discretionary powers, one must understand the purpose of occupational pension funds and their role in South African society. This chapter explains the legal and social context within which retirement fund death benefits are distributed.

**Chapter 3** investigates and critically analyses the distribution of retirement fund death benefits in South Africa. Uncertainties are pointed out, and provisions of the Pension Funds Act, including section 37C, are analysed. The problematic issues to be examined in the comparative studies are then identified.

**Chapter 4** includes the first comparative survey,<sup>117</sup> examining the distribution of retirement fund death benefits in the United Kingdom. This comparative chapter deals with the legal position in the United Kingdom and focuses on problem areas identified in Chapters 2 and 3 of this thesis. Chapter 4 shows how the United Kingdom regulates or deals with the same issues or situations. As far as possible, Chapter 4 has the same structure as the South African Chapter 3 to assist legal comparison.

Similarly, **Chapter 5** includes the second comparative survey, examining the distribution of retirement fund death benefits in Germany. This comparative chapter deals with the legal position in Germany and focuses on problem areas identified in Chapters 2 and 3 of this thesis. Chapter 5 shows how Germany regulates or deals with the same issues or situations. As far as possible, Chapter 5 has the same structure as the South African Chapter 3 to assist legal comparison.

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<sup>117</sup> The distribution of retirement fund death benefits in South Africa is compared with the distributions in United Kingdom and Germany to determine how the law is applied in both those foreign jurisdictions and how it differs from the South African law. It is important to consider developments in pension law in foreign countries to ensure that the South African law on distributing fund death benefits is fair and efficient.

The comparative study in Chapters 4 and 5 is intended to determine the best way of dealing with the identified problems relating to the distribution of retirement fund death benefits in South Africa.

**Chapter 6** is the concluding one. It summarises important principles relating to the distribution of retirement death benefits that were canvassed in the preceding chapters without including or referring to any new authorities. Considering developments in South Africa and the other legal systems investigated, certain conclusions are drawn. Several recommendations are made on the distribution of retirement fund death benefits in South Africa. Some amendments to the Pension Funds Act are proposed. Recommendations are also made to promote legal certainty and provide solutions to the challenges faced by pension fund trustees in distributing retirement fund death benefits in South Africa.<sup>118</sup>

Three limitations apply to this thesis. In the first place, to limit its scope, the thesis concentrates on occupational retirement funds.<sup>119</sup> The Pension Funds Act does not govern several other occupational pension funds. The focus here remains on the retirement funds governed by that Act, especially when section 37C applies. Secondly, the thesis does not address the taxation of retirement fund death benefits. Thirdly, many migrants enter South Africa from other parts of Africa and elsewhere to work here, and they contribute to pension funds based here. This thesis does not explore pension fund trustees' challenges in distributing and paying death benefits to migrant workers' surviving dependants and nominated beneficiaries.

The analysis of the South African law and the comparative studies of the legal position in the United Kingdom and Germany entail a brief historical overview of the development of the law regulating the distribution of retirement fund death benefits in each jurisdiction. The historical introduction places the present law in the relevant context.<sup>120</sup> A brief general overview of the retirement funding structure in all three

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<sup>118</sup> The thesis ends by recommending the way forward for the distribution of retirement fund death benefits to ensure consistency and efficiency as well as the realisation of the State's objectives in the establishment of retirement funds in South Africa. See Chapter 6 in this regard.

<sup>119</sup> See Chapter 2, par 3, where the concept of occupational pension funds in South Africa is discussed.

<sup>120</sup> Without looking at the history of pensions in a country, it is difficult to understand its current laws relating to the distribution of retirement benefits. The chain of historical events and the cultural



countries is provided. The intention in doing so is to explain the importance of occupational retirement funds in the social context of each country. The basic retirement fund structure in each is investigated and described. Then different types of pension funds are briefly discussed: public pension funds (State pension funds), employment-related funds (occupational retirement funds), and private pensions. Next, the different types of retirement benefits available in the particular legal system are explained.<sup>121</sup> The emphasis remains on the distribution of occupational retirement fund death benefits.

The roles of bodies, institutions, and agencies involved in distributing retirement fund death benefits are clarified,<sup>122</sup> and the role of pension fund trustees in distributing death benefits is considered. Furthermore, the legal remedies available to dissatisfied members and beneficiaries are considered, including the liability of the trustees for wrongful distribution of death benefits.<sup>123</sup>

## **8 THE TERMINOLOGY USED IN THE THESIS**

The meaning of specific terms used in this thesis can be confusing. Similar terms may have different meanings in different jurisdictions, and different terms may have similar meanings. For this reason, the meaning of some of these terms and the context in which they are used in the thesis are explained below. These definitions help the reader understand the context in which the terms are used.

### *8.1 Retirement fund*

A “retirement fund” is a generic term to describe pension funds, provident funds, retirement annuity funds, and preservation funds. A pension fund is known by various names in the surveyed countries: sometimes it is called a pension plan (in

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constructs are important in this regard, and they offer explanations of today’s conditions (policies). See *Loar Pay Gap* at 8-9.

<sup>121</sup> Such as pension funds, provident funds, umbrella funds, and retirement annuity funds in South Africa.

<sup>122</sup> For example, the FSCA and the Office of the Pension Funds Adjudicator in South Africa.

<sup>123</sup> In this regard the OECD *Recommendation of the Council on Guidelines for Pension Fund Governance* adopted by the OECD Council on 28 April 2005, OECD/LEGAL/0336 available at <https://legalinstruments.oecd.org/public/doc/251/251.en.pdf> (last accessed on 23 July 2021) at 6 provides that pension plan members and beneficiaries should be granted access to statutory redress mechanisms, through at least the regulatory or supervisory authority or the courts that assure prompt redress.

the United Kingdom), a pension trust (in the United Kingdom), or a pension scheme (in the United Kingdom and Germany). These terms are used throughout this thesis in their broadest sense, and they are synonymous with “retirement fund” and refer to any fund designed to provide retirement income to workers. Reference to a particular name depends on the context of the jurisdiction in which it is used: for example, the term “pension scheme” is used in the United Kingdom and Germany.<sup>124</sup>

## 8.2 Retirement fund member

A “retirement fund member” (referred to simply as a “member” or a “fund member” in this thesis) is a person who has been admitted to membership of a retirement fund and is entitled to benefit under the fund.<sup>125</sup> In the context of this thesis, a “member” or a “fund member” often refers to someone who was still an active fund member at death.<sup>126</sup> It is submitted that the members are the chief constituents of any retirement fund formed to provide an income for these members or their dependants when they are no longer earning a regular income from their employment or they die while still in service.<sup>127</sup> Members have an interest in ensuring that people close to them are financially provided for even after they die. The financial security of these surviving dependants is also the purpose of the

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<sup>124</sup> For example, an *occupational pension scheme* is also called an *occupational pension plan* in the United Kingdom; in Germany it is called an *occupational pension fund* or a *company pension fund*; and in South Africa it is called an *occupational pension fund* or simply a *pension fund*.

<sup>125</sup> King IV at 15 under “Glossary of Terms” for “Member” states that when the word “member” is used in reference to a retirement fund, it “means a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund”, as defined in s 1 of the Pension Funds Act.

<sup>126</sup> Section 1 of the Pension Funds Act defines a “member”,  
“in relation to-

- (a) a fund referred to in paragraph (a) or (c) of the definition of 'pension fund organisation', means any member or former member of the association by which such fund has been established;
- (b) a fund referred to in paragraph (b) of that definition, means a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund”.

<sup>127</sup> See Njuguna *Strategies* at 26. See also Downie *Essentials* at 7, echoing this submission.

pension commitment, which as a contract in favour of third parties is intended to protect people who are not contractual parties.<sup>128</sup>

### 8.3 *Dependant*

Pension fund trustees, retirement fund members, dependants, and nominated beneficiaries all need to understand the meaning of the word “dependant”. The reason is that being a dependant of a retirement fund member entitles a person to be considered by pension fund boards as one of the potential recipients of the death benefit or a portion of the benefit when a fund member dies while still in service.<sup>129</sup> The manner in which the different subsections in section 37C of the Pension Funds Act are applied is determined by whether the potential recipient of a death benefit was a “dependant” of the deceased fund member.<sup>130</sup> So pension fund boards may decide whether to distribute a death benefit to a person if the latter qualifies as a “dependant”. Broadly speaking, a dependant is someone whom a member is legally or factually<sup>131</sup> liable to maintain or whom the member would in future have become

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<sup>128</sup> See Deloitte Legal “Recent Employment Case Law with Respect to Pensions Schemes” available at <https://www2.deloitte.com/dl/en/pages/legal/articles/aktuelle-arbeitsrechtliche-rechtsprechung-zur-bAV.html> (last accessed on 23 July 2021), discussing the Federal Labour Court (*Bundesarbeitsgericht (BAG)*) judgment of 19 February 2019, 3 AZR 150/18 in par 2.

<sup>129</sup> See Chapter 3, par 2.2.1.1 for the definition of a “dependant” in terms of s 1 of the Pension Funds Act. See also *Govender v Alpha Group Employees Provident Fund* 2001 4 BPLR 1843 (PFA) par 14, confirming that the definition of a “dependant” creates three categories of dependants. These categories of dependants are discussed in Chapter 3, par 2.2.1.1.

<sup>130</sup> Section 37C of the Pension Funds Act refers to dependency rather than a biological relationship as a crucial factor in determining whether a person should be allocated a death benefit. See in this regard *Kekana v Nedbank Defined Contribution Provident Fund* 2010 3 BPLR 295 (PFA). So whether a person is entitled to be allocated a portion of the death benefit depends not only on the biological relationship with the deceased but also on the dependency on the deceased and the extent of that dependency.

<sup>131</sup> The Debswana Pension Fund “Pension Death Benefit Claims Guide: ‘*Shedding Light in Times of Darkness*’ A Guide for Dependents/Families of a Deceased DPF Member” available at [https://financedocbox.com/Retirement\\_Planning/93518393-Pension-death-benefit-claims-guide.html](https://financedocbox.com/Retirement_Planning/93518393-Pension-death-benefit-claims-guide.html) (last accessed on 23 July 2021) at 3 in par 2 succinctly explains the definitions of a “legal dependant”, and “financial dependant” as follows: a legal dependant is considered to be any person whom the member is legally liable for maintenance at the time of death, e.g., biological children, married spouse and so on, while a financial dependant, determined after careful review by the DPF Board of Trustees, is deemed to be a person who, even though the member is not legally liable for maintenance, is considered upon the death of the member to be in fact dependent on the member for maintenance, e.g., long-term partner, traditionally married spouse, a child born after the member’s death, an adopted child, a child born out of wedlock, a stepchild, or a person for whom, given factual evidence, the member would have become legally liable for maintenance had the member not died. Because the trustees must determine the financial dependency of non-factual dependents, an exhaustive claims investigation process must be carried out prior to each claim settlements. Although this Guide deals with benefits in the context of the Debswana Pension Fund in Botswana, the definitions of the two terms equally apply in South Africa. In Australia, under the superannuation law, a death benefit dependant

legally liable to maintain.<sup>132</sup> In South Africa, the term “dependant” is defined to align with the Constitution: for example, the definition of “dependant” should not discriminate on the basis of considerations such as same-sex marriages and informal marriages.<sup>133</sup> Although the word “dependant” is defined in section 1 of the Pension Funds Act, this definition is unclear and subject to different interpretations by the pension fund trustees, the courts, and the Pension Funds Adjudicator.<sup>134</sup>

#### 8.4 Retirement fund beneficiary or nominated beneficiary

A “retirement fund beneficiary” in the context of distributing a death benefit is a person entitled to benefit under a fund or who will become entitled upon the death of a fund member who was still in service. Section 1 of the Pension Funds Act defines a beneficiary as “a nominee of a member or a dependant who is entitled to a benefit, as provided for in the rules of the relevant fund”. Potential recipients of a death benefit should somehow be connected to the retirement fund member to be considered for the allocation of such benefits by pension fund boards. Such a

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includes the deceased’s spouse or *de facto* spouse; a child of the deceased (any age); and a person in an interdependency relationship with the deceased — this is a close personal relationship between two people who live together, where one or both provide for the financial, domestic, and personal support of the other. See in this regard Australian Tax Office “Paying Superannuation Death Benefits” (6 December 2016) available at <https://www.ato.gov.au/Super/APRA-regulated-funds/Paying-benefits/Paying-superannuation-death-benefits/?anchor=dependants> (last accessed on 23 July 2021).

<sup>132</sup> In *Van der Merwe and Another v Central Retirement Annuity Fund and Another* 2005 5 BPLR 463 (PFA) par 17, the Adjudicator showed that there is a difference between factual dependence and mutual interdependence for the purpose of s 37C(1)(b)(i) of the Pension Funds Act. Interdependence does not suffice to bring a person within the definition of “dependant” under the section. Factual dependence occurs when a person is dependent on financial support, while mutual interdependence is where people pool their financial resources. *Hlathi v University of Fort Hare Retirement Fund and Others* 2009 1 BPLR 37 (PFA) reversed the *Van der Merwe* determination and found that mutual dependence is enough for considering a person a dependant under s 37C of the Pension Funds Act. See also Hanekom *Manual* at 185-207 for the general meaning of a “dependant”. See Chapter 3, par 2.2.1.1 for the definition of a “dependant” in terms of s 1 of the Pension Funds Act.

<sup>133</sup> See *Volks NO v Robinson and Others* 2005 5 BCLR 446 (CC) par 175, n 171, stating: “The following is an incomplete overview of the statutes indicating the legislator’s acknowledgment of domestic partnerships: ...

The Pensions Fund Act 24 of 1956. Although s 1 (as amended by s 6 of the Pensions Fund Amendment Act 22 of 1996) does not expressly define a domestic life partner as a “dependant” in relation to a member, it does make provision for persons who are factually (but not legally) dependent on the member for maintenance. It may as a result be inferred that a person whose life partner was a member of the fund may be included as a dependant for the purpose of the Act.” In 2007, s 1(t) of the Pension Funds Amendment Act 11 of 2007 inserted a definition of “spouse” into s 1 of the Pension Funds Act and it now includes a permanent life partner of the fund member. See Chapter 3, n 145, where the full definition of a spouse is provided.

<sup>134</sup> See Chapter 3, par 2.2.1, where the definition of a dependant as well as the allocation of death benefits to dependants are discussed.

recipient must be a dependant of the deceased fund member or at least someone whom the member nominated as one of the beneficiaries in the beneficiary nomination form.<sup>135</sup> Pension fund trustees exercise their discretion in allocating the death benefit to the beneficiaries. This discretion is still limited to the persons stated in the definition of a “beneficiary” in section 1 of the Pension Funds Act.<sup>136</sup>

#### 8.5 *Pension fund board members (trustees)*

The Pension Funds Act does not define a “pension fund trustee”. Instead, the Act names the pension fund trustees as members of the board or the persons managing the fund’s business. In this thesis, the term “pension fund trustees” refers to pension fund board members. Trustees of pension funds are called by various names in the different countries surveyed in the thesis: so, for example, in the United Kingdom, they are called pension scheme or plan trustees.<sup>137</sup> In Germany, there are no pension fund trustees as such, and the pension funds are managed in the two-tier corporate system by pension fund management boards advised by supervisory boards.<sup>138</sup> In all three countries surveyed, members of retirement fund boards (irrespective of whether they are called trustees or members of the management board) are tasked with overseeing the management and running of retirement funds.

## 9 REFERENCE TECHNIQUES

A complete table of contents appears at the beginning of the thesis. The relevant part of this table of contents is repeated at the beginning of each chapter for easy reference. Also at the beginning of the thesis there is a list of abbreviations and translations for the convenience of readers travelling through several jurisdictions.

Names of cases are accompanied by full references. Books, articles, and theses are given short reference forms, which appear with the full references in the

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<sup>135</sup> A nominated beneficiary is a person who is nominated by the pension fund member as a beneficiary or one of the beneficiaries to be considered by pension fund trustees in the distribution of the death benefit. A nominated beneficiary is often referred to as a nominee in s 37C of the Pension Funds Act as well as in this thesis. Yet a nominee is not defined in the Pension Funds Act, although the nomination must be in writing and is commonly reflected on the nomination of beneficiary form completed by the deceased fund member. See Chapter 3, par 2.1.1 for a discussion of a nomination form.

<sup>136</sup> See Chapter 3, par 3 for a discussion of pension fund trustees’ discretionary powers.

<sup>137</sup> See Chapter 4, par 4.2.4 for a discussion of pension fund trustees in the United Kingdom.

<sup>138</sup> See Chapter 5, par 5.2 for a discussion of pension fund management boards in Germany.

Bibliography at the end of the thesis. In the footnotes, the abbreviation “par” is used for “paragraph”, “n” for “footnote”, and “s” for “section”. If the source of an article, case, or report was the internet, the website and the date on which it was last accessed are given in a footnote.

The law is stated as it was on 30 June 2021.

## **10 CONCLUSION**

This introductory chapter laid the foundation for the thesis. It introduced the research questions,<sup>139</sup> purpose, and justification of the thesis,<sup>140</sup> the key role of occupational retirement funds in the South African social and economic contexts,<sup>141</sup> and the objectives behind establishing occupational retirement funds.<sup>142</sup> The research methodology was described and justified,<sup>143</sup> and essential terms were defined.<sup>144</sup> The structure and delimitations of the thesis were provided.<sup>145</sup>

Chapter 1 linked the thesis to the title. The next chapter describes the historical development and types of occupational retirement funds and other factors influencing the distribution of death benefits in South Africa.

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<sup>139</sup> See par 3 above in this regard.

<sup>140</sup> See par 4 above in this regard.

<sup>141</sup> See par 2 above in this regard.

<sup>142</sup> See par 2.4 above in this regard.

<sup>143</sup> See par 6 above in this regard.

<sup>144</sup> See par 8 above in this regard.

<sup>145</sup> See par 7 above in this regard.

**CHAPTER 2**  
**AN OVERVIEW OF OCCUPATIONAL RETIREMENT FUNDS IN SOUTH AFRICA**

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- 1 INTRODUCTION**
  - 2 A HISTORICAL OVERVIEW OF AND PHILOSOPHICAL JUSTIFICATION FOR THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS**
  - 3 THE TYPES OF OCCUPATIONAL RETIREMENT FUNDS IN SOUTH AFRICA**
  - 4 THE LEGAL STATUS OR CHARACTERISTICS OF OCCUPATIONAL RETIREMENT FUNDS IN SOUTH AFRICA**
  - 5 THE NOTION OF “SOCIAL SECURITY” IN THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN SOUTH AFRICA**
  - 6 THE ROLE-PLAYERS AND STAKEHOLDERS IN THE DISTRIBUTION OF DEATH BENEFITS**
  - 7 THE REGULATORY AND LEGISLATIVE FRAMEWORKS FOR DISTRIBUTING RETIREMENT FUND DEATH BENEFITS**
  - 8 CONCLUSION**
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**1 INTRODUCTION**

The importance of occupational retirement funds and the objectives of their establishment were highlighted in Chapter 1. Before the efficiency of the current legal provisions on distributing retirement fund death benefits is analysed,<sup>1</sup> it is important to state various issues directly or indirectly affecting the realisation not

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<sup>1</sup> The provisions that currently apply in the distribution of death benefits are those in s 37C of the Pension Funds Act.

only of the objectives for retirement fund establishment but also of the provisions of section 37C of the Pension Funds Act.<sup>2</sup>

The discussion in this chapter is divided into eight parts. The first is this introduction. The second entails a brief historical overview explaining the origin of occupational retirement funds and the distribution of retirement fund death benefits (hence “the death benefits”) in South Africa.<sup>3</sup> This part highlights the social and historical factors that make South Africa unique as far as the provision of income at retirement and the distribution of the death benefits are concerned.<sup>4</sup> Some of these factors may also be seen as challenges that South Africa and the pension fund boards (hence “the board” or “pension fund trustees” or “the trustees”) face in improving the efficient distribution of death benefits under the State’s objectives on the establishment of retirement funds.<sup>5</sup> The third part describes various types of occupational retirement funds in South Africa, particularly those registered under the Pension Funds Act.<sup>6</sup> The fourth part deals with the legal status of occupational retirement funds in South Africa and its impact on the distribution of the death benefits,<sup>7</sup> the fifth part deals with the concept of social security in that distribution,<sup>8</sup> and the sixth part deals with the key role-players pivotal to that distribution.<sup>9</sup> Pension fund boards are one of these key role-players. The seventh part deals with the regulatory and legislative frameworks for distributing the death benefits;<sup>10</sup> and the concluding remarks appear in the last (eighth) part.<sup>11</sup>

The discussion in parts 6 and 7 focuses first on whether the South African laws, institutions, and offices such as the Financial Services Conduct Authority (FSCA)

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<sup>2</sup> Pension fund trustees’ discretionary powers in distributing the death benefits should be considered against the background of South Africa’s broader social, economic, and legal contexts. Pension funds exist within a governance framework set by laws, regulations, codes, and pension fund rules.

<sup>3</sup> See par 2 below.

<sup>4</sup> See par 2.3 below.

<sup>5</sup> These issues play a role in the efficient distribution of death benefits as well as determining a suitable mode for their distribution.

<sup>6</sup> See par 3 below.

<sup>7</sup> See par 4 below.

<sup>8</sup> See par 5 below.

<sup>9</sup> See par 6 below.

<sup>10</sup> See par 7 below.

<sup>11</sup> See par 8 below.



adequately protect the rights of members and beneficiaries. Secondly, the discussion also focuses on whether these systems (South African laws, institutions, and offices) ensure that the process by which boards distribute death benefits is fair, transparent, and justifiable under the State's objectives when establishing retirement funds.<sup>12</sup>

## **2 A HISTORICAL OVERVIEW OF AND PHILOSOPHICAL JUSTIFICATION FOR THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS**

### *2.1 The diminishing role of the traditional family support structure*

Both State social pensions (older person's grants) and occupational retirement funds are recent phenomena, and their establishment globally is associated mainly with the development of industry.<sup>13</sup> Before industrialisation, the extended family supported individuals throughout the life cycle, with several generations living in one house — grandparents, parents and children, aunts and uncles.<sup>14</sup> The older members helped the younger ones as long as possible and received help in meeting their basic needs. In the case of a family member's disability (mental or physical incapacity) or death, other family members looked after the social needs of that member's dependants.

Particularly in cities, though, this intergenerational living pattern and family support system have vanished. Responsibility for the aged, people with disabilities, and destitute dependants has shifted from the family to society, the State, employers, and former employers. Individuals are expected to plan for their retirement and other life contingencies such as death and disability. The collapse of these traditional support systems for old age highlights the need to introduce and strengthen the formal channels providing income to employees at retirement or to their dependants if the fund member dies while still in service. So the introduction of retirement funds

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<sup>12</sup> The Financial Sector Regulation Act 9 of 2017 ("FSRA") was promulgated in 2017 (*Government Gazette* ("GG") 41060 of 22 August 2017). This Act became effective on 1 April 2018. It establishes, among other things, the FSCA to replace the Financial Services Board ("FSB"). A broad overview of the structure of the FSRA is provided in Schulze 2016 ASSAL 379-394. A reference in this thesis to the Registrar or the FSB must be read as a reference to the Authority.

<sup>13</sup> Kodar *Corporate Law* at 32.

<sup>14</sup> At 32. See also in this regard Manamela *System* at 127-129 and authorities cited there for a brief discussion of the kinship system.

sought to address the changes flowing from the diminishing role of the traditional family support structure.

## 2.2 *The origin of occupational retirement funds in South Africa*

The history of South African occupational pensions begins in the nineteenth century, and their function has since changed. In 1837 the British Government paid out the first form of pension to some members of their military forces based in South Africa at the time.<sup>15</sup> This payout was followed by the establishment of a fund for the wounded, widows, and orphans of the First Boer War in 1882.<sup>16</sup> The main aim of this fund was to provide soldiers wounded in the First Boer War with an income, but it also provided income to the widows and orphans of soldiers who died in that war.<sup>17</sup> These pensions were paid to people and their dependants who had employment relationships with the British Military Forces or were soldiers in the Boer War. The pensions were created to show appreciation to employees for their commitment, loyalty, and long service to their employers.<sup>18</sup> The employer had the sole discretion regarding the beneficiary of this pension benefit. This benefit was believed to encourage employees' loyalty to their employers, who also used the fund to attract and retain better-skilled employees.<sup>19</sup> It should be emphasised that the main

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<sup>15</sup> See Mbatha *Implementation* at 13. See also George *Analysis* at 3. See also Human Awareness Programme "State Pension Scheme and Private Pension Funds – How They Affect Black People in South Africa" in *Second Carnegie Inquiry into Poverty and Development in South Africa* Carnegie Conference Paper No. 138 Cape Town 13–19 April 1984 volume 14 (SALDRU, School of Economics, University of Cape Town Rondebosch 1984) at 1 and 2, stating that "the first pensions were introduced in 1837 for retired field-cornets in the Cape Colony. In 1882, the Transvaal Republic established a pension fund, administered by the Master of the Supreme Court. Contributions received from a number of countries during the first war of independence (1880–81) were used to support widows and orphans".

<sup>16</sup> Mbatha *Implementation* at 13. The First Boer War (1880–1881) is also known as the First Anglo–Boer War, the Transvaal War, the Transvaal Rebellion, or the First Transvaal War of Independence: it is the conflict referred to in the quotation in n 15 above.

<sup>17</sup> Private employment pensions were not the only type of pension that developed in the 19th century, as the State began various social pensions. The recipients of these benefits did not have to contribute to qualify for these social pensions. See Chapter 1, par 2.1 for a discussion on the State's older person's grants.

<sup>18</sup> George *Analysis* at 4, referring to Petersen *Optimising*, who suggests that "the pension fund has traditionally been seen as a benefit for 'good and faithful' employees, to enable them to enjoy their retirement or to provide for their dependants in the event of premature death or disablement. The pension fund provides financial support to allow the employer to discharge his moral obligation to employees or their dependants".

<sup>19</sup> George *Analysis* at 4, referring to Ponting *Responsibility*, stating that "in addition to helping employers cope with the problem of their older staff retiring, a retirement fund also enables them to offer benefits that will attract and keep the staff they need in their organisation. This explains why defined benefit funds were geared towards providing benefits for employees who stay with

difference between these early pensions and the modern pensions in the form of occupational retirement funds is that the sponsoring employer no longer exercises a discretion regarding the beneficiary of the pension benefit. This duty is now in the hands of the pension fund boards.<sup>20</sup>

Governmental regulation of pension funds grew apace in the twentieth century. At first, private sector occupational pension funds were not regulated in South Africa. Funds established in South Africa before 1956 mainly took the form of trusts, and many of these funds still have trusts deeds held by the Master of the High Court.<sup>21</sup> In the 1920s, the South African Government began recognising and supervising occupational retirement funds.<sup>22</sup> In 1956, the Government enacted the current Pension Funds Act, which came into effect on 1 January 1958. A good reason for formalising the retirement fund industry through legislation was that a form of protection was needed for the fund members who had paid contributions to their employer in the expectation of receiving benefits on retirement<sup>23</sup> or providing financial security to their dependants and nominated beneficiaries should the fund member die while still in service. So this Act became the first statute to regulate private pension funds in South Africa. It is still the principal statute governing the distribution of private sector occupational retirement benefits in South Africa by funds registered under its provisions.<sup>24</sup> It should be noted, though, that numerous occupational funds are regulated under other statutes rather than the Pension Funds Act, and that the discussion of these occupational funds falls beyond the scope of this thesis.<sup>25</sup>

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the company until they retire. Employees lost a substantial amount of their expected retirement benefits when they resigned or were retrenched before retirement”.

<sup>20</sup> In *Yskor Bpk v Meyer* 1995 16 ILJ 864 (LAC), the Labour Appeal Court recognised the independence of a pension fund from the employer.

<sup>21</sup> See Hunter R *et al Pension Funds Act* at 163 and n 16, stating that “many trust law principles cannot properly be applied to the relationship between boards and members of funds because trusts and retirement funds are fundamentally different. Trusts are not legal persons”.

<sup>22</sup> See Hanekom *Manual* at 3.

<sup>23</sup> See Downie *Essentials* at 6.

<sup>24</sup> *Registrar of Pension Funds and Another v Angus NO and Others* 2007 5 SA 1 (SCA) in par 43.

<sup>25</sup> See George *Analysis* at 17, stating that there are many occupational funds, other than funds established in terms of industrial agreements, to which the Pension Funds Act does not apply because of s 4 of the Pension Funds Act. These funds represent much of the pension funds industry which is not subject to regulatory oversight by the Registrar (now the FSCA). They include: The Government Employees Pension Fund maintained in terms of the Government Employees Pension Law 21 of 1996; The Temporary Employees Pension Fund established in

Returning to the Pension Funds Act, we note that when promulgated in 1956, it did not initially regulate the distribution of death benefits. The benefit payable on the fund member's death was paid to the member's deceased estate to devolve under the member's will or the rules of intestate succession.<sup>26</sup> So if the member died testate, the death benefits were distributed under the will, and there was no consideration of dependency in order to achieve a social objective. And if the fund

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terms of the Temporary Employees Pension Fund Act 75 of 1979; The Associated Institutions Pension Fund established in terms of the Associated Institutions Pension Fund Act 41 of 1963; The Associated Institutions Provident Fund established in terms of the Associated Institutions Provident Fund Act 11 of 1971; The Members of Statutory Bodies Pension Scheme established in terms of the Members of Statutory Bodies Pension Act 94 of 1969; The Members of Parliament and Political Office-Bearers Pension Scheme established in terms of the Members of Parliament and Political Office-Bearers Pension Scheme Act 112 of 1984; The Closed Pensions Fund, established in terms of the Closed Pension Fund Act 197 of 1994; The South African Public Library Provident Fund established in terms of the South African Public Library (Pensions and Provident Fund) Act 9 of 1924; The Transport Pension Fund, the Transnet Retirement Fund and the Transnet Second Defined Benefit Fund established in terms of the Transnet Pension Fund Act 62 of 1990; The Post Office Pension Fund (formerly the Postal Pension Fund) established in terms of the Post Office Act 44 of 1958; and The Telkom Pension Fund (formerly Telecommunications Pension Fund) established in terms of the Post Office Act, 1958. See National Treasury *2013 Retirement Reform Proposals for Further Consultation* at 3, stating that "a process is currently underway to bring public pension funds currently not governed under the Pension Funds Act, including the Government Employees Pension Fund (GEPF), Transnet, Telkom and Post Office retirement funds, into the purview of the Act". As of June 2021, there has not yet been any notable progress on this proposal, except for the Conduct of Financial Institutions Bill Second Draft (hence the "COFI Bill"), published for public comment in Notice 519 GG 43741 of 29 September 2020. The COFI Bill Second Draft is available at [http://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20\(version%20published%20for%20comment\)%20\(slightly%20updated\).pdf](http://www.treasury.gov.za/public%20comments/2020%2010%2008%20CoFI%20Bill%20(version%20published%20for%20comment)%20(slightly%20updated).pdf) (last accessed on 21 July 2021). Section 75 of the Bill deals with transitional arrangements for public sector retirement funds. Section 75 states that, upon promulgation of the Conduct of Financial Institutions Act, the public sector funds such as the GEPF will now have to be licensed under the Retirement Funds Act and the Conduct of Financial Institutions Act and that the same principles and requirements applicable to private sector funds will also apply to public sector funds. The title of the Pension Funds Act 24 of 1956 is to change to the Retirement Funds Act 24 of 1956 upon the promulgation of the COFI Bill: this will be in line with the proposed consequential amendment in item 49 of Schedule 5 to the COFI Bill.

<sup>26</sup> See also in this regard David M "Onus on Pension Trustees to Act Fairly" (*Norton Rose Fulbright*, 11 November 2013) available at <http://www.nortonrosefulbright.com/knowledge/publications/109346/onus-on-pension-trustees-to-act-fairly-michelle-david> (last accessed on 30 June 2020). The original version of s 37C as introduced in 1976 did not provide for payment of death benefits to "nominated beneficiaries" but referred *only to dependants*. It was further substituted by s 13 of the Financial Institutions Amendment Act 80 of 1978, s 41 of the Financial Institutions Amendment Act 99 of 1980; and amended by s 6 of the Financial Institutions Amendment Act 51 of 1988, s 21 of the Financial Institutions Second Amendment Act 54 of 1989, s 29 of the Financial Institutions Amendment Act 83 of 1992; s 28 of the Financial Institutions Second Amendment Act 104 of 1993; s 5(a), (b), and (c) of the Pension Funds Amendment Act 22 of 1996; s 27(a), and (b) of the Pension Funds Amendment Act 11 of 2007; and s 51 of the Financial Services Laws General Amendment Act 45 of 2013. One of the objectives of these statutes was to amend the provisions of the Pension Funds Act of 1956 (s 37C) that apply to the disposition benefits upon the death of a member of a pension fund.

member died intestate, his or her death benefits were paid to the deceased estate for distribution to identified heirs under the common law.<sup>27</sup>

The statutory changes regulating the distribution of death benefits began in section 37C of the Act, introduced by section 24 of the Financial Institutions Amendment Act 101 of 1976. Section 37C removed the fund member's freedom of testation and the application of the common law of intestate succession when the member dies while still in service.<sup>28</sup> Instead, section 37C confers the powers and discretion on the pension fund board to distribute the fund member's death benefits. The common law of succession then has only limited application to the board's discretion to distribute death benefits. Nor does the common law apply when specifically excluded by statutory provisions such as section 37C of the Pension Funds Act or when its application contravenes the Constitution.<sup>29</sup> This outcome does not mean that the common law is irrelevant to the distribution of death benefits.<sup>30</sup> But pension fund board members (hence the "board members" or "pension fund trustees" or "the trustees") must comply with various duties, including their fiduciary obligations and the duties of care and skill which may arise either at common law or by statute.<sup>31</sup>

The State's approach to the distribution of death benefits in South Africa has developed. The Pension Funds Act, including section 37C, has thus been amended *ad hoc* several times.<sup>32</sup> These amendments can be interpreted as a sign that the State is still not satisfied with the efficiency and adequacy of section 37C in regulating the distribution of death benefits. Besides the amendments of the section, several commissions, a consultative forum, and a committee were also established to investigate the intricacies of retirement funding and make recommendations to

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<sup>27</sup> The Intestate Succession Act 81 of 1987 was passed on 30 September 1987 and commenced on 18 March 1988.

<sup>28</sup> See Chapter 3, par 2.1 for a discussion about removing the fund member's freedom of testation.

<sup>29</sup> Section 39(3) of the Constitution states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law, or legislation, to the extent that they are consistent with the Bill.

<sup>30</sup> See s 39(2) of the Constitution which states that when interpreting any legislation, and when developing the common law or customary law, every court, tribunal, or forum must promote the spirit, purport, and objects of the Bill of Rights.

<sup>31</sup> See Chapter 3, par 5 for a discussion on pension fund boards' duties.

<sup>32</sup> The most recent amendments are the Financial Services Laws General Amendment Act 22 of 2008 and the Financial Services Laws General Amendment Act 45 of 2013. See also Chapter 6, par 5.16, where the amendments to s 37C of the Pension Funds Act suggested by the COFI Bill Second Draft are discussed.

improve the regulation of retirement funding in South Africa. These commissions included the Mouton Commission (1992),<sup>33</sup> the Katz Commission (1995), the Smith Commission (1995), the National Retirement Consultative Forum (1997), and the Taylor Committee (2002).<sup>34</sup> In addition, various discussion and research papers have been published by the Government through the Treasury and the Department of Social Services since 2004 to reform the retirement industry.<sup>35</sup> It is submitted that despite the appointment of numerous commissions on retirement fund matters, the amendments to the Pension Funds Act, and the introduction of various retirement

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<sup>33</sup> See Mouton Committee *Report* at 2, stating that the mandate of the Committee was “to review the effectiveness of the retirement provision systems in South Africa and propose guidelines for any changes that are deemed necessary to move towards the goal of providing all South Africans with adequate incomes in their old age”.

<sup>34</sup> See the National Treasury *Retirement Fund Reform 2004* at 5. See the Committee of Inquiry into a Comprehensive System of Social Security for South Africa *Transforming the Present – Protecting the Future: Consolidated Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa* (The Committee of Inquiry into a Comprehensive System of Social Security for South Africa Pretoria 2002) available at <https://www.cdhaarmann.com/resources/publications/Taylor-report.pdf> (last accessed on 21 July 2021) (hence the “*Taylor Report*”). See the *Taylor Report* at 95 in par 9.2.2.3 under “Allocation benefits to dependants”, stating that “the process of allocating benefits to dependants on death and divorce is problematic from the point of view of efficiency and equity”. The Taylor Committee recommended that the matter should be given a high priority by the FSB. The Committee at 95 in par 9.2.2.4 under “Fiduciary duties” stated that “[t]he fiduciary duties of trustees and directors of insurance corporations require ongoing monitoring. Conflicts of interest arise frequently in the choice of service providers, of investments and in the allocation of benefits”. The Committee recommended that the FSB include in its annual report the steps that it took to ensure that higher standards are met. See also *Taylor Report* at 98 in par 9.2.7 under “Missing beneficiaries”, stating that “[i]t appears that a large proportion of retirement and life assurance benefits are not claimed”. The Taylor Committee recommended that the FSB co-ordinate a national initiative to find the missing beneficiaries. See Chapter 3, par 2.2.10, where the non-payment of benefits (unclaimed benefits) is discussed.

<sup>35</sup> The South African Institute of Race Relations *Race Relations Survey 1987/88* at 689-690 stated the following on the Meiring Report: “The report of the joint committee on pension benefits appointed in 1986 under Mr J Meiring ... was published in February. Its brief was to inquire into the satisfactory provision of pension benefits, the transferability of pensions and the commutation of a part of lump-sum benefits into annuities. In 1978 the interdepartmental committee of inquiry into specific matters (the Louw Committee) had investigated similar problems and its findings had been published in March 1980, but, owing to industrial unrest, some of the report’s recommendations, specifically those on the freezing of pension payouts, had not been implemented.” The report commented on, among other things, the following issues: the western models for pension provision were not necessarily the most appropriate; the status of the social and family lives of the community was changing; the country had a large third-world population which had its own needs as far as pensions were concerned; and there was a need to promote job creation and lessen the current level of unemployment. The report set out six principles as being appropriate for a pension system in South Africa, including the encouragement of private sector employers to set up occupational pension funds for their employees; the encouragement of individuals and employers to assume responsibility by making advance provision; and the creation of an environment that encouraged individuals to be self-reliant. The report placed the onus on the private sector to ensure adequate social welfare, and its suggestions and recommendations were considered to offer a chance to demonstrate that the principles of free enterprise could work in the public interest.

reform and discussion papers since 2004, the efficiency and adequacy of trustees' distributing death benefits still seems to be doubted.<sup>36</sup>

### 2.3 *The South African socio-political history, demographics, and culture*

History, demographics,<sup>37</sup> and culture all shape how a country structures legislation and responds to challenges in providing income for its ageing population and destitute dependants.<sup>38</sup> The shaping process includes formulating policies and laws on establishing, regulating, and supervising retirement funds and on the mode of paying their benefits at retirement or on the member's death while still in service.<sup>39</sup> Some distinctively South African aspects of providing income at retirement and distributing death benefits when a member dies while in service are now discussed.

First, South Africa is characterised by high rates of unemployment,<sup>40</sup> poverty,<sup>41</sup> low salaries,<sup>42</sup> and informal and temporary workers.<sup>43</sup> This combination makes it difficult

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<sup>36</sup> This submission is borne out by the high number of disputes before the Pension Funds Adjudicator and the courts, in relation to the distribution of death benefits. See Chapter 1, n 11 for statistics and n 83, where the Adjudicator called for the revision of s 37C of the Pension Funds Act.

<sup>37</sup> Demographics directly affect pension systems via the potential number of contributors and pensioners. See in this regard Pallares-Miralles, Romero and Whitehouse *International Patterns* at 13.

<sup>38</sup> See Lomax *Comparative Pension* at 8, stating that the history and culture of "the welfare state ethos used to describe each nation will continue to shape baseline opinions of each nation's pension structure, as well as affect the future policy direction of that nation". See also *Pickering Report* at 47, stating that "around the world, pension systems are the product of local culture. It is, therefore, not sensible to suggest the wholesale transfer of one country's pension system to another. However, there are lessons that we can usefully learn by observing the ways in which other countries meet contemporary pension challenges".

<sup>39</sup> See Chang *Risk Management* at 27, stating that the provision of retirement income "is not likely to be the same for all countries, nor at all times for any given country, because the particular features of a multipillar system should be a function of a country's social objectives and history, its emphasis on poverty reduction versus savings, and the current level of its economic development".

<sup>40</sup> The economy has not created many jobs in the past years but is shedding jobs instead. As a result, many people in South Africa are unemployed. See *The Times* "Unemployment at its Worst" (10 May 2016) at 1, reporting that unemployment had hit its highest at 26.7 per cent in terms of statistics provided by Stats SA. In 2019, the unemployment rate in South Africa was 29 per cent. See in this regard Chapter 5, n 24. This rate contrasts with the employment rate of the United Kingdom (at 75.6 per cent) and the unemployment rate of Germany (at 3 per cent) which form part of the comparative study in this thesis. See Chapter 4, par 2.3, n 126 for the unemployment rate in the United Kingdom and Chapter 5 par 1, n 24 for that of Germany.

<sup>41</sup> The poor are not overly concerned with saving for retirement, but with ensuring that there is food on the table.

<sup>42</sup> Low-income earners are more concerned about survival and current consumption needs; as a result, a system forcing these people to forgo current needs for a future that they are least likely to reach is unreasonable. See in this regard Somaguda-Nogantshi *Retirement Reform* at 57.

<sup>43</sup> South Africa faces many challenges that are not limited to retirement fund matters but are based

for much of the population to participate meaningfully in occupational retirement funds: they cannot raise enough money to join these funds.<sup>44</sup> As a result, when they reach retirement age, many have no income (except the State's older person's grant), as they did not belong to a retirement fund or have private savings.<sup>45</sup> And as they did not belong to a retirement fund, no retirement fund death benefit is payable to their surviving dependants and beneficiaries.

Massive unemployment is a major challenge for South Africa's policymakers because sustainable retirement funding requires that people should be employed.<sup>46</sup> For the State to use occupational retirement funds to alleviate poverty among the elderly and the destitute dependants, it is necessary to increase the number of people or workers participating in occupational retirement funds. This need compels the State to respond to the problem of unemployment through policy reforms and long-term planning.<sup>47</sup> As long as unemployment remains high, private sector occupational retirement funds cannot be the sole or main tool used to reduce poverty and the population's over-reliance on social grants in South Africa. The State should employ other strategies, including policies encouraging job creation. Creating jobs will both directly and indirectly increase the number of participants in

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on other factors as well. There is ignorance and lack of understanding of the provisions of s 37C of the Pension Funds Act by some board members, dependants, nominated beneficiaries, and fund members, as well as unscrupulous and incompetent acts by some pension fund board members. See also in this regard Chapter 1, n 87.

<sup>44</sup> In 2008 already, Sanlam Employee Benefits *Annual Survey of Retirement Benefits in South Africa* (2009) at 5 stated that "given the South African context where working life is short and choppy, [pension] contributions are predominantly inadequate and infrequent, dependency ratios are high, the majority of workers are in the low income bracket and the prevalence of premature withdrawals from the system are high, it is clear that our accumulation will fare poorly, relative to other economies". It is submitted that these challenges are still prevalent in 2021.

<sup>45</sup> See National Treasury *Retirement Fund Reform 2004* at 56, confirming: "Though there is wide coverage in South Africa of those in employment, by international comparison, many people lack effective access to an affordable retirement funding vehicle. This relates to the structure of the economy — South Africa has a high rate of unemployment, a large informal sector, and many working-age individuals who have periods of unemployment scattered throughout their working lives."

<sup>46</sup> National Treasury *Social Security and Retirement Reform 2007* in par 50 identified high levels of unemployment and the legacy of inequality as two features that stand out in South Africa and that must be accommodated in the structure of the retirement system.

<sup>47</sup> Clearly, there will be a significant reduction in poverty rates among the elderly and among destitute dependants in South Africa if many South Africans become members of retirement funds.



occupational retirement funds.<sup>48</sup> It is submitted that dependants and nominated beneficiaries who are financially independent are less likely to fight desperately for a share of a death benefit if the fund member dies while still in service.

Secondly, the State provides both employers and employees with tax incentives to use retirement funds to save for retirement or other life contingencies. Contributions to qualifying retirement funds provide employees with tax advantages because their contributions are expenses deductible against taxable income under the Income Tax Act 58 of 1962.<sup>49</sup> But the tax benefit does not accrue to unemployed people or those who earn meagre salaries, since they fall below the minimum tax thresholds and do not pay income tax.<sup>50</sup> So this category of employees cannot be expected to be enthusiastic about participating in retirement funds as members:<sup>51</sup> they may join only when they earn enough to cross the minimum tax threshold.

Thirdly, because of South Africa's political history, particularly the apartheid policies, many people never had educational opportunities, a continuing lack which makes securing formal employment very difficult.<sup>52</sup> This apartheid policy also compromised the potential of millions to participate in retirement funds and secure income for retirement and other life contingencies.

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<sup>48</sup> South Africa has a functioning private sector retirement system; the challenge to the State is to include a large number of the population as participants or members in private sector retirement funds.

<sup>49</sup> See s 11(l) of the Income Tax Act 58 of 1962 dealing with deductions allowed in determining taxable income from contributions by an employer for the benefit of his or her employees to any pension fund, provident fund, or benefit fund.

<sup>50</sup> Taxpayers whose total employment income or salary per year (March 2019 to February 2020) was less than R500 000 may elect not to submit an income tax return if they comply with certain stated requirements. See in this regard "Personal Income Tax" (*South African Revenue Service*, no date) available at <https://www.sars.gov.za/types-of-tax/personal-income-tax/> (last visited on 30 September 2020).

<sup>51</sup> See National Treasury *2013 Retirement Reform Proposals for Further Consultation* (2013) at 3, stating: "Government is exploring ways to increase retirement fund coverage to all workers". It notes: "This is a complex issue, given the large proportion of uncovered workers who earn below the tax threshold, who work for small employers, or who have a tenuous connection to the formal labour force, for instance because they work in construction or domestic service". As of June 2021, there has been no notable progress on this proposal.

<sup>52</sup> See Somaguda-Nogantshi *Retirement Reform* at 104, stating that "South Africa is considered to have a thriving private pension sector that is ineffective in addressing all population groups of South Africa. This sentiment is borne out of the legacy of the country, apartheid, which has resulted in a vast number of unskilled and unemployable South Africans". See also the preamble to the Consumer Protection Act 68 of 2008 recognising that the apartheid and discriminatory laws of the past have burdened the nation with unacceptably high levels of poverty, illiteracy, and other forms of social and economic inequality.

Fourthly, the challenge facing European countries about their ageing populations contrasts starkly with the one that South Africa faces because of the HIV/Aids pandemic.<sup>53</sup> In Europe, the problem of ageing populations calls the viability of social state pensions into question and raises doubts about their sustainability.<sup>54</sup> The challenges confronting South Africa differ in that an ageing population is only one of several substantial challenges.<sup>55</sup> The average lifespan in South Africa is below 65 years,<sup>56</sup> relatively low compared with the average lifespan of Europeans.<sup>57</sup> So the

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<sup>53</sup> The HIV/Aids pandemic is wreaking havoc on the workplace and communities in South Africa. It affects everyone, including employees and members of retirement funds. It also has an impact on the distribution of retirement fund death benefits. The disease contributes to many disabilities among retirement fund members; they are retiring early and dying young. This outcome reduces the number of members taking part in retirement funds and increases the need for paying out disability and death benefits. The disease exacerbates poverty as many dependants are left without breadwinners. See in this regard Avert, Global information and education on HIV and AIDS “HIV and AIDS in South Africa” available at <https://www.avert.org/professionals/hiv-around-world/sub-saharan-africa/south-africa> (last accessed 30 September 2020), stating that as of 2018, South Africa had the biggest HIV epidemic in the world with 7.7 million people living with HIV; about 20 per cent (20.4) of adult HIV prevalence was between the ages of 15 and 49 years; and there had been 71 000 AIDS-related deaths. See also UNAIDS “AIDSinfo” available at <http://aidsinfo.unaids.org/> (accessed on 30 September 2020). More than 2 million children in South Africa have been orphaned by HIV and AIDS (see the UNICEF *Biennial Report: South Africa 2014-2015* at <https://www.unicef.org/southafrica/media/666/file/ZAF-biennial-report2014-15.pdf> (last accessed on 21 July 2021).

<sup>54</sup> See Pallares-Miralles, Romero and Whitehouse *International Patterns* at 16 (Table 2: Distribution of the old by regions), showing Sub-Saharan Africa with the lowest current life expectancy among regions; the highest life expectancy is found in high-income OECD countries, followed by Latin America and the Caribbean, and East Asia and Pacific; and stating (at 16) that the population over 65 years represents less than 5 per cent of the population in the Middle East and North Africa, South Asia and Sub-Saharan Africa and 7 per cent in East Asia and Latin America.

<sup>55</sup> One of the challenges in South Africa is the increasing number of social pension and grant recipients. See in this regard Chapter 1, n 26, where the numbers of social grant recipients in South Africa, including recipients of the older person’s grant, are stated. Considering that social grants are funded from money that the Government collects as taxes, the increasing number of social grants requires that the Government must have other means to sustain the payment of grants. This is because only about one-third of the South African population comprises individuals registered for payment of income tax with SARS. There were only 21 million individuals registered with SARS for payment of income tax as of 31 March 2018. See in this regard National Treasury and the South African Revenue Service *2018 Tax Statistics – Highlights* available at <https://www.sars.gov.za/wp-content/uploads/Docs/TaxStats/2018/Tax-Statistics-2018-Highlights-booklet.pdf> (last accessed on 19 July 2021).

<sup>56</sup> According to the South African Medical Council’s Burden of Disease Research Unit *Rapid Mortality Surveillance Report 2017* (January 2019) at 13 and 29, South Africa’s life expectancy escalated to about 64 years (64.2) in 2017 (<http://www.samrc.ac.za/sites/default/files/files/2019-02-06/RapidMortalitySurveillanceReport2017.pdf> (last accessed on 30 June 2020)). As of June 2020, life expectancy at birth in South Africa was 63.6 per cent (males – 60.2% and females – 67.0%). See in this regard “Life Expectancy in South Africa” (*World Life Expectancy*) <https://www.worldlifeexpectancy.com/south-africa-life-expectancy> (last accessed 30 June 2020).

<sup>57</sup> As of June 2020, life expectancy at birth in Germany was 81.0 per cent (males 78.7% and females 83.3%) and in the United Kingdom 81.4 per cent (males 79.7% and females 83.2%). See in this regard “Life Expectancy in Germany” (*World Life Expectancy*) available at <https://www.worldlifeexpectancy.com/germany-life-expectancy> (last accessed on 30 June 2020).

average South African does not retire, but dies before reaching retirement age.<sup>58</sup> Most retirement fund members therefore die young, and only their dependants and beneficiaries receive the death benefits from their retirement funds — members are often not the ones receiving retirement benefits on reaching normal retirement age. HIV/Aids and poverty significantly reduce South African life expectancy.<sup>59</sup> Because of this factor, the retirement industry in South Africa is evolving from retirement to risk protection: the efficient distribution of death benefits is crucial. Stakeholders such as retirement funds must therefore ensure that their industry aligns with the changes from retirement to risk protection so that they keep up with their members' needs.

Fifthly, South Africa has a scanty rate of financial literacy.<sup>60</sup> This lack is not just a factor of socio-economic illiteracy,<sup>61</sup> for even some astute individuals have no idea

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2020), and “Life Expectancy in United Kingdom” (*World Life Expectancy*) available at <https://www.worldlifeexpectancy.com/united-kingdom-life-expectancy> (last accessed on 30 June 2020). The United Kingdom and Germany are the two countries selected for the comparative study in this thesis.

<sup>58</sup> In a country as diverse as South Africa, people have short-term needs which are not being met. They do not have enough money for housing, schooling, or even food. For that reason, they cannot be condemned for living in starvation or in a squatter camp, nor can they be expected to pay money taken for an uncertain event such as retirement. See in this regard Somaguda-Nogantshi *Retirement Reform* at 60.

<sup>59</sup> It would be interesting to investigate whether actuaries' projections, which are based on retirement fund members' retiring at the age of between 60 and 65 years and then living for another 15 to 20 years, are still correct and relevant for many members of retirement funds in South Africa. Given the HIV/Aids statistics and low life expectancy, there is a high possibility that a huge part of the workforce will not reach retirement age. Pension fund trustees have a lot to learn about both retirement benefits and risk benefits. See, for example, the Financial Sector Conduct Authority *Annual Report 2018* at 155 in par 16, where the pension fund for FSB permanent employees assumed that its members would retire at the age of 63 (mortality rate) and live for another 17 to 21 years (life expectancy). These projections were used to estimate the mortality rate and life expectancy of pension fund members with regard post-retirement benefit obligations (<https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202018.pdf> on 30 June 2020).

<sup>60</sup> Singh and Sehrawat 2014 *IEEJ* 141 at 142 state that financial literacy “refers to the set of skills and knowledge that allows an individual to make informed and effective decisions with all of their financial resources. The absence of financial literacy can lead to making poor financial decisions that can have [an] adverse impact on the financial health of an individual”.

<sup>61</sup> See *Mohlomi v Minister of Defence* 1996 12 BCLR 1559 (CC) in par 14, where Didcott J, referring to the relationship between poverty and access to justice, described South Africa as “a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial or geographical reasons”.

of how retirement funds work.<sup>62</sup> This problem affects how employees, members of retirement funds, dependants, and nominated beneficiaries perceive retirement funds and how those funds are regulated and the death benefits distributed.<sup>63</sup> It is submitted that improved financial literacy,<sup>64</sup> transparency, and better communication between stakeholders could help to instil trust and confidence in the retirement fund industry.<sup>65</sup>

Sixthly, many women, particularly African women, were not educated and did not have gainful employment in the past. This exclusion also denied them an opportunity to take part as members of occupational retirement funds. As a result, women could not save money for their old age or financially support their dependants should they die young. Cultural practices and beliefs worsened the exclusion of women from taking part in retirement funds, as many women were expected not to have formal employment but to run the household and raise children.<sup>66</sup> Some members of retirement funds remain reluctant to discuss with their partners the possible issues about death benefits and retirement funds in which they take part. This silence makes it difficult for their non-member spouses or partners to know about or trace death benefits that might be payable to them or their children after the death of their fund member partners.<sup>67</sup> Although most of these cultural practices and beliefs have

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<sup>62</sup> Somaguda-Nogantshi *Retirement Reform* at 58.

<sup>63</sup> It is vital to maintain people's confidence in the efficiency of retirement funds through better regulation, good governance, more efficient administration of funds, efficient and fair distribution of death benefits, protection of benefits against creditors and misspending by members and beneficiaries, and effective and less costly mechanisms for enforcing pension rights by members and beneficiaries.

<sup>64</sup> Section 57 of the Financial Sector Regulation Act 9 of 2017 gave the FSCA the mandate, among other things, to promote fair customer treatment by financial institutions, provide financial education and promote financial literacy, and help maintain financial stability.

<sup>65</sup> See Njuguna *Strategies* at 61, stating: "Pension fund members do however fail to grasp facts relating to their pension systems. Many of them have a low interest in the information and the products offered in the retirement industry, which is difficult to understand (Braham 2007: 13; James 2005: 8; Lusardi and Mitchell 2007a). That is why trustees should educate members about both their retirement needs and the systems that they contribute to (Braham 2007). To do so, trustees should also be financially educated".

<sup>66</sup> See generally, the Commission for Financial Literacy and Retirement Income *The Impact of Cultural Factors on Women's Retirement Income* (Financial Education and Research Centre, Massey University Palmerston North 2012), <http://www.cffc.org.nz/assets/Documents/Impact-of-Cultural-Factors-on-Womens-Retirement-Income.pdf> (last accessed on 30 June 2020). Although the study was done in New Zealand, South African women can associate with some of the factors that were identified in the study as impacting on women's retirement income.

<sup>67</sup> See Chapter 3, par 2.2.10 for a discussion of unclaimed death benefits.

ceased, especially in urban areas, their impact is still felt among the current generations.

Seventhly, in South Africa, especially in the rural areas, the concept of retirement funds and the distribution of retirement benefits at death is quite foreign to persons of the older generation and their cultural practices. This generation is accustomed to various laws, indigenous or customary, that apply to the distribution of the estate of a family member who dies leaving dependants.<sup>68</sup> In those cases, the fund members, dependants, and older persons are frustrated when the pension fund board distributes the death benefits under section 37C of the Pension Funds Act in a manner that differs from their cultural practices. For most of these people, it becomes difficult if not impossible to reconcile the distribution of retirement fund death benefits in terms of section 37C with the distribution of the deceased estate in terms of customary laws.<sup>69</sup>

The preceding discussion has considered the political history, unemployment rate, demographics, and cultural practices relating to the provision of income at retirement, and their effect on the efficient distribution of death benefits. These are factors that policymakers and researchers should consider when suggesting improvements to the current statutory provisions on these distributions.<sup>70</sup> In other

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<sup>68</sup> Section 1 of the Recognition of Customary Marriages Act 120 of 1998 defines “customary law” as the customs and usages traditionally observed among the indigenous African people of South Africa and which form part of the culture of those peoples.

<sup>69</sup> See, for example, *Mofana v Mine Employees Pension Fund and Another* 2015 3 BPLR 372 (PFA) at 374, where the Adjudicator had to determine whether the board correctly allocated the death benefit among the deceased’s identified beneficiaries. She found that lawyers representing the complainant conflated the law of succession with the provisions of s 37C of the Pension Funds Act. See also *Masuku v Liberty Provident Fund* 2014 3 BPLR 390 (PFA), where the Adjudicator dealt with a complaint relating to the distribution of death benefits. She found (at 394) that in this case, the complainant’s dissatisfaction with the distribution of the death benefit by the board stemmed from the complainant’s misapprehension of the law that a beneficiary nomination form was equivalent to a will of the deceased which was to be followed in relation to the distribution and allocation of a death benefit. The Adjudicator held that the complainant’s contention was incorrect, as s 37C of the Pension Funds Act is the applicable provision in the distribution of death benefits. See also above, par 2.2, where it was pointed out that s 37C was introduced into the Pension Funds Act only in 1976. See Chapter 3, par 2.1.1, where the beneficiary nomination form is discussed.

<sup>70</sup> *Gran Death* at 36. Countries have diverse cultural, historical, political, economic, and other backgrounds. Tailor-made solutions and policies for each country must thus be developed in line with the uniqueness of the country. Yet the experience of one country may help in finding solutions and avoiding some pitfalls in another country. The solutions of different countries can often be adapted to better suit the circumstances of other countries. See also in this regard Kalula *Foreword* at xi-xii.

words, policymakers and researchers are required to embrace the country's history of apartheid, high levels of unemployment, and massive reliance on social grants.<sup>71</sup> It is submitted that the factors described place a heavy burden on the State and individual taxpayers to alleviate social problems by providing certain state-funded social benefits or grants to the vast majority of the population, including children and older persons living in poverty. The unique challenge in South Africa is to maximise the use of occupational retirement funds as one of the ways to address broader societal needs. It is impossible to ignore the socio-economic circumstances of the fund member and his or her dependants and nominated beneficiaries. These circumstances must be considered by boards exercising their discretion to distribute the death benefits under section 37C of the Pension Funds Act.<sup>72</sup>

#### 2.4 *Theoretical foundations linked to the distribution of retirement fund death benefits*

It is important to provide a brief discussion of theories that relate to the distribution of retirement fund death benefits. Relevant for the purposes of this study is Roscoe Pound's theory of interests.<sup>73</sup> This theory is selected as an example because it touches on the plausible basis upon which section 37C of the Pension Funds Act may have been adopted, which is to promote a greater good in society.

According to Pound, there are three categories of legal interests: individual, public, and social.<sup>74</sup> Individual interests are "claims or demands or desires involved immediately in the individual life and asserted in title of that life".<sup>75</sup> Public interests are "claims or demands or desires involved in life in a politically organized society and asserted in title of that organisation. They are commonly treated as the claims

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<sup>71</sup> See *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 1 SA 604 (CC) in par 1, where the Constitutional Court stated that for many people in this country the payment of social grants by the state provides the only hope of ever living in the material conditions that the Constitution's values of dignity, freedom, and equality promise. About 15 million people depend on the payment of these social grants. They are vulnerable people, living on the margins of affluence in our society.

<sup>72</sup> See Chapter 3, par 3 for a discussion of equitable distribution as well as factors that the pension fund trustees consider when exercising their discretionary powers to distribute death benefits.

<sup>73</sup> Roscoe Pound (1870–1964) was one of the greatest leaders of the sociological school of jurisprudence. He was a Professor and Dean of Harvard Law School (United States of America) from 1916 to 1936. See generally Sayre *Life of Roscoe Pound*.

<sup>74</sup> Pound 1943 *Harv LR* 1 at 1.

<sup>75</sup> Pound 1943 *Harv LR* at 1-2. These categories of legal interests were also discussed in Nalbandian 2011 *Mizan LR* 141 at 142-143. See also Verhelle *Roscoe Pound* at 27-28.

of a politically organized society thought of as a legal entity”.<sup>76</sup> Public interests include the interests of the state as a juristic person and as the guardian of social interests.<sup>77</sup> Social interests are described as “claims or demands or desires involved in social life in civilized society and asserted in title of that life. It is not uncommon to treat them as the claims of the whole social group as such”.<sup>78</sup>

The three categories of interests stated above are not the same and often compete against each other. Pound explains the concept of “jural postulates” as the method by which interests may be tested and evaluated so that the conflicts between the various interests may be resolved.<sup>79</sup> He states that the competing interests have to be balanced against each other considering the legal assumptions that can be held by a reasonable person in society.<sup>80</sup> This, according to Pound, is intended to provide “as much as [society can] of the total of people’s reasonable expectations in life in civilized society with the minimum of friction and waste”.<sup>81</sup>

Pound is of the view that the task of law as a form of social control “is to hold in check the individual tendency to aggressive self-assertion to satisfy individual desires. Even more, as the individual’s aggressive self-assertive tendencies unchecked leave him callous to possible risks he is imposing upon others by thoughtless actions, the general security calls for restraint”.<sup>82</sup> So the function of the law is to fulfil individual, social and public interests as well as providing social control. Pound states:

For the purpose of understanding the law of today I am content with a picture of satisfying as much of the whole body of human wants as we may with the least sacrifice. I am content to think of law as a social institution to satisfy social wants — the claims and demands and expectations involved in the existence of civilised society — by giving effect to as much as we need with the least sacrifice, so far as such wants may be satisfied or such claims given effect by an ordering of human conduct through politically organized society. For present purposes I am content to see in legal history the record of a continually wider

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<sup>76</sup> Pound 1943 *Harv LR* at 1-2.

<sup>77</sup> Verhelle *Roscoe Pound* at 28-29, referring to Pound 1945 *Harv LR* 909-929.

<sup>78</sup> Pound 1943 *Harv LR* at 2.

<sup>79</sup> Nalbandian 2011 *Mizan LR* at 145. Nalbandian 2011 *Mizan LR* at 145 further states that “jural postulates” presuppose legal reasoning about rights and obligations at various levels and involve what human beings must be able to (reasonably) assume in a civilized society.

<sup>80</sup> Nalbandian 2011 *Mizan LR* at 146.

<sup>81</sup> Pound 1954 *Harv LR* 1 at 19.

<sup>82</sup> Pound 1954 *Harv LR* at 19.

recognizing and satisfying of human wants or claims or desires through social control; a more embracing and more effective securing of social interests; a continually more complete and effective elimination of waste and precluding of friction in human enjoyment of the goods of existence — in short, a continually more efficacious social engineering.<sup>83</sup>

In his theory of interests, Pound recognises that

all people have a multiplicity of desires and demands which they seek to satisfy. However, the desires of each continually overlap and even conflict with those of his neighbors. It is the function of jurisprudence to see, as far as possible, that these claims and demands are fulfilled.<sup>84</sup>

Since all men have an infinite number of desires and wants, it is impossible that all be gratified. So the legal order is viewed as “an adjustment of human actions and relations in order to conserve the goods of existence, prevent friction in the human use and enjoyment and eliminate waste of them”.<sup>85</sup> The legal order does this by securing as many interests as it may with the least sacrifice of other interests.<sup>86</sup> This is the primary and proximate end of law.<sup>87</sup> The chief concern of the legal system is to define the limits within which those interests shall be recognised and given effect.<sup>88</sup>

The distribution of retirement fund death benefits in terms of section 37C of the Pension Funds Act involves balancing of various interests: individual interests, social interests, and public interests and that will become clear in the discussion of freedom to contract versus that of social purpose in Chapter 3 below.<sup>89</sup>

There are two important approaches relating to the process of distribution of retirement fund death benefits. One that supports the view that individual interests must triumph against social interests. In regard to the distribution of retirement fund

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<sup>83</sup> Pound *Introduction* at 98-99. See Nalbandian 2011 *Mizan LR* at 147.

<sup>84</sup> See Pound *Social Control* at 64-65, where he calls the function of the jurisprudence the “great task of social engineering. ... We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and do things, go round as far as possible with the least friction and waste”. See also Verhelle *Roscoe Pound* at 24.

<sup>85</sup> See Verhelle *Roscoe Pound* at 24, referring to Pound and Plucknett *Readings* at 465.

<sup>86</sup> Pound *Introduction* at 96-98.

<sup>87</sup> Verhelle *Roscoe Pound* at 24.

<sup>88</sup> Verhelle *Roscoe Pound* at 27.

<sup>89</sup> See Chapter 3, par 2.1.6.



death benefits, that will mean that fund members be allowed to determine how their pension benefits should be distributed upon their death. The wishes of fund members are indicated through nomination forms. This will mean that the nomination forms are binding, and pension fund trustees have no discretion to pay the death benefits in any other way except as stated in the nomination form.<sup>90</sup>

The second approach is that which supports the view that the interests of society or public interests must triumph against the individual interests of the fund members. In regard to the distribution of retirement fund death benefits, that will mean that fund members are not allowed to determine how their pension benefits should be distributed upon their death, but the State through pension fund trustees must decide who to receive the death benefits.<sup>91</sup> This is done irrespective of the wishes of the fund member as indicated in the nomination forms (although in the context of South Africa, wishes of the fund, although not binding can be used as guidance to trustees when they are distributing death benefits).<sup>92</sup> This will mean that the nomination forms are not binding and pension fund trustees have a discretion to pay the death benefits in any manner they deem equitable.<sup>93</sup>

The question is whether the approach that South Africa has established to distribute death benefits is efficient in realising the objective of retirement funds establishment, and if not, what are the challenges, and what needs to be done to improve the efficiency of the process.<sup>94</sup> In Chapter 6 of this thesis, I propose a new definition of a “dependant”<sup>95</sup> to reduce the wide discretionary powers of pension fund trustee and also a distribution process that divide potential beneficiaries of the death benefits into two groups, primary and secondary groups.<sup>96</sup> In addition to the proposals regarding the discretionary powers of pension funds to distribute

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<sup>90</sup> See Chapter 3, par 2.1.1 for a discussion of a nomination form.

<sup>91</sup> See Chapter 3, par 2.2 for a discussion of allocation to potential beneficiaries of retirement fund death benefits.

<sup>92</sup> See Chapter 3, par 2.1.1 for a discussion of a nomination form.

<sup>93</sup> See Chapter 3, par 2.2 for a discussion of allocation to potential beneficiaries of retirement fund death benefits.

<sup>94</sup> See Chapter 1, par 3.

<sup>95</sup> See Chapter 6, par 5.12.

<sup>96</sup> See Chapter 6, par 5.9.

retirement fund death benefits, I propose other factors that need attention to improve the efficiency of distributing retirement death benefits in South Africa.<sup>97</sup>

It is not the purpose here to discuss in detail the theories of Roscoe Pound, but to indicate that the challenges facing South Africa in the distribution of retirement fund death benefit are not unique. The challenges of balancing the interests of individuals against that of the State or society have also confronted the greatest jurists and philosophers in first world countries.<sup>98</sup> In addition to the difficulty imposed by balancing the interests of individuals and that of society, there is also a lack of clear direction on how the death benefits should be distributed. There is also a challenge that is brought by different stakeholders in the retirement fund industry and the country as a whole. These stakeholders have varied interests and contrasting views as to how the death benefits should be distributed. These interests and views are not always aligned to the objectives of the State in the establishment of retirement funds, and, in some instances, do not always promote the interests of pension fund members. So the final chapter of this thesis recommends that stakeholders should be canvassed about the distribution process. It is particularly important that pension fund members' views should be heard regarding the distribution of the death benefits if those members should die while still in service.

An argument can be made that the State in South Africa, through the legislature, by prescribing that retirement fund death benefits must be distributed in terms of section 37C of the Pension Funds Act is interfering with the rights of the individuals to decide how their pension benefits must be distributed upon their death. John Stuart Mill, being a proponent of the State not interfering with individual's rights and liberty, recognises that an individual does not have an absolute right to liberty, and that there are exceptions to this general position. He states that "the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant".<sup>99</sup> "The only part of the conduct of any one, for which he

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<sup>97</sup> See Chapter 6, par 5.

<sup>98</sup> See, for example, Adam Smith and John Stuart Mill. Adam Smith (1723–1790) was a Scottish economist and philosopher who wrote *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776). John Stuart Mill (1806–1873) was an English philosopher, political economist, Member of Parliament (MP) and civil servant whose works include *On Liberty* (1859).

<sup>99</sup> See Mill *On Liberty* at 6.

is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign".<sup>100</sup>

Jeremy Bentham was an English philosopher and is regarded as the founder of Utilitarianism. Among other things, he advocated individual rights. He is famous for the principle that "it is the greatest happiness of the greatest number that is the measure of right and wrong".<sup>101</sup> In his *Principles of Legislation*, Bentham recognises that

As a general rule, the greatest possible latitude should be left to individuals, in all cases in which they can injure none but themselves, for they are the best judges of their own interests. If they deceive themselves, it is to be supposed that the moment they discover their error they will alter their conduct. The power of the law need interfere only to prevent them from injuring each other. It is there that restraint is necessary; it is there that application of punishments is truly useful, because the rigour exercised upon an individual becomes in such a case security of all.<sup>102</sup>

These distinct views of philosophers, academic writings, authors, and contrasting processes of distributing death benefits that are found in various countries open the space for deeper analysis around the role of retirement funds in achieving social security in South Africa and the world as well as the most appropriate process to realise this role.

### **3 THE TYPES OF OCCUPATIONAL RETIREMENT FUNDS IN SOUTH AFRICA**

Occupational retirement funds comprise the various pension fund arrangements in both the private and the public sectors.<sup>103</sup> A retirement fund can take various forms: a pension fund, a provident fund, an umbrella fund,<sup>104</sup> or a retirement annuity

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<sup>100</sup> See Mill *On Liberty* at 6.

<sup>101</sup> Jeremy Bentham (1748–1832). See Bentham *A Comment on the Commentaries and A Fragment on Government* at 393.

<sup>102</sup> See Bentham *Theory of Legislation* at 63 where he discusses "the limits that separate morals from legislation". See Chapter 3, par 2.1.6, where the freedom to contract versus public interest is discussed.

<sup>103</sup> Public sector occupational funds are funded by the Government and are set up for public sector employees. They are not registered under and are therefore not supervised under the Pension Funds Act. Typically, these funds apply to employees of government departments, statutory organisations, parastatals and local authorities, and members of legislative bodies.

<sup>104</sup> Some employers have only a few employees, and "it is often not economical for every small employer to have their own retirement fund for their employees". Umbrella funds are set up to enable several employers that do not have private pension funds for their employees to contribute collectively together with their employees to an umbrella fund. See in this regard the

fund.<sup>105</sup> Special types of funds include provident preservation funds,<sup>106</sup> pension preservation funds, beneficiary funds,<sup>107</sup> and unclaimed benefit funds.<sup>108</sup> Although the Pension Funds Act regulates these funds, its section 37C does not apply to the payment of benefits from beneficiary funds or unclaimed benefits funds.<sup>109</sup>

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National Treasury “Governance of umbrella funds” *Executive Summary* at 1, available at [http://www.treasury.gov.za/comm\\_media/press/2021/2021121401 Commercial Umbrella Funds.pdf](http://www.treasury.gov.za/comm_media/press/2021/2021121401%20Commercial%20Umbrella%20Funds.pdf) (last accessed 23 November 2021). An umbrella fund is a pooled, single retirement fund (either pension or provident) consisting of unrelated participating employers under an umbrella arrangement. See in this regard Manamela *System* at 238-239 and authorities cited there for a brief discussion of umbrella funds. Most of the large insurance companies in South Africa run umbrella funds, including Old Mutual, Sanlam, Liberty, and Alexander Forbes.

<sup>105</sup> A “retirement annuity fund” falls under s 1, paragraph (a) of the definition of a “pension fund organisation” in the Pension Funds Act. This Act states that a retirement annuity fund is defined by s 1 of the Income Tax Act 58 of 1962. The latter Act in s 1 defines “retirement annuity fund” as (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon reaching their retirement dates, or for the dependants of such members or former members upon the death of such members or former members. The purpose of a retirement annuity fund is to provide people who are not linked to any employers with a mechanism for saving money for their retirement. Some employees also use the fund to augment their pension and provident benefits. A retirement annuity fund is characterised by direct member participation (i.e., there is no involvement of a participating employer), and the compulsory preservation of two-thirds of the benefit in the form of a pension after retirement. A member of a retirement annuity fund qualifies to receive the benefits between the ages of 55 and 75 years and may not access the savings before the age of 55 years, unless he or she becomes permanently disabled. The moneys usually also become available to the beneficiaries of the member on his or her death. There is no provision for a withdrawal benefit, as is the case with most occupational funds, which is in line with the policy of incentivising preservation of savings until retirement. See in this regard Mackenzie 2007 *ILJ* 43 at 44.

<sup>106</sup> In this category, members do not contribute to a pension fund. Instead, the fund is created so that when the fund members change or terminate employment, rather than their receiving the withdrawal benefits, their pension money is transferred from pension funds, provident fund, and retirement annuities to preservation funds. A “pension preservation fund” means a fund that is a – (a) pension preservation fund as defined in s 1 of the Income Tax Act, 1962; or (b) pension fund as defined in s 1 of the Income Tax Act, 1962, doing the business of a pension preservation fund as described by the South African Revenue Services (SARS) Commissioner in terms of the Act.

<sup>107</sup> A “beneficiary fund” is defined in terms of the definition par (c) of “pension fund organisation” in s 1 of the Pension Funds Act. See in this regard Chapter 1 par 2.4, where the definitions of both a “pension fund organisation” and a “beneficiary fund” are provided. Beneficiary funds are set up to administer the death benefits that become payable under s 37C of the Pension Funds Act on behalf of beneficiaries, in particular minor beneficiaries. The death benefits are paid to the beneficiary fund by the pension fund boards in terms of s 37C(2)(a) of the Pension Funds Act. This payment is considered to be payment to the beneficiary concerned. Upon the death of a beneficiary (the recipient of benefits in the beneficiary fund), his or her benefit in the beneficiary fund would be paid to that former member’s deceased estate, and the provisions of s 37C of the Pension Funds Act do not apply here. See in this regard s 37C(5) of the Pension Funds Act. Section 37C of the Pension Funds Act and its subsections are quoted in full in Chapter 3, par 1.

<sup>108</sup> See Chapter 3, par 2.2.10.1, where unclaimed benefits are discussed.

<sup>109</sup> The Pension Funds Act regulates employment-related pension funds registered with the FSCA and does not apply automatically to government sector funds and collective bargaining funds.

Retirement funds can be classified further as either defined contribution funds or defined benefit funds, or as a combination known as a hybrid structure.<sup>110</sup> Private sector retirement funds tend to be defined contribution funds, where the amounts contributed to the fund are specified, but not the benefit payout.<sup>111</sup> In a defined contribution fund, the fund member's entitlement on retirement or death would be a cash lump sum equal to that member's share of the fund.<sup>112</sup> It is submitted that any court order or Adjudicator's determination requiring a defined contribution retirement fund to pay a claimant or complainant as a result of the board's wrongfully distributing death benefits could prejudice the remaining fund members' rights.<sup>113</sup>

Retirement funds can be either underwritten funds or self-administration funds. In an underwritten fund, the fund is the policyholder, and it does not have its own

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<sup>110</sup> See in this regard George *Analysis* at 31. Section 1 of the Pension Funds Act states that a "defined contribution category of a fund" means "a category of members whose interest in the fund has a value at least equal to-

(a) the contributions paid by the member and by the employer in terms of the rules of the fund that determine the rates of both their contributions at a fixed rate;

(b) less such reasonable expenses as the board determines;

(c) plus any amount credited to the member's individual account upon the commencement of the member's membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit category to a defined contribution category of a fund or upon the amalgamation of his or her fund with any other fund, if any, other than amounts taken into account in terms of paragraph (d);

(d) plus any other amounts lawfully permitted, credited to or debited from the member's individual account, if any,

as increased or decreased with fund return: Provided that the board may elect to smooth the fund return".

<sup>111</sup> See Ackson *Social Security Law* at 195, arguing that in the case of defined contributions, the performance of the markets, exchange rates, and interest rates helps determine what the beneficiary will receive. She also submitted that "this means that if one retires when the market is performing well, then one has the advantage, but if the market is performing poorly, the benefits may be low. Hence, there can be no guarantee that adequate benefits will be available when the worker retires under [a] defined contribution scheme" (at 195).

<sup>112</sup> See in this regard *Swanepoel v Abrahams and Gross Provident Fund and Another* 1999 10 BPLR 216 (PFA) at 216, explaining the meaning of "defined contribution fund".

<sup>113</sup> In *Matene v Noordberg Group Life-Assurance Scheme and Another* (2) 2001 2 BPLR 1610 (PFA), the fund argued that it had been converted from a defined benefit fund to a defined contribution fund and that any order requiring the fund to pay the complainant R31 277,82 would prejudice the rights of the remaining members of the fund (at 1610). The Adjudicator held that the prejudice to remaining fund members could be avoided if the fund used other remedies to recover its losses, such as suing to recover the moneys from the recipient of the wrongful payment by relying on the principles of unjustified enrichment. Alternatively, the fund could hold the trustees personally liable in terms of s 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984. The remaining members of the fund would therefore not bear the liability of any order made against the fund (at 1611). See Chapter 3, par 6, where the liability of funds and pension fund trustees for wrongful distribution of death benefits is discussed. See Chapter 3, n 93, where *Matene's* determination is also discussed further.

assets.<sup>114</sup> On receiving claims, the fund approaches the insurer for payments. These claims are dealt with in terms of the issued policy. By contrast, a self-administered fund receives contributions from the members and the employer.

The preceding discussion has shown several types of retirement funds in South Africa: pension funds, provident funds, pension preservation funds, provident preservation funds, retirement annuity funds,<sup>115</sup> defined contribution funds, and defined benefit funds. It is important to point out that if a member of any of these funds dies before retiring, the fund board determines the death benefit payment to the member's dependants and/or nominated beneficiaries under section 37C of the Pension Funds Act.

#### **4 THE LEGAL STATUS OR CHARACTERISTICS OF OCCUPATIONAL RETIREMENT FUNDS IN SOUTH AFRICA**

A retirement fund occupies a particular standing in South African law to enable it to perform its mandate to provide income on the member's retirement or death.<sup>116</sup> Its specific obligations, capacities, and limitations need to be understood.<sup>117</sup> Besides these obligations, participants in an occupational retirement fund have unique and complicated relationships with one other which may lead to conflict and legal

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<sup>114</sup> See in this regard *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) in par 12, stating: "It is common cause that in practice pension funds fall into two broad categories – underwritten (or audit-exempt) funds on the one hand and privately administered funds on the other. Privately administered funds are subject to the regulatory process of the Act with regard to auditing, accounting and, where applicable, valuation. Underwritten funds are exempt from the auditing and accounting provisions of the Act subject to the conditions referred to in regulation 1. The most significant distinguishing feature between the two is that an underwritten fund is operated exclusively by means of a policy of insurance issued by a registered insurer".

<sup>115</sup> See *Van der Merwe and Others v Southern Life Association Ltd and Another* 2000 3 BPLR 321 (PFA) at 324, confirming that the distribution of benefits payable under retirement annuity policies is governed by s 37C of the Pension Funds Act.

<sup>116</sup> See Chapter 1, par 2.4 for a discussion of the objectives of retirement funds.

<sup>117</sup> Retirement fund members are the main participants in a fund. See in this regard Chapter 1, par 8.2. Contributions are collected by the sponsoring employer from the fund member or employee's income so that the employer can pay it over on behalf of the employee to a retirement fund. As soon as the retirement fund accepts the contributions, the employee becomes a member of the fund and after that the fund members and their beneficiaries look towards that particular fund (not the sponsoring employer) for the fulfilment of the pension promise, which is income on retirement or for dependants and nominated beneficiaries on the death of a fund member. Section 13A of the Pension Funds Act regulates the payment of contributions and certain benefits to pension funds. See Chapter 3, par 2.2.10.2, where s 13A of the Pension Funds Act is discussed.

problems.<sup>118</sup> There are also some intertwined arrangements for the control of and ownership rights in respect of the fund's assets, including retirement fund benefits.

#### 4.1 *The ownership of retirement fund benefits*

Sponsoring employers establish occupational retirement funds in South Africa for their employees' benefit.<sup>119</sup> A retirement fund established under the Pension Funds Act is constituted as a legal entity separate from its founders, retirement fund members, employers, and pension fund board members.<sup>120</sup> On registration, this retirement fund becomes a juristic person.<sup>121</sup> The fund also becomes the owner of the assets registered in its name, whatever their origin.<sup>122</sup> The fund board's responsibility is to direct, control, and protect these benefits in the best interests of the fund it represents and the retirement fund members.<sup>123</sup> Although the board members have the sole discretion regarding how the death benefits should be

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<sup>118</sup> The legal relationships between a retirement fund, the sponsoring employer (that established a retirement fund), the retirement fund members, dependants, retirement fund beneficiaries, and pension fund boards needs to be explained so that it is understood by all parties. Clarification of the legal status and the nature of the relationships is crucial.

<sup>119</sup> See Chapter 1, par 2.4 on societal objectives for the establishment of retirement funds.

<sup>120</sup> See below, par 4.2, n 125 for a discussion of a *universitas*. Like a company, a retirement fund is an independent entity unable to be owned by individuals such as fund members, sponsoring employers, or its board members.

<sup>121</sup> See in this regard s 4B of the Pension Funds Act stating the effect of registration of retirement funds.

<sup>122</sup> See in this regard *Registrar of Pension Funds and Another v Angus NO and Others* 2007 5 SA 1 (SCA) in par 43 at 17.6; and *TEK Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) at 894. See also *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) in par 4, stating that a fund is an entity separate from the sponsoring employer. The separate legal personality of a retirement fund offers protection to retirement fund benefits against attachment orders by creditors of the sponsoring employer or members of the pension fund boards. It should be noted that this explanation does not apply to underwritten funds. Under an underwritten fund, the fund is the policyholder, and it does not have assets of its own. See in this regard n 114 above.

<sup>123</sup> See in this regard s 7C(1) of the Pension Funds Act dealing with the object of the board. See Chapter 3, par 5.4.1, where s 7C(1) of the Pension Funds Act is discussed. Pension fund boards are the drivers of retirement funds; without them these funds cannot function, and death benefits cannot be paid. The responsibility of pension boards to direct and control fund assets in the interests of the fund and its members resembles that of directors of companies. See Hayton D "The Extent of Pension Trustees' Obligations in South Africa" (Unpublished paper presented at the Pension Lawyers Association's Annual Conference 15 to 17 February 2004) available at <http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PensionTrusteesObligationsSouthAfrica.pdf> (last accessed on 18 July 2021) in par 1 (hence "Hayton *Extent*"). Section 66(1) of the Companies Act 71 of 2008 states that the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all the powers and perform any of the functions of the company, except to the extent that the Companies Act or the company's MOI provides otherwise. See par 6.4 below for a discussion of pension fund boards and their board members.

distributed to dependants and nominated beneficiaries, the board members do not own these benefits.<sup>124</sup>

#### 4.2 *The pension fund as a separate legal entity*

Like a company established under the Companies Act 71 of 2008 and whose powers are defined in its Memorandum of Incorporation (MOI),<sup>125</sup> a retirement fund is established under the Pension Funds Act, and its powers and functions are set out in its rules. The fund must register with the FSCA before doing business and must comply with the Pension Funds Act.<sup>126</sup> The effect of becoming a legal person is important, especially in the distribution of death benefits. Once registered, the fund becomes a body corporate and acquires the status of a legal person.<sup>127</sup> The effect of its being a separate legal person is that it can sue and be sued in its own

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<sup>124</sup> The Adjudicator in *Kransdorff v Sentrachim Pension Fund and Another* 1999 9 BPLR 55 (PFA) commented on the fund members' rights to pension fund assets. He concluded (at 12 and 40) that pension funds' assets belong to the funds, and all that their members are entitled to are the benefits provided for in terms of the funds' rules. See also in this regard *Hunter et al Pension Funds Act* at 166.

<sup>125</sup> See *Venter v Protektor Pension Fund* 2000 3 BPLR 340 (PFA) at 345, referring to *Webb v Northern Rifles* 1908 TS 462 at 464, stating that "a *universitas* is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are required or incurred for the body as a whole, and not for the individual members". Section 19(1) of the Companies Act 71 of 2008 deals with the legal status of companies in South Africa.

<sup>126</sup> See in this regard ss 4 and 31 of the Pension Funds Act. The business of pension funds is to receive contributions from members and pay benefits set out in the rules (subject to s 14A and s 14B of the Pension Funds Act). Members' contributions are only paid to registered funds, otherwise pension fund trustees could be liable to members if the money disappears. See in this regard s 13B(1) of the Pension Funds Act, which is explained in n 192 below.

<sup>127</sup> Section 5 of the Pension Funds Act provides that once a pension fund is registered, it becomes a juristic person (legal person). Section 5(1) of the Pension Funds Act deals with the effect of registration of pension fund and it states:

"Upon the registration under this Act –

(a) of a fund which is a pension fund organisation in terms of paragraph (a) of the definition of 'pension fund organisation' in subsection (1) of section one, the fund shall, under the name by which it is so registered, and in so far as its activities are concerned with any of the objects set out in that definition, become a body corporate capable of suing and being sued in its corporate name and of doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules;

(b) of a fund which is a pension fund organisation in terms of paragraph (b) of the said definition, all the assets, rights, liabilities and obligations pertaining to the business of the fund shall, notwithstanding anything contained in any law or in the memorandum, articles of association, constitution or rules of any body corporate or unincorporate having control of the business of the fund, be deemed to be assets, rights, liabilities and obligations of the fund to the exclusion of any other person, and no person shall have any claim on the assets or rights or be responsible for any liabilities or obligations of the fund, except in so far as the claim has arisen or the responsibility has been incurred in connection with transactions relating to the business of the fund".



name.<sup>128</sup> It acquires the legal capacity to do all things necessary to fulfil its objects in its own name,<sup>129</sup> such as distributing death benefits to dependants and nominated beneficiaries.<sup>130</sup> On the formation of a retirement fund, the board members (the trustees) incur certain obligations or duties and acquire powers.<sup>131</sup> These obligations and powers are found in statutes, the common law, the pension fund rules, and the Constitution.<sup>132</sup> Retirement fund members, dependants, and nominated beneficiaries also acquire some rights and their protection stated in the statutes and the fund rules.<sup>133</sup> Conferring a separate juristic personality on a registered retirement fund ensures that the fund's rights and obligations are separated from those of other people, such as a sponsoring employer, the pension fund board members, and the fund members. It is crucial to understand the separate legal status of a retirement fund so that fund members, dependants, and nominated

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<sup>128</sup> See in this regard *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 159 (SCA). Section 5(1)(a) of the Pension Funds Act states that a registered fund becomes a body corporate capable of suing and being sued in the corporate name and doing all such things as may be necessary for or incidental to the exercise of its powers or the performance of its functions in terms of its rules. See also the Adjudicator's determination of *Zwane v Wiseman and Others* 2005 1 BPLR 92 (PFA) in par 3, stating that a fund is a separate legal entity, but any action carried out on its name can only be done so by the board of trustees acting as a whole, or by one or more trustees who have the authority to act on behalf of the board as a whole.

<sup>129</sup> See in this regard *TEK Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) in par 15, where the Supreme Court of Appeal confirmed that a fund is a legal person and owns its assets in the fullest sense of the word "own".

<sup>130</sup> The separation of pension fund assets from those of employers ensures that employees would not be completely dependent on the employer's continued solvency to receive the promised pension benefit. See in this regard *Davis Interests* at 63.

<sup>131</sup> This attribute (separate legal personality of a retirement fund) distinguishes the position of a pension fund from that of a common law trust. A trust is not a legal person. The only exception to the rule is where the provisions of the Companies Act apply to it: s 1(b) of the Companies Act 71 of 2008 defines a "juristic person" to include "a trust, irrespective of whether or not it was established within or outside the Republic". See in this regard *Land and Agricultural Development Bank of SA v Parker and Others* 2004 4 All SA 261 (SCA) in par 10, where Cameron JA stated that "[a trust] is an accumulation of assets and liabilities. These constitute the trust estate, which is a separate entity. But though separate, the accumulation of rights and obligations comprising the trust estate does not have legal personality. It vests in the trustees, and must be administered by them – and it is only through the trustees, specified as in the trust instrument, that the trust can act". See also *Nedbank v The Trustees for the time being of the Mthunzi Mdwaba Family Trust* 2019 JDR 1398 (GP) in par 10, referring to the above paragraph in *Land and Agricultural Development Bank of SA v Parker*.

<sup>132</sup> See Chapter 3, par 4 for a discussion of the boards' sources of power and also *TEK Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) in par 15, where the Supreme Court of Appeal confirmed that the powers and duties of pension fund trustees, and the rights and obligations of fund members and the employer, are governed by the rules of the fund, relevant legislation, and the common law.

<sup>133</sup> See Chapter 3, par 6.5 for a discussion on the remedies available to aggrieved dependants and nominated beneficiaries.

beneficiaries can all know who is obliged to pay the pensions at the member's retirement or death, and whom they must sue for wrongful distribution.

#### 4.3 Retirement benefits as "property"

The question arises whether a retirement fund benefit qualifies as "property" under the Constitution.<sup>134</sup> The Adjudicator has determined that a retirement fund benefit is property that deserves to be protected by the Constitution.<sup>135</sup> So any retirement fund rules or board members' conduct that unlawfully deprives retirement fund members, dependants, and nominated beneficiaries of the benefits due to them violates the constitutional guarantee of property rights.<sup>136</sup> It follows that aggrieved dependants

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<sup>134</sup> In *Younghusband and Others v Decca Contractors (SA) Pension Fund and its Trustees* 2000 1 BPLR 88 (PFA) at 104 -106, the Adjudicator explained the role of retirement funds in achieving socially motivated goals. Although this explanation was in the context of transfers in terms of s 14 of the Pension Funds Act, it is submitted that the principles highlighted in it can easily be applied in the context of s 37C of the Pension Funds Act. The Adjudicator stated (at 105-106): "Section 14 of the Pension Funds Act is therefore a part of the broader legislative scheme to socialise legal relationships in the employment context. In relation to property and contractual rights such legislation entails a shift away from an individualistic perception of rights towards the notion that property, in the sense of a power relation over the distribution and utilisation of resources, (including contractual obligations and entitlements), is a social responsibility. The institution of property in the broader sense is derived from and protected by society, i.e., it is a social institution and must be harnessed to serve particular social objectives. This is accomplished through the regulation of the use and application of resources in the form of protective legislation. Section 14(1)(c), in particular, requiring as it does transfers to be reasonable and equitable, must be seen within the context of this general scheme of socialisation. As stated in *Lorentz v Tek Corporation Provident Fund and Others* 1998 (1) SA 192 (W), pension funds should be construed contextually as being an integral part of the employer-employee relationship. Its provisions, therefore, ought to be construed holistically in conjunction with general legislative policy governing security on transfer of employment as currently reflected in section 197 of the Labour Relations Act of 1995."

<sup>135</sup> See *Manzini v Metro Group Retirement Fund and Another (1)* 2001 12 BPLR 2808 (PFA) in par 40, stating that the concept of "property" in the constitutional sense is not restricted to movable or immovable corporeals. It includes incorporeals where one may have a right (such as a share in a company or a personal right arising from contract or delict) that is the object of another right such as ownership — a right in a right. See also *Atkinson and Others v Southern Field Staff Defined Contribution Pension Fund* 2000 4 BPLR 367 (PFA) in par 38. Currie and De Waal *Bill of Rights* at 535 state that "there are at least three possible meanings for the word 'property' as used in s 25. First, the clause could refer to property itself, to those things with respect to which legal relations between people exist. Second, the term could refer to the set of legal rules governing the relationship between individuals and property – what the common law terms property rights. Third, the term could refer to any relationship or interests having an exchange value".

<sup>136</sup> See, for example, ss 25 and 27 of the Constitution, which provide for protection of pension rights under the property clause and the right to social security, respectively. Members' retirement benefits should be protected against unlawful deprivation by employers, funds, administrators, and pension fund trustees. This is provided by s 25(1) of the Constitution, which states that no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. This provision applies not only to organs of State but also to other private institutions that have the authority to exercise power. See *Manzini v Metro Group Retirement Fund and Another (1)* 2001 12 BPLR 2808 (PFA) in par 39, where the Adjudicator echoed the point that a pension fund benefit is a right to property and therefore

and nominated beneficiaries may invoke the constitutional protection of the property clause and the prohibition against arbitrary deprivation.<sup>137</sup> It is submitted that at the fund member's death, the deceased's right to his or her retirement fund benefit becomes an accrued benefit in the form of a death benefit payable to the deceased's dependants and nominated beneficiaries. The boards distribute that accrued benefit to dependants and nominated beneficiaries under section 37C of the Pension Funds Act. The right to the retirement fund death benefit cannot be arbitrarily restricted or taken away, without compensation, to the prejudice of a potential recipient. If the fund fails to pay the death benefit that is due or if the sponsoring employer instructs the fund to withhold the payment of death benefits unlawfully, an aggrieved dependant or nominated beneficiary has recourse to section 25 of the Constitution.<sup>138</sup>

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deserves to be protected by the Constitution. He referred (in par 42) to *BverfGE53*, 257 (289) of the Federal Constitutional Court of Germany, where the court pointed out that pension benefits are based on one's own work and deserve protection by the Constitution because their amount is determined by the work performance of the insured individual as reflected in that individual's income-related contribution. See also *Atkinson and Others v Southern Field Staff Defined Contribution Pension Fund* 2000 4 BPLR 367 (PFA) in par 40, where the Adjudicator reiterated these statements. A study of German pension law appears in Chapter 5 of this thesis.

<sup>137</sup> Recognising retirement benefits as rights affects how these benefits are distributed in that when pension benefits are recognised as rights or deferred pay, the employee's claim to his or her pension rights is strengthened. The fact that employees usually contribute to the retirement funds to which they belong gives weight to the fact that they have rights in relation to the benefit, rights deserving of particular standards of protection. See in this regard, *Whiteford Adapting* at 75-78. See also *Atkinson and Others v Southern Field Staff Defined Contribution Pension Fund* 2000 4 BPLR 367 (PFA) in par 45, where the Adjudicator held that pension benefits as well as additional benefits such as withdrawal benefits under a pension fund are deferred pay and therefore property.

<sup>138</sup> See in this regard *Manzini v Metro Group Retirement Funds and Another (1)* 2001 12 BPLR 2808 (PFA) and *Sebola v Johnson Tiles (Pty) Ltd and Others* 2002 3 BPLR 3242 (PFA). The complaints in both *Manzini* and *Sebola* concerned the reasonableness of a fund rule which precluded a member from an entitlement to the employer's contributions when his departure from the fund was based on a dismissal for misconduct. In *Younghusband and Others v Decca Contractors (SA) Pension Fund and its Trustees* 2000 1 BPLR 88 (PFA), the Adjudicator referred (at 105) to the (British) Occupational Pensions Board *Greater Security for the Rights and Expectations for the Members of Occupational Pension Schemes* in par 4.10, where it was stated that "in the days when pension schemes were looked upon as a form of employer benevolence, it may have been easier to equate the employer with a *paterfamilias* endowing his infant successors with an inheritance held in trust, but the notion now seems increasingly incongruous. Under trust law the employer is considered to be the 'settlor' who endows the trust from which the members or 'beneficiaries' draw their pensions, overlooking the fact that the members, as well as the employer often contribute to the scheme and the employer's contributions can scarcely be considered as an act of unilateral benevolence". The Adjudicator in *Younghusband* at 105 further commented that accepting that pensions are deferred pay leads one to view the rules of pension funds, and statutory provisions protecting benefits, as the means of implementing a remunerative promise and the trustees of pension funds have to act with appropriate diligence and impartiality to ensure that the member's interests are protected. The study of United Kingdom pension law appears in Chapter 4 of this thesis.

So, for examples of cases where arbitrary deprivation of death benefits was denied,<sup>139</sup> one may consider, first, *Swanepoel v Abrahams and Gross Provident Fund and Another*,<sup>140</sup> in which the board decided not to pay the death benefits after the fund member's death because of the instructions that the board received from the employer. The latter intended to set off money owed to it for loans such as personal loans and losses that it had suffered as a result of the deceased's negligence. The Adjudicator held that the Pension Funds Act does not permit set-off for such losses, however, and that claims for such losses should be lodged against the deceased's estate.<sup>141</sup> The Adjudicator accepted the proposition that pension contributions constitute remuneration by referring to *Parry v Clever* and *Oberholzer v Santam Insurance Co Ltd and Another*, where Fannin J held that "a pension was not deductible from damages to be awarded to an injured plaintiff because, whether 'contributory' or 'discretionary', it was a return for the plaintiff's past services".<sup>142</sup> The Adjudicator also referred to *Thrells v Lomas and Worryingham v Lloyds Bank Ltd*, which also held that the employer's contributions to a pension fund form part of an employee's remuneration package.<sup>143</sup>

The observation about the ownership of retirement fund benefits, especially the separation of employers' assets and board members' assets from those of their retirement funds,<sup>144</sup> is relevant to the research for this thesis. The observation provides background for a better understanding of the discussion in Chapter 3 of the fiduciary obligations owed by the boards (the pension fund trustees) in distributing death benefits.<sup>145</sup> It is submitted that the separation of ownership and

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<sup>139</sup> It should be noted that although the arbitrary deprivation of benefits was denied by the Adjudicator, the parties to these cases did not argue their matters on constitutional grounds.

<sup>140</sup> *Swanepoel v Abrahams and Gross Provident Fund and Another* 1999 10 BPLR 216 (PFA) at 216.

<sup>141</sup> At 216.

<sup>142</sup> At 222 (per the Adjudicator), referring to *Parry v Clever* [1970] AC 1 (HL) at 36 and *Oberholzer v Santam Insurance Co Ltd and Another* 1970 1 SA 337 (N).

<sup>143</sup> *Swanepoel v Abrahams and Gross Provident Fund and Another* 1999 10 BPLR 216 (PFA) at 222, referring to *Thrells v Lomas* [1993] 1 WLR 456 (Ch) 468 and *Worryingham v Lloyds Bank Ltd* [1981] IRLR 178 (ECJ).

<sup>144</sup> Njuguna *Strategies* at 190 states that "the separation of fund ownership from the sponsor's business is an important matter in pension funds. Separating the affairs of the pension fund from those of the sponsor's business means that the trust legally segregates the assets of the pension fund from other monies (Galer 2009). The separation protects the pension fund assets from being confused with those of the trustees, sponsoring employers or custodians. Separation also protects the assets from the creditors of the sponsors, trustees and custodians (Galer 2009: 4)".

<sup>145</sup> See Chapter 3, par 5 on the discussion of boards' duties. Pension fund trustees are bound by

control of retirement fund assets requires that there should be ways to ensure that board members perform their duties for and in the best interests of a fund and the fund members.<sup>146</sup> This outcome is achieved through the common law, statutory law, and the trustees' fiduciary obligations to the fund.<sup>147</sup>

## **5 THE NOTION OF "SOCIAL SECURITY" IN THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN SOUTH AFRICA**

### *5.1 Retirement fund death benefits as "social security"*

In analysing the distribution of death benefits, understanding the concept of "social security" is crucial to clarifying whether these benefits form part of social security<sup>148</sup> and their role in society.<sup>149</sup> The rules for distributing and protecting death benefits could differ, depending on whether they are considered part of social security. For example, if deemed part of social security, they should be constitutionally protected under the property clause (section 25) and the right to social security (section 27).<sup>150</sup> That outcome would lend more weight and justification to the restrictions in section 37C of the Pension Funds Act to deny the fund member the right to choose the beneficiary of his or her death benefit if the member dies in service.<sup>151</sup> Recognising death benefits as forming part of social security would then mean that the section 37C restrictions on the fund member's freedom of contract or choice, which is

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fiduciary obligations to distribute retirement fund death benefits in accordance with applicable laws and pension fund rules.

<sup>146</sup> See *Land and Agricultural Development Bank of SA v Parker and Others* 2004 4 All SA 261 (SCA) in par 22, where the court (per Cameron JA) held that the duties imposed on trustees and the standard of care expected of them derive from the principle that there should be separation of enjoyment (of trust benefits) and control (of trust property). The court held that it is this separation that serves to secure diligence on the part of a trustee.

<sup>147</sup> See Chapter 3, par 4, where the pension fund trustees' sources of power are discussed.

<sup>148</sup> The debate on the role of retirement fund benefits in South Africa includes whether they are part of social security or belong somewhere else. This debate is also reflected in the retirement reforms that are currently found and run by two different ministerial structures: Finance (Treasury) and Social Development. The contradictory mandate is partly because the State's role in providing income on retirement has become confused with the parallel involvement of the Department of Social Development and the National Treasury in dealing with issues of retirement reform. Both Departments serve various purposes and have specific roles.

<sup>149</sup> See Chapter 1, par 2 for a discussion of the role that occupational retirement funds play in the South African economic and social contexts.

<sup>150</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 provides for the right to social security. See par 4.3 above, where the property clause is discussed.

<sup>151</sup> See Chapter 3, par 2.1, where the fund member's restriction on freedom of choice is discussed.

usually exercised through the nomination form and/or a will, would achieve a social purpose and could be linked to a broader social objective of the State.<sup>152</sup>

The South African Constitution guarantees the right to social security. Section 27 recognises social security as a fundamental right of all South Africans.<sup>153</sup> The Government has introduced measures to ensure that people can exercise and enjoy their right to social security.<sup>154</sup> The Government's objective is concisely expressed in the *National Development Plan 2030*. The Plan states that all South Africans seek a better future for themselves and their children and that its objective is to eliminate poverty and reduce inequalities by 2030.<sup>155</sup> The objectives for social protection stated in the Plan include

- creating an inclusive social protection system that addresses all areas of vulnerability and responds to the needs, realities, conditions, and livelihoods of those most at risk; and
- encouraging a culture of individual saving for risks associated with loss of income through unemployment, old age, and illness by providing appropriate frameworks and incentives.<sup>156</sup>

The Plan emphasises the protection of vulnerable groups and citizens from the worst effects of poverty. It also states:

The different elements of social protection are complementary and thus should not be seen in isolation. Coordination is a critical element of the social protection system. The other areas such as the judiciary also have a complementary role to play in reinforcing social protection. The focus here is on measures that help

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<sup>152</sup> See below, par 5.2, where the social objective of s 37C of the Pension Funds Act is discussed.

<sup>153</sup> See s 27(1)(c) of the Constitution, as well as the discussion of the social objective of s 37C of the Pension Funds Act below, par 5.2. On the social protection objectives, see also National Planning Commission *Our Future: Make It Work: National Development Plan, 2030* (National Planning Commission Pretoria 2012) at 353 and 357 (the "*National Development Plan 2030*"), [https://www.gov.za/sites/default/files/gcis\\_document/201409/ndp-2030-our-future-make-it-workr.pdf](https://www.gov.za/sites/default/files/gcis_document/201409/ndp-2030-our-future-make-it-workr.pdf) (last accessed on 30 June 2020).

<sup>154</sup> For example, by the provision of various social grants to qualifying persons in terms of the Social Assistance Act 13 of 2004 and the promulgation of statutory provisions such as s 37C of the Pension Funds Act to realise a social objective through the distribution of death benefits.

<sup>155</sup> See *National Development Plan 2030* at 1 (foreword).

<sup>156</sup> At 353.

people prevent, manage and overcome situations that adversely affect their well-being.<sup>157</sup>

In short, the *National Development Plan 2030* encourages the use of policies and available resources to promote the provision of social security to vulnerable groups and help people overcome situations that harm their well-being. As stated in Chapter 1 of this thesis, occupational retirement funds are one of the instruments or measures used to provide financial support or social security to alleviate poverty among retirees and their dependants.<sup>158</sup>

It is submitted that the role of occupational retirement funds must be recognised as forming part of the social security system in South Africa, owing to the function that these funds fulfil in society.<sup>159</sup> Occupational retirement funds provide social protection. Benefits in the form of income at the fund member's retirement or death while still in service are earned through the member and the employer's paying regular contributions to retirement funds while the member is employed.<sup>160</sup> Social protection is both a public matter, through the State's social grants such as older person's grants, and a private matter, through payments from occupational

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<sup>157</sup> At 354.

<sup>158</sup> See Chapter 1, par 2.4 for a discussion of the objectives of retirement funds.

<sup>159</sup> It is submitted that the link between occupational retirement funds and social security is provided by s 37C of the Pension Funds Act. It is noted that the role that occupational retirement funds play as a tool to provide social security is limited to members of such funds and their dependants. Section 37C of the Pension Funds Act is not the only provision in the Act that compels fund members to attend to their social responsibilities; in this regard, for example, s 37D of the Act also provides for the attachment of retirement benefits of defaulting pension fund members to pay maintenance to their dependants, in particular children. The ILO defines social security as "the protection which society provides for its members through a series of public measures: to offset the absence or substantial reduction of income from work resulting from various contingencies (notably sickness, maternity, employment injury, unemployment, invalidity, old age and death of the breadwinner); to provide people with health care; and to provide benefits for families with children". See *International Labour Organisation World Labour Report 2000* at 29. In South Africa the Ministry for Welfare and Population Development *White Paper for Social Welfare* at 49 states that social security is "a wide variety of public and private measures that provide cash or in-kind benefits or both, never developing, or being exercised only at unacceptable social cost and such person being unable to avoid poverty and secondly, in order to maintain children". See Triegaardt *Accomplishments* at 2. Article 22 of the Universal Declaration of Human Rights (1948) defines social security: "Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". South Africa is not one of the signatories to the Charter.

<sup>160</sup> See in this regard Jansen van Rensburg and Lamarche *Rights to Social Security and Assistance*.

retirement funds.<sup>161</sup> In other words, providing social security is not a task that falls on the State alone but also on employers and individual employees themselves through occupational retirement funds. Although the establishment and control of private sector occupational retirement funds remain in private hands as these funds are controlled by pension fund boards, the State crucially supervises the system through legislation and regulations.<sup>162</sup> Thus the State sets the requirement that retirement funds must register with the FSCA, and regulates the fitness for appointment and the required standards of conduct of people involved in running these funds.<sup>163</sup> The State also prescribes how the fund death benefits should be distributed when a fund member dies while still in service.<sup>164</sup>

A retirement fund's main purpose is to provide financial income to pension fund members in old age and their dependants if they die while still in service.<sup>165</sup>

Given the fund's social objective, it is submitted that paying death benefits should not be a once-off event but should require that these benefits be sustainable and preserved by the recipients to cover much longer periods.<sup>166</sup> This social objective is not realised if a death benefit is paid to a recipient in cash which is then spent on luxury items. The sustainability and preservation of death benefits ensure the achievement of the State's objectives of providing social security and alleviating poverty for pensioners and fund members' dependants through retirement funds.

## 5.2 *The objectives of section 37C of the Pension Funds Act*

Boards should allocate death benefits by exercising their discretion under section 37C of the Pension Funds Act.<sup>167</sup> The Act assigns the boards the duty and discretionary power to distribute the retirement benefit payable upon a member's death in such a manner as they may deem equitable among the deceased's

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<sup>161</sup> See *National Development Plan 2030* at 355.

<sup>162</sup> See also par 7 below for a discussion of regulations and legislation that apply to occupational retirement funds.

<sup>163</sup> See par 7 below on the registration of retirement funds by the FSCA.

<sup>164</sup> See Chapter 3, pars 1 and 2, where s 37C of the Pension Funds Act is discussed.

<sup>165</sup> See Chapter 1, par 2.4, where the societal objectives of retirement funds are discussed.

<sup>166</sup> See Chapter 3, par 2.2.9, where the mode of payment of death benefits and the sustainability thereof are discussed.

<sup>167</sup> See Chapter 3, pars 1 and 2, where s 37C of the Pension Funds Act is discussed.



dependants and nominated beneficiaries.<sup>168</sup> The boards are required to consider the social function and purpose of section 37C of the Pension Funds Act, which is to protect the dependants even over the clear wishes of the deceased member.<sup>169</sup> Preference is thus given to need and dependency above the member's choice.<sup>170</sup> The section imposes a duty on the board to determine need and make an equitable distribution among the deceased's dependants and nominees.<sup>171</sup>

Section 37C serves a social function by restricting freedom of testation so that no dependant is left without support.<sup>172</sup> Thus section 37C overrides the deceased fund member's freedom to dispose of his or her property by will.<sup>173</sup> This provision is a type of social security measure in placing the benefit payable on a member's death under the control of the board to pay it to the member's dependants and beneficiaries in the proportions that the board deems equitable.<sup>174</sup>

The reason the section is interpreted to serve a social function, and is seen as a social security measure, needs to be explained. The main purpose of social security is to alleviate poverty and ensure that the State's citizens are provided for to meet their basic needs.<sup>175</sup> Under the Bill of Rights, more specifically section 27(1)(c) of

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<sup>168</sup> See ss 37C(1)(a) and 37C(1)(bA) of the Pension Funds Act, which contain provisions referring to equitable distribution. These two subsections are discussed in Chapter 3, pars 2.2.1 and 2.2.3.

<sup>169</sup> See in this regard *Berge v Alexander Forbes Retirement Fund (Pension Section)* 2009 JDR 0123 (W) in par 9; and *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP) in par 7, confirming that s 37C of the Pension Funds Act is intended to serve a social function. See also Chapter 3, n 822, where *Berge's* case is discussed further.

<sup>170</sup> The restriction on members' choice is discussed in Chapter 3, par 2.1.

<sup>171</sup> Equitable distribution is discussed in Chapter 3, par 3.

<sup>172</sup> See in this regard *Van der Merwe and Others v Southern Life Association Ltd and Another* 2000 3 BPLR 321 (PFA) and *TWC and Others v Rentokil Pension Fund and Another* 2000 2 BPLR 216 (PFA). See also Chapter 3, par 2.2.2, n 207, where the *TWC* determination is discussed.

<sup>173</sup> Nevondwe March/May 2009 *Today's Trustee* 38.

<sup>174</sup> Section 37C(1) of the Pension Funds Act provides that any benefit payable by a fund upon the death of a member must not form part of the assets in the estate of that member.

<sup>175</sup> See Demaestri and Ferro *Integrated Financial Supervision* at 103, stating that private pension funds are a way to organise the pension system, which in turn forms part of the social security system. Social security involves actions that society undertakes to confront problems of need caused by the biological diminution of human capital because of old age, invalidism, death, and the survival of dependants, accidents at work, sickness, and unemployment. The pension system covers those "claims" related to old age, invalidism, and the survival of dependants. See *Lombard v Central Retirement Annuity Fund* 2003 3 BPLR 4460 (PFA) at 4463, confirming that s 37C of the Pension Funds Act is a social security-type measure. The Adjudicator in *Lombard* found that the opening subparagraph of s 37C(1) makes it clear that its aim is to exclude pension benefits from the estate of a deceased except in limited situations as set out in the section (at 4463).

the Constitution, everyone has the right to have access to social security, including, if they cannot support themselves and their dependants, appropriate social assistance. And under section 27(2) of the Constitution, the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right of access to social security and social assistance.<sup>176</sup> Section 37C of the Pension Funds Act can therefore be seen as a measure that enforces the right of dependants to social security.<sup>177</sup> The primary purpose of section 37C is to protect those who depended financially on the deceased fund member while alive.<sup>178</sup> It is submitted that the State's duty to provide everyone in the country with social security<sup>179</sup> and alleviate poverty justifies the State's intervention in how boards distribute death benefits. The State also has a vested interest in this distribution because of the tax subsidies granted to employers and employees for contributions to qualifying retirement funds.<sup>180</sup> The State thus has a fair and legitimate governmental purpose and acts in the interests of the public by restricting the fund members' wishes in terms of section 37C of the Pension Funds Act. This purpose is less convincing when death benefits are distributed to dependants and nominated beneficiaries who are financially independent.<sup>181</sup> It is submitted that the primary policy tool linking occupational retirement funds to the achievement of the State's objective of improving the social security of its people remains the Pension Funds Act. This achievement is made possible through section 37C of the Pension Funds Act on the distribution of death benefits, as well as section

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<sup>176</sup> See above, par 5.1 for a discussion of the concept "social security".

<sup>177</sup> In *Mashazi v African Products Retirement Benefit Provident Fund and Another* 2003 1 SA 629 (W) at 632 the court held that s 37C of the Pension Funds Act was enacted to protect dependency, even over the clear wishes of the deceased. This section specifically restricts freedom of testation so that no dependants are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion considering a number of factors. See Chapter 3, par 2.1, where the restriction on death benefit distribution is discussed.

<sup>178</sup> See *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) at 301.

<sup>179</sup> See the provisions of s 27(2) of the Constitution in Chapter 1 of this thesis, n 45.

<sup>180</sup> See *Lombard v Central Retirement Annuity Fund* 2003 3 BPLR 4460 (PFA), where the Adjudicator held (at 4460) that the purpose of s 37C of the Pension Funds Act is to place the benefit payable upon a member's death under the control of the retirement fund, which has the discretion to pay it to the member's dependants as it deems equitable. The State therefore aims to ensure that moneys for which it allowed tax concessions are used to benefit the deceased member's dependants, thus reducing the State's burden of caring for its citizens.

<sup>181</sup> See Chapter 3, par 2.2, where the allocation of death benefit to dependants and nominated beneficiaries is discussed.

37A (protecting accrued rights)<sup>182</sup> and section 37D (allowing permissible deductions).<sup>183</sup>

The following paragraph deals with the role-players involved in the distribution and protection of retirement fund death benefits.

## **6 THE ROLE-PLAYERS AND STAKEHOLDERS IN THE DISTRIBUTION OF DEATH BENEFITS**

Various role-players are involved in the distribution of death benefits in South Africa and contribute to helping the State achieve its objectives of establishing retirement funds. These role-players include sponsoring employers, retirement fund members, principal officers, pension fund board members (trustees), and service providers such as pension fund administrators and employee benefits consultants. The discussion in this paragraph surveys the roles that an employer, pension fund administrator, principal officer, pension fund trustee, the Pension Funds Adjudicator, and the Financial Services Tribunal all play in distributing death benefits.<sup>184</sup>

### *6.1 The employers*

Occupational retirement funds are usually financed by contributions made to the fund by employees and their employers through the payment of regular premiums. Employers are not compelled to set up retirement funds for their employees; doing so is a voluntary act by the employer.<sup>185</sup> If an employer does create a retirement fund, though, participation by the employees in the fund is compulsory. In *Malatji v Gauteng Building Industry Provident Fund and Others*,<sup>186</sup> the Adjudicator dealt with a situation in which the employer did not register an employee with a pension fund. Meagre death benefits were thus payable after the employee died. The Adjudicator found that an employer is duty-bound to make it a condition of employment that all its employees eligible to become members of the fund in which it participates do

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<sup>182</sup> See par 7 below for a discussion of s 37A of the Pension Funds Act.

<sup>183</sup> See par 7 below for a discussion of s 37D of the Pension Funds Act.

<sup>184</sup> See par 7 below for the discussion of the FSCA.

<sup>185</sup> See National Treasury *Social Security and Retirement Reform 2007* in par 41.

<sup>186</sup> *Malatji v Gauteng Building Provident Fund, Alexander Forbes Financial Services (Pty) Ltd and LR Civil (Pty) Ltd* (PFA/NP/9447/2011/LMP). This determination was also explored in Mpedi 2014 *De Jure* 355.

become members of that fund and remain so throughout their period of employment.<sup>187</sup> The pension fund board is responsible for distributing benefits to retirement fund members, their dependants, and beneficiaries. In other words, the employer does not distribute benefits: the retirement fund board does.<sup>188</sup> But the employer must notify the fund of the death of an employee who is also a fund member.<sup>189</sup> Failure to comply with this duty breaches the employer's common-law duty of good faith to its employees.<sup>190</sup>

## 6.2 *The pension fund administrators*

Pensions fund boards must appoint an administrator for their pension funds which should perform its functions and fulfil its duties in terms of applicable laws, including the Pension Funds Act. Pension fund administrators play a crucial role in administering pension funds. Although pension fund boards are entrusted with the duty to control and manage retirement funds, in reality these boards meet only a few times each year and so they delegate some of their responsibilities to pension fund administrators.<sup>191</sup> FSCA approval is thus required before anyone can administer or dispose of benefits on behalf of a fund.<sup>192</sup> Section 13B(5) of the Pension Funds Act

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<sup>187</sup> See *Malatji v Gauteng Building Provident Fund, Alexander Forbes Financial Services (Pty) Ltd and LR Civil (Pty) Ltd* (PFA/NP/9447/2011/LMP) in par 5.9. The employer's failure to register an employee with a fund may lead to the aggrieved dependants and beneficiaries' claiming that they suffered losses of retirement benefits in the sense that they are not getting what they would have got if the member or employee had been registered with the fund. In *Malatji* the Adjudicator held that the employer was liable to pay the death benefit as it would have become payable by the retirement fund at the time of the employee's death had the employer registered the deceased on time (in par 5.1.2).

<sup>188</sup> The sponsoring employer has the potential to interfere directly or indirectly in the role that the board plays in distributing death benefits in terms of s 37C of the Pension Funds Act. The employer may, where applicable, request non-payment or the withholding of payment of a death benefit of the deceased member in terms of s 37D of the Pension Funds Act. See par 7 below for a discussion of permissible deductions in terms of s 37D of the Pension Funds Act.

<sup>189</sup> The employer's duty to notify the fund about the employee's death is crucial: first, the fund cannot start the distribution process until it has notice of the death; and, secondly, s 37C of the Pension Funds Act states the period within which pension fund trustees should conduct investigations, and this period begins at the time the fund is notified of the death. See Chapter 3, par 2.2.5, where the period within which to conduct investigations is discussed.

<sup>190</sup> See *Matekane v South African Municipal Workers Union Provident Fund and Others* 2011 2 BPLR 197 (PFA) at 197, where the Adjudicator dealt with a matter that concerned the employer's duty of good faith.

<sup>191</sup> See par 6.4 below, where delegation and the role of benefit administrators are discussed further.

<sup>192</sup> Sections 13B(1A) and 13B(1B) of the Pension Funds Act outline the requirements that must be met when an application for approval to administer a pension fund is made. Section 13B(1) of the Pension Funds Act states that no person shall administer, on behalf of a pension fund, the receipt of contributions or the disposition of benefits provided for in the rules of the fund, unless

imposes specific duties on administrators, duties independent of any contractual arrangement between a fund and its administrators.<sup>193</sup> The administrators must administer funds properly and may be held liable if benefit payouts drop because of maladministration.<sup>194</sup>

### 6.3 *The principal officer*

Under section 8(1) of the Pension Funds Act, every registered fund must have a principal executive officer, and, in terms of section 8(1)(b), a deputy principal officer may also be appointed.<sup>195</sup> The principal officer is the retirement fund's official representative or the contact officer with the FSCA for the purposes of complying with the Pension Funds Act and its regulations.<sup>196</sup> The principal officer ensures that the fund implements the board's resolutions and recommendations.<sup>197</sup> This duty includes the board's recommendations on distributing a death benefit to identified

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such person has been approved by the Registrar (the FSCA) and continuously complies with such conditions as may be prescribed.

<sup>193</sup> Khumalo S "Jurisprudential Role Played by the Pension Funds Adjudicator in South African Law" (Pension Lawyers Association Conference 5 March 2006) available at <https://www.pensionlawyers.co.za/wp-content/uploads/2018/10/08-Adv.-Sandile-Khumalo-Paper.pdf> (last accessed on 23 July 2021).

<sup>194</sup> For example, in *Nayagar v Lifestyle Retirement Annuity Fund and Another* 2011 2 BPLR 224 (PFA), the Adjudicator ordered a negligent retirement annuity administrator to pay the shortfall in a member's benefit. The member's benefit was reduced because of the administrator's maladministration. The administrator was ordered to pay the complainant the difference of the amount which she would have had but for the administrator's negligence.

<sup>195</sup> See s 8(2)(e) of the Pension Funds Act, stating that if a fund has appointed a deputy principal officer, he acts as principal officer when the principal officer is absent from the Republic or unable for any reason to discharge any duty of the principal officer in terms of the Pension Funds Act, until the fund formally in the manner directed in its rules appoints a new principal officer.

<sup>196</sup> See the Financial Services Board Information Circular PF 130 "Good Governance of Retirement Funds" issued on 11 June 2007 ("PF 130") at 4-5 in par 18, available at <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> (last accessed on 30 June 2021). It aims to provide guidelines for the effective management of pension fund boards and to deal with the good governance of retirement funds. See Chapter 3, par 5.4.4, where this circular is also discussed. See also FSCA Communication 7 of 2019 (PFA) "The Role and Independence of the Principal Officer" (dated 12 December 2019) in par 2.3, available at [https://www.fsca.co.za/Regulatory Frameworks/Temp/FSCA Communication 7 OF 2019 \(PFA\).pdf](https://www.fsca.co.za/Regulatory Frameworks/Temp/FSCA Communication 7 OF 2019 (PFA).pdf) (last accessed on 30 June 2021). In terms of s 8(6)(b) of the Pension Funds Act, the principal officer of a retirement fund must report any suspicious activities and transgressions of the law to the FSCA. But the principal officer relies on the pension fund board for guidance relating to the affairs of the fund (including the distribution of death benefits) and may not always know whether the guidance is ill-informed.

<sup>197</sup> The appointment and functions of the principal officer are regulated by s 8 of the Pension Funds Act.

recipients. The principal officer plays a crucial role in making sure that the retirement fund functions efficiently.

#### 6.4 *The pension fund trustees*

A retirement fund, like a company, lacks the capability of running and directing its business like a natural person.<sup>198</sup> It can only act through agents: its board.<sup>199</sup> Retirement funds constitute these boards to act for the fund in administering and managing its affairs.<sup>200</sup> The board's constitution should satisfy the Pension Funds Act and the rules of the particular pension fund.<sup>201</sup>

Pension fund boards and their board members (who are also sometimes referred to collectively as the "pension fund trustees" or "trustees" in this thesis) play a significant role in distributing death benefits to members' dependants and nominated beneficiaries in South Africa. They are the retirement fund's spine and heart. Without

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<sup>198</sup> In *R v Kritzinger* 1971 2 SA 57 (A) at 59, the point was made that a company is an artificial person that cannot read a written representation or hear a spoken representation: "It reads or hears a representation through the eyes or ears of, *inter alios*, its directors acting in the course of their duty, and 'board' is the collective term used to designate the directors when they act together in the course of their duty to the company".

<sup>199</sup> The *OECD Guidelines for Pension Fund Governance* in par 2 states: "Every pension fund should have a governing body vested with the power to administer the pension fund and who is ultimately responsible for ensuring the adherence to the terms of the arrangement and the protection of the best interest of plan members and beneficiaries. The responsibilities of the governing body should be consistent with the overriding objective of a pension fund which is to serve as a secure source of retirement income. The governing body should retain ultimate responsibility for the pension fund, even when delegating certain functions to external service providers. For instance, the governing body should retain the responsibility for monitoring and oversight of such external service providers".

<sup>200</sup> Section 7A(1) of the Pension Funds Act states that every pension fund must have a board consisting of a minimum of four members, at least 50 per cent of whom the members of the fund shall have the right to elect. Pension fund boards should ensure that they are constituted according to the relevant statutes and the retirement fund rules. Failure to do so may negatively affect their powers to act on behalf of the fund and the validity of decisions that they make while they are not properly constituted. The distribution of benefits to members of funds and their beneficiaries under the circumstances may not be possible, or if possible, may be unreasonably delayed. See, for example, *Petch and Others v Illman Plastics Pension Fund and Others* 1999 12 BPLR 426 (PFA), where the Adjudicator dealt with a situation in which a fund had no management board or member representation (at 426). He held that the particular fund was operating illegally, and therefore all decisions taken while the fund was operating illegally, including the subsequent distribution of benefits (surplus), were of no force or effect (at 427).

<sup>201</sup> Section 13 of the Pension Funds Act deals with the binding force of retirement fund rules and states that, subject to the Pension Funds Act, "the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming". Section 13 of the Pension Funds Act is dealt with in more detail in Chapter 3, par 4.4 under rules of pension funds.

them, the fund lacks the capacity and the means to realise its objectives.<sup>202</sup> Good governance of funds by competent boards is essential to realising the objectives of the State in the establishment of retirement funds.<sup>203</sup> Pension fund board members are appointed or elected to manage the affairs of the fund.<sup>204</sup> The powers and duties of boards include distributing death benefits to dependants and nominated beneficiaries.<sup>205</sup> These powers and duties require the boards to ensure that these benefits are protected against creditors and abuse by sponsoring employers and are paid to the correct recipients.<sup>206</sup> Boards also have to ensure the protection of members' and their beneficiaries' interests. In addition, boards must ensure that their funds comply with the laws and regulations applicable to distributing death benefits to dependants and other beneficiaries upon a fund member's death.<sup>207</sup> The

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<sup>202</sup> It is recognised that there are cases in which the Registrar of Pension Funds (the FSCA) may appoint curators to replace malfunctioning pension fund boards, but this is only a temporary measure. See s 5(2) of the Financial Institutions (Protection of Funds) Act 28 of 2001 dealing with the appointment of curators. For a detailed discussion of curators see *Mostert and Others v Nash and Another* 2018 5 SA 409 (SCA).

<sup>203</sup> The King IV Report at 11 under "Glossary of Terms" states that for the purposes of King IV, "corporate governance" is defined as the exercise of ethical and effective leadership by the governing body towards the achievement of the following governing outcomes: ethical culture, good performance, effective control, and legitimacy. King IV at 40, Principle 6 states that the governing body should serve as the focal point and custodian of corporate governance in the organisation. See also International Organisation of Pension Supervisors (IOPS) "Supervisory Oversight of Pension Fund Governance" (*Mandatory Provident Fund Schemes Authority, Hong Kong, China* (IOPS Working Paper No. 8 August 2008) available at <http://www.iopsweb.org/41269776.pdf> (last accessed on 21 July 2021) at 4, stating: "In the context of pension plans and funds, governance refers to the framework by which the governing body, whether individuals or a body corporate (through its board of directors and senior management), makes decisions about the pension fund's business. It encompasses: the structure of the governing body (including legal basis and segregation of functions); the decision making processes within the governing body (including internal controls, risk management, compliance functions and internal oversight structures); the requisite skills and competency of the governing body; and the means by which the governing body is accountable to stakeholders (principally plan members and beneficiaries, but also a wider stakeholder set including employers, supervisory board, supervisors, regulators and government)".

<sup>204</sup> See s 7A of the Pension Funds Act dealing with the constitution and composition of pension fund boards.

<sup>205</sup> See below in this par 6.4 for a discussion of the powers of boards and Chapter 3, par 3 on the duties of pension fund trustees.

<sup>206</sup> See Chapter 1, n 35, stating that the value of assets under the management of pension funds that are regulated by the FSCA amounted to over R2 431 billion in 2018. Section 7C(2)(a) of the Pension Funds Act provides that pension fund boards must take all reasonable steps to ensure that the interests of members are protected at all times in terms of the pension fund rules. See Chapter 3, par 5.4.1, where s 7C of the Pension Funds Act is discussed.

<sup>207</sup> Pension fund board members are not remunerated or compensated for their services in South Africa. But they are reimbursed for costs and expenses they incur while performing their duties as board members. If board members are to be remunerated by their funds, the remuneration arrangements should be incorporated in the retirement fund rules. Pension Fund Circular 96 in par 4.12 states that the fund rules must specify the basis and calculation of remuneration if board members are remunerated from the fund. Pension Fund Circular 96 is available at

board's role affects the fund's financial sustainability and operational efficiency and its ability to pay death benefits to members, dependants, and beneficiaries when required.<sup>208</sup>

The board's decisions and actions affect thousands, perhaps millions of members, dependants, and beneficiaries:<sup>209</sup> so the board must comply with its duties, including that of distributing benefits diligently, correctly, and fairly.<sup>210</sup> It is submitted that boards comprising competent,<sup>211</sup> motivated<sup>212</sup> and accountable members, coupled with proper governance and regulatory measures, are better positioned to

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<https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20096.htm> (last accessed on 20 December 2020).

<sup>208</sup> This is the case if board members are not competent and lack the necessary skills to run the business of pension funds and to distribute benefits in accordance with applicable laws and in a fair and efficient manner. This situation prompts the question whether the objectives of establishing retirement funds and of s 37C of the Pension Funds Act will be achieved.

<sup>209</sup> Boards must decide on various issues relating to the business of a retirement fund such as the distribution of benefits on the death of a member. Although boards consist of individual members, they take decisions collectively as a unit, irrespective of whether these individual members sit on these boards as employee- or employer-nominated members. Pension Fund Circular 130 at 3 in par 15 states that "the board members should act jointly. If the rules of a fund permit a decision of the board to be carried by a majority of its members voting in favour of it, then the minority should respect the majority decision. Strong objections may be minuted but the final decision should be recorded clearly. A deadlock breaking mechanism should be outlined in the rules". See in this regard the Pension Fund Circular 130 at 3-4 in pars 15 and 16, available at <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%20130.pdf> (last accessed on 19 September 2020).

<sup>210</sup> See *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) in par 14, where Cloete JA commented on public interests: "The general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the Act [i.e., the Pension Funds Act]". In *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others* 2004 5 SA 609 (C), the court in par 81 referred to *Pepcor* with approval. See Chapter 3, par 5, where the duties of pension fund trustees are discussed.

<sup>211</sup> See National Treasury *2013 Retirement Reform Proposals for Further Consultation* (2013) at 9, emphasising the need for trustees to be sufficiently trained and knowledgeable to execute their responsibilities competently, independently, and free of conflict of interest.

<sup>212</sup> Pension fund board members must understand why a retirement fund exists and be able and willing to dedicate their time, wisdom, skills, and experience to helping the fund to achieve its purpose. See Ambachtsheer *The Three Grades of Pension Fund Governance Quality: Bad, Better, and Best* (Working paper as at 4 July 2007) available at [https://www.researchgate.net/publication/265614988\\_The\\_Three\\_Grades\\_of\\_Pension\\_Fund\\_Governance\\_Quality\\_Bad\\_Better\\_and\\_Best](https://www.researchgate.net/publication/265614988_The_Three_Grades_of_Pension_Fund_Governance_Quality_Bad_Better_and_Best) (last accessed on 3 August 2021) at 5. He also states (at 5) that whether compensated or not, the primary motivation of board members must be public service, and not fame, fortune, or other personal predilections (e.g., box seats, fancy trips, political profile). In this regard, s 7C(2)(c) of the Pension Funds Act provides that board members (pension fund trustees) should avoid a conflict of interest. See Chapter 3, par 5.3.2.4, where the duty of pension fund trustees to avoid a conflict of interest is discussed.



protect and distribute death benefits efficiently and diligently, correctly and fairly.<sup>213</sup> So boards and their members play a crucial role in the effective operation of retirement funds, the distribution of death benefits, and the realisation of the State's objectives in the establishment of retirement funds.<sup>214</sup>

The question arises whether South African pension fund boards and their individual board members are sufficiently equipped and competent to distribute death benefits correctly and fairly. The question is particularly compelling because of the enormous amounts of fund members' money involved and the high number of pension disputes before the courts and the Adjudicator.<sup>215</sup> Measures by the legislature to alleviate the challenges faced by the retirement fund industry over the lack of skills and qualifications by some members of pension fund boards are also explored in this thesis.<sup>216</sup>

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<sup>213</sup> These issues play a role in determining the efficiency and capability of pension fund board members to achieve the primary objective of establishing retirement funds for ensuring the financial security of members on retirement, as well as the fair distribution of death benefits to dependants and nominated beneficiaries.

<sup>214</sup> Section 7A(3) of the Pension Funds Act requires board members to attain and retain the levels of skills and training as prescribed by the Registrar of Pension Funds (the FSCA). So they are expected to acquire skills gradually or incrementally and the prudence necessary to enable them to deal with their responsibilities. The formal training is required within six months of appointment as a board member. The FSCA has not yet prescribed the level of skills and training needed before one is appointed as a member of a pension fund board. It remains to be seen whether the requirement that board members must attain and retain certain levels of skills and training means that the FSCA will make it compulsory for board members to have some kind of formal education. It is also not clear what the provisions of s 7(A) of the Pension Funds Act mean by the phrase "prescribed levels of skills and training". See n 223 below, where the FSCA's *Trustee Toolkit* is discussed.

<sup>215</sup> See Chapter 1, n 11 for the statistics, and Chapter 3 for a discussion of case law and the Adjudicator's determinations relating to the distribution of death benefits.

<sup>216</sup> The *OECD Guidelines for Pension Fund Governance* in par 4, on the suitability of governing body members, states: "Membership in the governing body should be subject to minimum suitability (or non-suitability) standards in order to ensure a high level of integrity, competence, experience and professionalism in the governance of the pension fund. The governing body should collectively have the necessary skills and knowledge to oversee all the functions performed by pension fund, and to monitor those delegates and advisors to whom such functions have been delegated. It should also seek to enhance its knowledge, where relevant, via appropriate training. Any criteria that may disqualify an individual from appointment to the governing body should be clearly laid out in the regulation". Section 69 of the Companies Act 71 of 2008 states those persons who are ineligible and those who are disqualified from being a director or a prescribed officer of a company. Section 69(7) of the Companies Act states that a "person is ineligible to be a director of a company if the person –  
(a) is a juristic person;  
(b) is an unemancipated minor, or is under a similar legal disability; or  
(c) does not satisfy any qualification set out in the company's Memorandum of Incorporation". Section 69(8) of the same Act lists the categories of persons who are disqualified from being a director of a company under the circumstances stated in the subsection. Similarly, s 8(5)(c) of

It is important that board members should understand the obligations they undertake in assuming their positions so that they can distribute the death benefits properly and thus avoid exposing their funds and themselves in their personal capacity to liability. A board member's lack of knowledge or ignorance is not a valid defence against a potential claim.<sup>217</sup>

The amendment of the Pension Funds Act in 2013<sup>218</sup> made it a statutory requirement that pension fund board members demonstrate knowledge of pension funds law. It prescribes qualifications after the members are appointed to these boards.<sup>219</sup> Board members should be equipped with skills and experience relevant to their ability to exercise their fiduciary obligations to their retirement funds and fund members with accrued benefits.<sup>220</sup> In some recent instances, the expertise and competence of some pension fund board members were questionable.<sup>221</sup>

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the Pension Funds Act states the requirements that the Registrar (the FSCA) will consider in order to assess whether a principal officer is a "fit and proper" person in accordance with the requirement of par (a) of the subsection. This position contrasts with that of pension fund trustees where no such requirements are stated in the Pension Funds Act. But pension funds may use the code of conduct to state the same. See par 6.3 above, where the role of a principal officer is briefly discussed, and Chapter 3, par 5.4.3, where the code of conduct and its legal status are discussed.

<sup>217</sup> See, for example, *Boyce v Bloem and Others* 1960 3 SA 855 (T) at 865, where the court stated: "It is no excuse for a person who by virtue of his office is required to make enquiry, to allege ignorance ... and he who ought to know is just as much *in culpa* as he who knows, and he who neglects to know that which he ought to know is not to be excused. ... Nor would the fact that they took legal advice excuse them". In *The Master of the High Court v Deedat* 1999 JDR 0606 (N) at 22 the court held: "A trustee is required to exercise the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.... It is not the care, diligence or skill which an individual trustee thinks or believes he can render but, that which can reasonably be expected of him in the management of the affairs of another, that is required". See in this regard Cameron *et al Honoré* at 377, referring to *Boyce's* case. See also Pretorius *Removal* at 28 in par 78.

<sup>218</sup> Amended by the Financial Services Laws General Amendment Act 45 of 2013.

<sup>219</sup> The lack of prescribed qualifications for appointment as pension fund board members does not constitute an excuse by members of boards not to comply properly with their duties in distributing benefits. The legislature has acknowledged the important role fulfilled by members of pension boards by introducing various provisions to strengthen the governance of retirement funds, also ensuring that members of pension fund boards have the necessary skills and are "fit and proper" to assume their appointments. The legislature has through s 8(b) of the Financial Services Laws General Amendment Act 45 of 2013 amended the Pension Funds Act by introducing s 7A(3), which deals with the required skills after a person is appointed a member of a pension board.

<sup>220</sup> See s 7C(2)(f) of the Pension Funds Act dealing with the duties of the boards. King IV at 40, Principle 7 states that to discharge its governance role and responsibilities objectively and effectively, the governing body should comprise the appropriate balance of knowledge, skills, experience, diversity, and independence.

<sup>221</sup> See the case law and determinations discussed in Chapter 3 for examples such as *Pretorius v The Pension Funds' Adjudicator and Others* (PFA 58/2019), where the findings of the Financial Services Tribunal are discussed in Chapter 3 n 14. The *Pretorius* case is available at

Board members must enhance their skills and knowledge of retirement funding issues, including the distribution of death benefits.<sup>222</sup> The magnitude of the challenges faced by board members who lack the required skills has been realised by the South African Government, the legislature, the Financial Sector Conduct Authority (FSCA),<sup>223</sup> and the retirement industry. Stakeholders have since made concerted efforts to ensure that people appointed as members of pension fund boards have the necessary skills and knowledge or the will to acquire these attributes.<sup>224</sup>

The *2013 Retirement Reform Proposals for Further Consultation* (2013) suggested strengthening the duty of trustees to act independently<sup>225</sup> and free from a conflict of

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<https://www.moonstone.co.za/upmedia/uploads/library/Moonstone%20Library/MS%20Industry%20News/Decision%20-%20D%20Pretorius%20v%20PFA%20and%20others.pdf>  
(last accessed on 21 July 2021).

<sup>222</sup> See in this regard, King IV, Part 6.4 “Supplement for retirement funds” at 98; Principle 7 states that the board should comprise the appropriate balance of knowledge, skills, experience, diversity, and independence for it to discharge its governance role and responsibilities objectively and effectively. It further states that professional development and learning are of critical importance in ensuring that those charged with the governance of retirement funds are able to execute their duties effectively. It is not a question of whether board members should become experts in retirement fund matters, as that may not be a realistic expectation, but they should at least possess the appropriate knowledge and skills in retirement fund matters to comply with their duties and appreciate the consequences of their decisions and conduct. See Njuguna *Strategies* at 62, advising “pension funds to offer finance and legal training to their trustees; provide guidance on the level and knowledge required of trustees; encourage trustee training on a continuous basis and provide online training; advise trustees where training can be obtained; approve training courses; and make funds available to pay for the training of trustees”. See also in this regard National Treasury *Social Security and Retirement Reform 2007* in par 118.

<sup>223</sup> The FSCA published for public comment the Draft Conduct Standard of 2019 dealing with the “minimum skills and training requirements for board members of pension funds”. The relevant documents are available at “Draft Conduct Standard for Banks” (*Masthead*, 14 May 2019) available at <https://www.masthead.co.za/newsletter/draft-conduct-standard-for-banks> (last accessed on 21 July 2021). The purpose of the Conduct Standard is to prescribe the skills and training that a board member must attain after appointment as contemplated in s 7A(3)(a) of the Pension Funds Act. It states (in par 3): “A board member contemplated in section 7A(3)(a) of the Act must attain the certification of the Trustee Toolkit within a period of six months from the date of appointment to the board, in addition to further skills and training from credible providers as deemed necessary by the board.” The Conduct Standard became effective on 1 January 2020. The Trustee Toolkit facility is an online education programme provided by the FSCA at FSCA “SA Trustee Toolkit” available at <https://www.trusteetoolkit.co.za/login/login.aspx> (last accessed 20 August 2022). It is not yet clear what happens to a trustee who is unable to obtain the certification as required by the Conduct Standard.

<sup>224</sup> Section 7A(3)(a) of the Pension Funds Act states that the Registrar (FSCA) “may” (my emphasis) prescribe level of skills and training. Section 7A(3)(a) implies that the training is not compulsory, and the FSCA is not compelled to prescribe level of skills and training.

<sup>225</sup> National Treasury *2013 Retirement Reform Proposals for Further Consultation* (27 February 2013) at 1. The duty of trustees to act independently is now included as s 7C(2)(e) of the Pension Funds Act. It was added by s 9 of the Financial Services Laws General Amendment Act 45 of 2013. See Chapter 3 par 5, where the duties of trustees are discussed.

interest to enhance the governance of retirement funds.<sup>226</sup> This set of proposals also suggested that Pension Fund Circular 130,<sup>227</sup> dealing with the governance of retirement funds, should be elevated to a Directive. It was further proposed that board members' appointments should be monitored and ensure that appointees meet "fit and proper" requirements set by the Financial Services Board.<sup>228</sup>

The importance of board members' understanding of and competency in pension fund matters cannot be underestimated. King IV, Principle 1 recommends that board members should both individually and collectively cultivate the following characteristics and exhibit them in their conduct:

- They should take steps to ensure that they have sufficient working knowledge of the organisation, its industry, the triple context in which it operates, the capitals it uses and affects, and the key laws, rules, codes, and standards applicable to the organisation.
- They must act with due care, skill, and diligence and take reasonable steps to become informed about matters for decision.
- They should continuously develop their competence to lead effectively.<sup>229</sup>

King IV also recommends that the pension fund board ensure that incoming board members are inducted to make the maximum contribution as soon as possible.<sup>230</sup> Board members have a key role to play in the efficient distribution of death benefits. Care should thus be taken to equip board members with the necessary skills to execute their duties efficiently. Unfortunately, though, case law and the Adjudicator's

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<sup>226</sup> The duty of trustees to avoid conflict of interest is also prescribed as s 7C(2)(c) of the Pension Funds Act. See Chapter 3 pars 5.3.2.4 and 5.4, where the duty of trustees to avoid conflict is discussed.

<sup>227</sup> See PF 130 at 6 in par 20.

<sup>228</sup> See in this regard National Treasury *2013 Retirement Reform Proposals for Further Consultation* at 1. Many members of retirement funds and their beneficiaries seem not to understand the nature and value of their retirement benefits. This lack of knowledge in both pension fund board members and fund members (including dependants and other beneficiaries) leads to unnecessary disputes at the time of distribution, and some members or their beneficiaries fail or neglect to claim retirement fund benefits which are due to them.

<sup>229</sup> See King IV, Part 5.1 (*b. Competence*) dealing with leadership, ethics, and corporate citizenship.

<sup>230</sup> See King IV, Part 5.3 dealing with governing structures and delegation, Principle 7 (22).

determinations show that some pension fund trustees, retirement fund members, and dependants do not understand the workings of retirement funds.

Boards are also required to ensure that pension fund members, dependants, and nominated beneficiaries have access to appropriate advice and relevant information to help them make informed decisions about their pension or death benefits.<sup>231</sup> It is submitted that if the board members themselves do not understand pension fund matters, it will probably be impossible for them to impart any useful information to members of funds, dependants, and nominated beneficiaries. It is further submitted that board members' over-reliance on consultants if they lack the required knowledge exposes them and their funds to liability.<sup>232</sup>

Pension fund boards are not involved in the day-to-day management of their funds, and so they are permitted to delegate some of their functions to appointed

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<sup>231</sup> See Lukhaimane MA "A Perspective from the Adjudicator" (unpublished presentation at the Pension Lawyers Association Conference 2018) available at [http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PLA\\_Session\\_7\\_Lukhaimane.pdf](http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PLA_Session_7_Lukhaimane.pdf) (last accessed on 21 July 2021) at 1, where the Adjudicator summarised her determination of *Rathelele v The Contract Cleaning National Provident Fund*. She explained that the fund in this matter had never issued the complainant (the member of the fund) with any benefit statements throughout her membership, and the employer had also failed to register the complainant in good time and pay full contributions on her behalf. The Adjudicator ordered the employer to pay arrear contributions, and the fund was ordered to issue the complainant with her latest benefit statement. This determination shows the extent of the ignorance of rights and benefits as members. It also shows that complainants are not always aware that they are not registered as members or that the employer is in default with contribution payments on their behalf. Complaints relating to benefit statements should be resolved at fund level. See Chapter 3, par 5.4.6.1, where beneficiaries' access to relevant information is discussed.

<sup>232</sup> See Chapter 3, par 6 for a discussion of the liability of funds and their board members.

administrators and consultants.<sup>233</sup> Most operational duties can be delegated,<sup>234</sup> such as

- keeping registers, books, and member records;
- keeping minutes of all board resolutions;
- ensuring that contributions are paid;
- ensuring that assets are properly invested;
- ensuring that benefits are paid;
- having proper systems in place;
- ensuring that rules comply with the relevant statutes; and
- ensuring that day-to-day operations comply with statute.<sup>235</sup>

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<sup>233</sup> Section 7D(2) of the Pension Funds Act deals with the delegation of duties. It is important to point out that where boards have delegated or appointed administrators and experts to execute some of their duties, there is no direct contractual relationship between the administrators and retirement fund members, as the administrators have contractual relationships with the fund. An understanding of this relationship is important in a case where a fund member or dependant or a nominated beneficiary is aggrieved by the conduct of an administrator and wishes to approach the Adjudicator or the courts for remedies. The delegation of responsibility does not release the delegating pension fund boards from liability for the wrongs committed in the administration of the fund, and the board remains responsible to the fund members. See in this regard also *Johannesburg Municipal Pension Fund and Another v NBC Employee Benefits and Another* (74/01) 2001 ZAGPHC 2 (11 April 2001) at 8. The remedies for wrongful distribution of death benefits are discussed in Chapter 3, par 6. King IV at 40, Principle 8 states that the governing body should ensure that its arrangements for delegation within its own structures promote independent judgement and assist with the balance of power and the effective discharge of its duties.

<sup>234</sup> See the *OECD Guidelines for Pension Fund Governance* in par 5 on delegation and expert advice, stating that the governing body may also delegate operational duties such as asset management, record-keeping, and benefit payment to internal executive staff and/or professional service providers. The OECD states (in par 5) that “the governing body may rely on the support of sub-committees and may delegate functions to internal staff of the pension entity or external service providers. Where it lacks sufficient expertise to make fully informed decisions and fulfil its responsibilities the governing body could be required by the regulator to seek expert advice or appoint professionals to carry out certain functions. The governing body should assess the advice received, including its quality and independence, and should verify that all its professional staff and external service providers have adequate qualifications and experience”.

<sup>235</sup> Section 7D(1) of the Pension Funds Act. See Chapter 3, par 5.4.1 for a discussion of this section.

Despite the delegation of duties,<sup>236</sup> boards remain tasked with the overall responsibility for administering and managing their funds, including distributing death benefits to dependants and nominated beneficiaries.<sup>237</sup> Section 7D(2)(a) and (b) of the Pension Funds Act enable boards to delegate functions to a person, group of persons, or a committee of the board.<sup>238</sup> The board is still not relieved of a delegated function and is entitled to withdraw the delegation.<sup>239</sup> Delegation of the duty to distribute death benefits in section 37C of the Pension Funds Act should also be possible.<sup>240</sup> The above-mentioned statutory provisions about delegating

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<sup>236</sup> Pretorius *Removal* at 35 and 36 in par 110 submits that in considering the power of a board to delegate, it is important to distinguish between delegation, on the one hand, and abdication, on the other. Cameron *et al Honoré* at 326 state: “a trustee can employ subordinates to attend to humdrum aspects of trust administration, and even pass on everyday aspects of running the trust to an outside agency or company. Thus it is not uncommon for a trustee to delegate the administration of the trust to another. This may be to a co-trustee, to a firm in which the trustee is or is not a partner, to a relative, to a suitably qualified professional person or even to a management committee. Such a course is not improper as long as it amounts only to a responsible delegation (the appointment of another, for which acts one will be responsible to act on one’s behalf) and not to abdication (the appointment of another to act instead of oneself, so as to relieve oneself of responsibility) ... it does not relieve the trustee from the duty of supervising and checking the work of any non-trustee to whom the delegation may have been made. Indeed, the trustee retains office as trustee with primary responsibilities to the beneficiaries under the trust and is accordingly at liberty at any time to revoke the delegation of the authority”. See also Cameron *et al Honoré* at 388, defining *delegation* as the “appointment of another, for which acts one will be responsible, to act on one’s behalf”, and *abdication* as “the appointment of another to act instead of oneself, so as to relieve oneself of responsibility”.

<sup>237</sup> In *Twerefoo v Liberty Life Association of SA Ltd and Others* 2000 12 BPLR 1437 (PFA) at 1448, the Adjudicator stated that trustees cannot abdicate all responsibility once they have delegated a duty. PF 130 at 2 in par 6 states that members and beneficiaries require legal recourse or remedies should the benefits not be provided to them as stipulated in the rules of the fund.

<sup>238</sup> In terms of s 7D(2)(a) and (b) of the Pension Funds Act, as added by s 10(c) of the Financial Services Laws General Amendment Act 45 of 2013, the board may, in writing and in accordance with a system of delegation set out in the rules, delegate any of its functions to a person or group of persons or committee of the board.

<sup>239</sup> See s 7D(2)(b) of the Pension Funds Act. In *Affirm Marketing (Pty) Limited and Others v IF Umbrella Pension Fund and Others* 2013 3 BPLR 300 (PFA) in par 3.2, the Adjudicator held that although the board of trustees is entitled to delegate the functions to administrators, it remains responsible for the actions of these service providers who act as agents of the fund. The delegation of duties does not amount to a transfer of the oversight function of the board, nor does it amount to an abdication of responsibilities entrusted to the board. In *Kruger v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* (PFA/EC/4362/2005/NVC) in par 25, it was stated that the trustees of the fund have a duty to ensure that the terms of any underlying contract taken out in respect of, and for the benefit of, a member are adhered to by the other contracting party. The trustees may not simply wash their proverbial hands of all responsibility. In this sense, members are in a similar position to trust beneficiaries. The *Kruger* determination is available at <https://www.pfa.org.za/Determinations/20062008/9763ED88-A9CB-4DFD-A65F-F163AAE03AB8.pdf> (last accessed on 21 July 2021).

<sup>240</sup> See in this regard *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 3 SA 798 (SCA), confirming that delegation of authority for the distribution of death benefits is possible.

functions are supported by the Pension Fund 130 Circular guidelines<sup>241</sup> and emphasise the role that boards and their board members should play when engaging with advisors, administrators, and experts to whom they have delegated some of their duties.<sup>242</sup>

It is apparent from the discussion above that pension fund trustees constitute the driving force of their pension funds. One can build the best-performing vehicle, but its potential will not be fully realised if its driver lacks the necessary skill or competency to drive it. Similarly, efforts could be made to enhance the efficiency of pension funds. Still, if their boards and trustees are incompetent, it will be difficult for the funds to realise the objectives of their establishment.<sup>243</sup> So the need for competent pension fund boards and skilled trustees is clear.<sup>244</sup> It is suggested that it may be prudent to require a person to pass a specific examination or successfully complete a prescribed course before assuming duties or taking up a position as a member of a pension fund board (as a pension fund trustee).<sup>245</sup> This outcome would

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<sup>241</sup> PF 130 in par 14 states that the board may, should the rules of the fund permit, delegate some of its functions to board subcommittees, employees of the fund, and service providers; but this delegation does not relieve the board of accountability for the functions so delegated. The board may not abdicate any of its functions and responsibilities. See also *Bonugli v Unibank Provident Fund and Others* 2011 2 BPLR 151 (PFA) at 155, where the Adjudicator confirmed that the pension fund has fiduciary obligations towards its members, and where it delegates any functions to third parties, it has a duty to exercise an oversight function over such service provider. She stated (at 155) that the duty of a fund to keep proper records in respect of members is of critical importance, as these are used to determine the benefits of members — any failure to maintain proper systems and to keep proper books and records will prejudice members.

<sup>242</sup> In most cases, the rules of a fund grant discretionary powers to the boards, such as in the distribution of death benefits. The boards must therefore ensure that the extensive powers granted to them to manage the fund are exercised in accordance with the boards' fiduciary duties. It is also essential that the boards, to comply with their fiduciary duties, monitor the performance of all service providers appointed to the fund. See in this regard Cheadle, Thompson & Haysom *Accountability* in pars 4 and 5 and also *Twerefoo v Liberty Life Association of SA Ltd and Others* 2000 12 BPLR 1437 (PFA) at 1448-1449. In *Johannesburg Municipal Pension Fund and Another v NBC Employee Benefits and Another* (74/01) 2001 ZAGPHC 2 (11 April 2001) at 8, the court stated that it is a well-established principle that when trustees choose to delegate any part of their functions, they are at liberty at any time to revoke such delegation of authority.

<sup>243</sup> See Chapter 1, par 2.4, where the objectives of pension funds establishment are discussed.

<sup>244</sup> See in this regard Chapter 3, pars 6.5.5.1 (criminal sanctions), where suggestions and recommendations are made for the legislature to strengthen the accountability of pension fund trustees. This step can be taken by ensuring that there are criminal sanctions against trustees who perform their duties fraudulently and abuse their positions. It then becomes crucial to make sure that the appointed pension fund trustees are competent, otherwise their appointments will amount to setting them up for failure and exposing them to liability and criminal sanctions.

<sup>245</sup> See Chapter 4, par 4.2.4 for the minimum qualifications required before a person can be appointed as a pension fund trustee in the United Kingdom, and Chapter 5, par 5.2.3.3 in the part dealing with the qualifications of members of pension management boards in Germany. See Chapter 6, pars 5.1 and 5.4, where suggestions are made in this regard.



align with the King IV recommendations for ensuring that the governing body of an institution is competent and its board members are suitably qualified.<sup>246</sup>

The Companies Act 71 of 2008, regarding directors of companies in South Africa, states that the Companies and Intellectual Property Commission “must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law”.<sup>247</sup> It is suggested that the FSCA should provide for a similar public register to publish names of persons who are disqualified from becoming members of pension fund boards.<sup>248</sup>

#### 6.5 *The Pension Funds Ombudsman (The Adjudicator)*

Before the Pension Funds Act was amended by the Pension Funds Amendment Act 22 of 1996, those who felt that the fund was not providing them with the benefit payable under the fund rules or who felt aggrieved by the board’s discretionary decision about benefits could not choose to ask the Adjudicator for relief. Instead, they had to hire expensive lawyers to represent them in court.<sup>249</sup> The Pension Funds Act creates another procedure for referring complaints about the payment of retirement fund death benefits to the Adjudicator for determination.<sup>250</sup> The Act thus created the office of the Pension Funds Adjudicator to enhance the protection of retirement fund members, beneficiaries, and other dependants.<sup>251</sup> The Adjudicator exercises jurisdiction over all retirement funds in South Africa registered under the Pension Funds Act.<sup>252</sup> The Adjudicator’s office is a quasi-judicial organ with the power to determine disputes and perform judicial acts upon considering facts and

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<sup>246</sup> See Chapter 6, par 5.4, where a suggestion is made about the establishment of minimum standards before one can be appointed as a pension fund trustee.

<sup>247</sup> Section 69(13) of the Companies Act 71 of 2008. Chapter 5, par 5.2.3.3 where the appointment and qualifications of members of pension fund management in Germany are discussed.

<sup>248</sup> See Chapter 6, par 5.13, where a suggestion is made in this regard.

<sup>249</sup> Section 30K of the Pension Funds Act states that no party shall be entitled to legal representation at proceedings before the Adjudicator.

<sup>250</sup> See Chapter VA of the Pension Funds Act.

<sup>251</sup> This office was established in terms of s 30B of the Pension Funds Act: i.e., in Chapter VA (comprising ss 30AA-30Y).

<sup>252</sup> Section 2 of the Pension Funds Act deals with the application of this statute to pension funds.

circumstances.<sup>253</sup> The Adjudicator conducts investigations and adjudicates disputes between retirement funds and their members or beneficiaries expediently and more cheaply.<sup>254</sup> Under section 30O(1) of the Act, the Adjudicator's determination is deemed to be a civil judgment of any court of law had the matter in question been heard by that court and must be noted by the clerk or the registrar of the court, as the case may be.<sup>255</sup>

The Adjudicator plays a crucial role in ensuring the efficient distribution of death benefits and protecting the interests of beneficiaries against unscrupulous board members, employers, and administrators.<sup>256</sup> Several determinations of the Adjudicator and decided cases indicate that the boards have distributed death benefits unfairly to the prejudice of dependants and nominated beneficiaries.<sup>257</sup> This failure by the boards to comply with their duties does not serve the best interests of members, dependants, or the nominated beneficiaries.<sup>258</sup> This reality underlines the importance of the Adjudicator's office as an additional mechanism to help members and other beneficiaries enforce their rights to their benefits.<sup>259</sup>

It is submitted that despite the Adjudicator's important role in protecting the rights and interests of fund members and their beneficiaries, the office has some limitations that hinder its maximum effectiveness. One such limitation is when a party appeals the determination in terms of section 30P(2) of the Pension Funds Act

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<sup>253</sup> See *Henderson v Eskom and Another* 1999 12 BPLR 353 (PFA) at 355.

<sup>254</sup> Section 30D of the Pension Funds Act deals with the main object of the Adjudicator.

<sup>255</sup> Section 30O(1) of the Pension Funds Act deals with the enforceability of the Adjudicator's determinations.

<sup>256</sup> Members' dependants and nominated beneficiaries can lodge claims against the retirement funds without incurring any legal costs. Exorbitant legal costs might deter members, dependants, and nominated beneficiaries from pursuing their legal claims against the retirement funds. In other instances, the relief provided by the accessibility of the Adjudicator's office is temporary because some of its determinations are appealed by the retirement funds in court. The Adjudicator seldom contests these appeals, and the dependants lack the financial resources to engage the services of lawyers. See in this regard Chapter 3, par 6.5.5.2, where this challenge relating to legal costs is discussed.

<sup>257</sup> See, for example, the Pension Funds Adjudicator *Annual Report 2017–2018*, detailing some of these determinations and cases. These cases and determinations are further discussed in Chapter 3.

<sup>258</sup> See the case law and determinations discussed in Chapter 3, where the courts or the Adjudicator criticised the conduct of the boards to the point where they substituted the boards' decisions to distribute death benefits with theirs.

<sup>259</sup> See *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* (1991/2001) 2002 ZAWCHC 38 (23 July 2002) at 18, the court pointing out that the Adjudicator is a public authority performing a valuable social function within a limited budget.

because the Adjudicator cannot defend the determination.<sup>260</sup> In *Meyer v Iscor Pension Fund*,<sup>261</sup> the Supreme Court of Appeal held that the court is not bound by the evidence or a ground on which the Adjudicator's decision was made.<sup>262</sup> Accordingly, the court can consider the matter afresh and make an order that it deems fit, which can also be based on new evidence.<sup>263</sup> The Supreme Court of Appeal held that the appeal is seen as a fresh consideration of the same complaint based on existing or new evidence.<sup>264</sup> The Adjudicator may still submit an affidavit containing information that may assist the court.<sup>265</sup> In *Orion Money Purchase Pension Fund (SA) of South Africa v The Pension Funds Adjudicator and Others*,<sup>266</sup> the High Court said that the Pension Funds Adjudicators' function is not to oppose applications against their determinations but to dispose of complaints lodged before them in a procedurally fair, economical, and expeditious manner.<sup>267</sup> The court in *Orion* referred to the following remarks made by Schutz JA in *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others*:<sup>268</sup>

It is not for Judges to participate in any stage subsequent to their judgments in order to defend their decision. Indeed it would be improper to do so, except in those rare cases when an obligation to provide information arises. ... The place to explain a decision is in a judgment. Once given it is given. ... Thirdly, and most importantly, it is not in the public interest that Judges should become embroiled in disputes between parties who have appeared before them. It is a

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<sup>260</sup> Section 30P of the Pension Funds Act is entitled "Access to court" and provides a right to any party who feels aggrieved by a determination of the Adjudicator to apply to the High Court for relief:

"(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced".

<sup>261</sup> 2003 2 SA 715 (SCA).

<sup>262</sup> At 725-726.

<sup>263</sup> At 725-726. Since 1 April 2018, the Adjudicator's decisions may be referred to the Financial Services Tribunal for review in terms of s 29 of the Financial Sector Regulation Act 9 of 2017. The Tribunal is discussed in par 6.6 below.

<sup>264</sup> *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) at 725-726.

<sup>265</sup> See *Mine Employees Pension Fund v De la Rey NO* 2012 2 BPLR 156 (GSJ).

<sup>266</sup> (1991/2001) 2002 ZAWCHC 38 (23 July 2002).

<sup>267</sup> At 4.

<sup>268</sup> 2003 2 SA 385 (SCA).

matter of the utmost importance that Judges should be seen as impartial and, in the kinder sense, aloof.<sup>269</sup>

The Adjudicator cannot become a defendant or respondent in an appeal brought against the determination by an aggrieved party dissatisfied with the determination but may only participate as a party in review proceedings against the determination. So, if the fund appeals the determination, a member or beneficiary is left alone to fight against funds that have the resources to hire the best lawyers,<sup>270</sup> and he or she will usually need legal representation in court. Some dependants and beneficiaries may lack the funds to pay for lawyers and may thus suffer potential prejudice.

#### 6.6 *The Financial Services Tribunal*

The Financial Sector Regulation Act 9 of 2017 (“FSRA”) established the Financial Services Tribunal (the “Tribunal”) as an independent tribunal. The FSRA conferred on the Tribunal the power to reconsider decisions by financial sector regulators, including those of the Pension Funds Adjudicator.<sup>271</sup> The introduction of the Financial Services Tribunal is a welcome development allowing parties dissatisfied with the decision of the Pension Funds Adjudicator to approach the Tribunal for further relief.<sup>272</sup> So, for example, *Pretorius v The Pension Funds Adjudicator and Others*<sup>273</sup> was an application under section 230 of the FSRA. The Tribunal was asked to reconsider the Adjudicator’s decision reversing the decision of the pension

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<sup>269</sup> At 402-403.

<sup>270</sup> See Chapter 3, par 6.5.5, where the challenges faced by beneficiaries in protecting their rights are discussed.

<sup>271</sup> The Financial Services Tribunal was established in terms of s 219(1) of the FSRA.

<sup>272</sup> The Pension Funds Adjudicator *Annual Report 2019/20* at 16 states that during the 2019/2020 financial year, the Tribunal received 97 applications for the reconsideration of the Office of the Pension Funds Adjudicator’s (“OPFA”) determinations. It further states that “46 applications were heard, whilst 46 applications were dismissed or settled without a hearing. 21 applications were referred back to the OPFA for reconsideration. Of these 21.7 matters were reconsidered and the original decision of the OPFA was maintained, whilst 2 cases were reconsidered and a new decision was made. The remaining matters were still pending reconsideration at the end of the reporting period”. The Pension Funds Adjudicator *Annual Report 2019/20* is available at <https://www.pfa.org.za/Publications/AnnualReports/Annual%20Report%202020.pdf> (accessed on 23 August 2021).

<sup>273</sup> *Pretorius v The Pension Funds’ Adjudicator and Others* (PFA58/2019). Section 230(b) of the FSRA states that the Financial Services Tribunal is an internal remedy that must be exhausted in relation to disputes that this forum has jurisdiction over, such as dissatisfaction with the Adjudicator’s determinations.

fund board of trustees to allocate the death benefit proportions. The legal question before the Tribunal was whether the Adjudicator has the power to substitute the board of trustees' decision with her own. This issue concerns the effect of section 30E(1)(a) on the power of the Adjudicator to substitute.<sup>274</sup>

The following paragraph of this thesis discusses South African regulatory and legislative measures to ensure the pension fund boards' efficient distribution and protection of death benefits.<sup>275</sup>

## **7 THE REGULATORY AND LEGISLATIVE FRAMEWORKS FOR DISTRIBUTING RETIREMENT FUND DEATH BENEFITS**

The distribution of death benefits is not just a matter of private concern affecting only individual fund members, dependants, and nominated beneficiaries but is also a matter of public interest.<sup>276</sup> The State has a vested interest in ensuring that death benefits are distributed efficiently according to the objectives of establishing retirement funds.<sup>277</sup> So the distribution of these benefits is subject to the power of the State, vested in the legislature through section 37C of the Pension Funds Act. This section prescribes how death benefits should be distributed.<sup>278</sup> Besides this section, the State also provides a body of law defining the attributes of the fiduciary relationship and the duties of the board and its members in distributing death benefits.<sup>279</sup> A second role of the State is solidly enforcing the rights of all

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<sup>274</sup> See Chapter 3, n 14, where *Pretorius v The Pension Funds' Adjudicator and Others* (PFA58/2019) is discussed.

<sup>275</sup> See *OECD Guidelines on Pension Fund Asset Management* at 2 in par 4, stating that the basic premise is that the regulatory framework should take into account the retirement income objective of a pension fund. See also Rocha, Gutierrez and Hinz *Improving* at 15, stating that the regulatory framework for pension funds also needs to consider the unique characteristics of these institutions, which derive from the special role that they play in advancing key social policy objectives, such as the provision of retirement income.

<sup>276</sup> See Hunter *et al Pension Funds Act* at 201, n 243, stating that "it is [in] the public interest that retirement funds are properly administered (*Government Employees Pension Fund v Buitendag & Others* [2006] 4 BPLR 284 (SCA) at par 14); and there may be public interest in the outcome of a decision that the board of a particular fund may take (*Marais v Democratic Alliance* [2002] 2 All SA 424 (C) at par 51)".

<sup>277</sup> It is submitted that the efficiency with which the governance framework in a country operates depends on how effective the legal and regulatory environment is.

<sup>278</sup> See Chapter 3, pars 1 and 2 for a discussion of s 37C of the Pension Funds Act.

<sup>279</sup> In South Africa, contributing to retirement funds is encouraged by a preferred tax treatment for contributions, effectively making the State a major "stakeholder" in a retirement fund. Ensuring the protection and equitability of the distribution of death benefits contributes to the perceived need for greater security in the regulatory approach. See in this regard Rocha, Gutierrez and Hinz *Improving* at 16.

stakeholders (aggrieved fund members, former members of retirement funds, dependants, and nominated beneficiaries) by the courts and the Adjudicator. Thirdly, the State provides a Regulator, the FSCA, to monitor the retirement fund industry and ensure sound administration and proper governance structures for retirement funds, improve the security of the members' benefits,<sup>280</sup> and see that the pension fund boards comply with their fiduciary duties and their duties of care and skill.<sup>281</sup>

The FSCA is the leading role-player regulating occupational retirement funds in South Africa.<sup>282</sup> So boards and pension fund trustees (board members), beneficiaries, sponsoring employers, retirement funds, principal officers, pension benefit administrators, and other affected stakeholders must all understand the legal and regulatory environment in which boards operate when distributing death benefits to members, dependants, and nominated beneficiaries. It is submitted that the State's inadequate regulation of retirement funds affects boards' effectiveness in distributing death benefits efficiently to dependants and nominated beneficiaries, which ultimately harms the realisation of the State objectives for establishing retirement funds.

The discussion below focuses on the regulatory and legislative aspects of the FSCA concerning the distribution of death benefits. The FSCA is an independent regulatory institution established in 2017. It succeeded the Financial Services Board ("FSB"), established in 1990 by the Financial Services Board Act 97 of 1990 to

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<sup>280</sup> See Mouton Committee *Report* at 14. Section 57 of the FSRA states the objective of the FSCA as follows: " to–

(a) enhance and support the efficiency and integrity of financial markets; and

(b) protect financial customers by–

(i) promoting fair treatment of financial customers by financial institutions; and

(ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions; and

(c) assist in maintaining financial stability.

<sup>281</sup> See Chapter 3, par 5, where the duties of pension fund trustees are discussed.

<sup>282</sup> Section 56 of the FSRA provides for the establishment of the FSCA, whose functions include the regulation and supervision of the conduct of financial institutions, including retirement funds, in accordance with the financial sector laws. Section 58 deals with the functions of the FSCA.

oversee the non-banking financial services industry, including pension funds.<sup>283</sup> The Registrar of Pension Funds (hence “the Registrar”) was appointed under the Pension Funds Act and exercised extensive powers and functions.<sup>284</sup> As it is in the interests of the general public that pension funds operate fairly, properly, and successfully,<sup>285</sup> all pension funds are required to register in terms of the Act, and their constitutions and rules and any amendments to these documents are subject to approval by the FSCA.<sup>286</sup> In addition, the FSCA provides administrative oversight by ensuring that pension funds comply with the Pension Funds Act.<sup>287</sup> The FSCA’s powers to regulate pension funds include

- the granting and withdrawal of licences for pension funds<sup>288</sup> and pension fund administrators;<sup>289</sup>

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<sup>283</sup> *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) in par 8. The FSCA registers new funds, approves rules and rule amendments, and deals with licensing.

<sup>284</sup> See, for example, the following sections of the Pension Funds Act dealing with the powers of the Registrar of Pension Funds (the FSCA): s 24 (enquiries), s 26 (the Registrar’s intervention in management of the fund); and s 27 (cancellation or suspension of registration).

<sup>285</sup> *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) in par 14.

<sup>286</sup> *Registrar of Pension Funds and Another v Angus NO and Others* 2007 5 SA 1 (SCA) in par 43 at 17.4.

<sup>287</sup> Under s 26 of the Pension Funds Act, the Registrar (the FSCA) may intervene in the management of a fund. If the fund is not in a sound financial condition or is not managed in accordance with the Pension Funds Act or the fund rules, the FSCA may direct that the rules of a fund be amended if this is in the best interests of the members. See generally *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) for a detailed discussion of the powers, functions, and duties of the Registrar of Pension Funds.

<sup>288</sup> The supervisory function of the FSCA includes ensuring compliance with the Pension Funds Act by pension fund organisations registered in terms of the Act. See Stewart *Experiences* at 5, stating that “Pension supervision involves monitoring the activities of pension funds to ensure protection for members and beneficiaries”. See Hu and Stewart *Licensing* at 3, stating that licensing is one of the safety mechanisms available to ensure the efficiency and sustainability of pension funds’ ability to fulfil their pension promises. The licencing system plays an important role in ensuring the effective efficient operation of the pension market, and in consequence is a useful and important mechanism for protecting the best interests of plan members and other relevant beneficiaries. See also Rocha, Gutierrez and Hinz *Improving* at 8, stating that licensing further plays an important role in ensuring the viability of new pension funds and the integrity and fitness of those who will control and manage them.

<sup>289</sup> See *OECD-IOPS Guidelines on the Licensing of Pension Entities: Recommendation of the Council* (OECD Directorate for Financial and Enterprise Affairs 28 March 2008) available at <https://www.oecd.org/finance/private-pensions/40434531.pdf> (last accessed on 22 July 2021) at 4, which defines “licence” as: “The authorisation of a pension entity to operate and/or to have the right to tax benefits”.

- the registration and deregistration of pension funds;<sup>290</sup>
- the suspension of pension fund operations;
- the establishment of norms and standards;
- inspections;
- the preparation and enactment of regulations;
- the appointment and removal of pension fund board members;
- the imposition of penalties for non-compliance; and
- monitoring and enforcement (sanctions and dispute resolution).<sup>291</sup>

Some international bodies and organisations also influence the regulation of the South African retirement fund industry and the distribution of benefits: these include the World Bank, the ILO, the OECD, and the IOPS.<sup>292</sup>

Through the legislature, the FSCA, the Pension Funds Adjudicator, and the courts, the State plays a substantial role in ensuring the sustainability and efficiency of occupational retirement funds. The way in which the distribution of retirement fund death benefits is regulated and monitored is crucial to the success and sustainability of occupational pension funds.<sup>293</sup> The regulation of the boards and their board members in the distribution of death benefits is necessary when one considers:

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<sup>290</sup> It is submitted that when retirement funds are deregistered or closed, their assets should be disposed of in a way that protects the rights of the members and beneficiaries, otherwise these people may be deprived of retirement fund benefits unlawfully. If these people cannot be traced, the assets of deregistered funds should be transferred to the Unclaimed Benefit Fund, where the rightful owners can claim them. See Chapter 3, par 2.2.10.1, where the Unclaimed Benefit Fund is discussed.

<sup>291</sup> See Demaestri and Ferro *Integrated Financial Supervision* at 109. See also Rocha, Gutierrez and Hinz *Improving* at 9, stating that the enforcement function is crucial to the efficiency of the supervisory process. This requires clear powers and an objective legal framework to mitigate risks related to litigation, overreaction, inaction, and interference.

<sup>292</sup> The provisions of these organisations are referred to in this thesis when they are considered to contribute guidance and weight to specific arguments and submissions.

<sup>293</sup> Retirement fund members spend their working lives saving money in a retirement fund so that when they retire, they will have sufficient income from the retirement fund to sustain them financially, or if they become disabled or incapacitated before retirement, they will receive disability benefits from their funds or, if they die before retirement, their dependants and beneficiaries will receive death benefits. Imagine what would happen to these pension fund



- the growing importance of private occupational retirement funds as a source of income on a member's retirement or death;
- the role that retirement fund benefits play in the economy<sup>294</sup> and society as a whole;
- the enormous amounts of money in the hands of the few individuals who are members of the pension fund board;<sup>295</sup> and
- the recognition that the failure of retirement funds to keep their pension promise could lead to the poverty of a retirement fund member on reaching old age and of dependants after losing a fund member who was also a breadwinner.

Retirement fund benefits are intended to help the most vulnerable in society, such as older people who no longer work and their dependants. If the benefits are not secured, pensioners have no other way of financially supporting themselves and their dependants and, in effect, must live in poverty since they rely on the basic income of the older person's grant.<sup>296</sup> A further result is that the State must dig deeper into its budget for social assistance.

Members and beneficiaries of retirement funds justifiably expect that their funds will be managed within a regulatory and supervisory framework ensuring the protection of their interests and that these funds will be able to deliver the promised benefits.<sup>297</sup>

The main objective of regulating retirement funds is to ensure that the fund keeps

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members if they were informed that their retirement funds were unable to pay their pension benefits because certain things had occurred because the retirement funds were not properly regulated. Now imagine the affected pension fund members and beneficiaries having nothing to sustain themselves financially with on the retirement, disability, termination of employment, or death of a member.

<sup>294</sup> The role of retirement funds in the South African economy was explained in Chapter 1, par 2.3.

<sup>295</sup> See *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) in par 13, stating that because pension moneys are perceived to be vulnerable, there is a need to provide protective safeguards. The mischief which the Pension Funds Act seeks to prevent is the abuse or misuse of pension funds by unscrupulous employers and other persons dealing with pension funds.

<sup>296</sup> National Treasury *Retirement Fund Reform 2004* at 4 states some of the broad objectives of the Government's retirement policy as seeking to encourage individuals to provide adequately for their own retirement and the needs of their dependants; to ensure that retirement funding arrangements are cost-efficient, prudently managed, transparent, and fair; to improve standards of fund governance, including trustee knowledge and conduct; and to protect members' interests, provide accountability, and disclose material information to members and contributors.

<sup>297</sup> See in this regard the Organisation for Economic Co-operation and Development *Guidelines for the Protection of Rights of Members and Beneficiaries in Occupational Pension Plans* at 3.

its pension promise to fund members, as contained in the rules, and secures the retirement benefits for the benefit of its members and their beneficiaries.<sup>298</sup> So it is in the interests of fund members and their beneficiaries that retirement fund benefits are properly protected.<sup>299</sup> For this to happen, the FSCA and policymakers should prioritise ensuring that the retirement system is efficient and well-regulated and that any inadequacies are removed. It is submitted that this initiative will enhance the protection of the interests of members and their dependants, thus contributing to the ability of the retirement fund industry to attract and retain participation by all and meet members' expectations. The efficient and fair distribution of retirement fund death benefits is equally important: the main purpose of a retirement system is to pay retirement and death benefits to the pensioners, dependants, and nominated beneficiaries.<sup>300</sup>

Poor regulation of the industry encourages corruption and non-compliance with applicable laws and destroys the confidence of fund members. Corruption must also be rooted out. Weak regulation and oversight functions by the FSCA hinder the protection of retirement fund members' interests and those of their dependants and beneficiaries.<sup>301</sup> These deficiencies also lead to the State's failing to realise its objectives in the establishment of retirement funds.<sup>302</sup> The retirement industry thus needs a legislative and regulatory framework conducive to efficient operation.<sup>303</sup> It is submitted that the FSCA's capacity to monitor the pension fund board's non-compliance with applicable laws and rules should be improved, and that the fund's dispute mechanism to resolve problems in distributing retirement fund death benefits should be enhanced.

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<sup>298</sup> See Schuh *Pension Regulation* at 7.

<sup>299</sup> Employees are also interested in the proper regulation and administration of their funds since retirement benefits are their major source of income at retirement or for their dependants in the case of the member's death while still in service.

<sup>300</sup> See Chapter 1, par 2.4, where the objectives of pension fund establishment are discussed.

<sup>301</sup> See below n 317 for specific examples, including Fidentia.

<sup>302</sup> For example, the accumulation of huge unclaimed benefits, as those benefits belong to former members or their beneficiaries, and failure by some employers to pay over their employees' pension contributions to the relevant funds. See Chapter 3, par 2.2.10, where the non-payment of benefits is discussed.

<sup>303</sup> See *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) in par 14, where the Supreme Court of Appeal commented that the general public interest requires that pension funds should be operated fairly, properly, and successfully and that the pension fund industry should be regulated to achieve these objects.

The South African retirement funding system is governed by an established body of legislation principally codified in the Pension Funds Act.<sup>304</sup> This Act is the main statute regulating the distribution of retirement fund death benefits.<sup>305</sup> It prescribes the requirements and processes for pension fund registration;<sup>306</sup> the composition of pension fund boards;<sup>307</sup> and the management and administration of pension funds, including the payment of withdrawal and retirement benefits to members, and the payment of death benefits to dependants and beneficiaries.<sup>308</sup> It sets statutory guidelines on how the boards should distribute retirement fund death benefits under section 37C.<sup>309</sup> And it protects the interests of retirement fund members,<sup>310</sup> their dependants or other beneficiaries, and the assets of retirement funds in compliance with the values enshrined in the Constitution, particularly under the property clause.<sup>311</sup>

In addition to the Pension Funds Act, the rights of retirement fund members and beneficiaries are also protected by the Financial Institutions (Protection of Funds)

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<sup>304</sup> The Pension Funds Act was enacted in 1956 with the main objective of regulating pension funds registered under its provisions. See also National Treasury *Retirement Fund Reform 2004* at 5.

<sup>305</sup> There are other statutes which affect how retirement benefits are distributed, such as the Constitution, the Maintenance Act 99 of 1998, and the Divorce Act 70 of 1979.

<sup>306</sup> Section 4 of the Pension Funds Act.

<sup>307</sup> Section 7A of the Pension Funds Act.

<sup>308</sup> National Treasury *2014 Budget Update on Retirement Reforms* (14 March 2014) at 11. The media release is available at the Treasury website at <https://www.treasury.gov.za/publications/RetirementReform/20140314%20-%202014%20Budget%20Update%20on%20Retirement%20Reforms.pdf> (last accessed on 19 July 2021). The 2014 reform paper states that “the Registrar is working with other FSB departments on proposals for new standards for the licencing, registration and operation of funds, including their administrators and those who provide other products and services to them”. The FSB has now been replaced by the FSCA.

<sup>309</sup> The objective of the Pension Funds Act is underlined in *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) at 171 in par 13 as follows: “The scheme of the Act is to permit privately administered pension funds subject to stringent regulatory requirements, or underwritten pension funds where an insurer, with its own statutory and internal regulatory mechanisms, takes over the administration and investments of the fund. Because pension moneys are perceived to be vulnerable there is a need to provide protective safeguards. The mischief which the Act seeks to prevent is the abuse or misuse of pension funds by unscrupulous employers and other persons dealing with pension funds”. See also in this regard *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others* 2004 5 SA 609 (C) in par 79.

<sup>310</sup> See, for example, ss 7 and 37A of the Pension Funds Act.

<sup>311</sup> See par 4.3 above for a discussion of a pension as “property”.

Act 28 of 2001, the Constitution,<sup>312</sup> the retirement fund rules,<sup>313</sup> and the common law.<sup>314</sup> The South African Revenue Service (SARS), through the Income Tax Act 58 of 1962, also plays a crucial role in shaping South African retirement funds by requiring all new pension funds and preservation funds to meet certain requirements before they are registered by the FSCA and qualify to receive tax exemptions.<sup>315</sup> The courts, the Adjudicator, and the FSCA provide an additional layer to ensure the protection of the rights of retirement fund members, dependants, and other beneficiaries. The judiciary and the Adjudicator play important roles in encouraging and ensuring the efficient distribution of death benefits, compliance with the applicable laws and the fund rules, and the accountability of responsible persons.<sup>316</sup>

It is inevitable that when the distribution of retirement benefits is discussed, consideration should be given to how these benefits are protected and preserved. Failure to protect and preserve them could mean that on termination of employment

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<sup>312</sup> There is no doubt that the Constitution plays a vital role in ensuring the protection of constitutional rights of members and other beneficiaries in respect of the distribution of retirement benefits.

<sup>313</sup> Section 13 of the Pension Funds Act.

<sup>314</sup> See s 8(3) of the Constitution on the importance of the common law.

<sup>315</sup> Section 1 of the Income Tax Act 58 of 1962 defines a “pension fund” as any superannuation, pension, provident or dependants’ fund or pension scheme established by law, whose rules provide, among other things, that membership of the fund throughout the period of employment shall be a condition of employment by the employer of all persons of the class or classes specified therein who enter its employment on or after the date on which fund comes into operation.

<sup>316</sup> Unlike in respect of company boards of directors where there are annual general meetings at which shareholders have an opportunity to discuss issues and ask the board questions, South African law does not currently prescribe annual general meetings where pension fund members have an opportunity similar to that of shareholders. See in this regard Keay and Loughrey 2015 *LS* 252 at 278. Annual general meetings are a legal obligation for public-listed companies and provide an opportunity for shareholders to ask questions. Pension funds, on the other hand, are covered by different laws and tend not to have annual general meetings. See in this regard PF 130, Principle 10, which deals with “Members and Beneficiaries (protection of rights)”, in par 64, where it is suggested that the pension fund board “should consider holding an annual general meeting at which fund issues can be discussed, provided this is practical and cost-effective. It would be appropriate at such a meeting that the financial statements of the fund as well as the performance of the investments be tabled and discussed. Members should be reminded that they may not pass resolutions which bind the board. The meeting should preferably be chaired by the chairperson of the board”. In the context of the distribution of retirement fund death benefits to potential beneficiaries (the dependants and/or nominated beneficiaries), this suggestion of annual general meetings does not provide much for the protection of rights of dependants and beneficiaries, as the attendance would be by fund members. However, the trustees could use this platform to reiterate the importance of completing nomination forms and sensitise pension fund members to crucial pension fund matters, including the provisions of s 37C of the Pension Funds Act. See Chapter 3, par 6.5.5, and Chapter 6, pars 5.11, 5.13, and 5.15 where suggestions are made to strengthen the accountability of pension fund trustees in this regard.

or on retirement, or on the fund member's death, the members' pension accounts will be left with no money for pension fund boards to distribute to fund members, dependants, and beneficiaries.

Retirement fund benefits must be protected to ensure that members, dependants, and beneficiaries can receive their benefits after the retirement or death of a member while still in service.<sup>317</sup> The provisions addressing the protection of retirement fund benefits appear in section 37A of the Pension Funds Act. This section protects members' retirement fund benefits against creditors by stating that a member may not reduce or transfer his or her retirement benefit. If a fund member attempts to transfer or otherwise cede, pledge, or hypothecate his or her benefit, the fund may withhold it or suspend its payment. The objective of section 37A(1) is to protect members against being deprived of a source of their income at retirement and to ensure that there is money in the member's retirement fund account that could be paid to dependants and beneficiaries if the member dies while still in service.<sup>318</sup> Section 37A(1) states that the retirement benefits may only be reduced, transferred, ceded, pledged, hypothecated or attached to the extent permitted by section 37D of the Pension Funds Act, the Income Tax Act 58 of 1962, the Maintenance Act 99 of 1998, section 65 of the Magistrates' Courts Act 32 of 1944, and the Divorce Act 70 of 1979. The fund rules cannot provide for terms contrary to

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<sup>317</sup> Therefore, pension fund members must expect that pension fund boards and their members of boards, in distributing retirement fund death benefits, will act in the best interests of the fund and its members, and not to promote their (the board members') private interests. See Hayton *Extent*. There are also cases where members of boards are found not to be acting in the best interests of the members, but for their own personal gain and for other ulterior motives: for example, *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others* 2006 2 BPLR 140 (PFA), which is discussed later in Chapter 3, par 6; and the Fidentia scandal, which involved the misappropriation of millions of rand, much of it belonging to mineworkers' widows and orphans. Fidentia was placed under curatorship, and two of its directors were arrested in 2007. There were also allegations that one trustee was exposed to conflicts of interest which were detrimental to the interests of beneficiaries. Arthur Brown, the former Fidentia boss, pleaded guilty to two counts of fraud. The Western Cape High Court sentenced him to a fine of R150 000 or imprisonment for a period of 36 months for his role in the debacle. The State took the judgment of the court *a quo* to an appeal where the Supreme Court of Appeal reversed the judgment and found Mr Brown guilty of fraud and sentenced him to 15 years in prison. Mr Brown's further appeal against his jail sentence by the Supreme Court of Appeal was dismissed by the Constitutional Court. Also, in *Executive Officer of the Financial Services Board ("The FSB") v Cadac Pension Fund* 2014 JDR 2721 (GJ), it was alleged that Mr Nash used the resources of Cadac Pension Fund for his direct and indirect benefit, namely, defending criminal charges that were brought or laid against him (in par 37).

<sup>318</sup> See Sigwadi 2009 ASSAL 1122 at 1124 for a brief discussion of permissible deductions.

section 37A of the Pension Funds Act, and where the rules so provide, the fund is empowered to withhold or suspend the payment of these benefits.<sup>319</sup>

The preceding discussion highlights the importance of having and maintaining robust legislative and regulatory systems, and the challenges relating to the regulation of retirement funds and the distribution of death benefits that still prevail in South Africa. The question now arises whether the FSCA has any regulatory tool to monitor the protection of the rights and interests of members, dependants, and nominated beneficiaries by boards when the latter distribute death benefits under section 37C of the Pension Funds Act. It is submitted that the FSCA has limited regulatory capacity to monitor the compliance of pension fund boards with all the applicable laws and fiduciary obligations across many thousands of funds. It appears that if a board distributes a death benefit without following section 37C of the Pension Funds Act, neither the FSCA, nor the Pension Funds Adjudicator, nor the courts will be aware of the contravention unless one of the aggrieved parties approaches one of these institutions with a complaint or claim. This problem may be complicated even further because some of the dependants or nominated beneficiaries may not even be aware that their breadwinner, now deceased, was a member of a retirement fund. The nominated beneficiaries (the nominees) also have no way of knowing (unless the fund member tells them while still alive) that their names appear on the list of beneficiaries in the fund nomination form. When a fund member dies, nominees are expected to wait and hope that a retirement fund will inform them of their nomination status. This unsatisfactory situation compromises the protection of the rights of members, dependants, and other beneficiaries.<sup>320</sup> The success of the FSCA in regulating the pension sector is seen when death benefits are distributed fairly, transparently, and efficiently. That is how confidence in the efficiency and safety of these funds could be enhanced. It is suggested that the FSCA's capacity and ability to monitor compliance with the applicable laws and fund rules on distributing retirement fund death benefits by pension funds and their trustees should be improved.<sup>321</sup>

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<sup>319</sup> *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* 2003 7 BPLR 4870 (D) at 4875 and *Sentinel Retirement Fund v Mtambo* 2015 JDR 1401 (GP).

<sup>320</sup> See in this regard the *Taylor Report* at 97 in par 9.2.6.

<sup>321</sup> See Chapter 6, par 5.3, where a suggestion is made in this regard.

## 8 CONCLUSION

The main aim of this chapter was to lay a foundation for critically examining the distribution of death benefits in accordance with the State's objectives for the establishment of occupational retirement funds. The chapter examined the South African occupational retirement fund history, types of funds, legal status, pension fund boards as one of the key role-players, and regulatory and legislative frameworks. Several key observations were made about distributing death benefits in South Africa. These can be summarised as follows:

- South Africa has unique historical, social, and economic factors influencing the retirement funding structure. This unique combination should form the backdrop for the boards' distributing death benefits.<sup>322</sup>
- Upon registration by the FSCA, South African retirement funds have a legal personality that exists separately from the sponsoring employer, retirement fund members, and pension fund board members.<sup>323</sup>
- Various key role-players, such as pension fund boards and their board members, are involved in distributing death benefits. They help the State achieve its objectives for the establishment of retirement funds.<sup>324</sup>
- The FSCA and the legislature play essential roles in ensuring the efficient running of funds, the protection of fund members' interests, and the correct distribution of death benefits.<sup>325</sup>

The adequacy of measures put in place by the State and the FSCA to safeguard the interests of pension fund members, dependants, and other beneficiaries is crucial to ensuring that the objectives for establishing pension funds are realised. Some court cases and Adjudicator's determinations against funds, their boards, and their board members show the uncertainty and a high level of dissatisfaction surrounding the distribution of death benefits in South Africa.<sup>326</sup> Employees need reassurance that the money they contribute will be safe in the hands of the boards and their

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<sup>322</sup> See par 2.3 above.

<sup>323</sup> See par 4.2 above.

<sup>324</sup> See par 6 above.

<sup>325</sup> See par 7 above.

<sup>326</sup> See Chapter 3 for a discussion of various cases and determinations.

members. The National Treasury *Social Security and Retirement Reform: A Second Discussion Paper* (2007)<sup>327</sup> stated that lack of transparency, weakness in the governance of some retirement funds, and limitations on the supervision and enforcement capacity of the authorities had all contributed to suboptimal protection of members' and pensioners' interests.<sup>328</sup> This sentiment was shared by the *National Development Plan 2030*, which observed that the private pension market was expensive and inadequately regulated.<sup>329</sup>

South Africa needs occupational retirement funds that are efficiently administered and well-regulated and competent pension fund boards that are relevant to resolving challenges that the country faces in ending or reducing poverty among older persons and dependants. Although section 37C of the Pension Funds Act is viewed as an essential tool for promoting the State's objective of social security, it is worth pointing out that the application of this provision does not always produce the best results. It is submitted that the provisions of section 37C and other provisions of the Pensions Funds Act in their current form cannot maximise the use of retirement funds as a tool for ending poverty among the dependants of pension fund members. Nor do these provisions address some of the boards and members' challenges in distributing death benefits. This combination is aggravated by the complexity of section 37C apparent from the discussion in the next chapter of this thesis, Chapter 3, on the South African law. Distributing death benefits to fund members' dependants and nominated beneficiaries creates inherent conflicts of interest among the potential recipients of the death benefits as the parties compete for a slice of the same benefit.

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<sup>327</sup> National Treasury *Social Security and Retirement Reform 2007*.

<sup>328</sup> In par 9.

<sup>329</sup> See *National Development Plan 2030* at 360.



## CHAPTER 3

### SOUTH AFRICAN LAW

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- 1 INTRODUCTION
  - 2 THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS
  - 3 EQUITABLE DISTRIBUTION OF DEATH BENEFITS, DISCRETIONARY POWERS, AND LACK OF LEGISLATIVE CLARITY
  - 4 THE SOURCES OF PENSION FUND TRUSTEES' DISCRETIONARY POWERS IN DISTRIBUTING DEATH BENEFITS
  - 5 THE DUTIES OF PENSION FUND TRUSTEES CONCERNING THE DISTRIBUTION OF DEATH BENEFITS
  - 6 THE LIABILITY OF PENSION FUNDS AND THEIR TRUSTEES
  - 7 INDEMNITY INSURANCE AS A FORM OF PROTECTION FOR RETIREMENT FUNDS AND THEIR TRUSTEES AGAINST LIABILITY FOR WRONGFUL DISTRIBUTION
  - 8 CONCLUSION
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#### 1 INTRODUCTION

Retirement funds are created with the main objective of providing income to members when they reach retirement age. In reality, not all these members live long enough to reach retirement age; and their death often creates financial stress for their remaining family members or dependants.<sup>1</sup> Confusion and squabbles could arise between the remaining family members and dependants about how the assets belonging to the deceased should be divided.<sup>2</sup> For distributing retirement fund death

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<sup>1</sup> See Asher *Design* at 141.

<sup>2</sup> See, for example, *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA), a complaint to the Pension Funds Adjudicator about allocating and distributing a death benefit. The complainant was the son of the deceased fund member. After the member died, a death benefit of R6 828 086 became available for distribution to the deceased's beneficiaries and dependants in terms of s 37C of the Pension Funds Act. The fund allocated the death benefit to four beneficiaries: the life partner of the deceased (R3 082 000); two major sons of the deceased (R882 000 each), one of these two major sons being the complainant; and a minor daughter (R1 982 086). The complainant submitted that at the time of his father's death, the deceased had lived with the life partner for 22 months, and the complainant was aggrieved that the life partner was awarded a greater share of the death benefit: 40 per cent of the death benefit, which did not accord with the deceased's will and wishes and contradicted the oral arrangement he (the complainant) had with her that she would need only about R200 000 from the death benefit. This determination is not discussed in detail here but sketched merely to

benefits, though, the position is regulated by section 37C of the Pension Funds Act.<sup>3</sup> It confers a pivotal function on the pension fund boards (hence the “pension fund trustees”) to exercise their discretion in fulfilling the State’s policy objectives as laid down in that section.<sup>4</sup> The stated purpose of section 37C is to benefit the deceased member’s dependants, not his or her estate.<sup>5</sup> Section 37C is thus a tool for pension fund trustees to advance a crucial social protection policy of the State in ensuring that dependants are not left destitute by the death of the fund member, who is usually their breadwinner.<sup>6</sup>

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illustrate the kind of squabbles that arise between dependants and/or beneficiaries after a fund member dies.

<sup>3</sup> See below in this par 1, where s 37C of the Pension Funds Act is quoted in full.

<sup>4</sup> See Chapter 2, par 5.2, where the policy objectives of s 37C of the Pension Funds Act are discussed. When pension fund trustees exercise their discretion to distribute the death benefits in a particular manner, this does not necessarily mean that they will come to a correct or an incorrect answer. There may be various correct answers. What is important is that the trustees must comply with their duties, including the duty to act in good faith and consider relevant factors in distributing a death benefit. See par 5 below, where the pension fund trustees’ duties are discussed.

<sup>5</sup> Section 37C(1) of the Pension Funds Act expressly states that unless permitted by the section, the death benefits do not form part of the assets in the member’s estate. See par 2.1.2 below, where a restriction on the inheritance of death benefits is discussed.

<sup>6</sup> In terms of s 37C(1)(a) of the Pension Funds Act, the dependants of the deceased fund member are the first group to be considered by the board for the payment of retirement fund benefits after the fund member dies. See in this regard *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.8, where the Adjudicator stated that the purpose of s 37C of the Act is to ensure that those who were financially dependent on the deceased are not left financially destitute by his or her death. See par 2.2.1.6 n 198 below, where the *Makhubele* determination is discussed. In *Maduna v Dickinson Group Pension Fund* 2004 5 BPLR 5724 (PFA), the Adjudicator held that the purpose of a death benefit is not to put the beneficiaries in the position in which they would have been had the deceased not died. The amount of the death benefit is determined solely by the fund rules. Its purpose is to alleviate, in part, the financial hardship in which the deceased’s dependants might find themselves on the loss of their source of income and support (at 5725). In *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP), the North Gauteng High Court stated that the purpose of s 37C of the Act is to alleviate, in part, the financial hardship in which the deceased’s dependants might find themselves on the loss of their source of income and support (in par 7). The court also referred with approval to the determination of *Maduna v Dickinson Group Pension Fund* (in par 8) and *Makhubele v Rand Water Provident Fund*. See in this regard also *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) at 289, stating that the very purpose of s 37C of the Act is to prioritise need and dependency (see also n 2 above, where *Whitcombe* is discussed); *Kitching v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* PFA/KZN/33168/2009/RM in par 5.3 (available at <https://www.pfa.org.za/Determinations/20092011/A6CA515E-810F-4DF8-9D01-4FDA44BA034E.pdf> (last accessed on 7 August 2021); and *Diener v PSG Wealth Retirement Annuity Fund and Another* 2019 2 BPLR 400 (PFA). In *Diener* the subject matter of the complaint was the allocation of the death benefit to the deceased’s beneficiaries. The complainant was the life partner of the deceased. Following the death of the deceased, a death benefit for R1 653 640 became available for distribution. The complainant was allocated 80 per cent of the benefit, the mother of the deceased 10 per cent, and each of the deceased’s two biological children 5 per cent; this allocation was the subject of the complaint. The complainant was dissatisfied with the allocation to the other three beneficiaries and requested the Adjudicator to allocate the

This chapter investigates the distribution of retirement fund death benefits (hence “death benefits”) with a specific focus on the provisions of section 37C of the Pension Funds Act about the duties of pension funds and their board members (pension fund trustees). The chapter explores the challenges that are faced by pension fund trustees in the distribution of death benefits and the challenges that are faced by retirement fund members’ dependants and beneficiaries in enforcing their rights when those benefits are wrongfully distributed. The solutions to these challenges are proposed and discussed in Chapter 6 of this thesis.

The discussion below now considers whether the distribution of death benefits in terms of section 37C of the Pension Funds Act is performed in an efficient manner that helps the State realise its objectives of establishing retirement funds and whether pension fund trustees are competent in administering the funds so that these objectives are attained.<sup>7</sup> These questions are essential because of the provisions of section 37C, and it is obligatory for the trustees to comply with them.<sup>8</sup> Failure to do so is considered a breach of the trustees’ duties and may lead to liabilities for both the funds and their trustees in their personal capacity.<sup>9</sup> It is therefore imperative that the trustees exercise their discretion when distributing death benefits with due consideration of the obligations and duties required of them.<sup>10</sup>

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entire death benefit to her. The issue was whether the fund had allocated the death benefit fairly and equitably to the deceased’s beneficiaries. The Adjudicator highlighted that the object behind s 37C of the Act is to ensure that persons who were dependent on the deceased were not left destitute by the member’s death (in par 5.9). She held that the death of the member in *Diener* did not leave the complainant destitute (in par 5.8). She was concerned by complainants like Diener who lodge their complaints with the aim of defeating the entire purpose of s 37C of the Act, and she held that the Adjudicator’s office could not be seen to be condoning this conduct (in par 5.8). She indicated that her office strongly condemned the complainant’s conduct because it showed the greed of some dependants (in par 5.8). The State’s objectives of establishing pension funds are discussed in Chapter 1, par 2.4.

<sup>7</sup> See Chapter 2, par 6.4, where the competency of pension fund board members (pension fund trustees) is discussed.

<sup>8</sup> See, for example, *Mthiyane v Fedsure Life Assurance Ltd and Others* 2001 7 BPLR 2230 (PFA), where the Adjudicator stated that s 37C of the Pension Funds Act makes it clear that irrespective of what the rules of the fund say, where a retirement fund benefit is payable following the death of a fund member, it must be disposed of according to the statutory scheme of this subsection (at 2232).

<sup>9</sup> See par 6 below for a discussion of the liability of retirement funds and their board members.

<sup>10</sup> The duties of pension fund trustees are discussed in par 5 below. See, for example, *Ntoy v Transportation Motor Spares Group Pension Fund and Another* 2002 8 BPLR 3797 (PFA), where the fund had failed to include a spouse and a minor child in the distribution of death benefits after the death of the deceased fund member. The fund’s decision was based on the

The question is whether retirement fund death benefits are distributed in an efficient manner in South Africa that correlates with the State objectives in establishing retirement funds.<sup>11</sup> It is submitted that the ultimate test for determining the efficiency of the distribution of death benefits in achieving their social objective is whether these benefits are paid and received by the intended recipients (the dependants and/or nominated beneficiaries) and, if so, how far the recipients use these benefits for their intended purpose of alleviating poverty.<sup>12</sup> It is argued that besides the challenges arising from section 37C of the Pension Funds Act, there are other factors hindering the efficient distribution of death benefits. These include:

- a failure to preserve these death benefits;<sup>13</sup>
- incompetence by some pension fund trustees;<sup>14</sup>

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allegation that the complainant should not be considered a dependant because she had deserted the deceased when he was still alive. The Adjudicator held that the fund did not exercise its discretion properly and ordered it to reconsider the matter having regard to all relevant facts (at 3797).

<sup>11</sup> Section 1 of the Pension Funds Act defines “benefit” in relation to a fund, to mean any amount payable to a member or beneficiary in terms of the rules of that fund.

<sup>12</sup> See Chapter 1, par 2.4, discussing the social objectives of establishing retirement funds. The recipients of death benefits are not always and need not be destitute, but the objective of the section is to provide financial security for dependants of the fund member. The court in *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) and the Adjudicator in several determinations specifically state that the social objective of s 37C of the Pension Funds Act is to ensure that dependants of the deceased fund member are not left destitute (see, for example, n 6 above, *Diener*). The financial need of a potential recipient of the benefit (the beneficiary) is one factor that pension fund trustees must consider when they distribute the death benefit equitably. The concern is that when these benefits are paid to recipients as lump sums, they may be dissipated soon afterwards. See, for example, in *Van Vuuren v Central Retirement Annuity Fund and Another* 2000 6 BPLR 661 (PFA) in par 34, where the Adjudicator stated that the legislature in the guise of s 37C is clearly advancing an important social protection policy which is left in the hands of pension fund trustees to execute.

<sup>13</sup> See par 2.2.9 below, where the payment mode for death benefits is discussed.

<sup>14</sup> This chapter of the thesis discusses cases and determinations where the pension fund trustees have misconstrued the provisions of s 37C of the Pension Funds Act, leading to disputes before the courts and the Adjudicator. See in this regard *Pretorius v The Pension Funds’ Adjudicator and Others* (PFA 58/2019) in par 51, where the Financial Services Tribunal held that the board of trustees was both biased and incompetent. The Tribunal found that it (the board of trustees) failed to make a proper investigation in terms of s 37C of the Act and this failure resulted from trustees’ going out of their way to advantage one beneficiary at all costs to the disadvantage of other beneficiaries. In this matter, the fund member had before his death nominated his life partner as well as his two major daughters to receive 33 per cent of his death benefit. After his death an amount of just over R5 million became available for distribution in terms of s 37C of the Act. The board of trustees initially wanted to pay 100 per cent of the death benefit to the life partner, but the two major dependants complained about this decision to the fund. The fund then decided to pay 70 per cent of the benefit to the life partner and 15 per cent each to the two daughters. The daughters were aggrieved by the decision and approached the Adjudicator for relief, requesting her to compel the fund to stick to the allocation of death benefits as stipulated

- failure by funds to pay benefits that are due to lawful recipients;<sup>15</sup>
- the challenges associated with enforcing the rights of beneficiaries aggrieved by how the trustees are distributing or have distributed the death benefits;<sup>16</sup>
- lack of accountability by pension fund boards and their trustees; and
- the costs of indemnity insurance for retirement funds and their trustees (the board members).<sup>17</sup>

A retirement fund member should be assured that if he or she dies while still in service, the dependants and other nominated beneficiaries left behind will be cared for financially.<sup>18</sup> The death benefit provides the deceased member's dependants

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in the nomination form. The fund explained that although all three nominees were also dependants of the fund member, the two major daughters failed to prove financial dependency on the deceased while the life partner did so. The Adjudicator had to determine whether the board acted in accordance with s 37C and had properly investigated financial dependency before making the allocation. The Adjudicator found that the fund had failed to conduct a proper investigation and set aside and substituted the decision of the fund with hers. The fund later approached the Financial Services Tribunal to determine whether the Adjudicator had the power to substitute its decision with hers. The Tribunal held that in a case where the board of trustees was irrational, biased, and incompetent, the Adjudicator is empowered to substitute the board's decision with hers. The Tribunal dismissed the application. See also the *National Treasury Retirement Fund Reform 2004* at 56 in par 5.2, stating seventeen years ago that there were deficiencies in the skills and expertise of some trustees, many of whom were responsible for the management of billions of rands of retirement fund assets. It is submitted that the deficiency of skills among pension fund trustees is still prevalent today (see in this regard the discussion in Chapter 2, par 6.4). King IV ("Glossary of Terms" at 11) defines "competence" as possessing the skills and attributes, and exhibiting the conduct, that is used to define and measure suitability for a certain role or function.

<sup>15</sup> See par 2.2.10 below, where the non-payment of retirement benefits to fund members and/or to their dependants and beneficiaries as well as the challenges of unclaimed benefits are discussed.

<sup>16</sup> See par 6.5.5.2 below, where legal costs and other challenges are discussed.

<sup>17</sup> See par 7 below, where indemnity insurance is discussed.

<sup>18</sup> See *Mogupudi v Old Mutual Superfund Pension Fund and Another* 2011 3 BPLR 394 (PFA) at 394, where the Adjudicator confirmed that a death benefit was payable to the member's beneficiaries only if that member had died before withdrawing or exiting from the fund. As the complainant in *Mogupudi* was still alive when he exited the fund and was also still alive when his withdrawal benefit was paid, the rule on granting death benefits did not apply to him. See in this regard the FSB Information Circular PF No 2 of 2010 issued on 8 March 2010 by the Registrar of Pension Funds at the Financial Services Board. This Circular provides that the provisions of s 37C of the Pension Funds Act apply only to lump sum benefits which become payable by the fund in terms of its rules as a result of the death of a fund member. It also provides that if a member exits the fund because of resignation, dismissal, retrenchment, or retirement, the relevant withdrawal or retirement benefit accrues in terms of the rules of a fund. Should the member die after the date of accrual of the withdrawal or retirement benefit, but before payment can be made, the legal nature of the benefit does not change, and the provisions of s 37C of the Pension Funds Act do not apply.

and beneficiaries with financial support when they need it most. When a fund member dies in service, pension fund trustees have to pay benefits to dependants and other beneficiaries, subject to the fund's rules and applicable laws such as the Pension Funds Act.<sup>19</sup> Section 37C of the Act prescribes how these benefits should be distributed among the dependants and nominated beneficiaries.<sup>20</sup> It deals with the distribution of retirement benefits upon the death of a fund member and is quoted below for easy reference:

### **37C Disposition of pension benefits upon death of member**

(1) Notwithstanding anything to the contrary contained in any law<sup>21</sup> or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules)<sup>22</sup> payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) (b) (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.<sup>23</sup>

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

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<sup>19</sup> See *Joint Municipal Pension Fund and Another v Grobler and Others* 2007 5 SA 629 (SCA) in par 11, where the Supreme Court of Appeal stated that benefits are provided by the retirement fund rules and become payable on the occurrence of specific events such as retirement or death or physical incapacitation or retrenchment of a fund member.

<sup>20</sup> See par 3 below, discussing s 37C of the Pension Funds Act.

<sup>21</sup> See par 2.1 below, where the restriction on death benefit distributions is discussed.

<sup>22</sup> It is important to note this part of the provisions of s 37C(1) of the Pension Funds Act, because these render s 37C(1) inapplicable when the fund rules provide that the benefit payable upon a member's death will be payable to the member's spouse and children in a form of a spousal or children's pension.

<sup>23</sup> See n 216 below, where the Supreme Court of Appeal decision of *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA) is discussed. This case dealt with the proper construction of s 37C(1)(a) of the Pension Funds Act. See also par 2.2.1 below, where the definition of a "dependant" is discussed.

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

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.<sup>24</sup>

(2) (a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to-

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by-

(aa) the member;

(bb) a major dependant or nominee, subject to subparagraph (cc); or

(cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs;

(ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or

(iii) a beneficiary fund.

(b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as

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<sup>24</sup> In *Dhlamini v Smith and Another* 2003 7 BPLR 4894 (PFA), the Adjudicator noted that subparagraphs (b) and (bA) of s 37C(1) of the Pension Funds Act require that the member designate his or her nominees in writing, and also indicate in writing the percentage or amount of the benefit that the nominee should receive. The written nomination must also be conveyed to the fund. Thus, it is not enough for the member to make a verbal nomination (at 4900). The word "verbal" is understood to mean "oral" in *Dhlamini*. The beneficiary nomination form is discussed in par 2.1.1 below.

the board may from time to time consider appropriate and in the best interests of such dependant or nominee:

Provided that interest at a reasonable rate, having regard to the fund return earned by the fund, shall be added to the outstanding balance at such times as the board may determine:

Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

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

(i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and

(ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

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

(5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

The following discussion examines the application of section 37C by pension fund trustees and its interpretation by the South African courts and the Adjudicator. The law on the distribution of death benefits is complicated and presents pension fund trustees with difficulties in its application.<sup>25</sup> The complexities of section 37C of the Pension Funds Act were succinctly summarised by the Adjudicator in *Dobie NO v National Technikon Retirement Pension Fund* as follows:

One thing is certain about section 37C, it is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the

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<sup>25</sup> The complexity of the distribution of retirement fund death benefits is also clear when this distribution process is compared to the process which applies to other financial products, such as living annuities and other savings products. These other benefits are often distributed to beneficiaries long before retirement fund death benefits because the other products fall under different legislation that is not as complicated as s 37C of the Pension Funds Act. See in this regard Allan Gray "Understanding the Death Claim Process of Retirement Funds" at 1. This document is available at <https://www.allangray.co.za/globalassets/documents-repository/product/brochures/Multiple%20products/Files/Understanding%20the%20death%20claims%20process%20of%20retirement%20funds.pdf> (last accessed on 7 August 2021) (hence "Allan Gray *Understanding the Death Claim Process of Retirement Funds*").



resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.<sup>26</sup>

Section 37C(1) opens with the proviso: “Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund”. The question arises whether the provisions of section 37C apply in all circumstances, even when they may also contravene the Constitution.<sup>27</sup> The answer is no because the Constitution is the supreme law in South Africa, and all other laws, including the Pension Funds Act, must comply with its provisions.<sup>28</sup> In exercising their discretion when distributing death benefits, pension fund trustees should ensure that the constitutional rights of dependants and nominated beneficiaries are protected.<sup>29</sup> Yet the trustees should also consider whether the particular right that the Constitution protects cannot be limited in terms of section 36 of the Constitution, for example, where the right is expressly limited by a particular statute.<sup>30</sup>

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<sup>26</sup> See *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41. See also *Coetzee v Toyota South African Pension Fund and Others (1)* 2001 5 BPLR 2007 (PFA), where the Adjudicator echoed this sentiment by recognising that s 37C of the Pension Funds Act is a difficult provision for pension fund trustees to apply, and he suggested that perhaps a round-table conference of all parties on this particular matter might be the best way to bring the complaint before him to a satisfactory conclusion (at 2013).

<sup>27</sup> Section 36(2) of the Constitution states: “Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.” The following relevant constitutional rights are entrenched in the Bill of Rights: the right to equality (s 9 of the Constitution); the right to social security (s 27(c) of the Constitution); the child’s best interests (s 28(2) of the Constitution); the right to property (s 25 of the Constitution); and the right to fair administrative action (s 33 of the Constitution). Section 39(2) of the Constitution also provides: “When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

<sup>28</sup> Section 2 of the Constitution states that it “is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. In *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC) in par 44, the Constitutional Court stated that there is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

<sup>29</sup> Section 33 of the Constitution deals with just administrative action. See par 6.5.1.2 below, where this right is discussed.

<sup>30</sup> Section 7(3) of the Constitution provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in s 36 or elsewhere in the Bill. Section 36 of the Constitution deals with the limitation of rights and it states:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

Any limitations of the rights in the Bill of Rights must be justified under the limitation clause. These rights may be limited, but only if and to the extent that it is justified. A decision by pension fund trustees that restricts dependants and/or dependants' constitutional rights would need to meet the provisions of section 36 of the Constitution. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, the Constitutional Court pointed out that as a prerequisite for the limitation of rights entrenched in Chapter 3 of the Constitution, section 33(1)(a)(ii) of the Interim Constitution provides that such limitation shall be permissible only to the extent that it is justifiable in an open and democratic society based on freedom and equality.<sup>31</sup>

## 2 THE DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS

### 2.1 Restrictions on death benefit distributions

The preceding paragraph has laid the foundation for the discussion in this chapter on the distribution of retirement fund death benefits. It is apparent in the discussion to follow in this paragraph that the legislature in formulating the provisions of section 37C of the Pension Funds Act included measures to ensure that the fund member's

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- (a) the nature of the right;
  - (b) the importance of the purpose of the limitation;
  - (c) the nature and extent of the limitation;
  - (d) the relation between the limitation and its purpose; and
  - (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

The task of determining whether the conduct of a pension fund and/or that of its trustees is invalid because it conflicts with the guaranteed rights such as the right to property, right to equality, right to just administrative justice, right to dignity, and right to social security involves two stages by a court: first, an enquiry about whether there has been an infringement of the guaranteed right; if so, a further enquiry about whether this infringement is justified under s 36 of the limitation clause in the Constitution. See in this regard *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 44. Although this case referred to guaranteed rights contained in the Interim Constitution of 1993, it is submitted that the principles (the limitation of rights) canvassed there remain the same and applicable in the current Constitution of 1996.

<sup>31</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 53. See also par 2.1.6 below, n 27 and n 107 (dealing with s 36(2) of the Constitution), where the limitations of the constitutional rights to property and freedom to contract are discussed. See Currie and De Waal *Bill of Rights* at 151, stating that "limitation' is a synonym for 'infringement' or, perhaps, 'justifiable infringement'. A law that limits a right infringes the right. However, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing rights in an open and democratic society based on human dignity, equality and freedom".

dependants are not left without financial support at the death of the fund member. The legislature has done this by ring-fencing retirement fund death benefits as follows:

- by not following the fund member's wishes as contained in the beneficiary nomination form,<sup>32</sup>
- by restricting the inheritance of death benefits (by will),<sup>33</sup>
- by restricting the application of the law of intestate succession,<sup>34</sup>
- by restricting the non-member spouse's entitlement to 50 per cent of the death benefits,<sup>35</sup>
- by restricting any agreements and any prior arrangements made by the fund member while still alive, and
- by restricting the fund member's right to contract.<sup>36</sup>

It is submitted in the discussion below that all these restrictions on the fund member's right to decide how the pension benefit should be used are intended to achieve the valid social policy or objective of ensuring that the member's dependants are not left without financial support after the member dies. It is also argued that if retirement fund death benefits are distributed in a manner that no longer aligns with the social purpose of section 37C of the Pension Funds Act and the State's objectives in the establishment of pension funds, it becomes difficult to justify these restrictions. These restrictions are discussed individually below.

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<sup>32</sup> See par 2.1.1 below, where the beneficiary nomination form is discussed.

<sup>33</sup> See par 2.1.2 below, where the restriction on the inheritance of death benefits is discussed.

<sup>34</sup> See par 2.1.3 below, where the restriction on the application of the law of intestate succession is discussed.

<sup>35</sup> See par 2.1.4 below, where the restriction on the non-member spouse's entitlement to 50 per cent of the death benefits is discussed.

<sup>36</sup> See par 2.1.5 below, where the restriction on any agreements and any prior arrangements made by the fund member while still alive is discussed. See also par 2.1.6 below, where the restriction on the fund member's right to contract is discussed.

### 2.1.1 The beneficiary nomination form

Retirement funds require their members to complete a beneficiary nomination form to indicate how they would like their retirement benefits to be distributed if they die in service.<sup>37</sup> One of the advantages of completing this form is that it helps pension fund trustees to know about potential beneficiaries nominated by a fund member.<sup>38</sup> Some of the trustees' challenges with beneficiary nomination forms arise when members do not fully complete or update their nomination forms or fully disclose all their dependants. Although this set of problems neither justifies pension fund trustees' failing to make payments nor absolves them from conducting proper investigations, it could delay the distribution and payment process, which becomes more complex and takes longer to trace all the dependants.

It is submitted that if dependants and nominees are easily identifiable and traceable by pension fund trustees, this advantage may speed up the timely payment of the death benefit to these beneficiaries. Where nominated by the deceased fund member in the nomination form, beneficiaries must be considered by the pension fund trustees in distributing the death benefits. However, this obligation does not compel the trustees to distribute a death benefit to the nominated beneficiaries.<sup>39</sup>

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<sup>37</sup> It is important that members of retirement funds update the list of their dependants and nominated beneficiaries in their beneficiary nomination form as their personal circumstances change. For example, a single man joining a retirement fund for the first time might name his parents as beneficiaries. Later, when he marries, he might wish to make his wife and children beneficiaries. See in this regard Blake *Pension Schemes* at 123. Some retirement funds require their fund members to complete identification of dependants forms as well: these do not bind the pension fund trustees but help them identify the nominated beneficiaries and dependants that must be considered before death benefits are distributed.

<sup>38</sup> In *Pandle v South African Local Authorities Pension Fund* 2015 3 BPLR 440 (PFA) at 447, it was stated that the nomination beneficiary form serves a limited purpose because it determines the deceased's nominees but does not grant them a greater right to the death benefit than any identified dependant. The fund member can appoint any person a "beneficiary" in the nomination form. In other words, the nominee need not be the fund member's dependant or relative.

<sup>39</sup> See *Tlou v Amplats Mines Retirement Fund and Another* 2011 3 BPLR 439 (PFA) at 440, where the Adjudicator stated that although the deceased had expressed an intention to benefit a nominated beneficiary, it did not necessarily follow that a benefit would in fact be awarded to the nominee, because the deceased's intention as contained in the nomination form is only one of the factors considered by the trustees when allocating a death benefit. And in *Tshetshe and Another v Vodacom Group Pension Fund* 2005 5 BPLR 459 (PFA), the Adjudicator held that the beneficiaries' nomination in a nomination form only entitles the nominees to be considered by the board of trustees when making an equitable distribution among the dependants. The nomination does not on its own entitle them to the benefit (at 459). See also pars 2.2.2 and 2.2.3 below, where the allocation of death benefits to nominees is explored.

The disadvantage of completing a beneficiary nomination form is that it provides a basis for disputes about the distribution of death benefits payable by the fund upon the death of its member.<sup>40</sup> Aggrieved dependants and nominated beneficiaries usually allege that pension fund trustees acted unreasonably by excluding them from the distribution of the death benefit, and so the fund did not distribute the proceeds of this benefit equitably.<sup>41</sup> It is submitted that failure by fund members, dependants, and nominated beneficiaries to understand the role and function of nomination forms in the distribution of death benefits contributes to disputes arising during and after the allocation of these benefits.<sup>42</sup>

Retirement fund members, pension fund trustees, dependants, and nominated beneficiaries must understand that retirement funds are not bound by the fund member's wishes, even those expressed through the member's beneficiary nomination forms.<sup>43</sup> The deceased's wishes merely provide pension fund trustees with guidelines and constitute only one of the factors that must be considered in deciding upon an equitable distribution of death benefits.<sup>44</sup> Indeed, strict adherence to the nominations in the beneficiary forms to the exclusion of other relevant factors amounts to an undue fettering of pension fund trustees' discretionary power.<sup>45</sup>

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<sup>40</sup> In *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 3 SA 798 (SCA), the Supreme Court of Appeal confirmed, first, that pension fund trustees are not bound to follow the nomination of beneficiaries form, and, secondly, that death benefits do not form part of the deceased estate.

<sup>41</sup> See par 2.2.3 below, where the allocation of death benefits to dependants and nominated beneficiaries is discussed.

<sup>42</sup> Case law and the determinations of the Adjudicator discussed in this thesis show that the people nominated by pension fund members (the nominated beneficiaries) often have a common misconception that they have the right to claim and receive payment from the fund upon the member's death.

<sup>43</sup> See in this regard *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP) in par 7, where the Gauteng North High Court reiterated that pension fund trustees are not bound by nomination forms when they distribute retirement fund death benefits.

<sup>44</sup> See in this regard *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP) in par 8; and Bechard M "Girlfriend Gets Too Big a Slice of Pie" (5 December 2015) <https://www.iol.co.za/personal-finance/retirement/girlfriend-gets-too-big-a-slice-of-pie-1955631> (last accessed on 7 August 2021), where the Adjudicator, among others, confirmed that pension fund trustees are not bound by the fund member's wishes when they exercise their discretion in distributing retirement fund death benefits.

<sup>45</sup> In *Van Vuuren v Central Retirement Annuity Fund and Another* 2000 6 BPLR 661 (PFA), the Adjudicator stated (in par 35) that the trustees had to investigate the deceased member's wishes because they are an important, but not decisive, factor. See n 193 below, where this determination is also discussed.

Hanekom suggests that retirement fund members who would like to ensure that their wishes are considered when their death benefits are allocated should provide sufficient information and guide pension fund trustees to understand the fund member's planning and strategy.<sup>46</sup> This can be done by writing a motivation on the nomination form or adding an attachment to the form to help pension fund trustees see the full picture and guide them to an outcome aligned with the fund member's objectives.<sup>47</sup> Although this suggestion helps provide trustees with more information, it must also be pointed out that neither the nomination nor this motivation binds pension fund trustees to distribute the death benefit in a particular way.<sup>48</sup>

Two questions are relevant to proposals on the use of nomination forms in South Africa:

- First, should these forms be made binding on pension fund trustees?
- Secondly, should pension funds abolish these forms?

Suppose these forms were to be made binding on pension fund trustees. Pension funds and the State would encounter challenges if a fund member nominated beneficiaries who were not dependants and excluded dependants, or nominated some dependants but excluded others.<sup>49</sup> Following these member's wishes would then go against the objectives of establishing pension funds.

It is suggested that abolishing the nomination form altogether is also not a good idea. Instead, what could be done is to restrict the list of potential recipients that may

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<sup>46</sup> "Nominating Retirement Fund Beneficiaries" (*Sanlam*, September 2015) <http://www.sanlam.com:80/mediacentre/media-category/media-releases/Nominating%20Retirement%20Fund%20Beneficiaries> (last accessed on 24 June 2021).

<sup>47</sup> "Nominating Retirement Fund Beneficiaries" (*Sanlam*, September 2015) <http://www.sanlam.com:80/mediacentre/media-category/media-releases/Nominating%20Retirement%20Fund%20Beneficiaries> (last accessed on 24 June 2021).

<sup>48</sup> Death benefits must be distributed in terms of s 37C of the Pension Funds Act.

<sup>49</sup> See, for example, in *Matene v Noordberg Group Life-Assurance Scheme and Another (2)* 2001 2 BPLR 1610 (PFA) in par 11, a complaint about the distribution of a death benefit. While still alive, the deceased fund member had nominated his second wife as the sole beneficiary of all his benefits, excluding the children who were born from his first marriage. *Matene* is also discussed in Chapter 2, n 113; and below, n 93. See also *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP), where the deceased fund member had nominated his brother (the complainant) to receive 100 per cent of the death benefit but did not nominate his spouse and his four children.

feature in the nomination form. The focal point for nomination and the death benefit distribution could be directed to “dependants” as defined in the Pension Funds Act, whether or not nominated by the deceased fund member.<sup>50</sup> If there are no such

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<sup>50</sup> See par 2.2.1 below, where the meaning of a “dependant” is explained and allocating death benefits to dependants is discussed. See Chapter 6, par 5.6, where a suggestion regarding the beneficiary nomination form is made. The provisions of Malawi’s Pension Act of 2011 (Chapter 55:02) are worth noting with regard to death benefit nominations and payment of death benefits. Section 70 of the Act deals with “Death benefit nominations”. It states:

“(1) A member of a pension fund may give the trustee a written nomination directing the trustee to pay the fund member’s benefits on his death to all or any of the following—

- (a) the member’s widow or widower, as the case may be;
- (b) the member’s child; or
- (c) the member’s close relation.

- (2) A nomination shall set out the amount or proportion of the benefits to be paid to each of the persons specified.
- (3) A member may amend a nomination by written notice to the trustee in line with the fund rules.
- (4) A member may revoke a nomination by written notice to the trustee.
- (5) A nomination shall be revoked by the divorce or later marriage of the member.
- (6) A nomination and a revocation of a nomination shall be signed by the member, but if the member is unable to sign his name, his thumb impression may be affixed in the presence of—
  - (a) a trustee of the fund;
  - (b) if the trustee is a corporate trustee a director or officer of the trustee; or
  - (c) a person prescribed by Registrar’s directives for the purposes of this section.
- (7) If the thumbprint of the member is so affixed, the nomination or revocation shall be deemed to be signed by the member.
- (8) The trustee shall not accept a nomination or a revocation of a nomination if it appears to the trustee that the nomination or revocation was not made voluntarily.”

Section 71 of the Act deals with “Payment of death benefits”. It states:

“(1) If a member’s nomination to the trustee of a pension fund is current at the death of the member, then, subject to this section, benefits payable out of the fund on the member’s death shall be paid as directed in the nomination.

- (2) The trustee shall not pay the death benefits in accordance with the nomination if it appears to the trustee that the nomination was not made voluntarily.
- (3) If, in relation to all or a part of the benefits payable on the death of a member of a pension fund—
  - (a) the member does not have a nomination current on his death; or
  - (b) the nomination is invalid; or
  - (c) under subsection 70 (8), the trustee has not accepted a nomination from the member,

then, subject to this Act and notwithstanding any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the member at the time of his death.

- (4) If a person to whom benefits are to be paid under this section, other than a surviving spouse of the member, is under the age of eighteen years, the amount of the benefit shall be held by the trustee in a separate trust for the person, to be paid to him when he turns eighteen years and the following shall apply in that case—
  - (a) the amount shall not be part of the fund assets of the pension fund, but may be invested and applied together with those fund assets;
  - (b) the trustee may at any time pay to the parent or guardian of the person any amount from the capital or income of the trust as the trustee thinks appropriate for the maintenance, education or welfare of the person;

defined dependants, the death benefit can be transferred to the member's deceased estate for disposal under applicable laws.<sup>51</sup>

## 2.1.2 Restrictions on the inheritance of death benefits

Unlike the rest of the deceased fund member's estate, the deceased's retirement fund death benefit cannot be inherited by the dependants or beneficiaries.<sup>52</sup> No rights to these benefits accrue to the fund member before death,<sup>53</sup> nor do these

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(c) the trustee shall not be bound to see to the application of amounts paid under paragraph (b)."

<sup>51</sup> See par 2.2.3 below (the allocation to nominees and dependants), and Chapter 6, par 5.12 for a detailed motivation for this submission. It is worth noting that Botswana's Retirement Funds Act 27 of 2014 (Cap. 27:03) and Retirement Funds Regulations 2016 SI 38 of 11 April 2017, contain provisions that attempt to codify some of the guidelines that trustees must follow when exercising their discretion. They have incorporated a reasonableness standard as a basis for determining the binding force of a beneficiary nomination form, which is subject to judicial control. Regulation 29 of the Retirement Funds Regulations 2016 states the following:

"(1) Subject to subregulation (2), a fund shall require its members to complete beneficiary nomination forms on entry to the fund, when the member's dependants change, or when the member changes his or her desired distribution amongst dependants.

(2) The member shall identify, on the beneficiary nomination form, each dependant and any desired beneficiaries who are not dependants whom the member wishes to receive a proportion of any lump sum benefit payable, and shall state what proportion of any lump sum death benefit should be awarded to each dependent or beneficiary, and the member may give reasons as to why that particular distribution is his or her preferred distribution.

(3) If the board is satisfied that there are no dependants other than those stated on the most recent beneficiary nomination form and that the member's desired distribution amongst beneficiaries is reasonable, the board may accept the direction given by the beneficiary nomination form.

(4) If, prior to distribution, the board becomes aware of any minor dependants that were not stated on the deceased member's most recent beneficiary nomination form, or the board considers the member's desired distribution amongst minor beneficiaries to be unreasonable, the board shall in its discretion in exceptional circumstances, distribute the lump sum amongst the member's dependants and nominated beneficiaries in such proportion as the board determines to be reasonable.

(5) In distributing such moneys, the board shall take into account —

(a) the degree of dependency;

(b) the age of the dependant or beneficiary;

(c) the likely duration of dependency;

(d) the relationship to the deceased;

(e) information provided in the member's beneficiary nomination form; and

(f) any distribution made by the deceased member in his or her will."

<sup>52</sup> In *Greyling v Government Employees Pension Fund* 2014 JDR 2387 (GP) in par 14, the court confirmed that retirement fund death benefits are not intended to form part of the deceased's estate and are payable to the estate only if there is no dependant. The difference between a dependant and a nominated beneficiary or a nominee is discussed in Chapter 1, par 8, which deals with terminology, as well as in pars 2.2.1 and 2.2.2 below.

<sup>53</sup> See *Hunter et al Pension Funds Act* at 683.



benefits form part of the member's deceased estate.<sup>54</sup> Instead, the benefits must be distributed under section 37C of the Pension Funds Act.<sup>55</sup> The death benefit could therefore be distributed to dependants and/or beneficiaries before the deceased member's estate is wound up, as they do not form part of this estate.<sup>56</sup> The pension fund trustees' responsibility relates to the distribution of death benefits, not the distribution of assets in the deceased estate — that is the executor's duty.<sup>57</sup> The last will of the deceased fund member cannot prescribe to pension fund trustees how to distribute the death benefit to dependants and beneficiaries.<sup>58</sup>

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<sup>54</sup> In *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) (also cited in n 12 above), Hussain J stated at 3705-3706 that "section 37C of the Act was intended to serve a social function. [It] was enacted to protect dependency, even over the wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. [It] specifically excludes the benefits from the assets in the estate of a member, [and] enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors". In *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 15, the Adjudicator said that other than the exceptional circumstances permitted by this section itself, the benefit may not form part of the estate of the deceased member and so the member's freedom of testation or the provisions of the Intestate Succession Act, 1987, where the member dies intestate is overridden in all its forms. See also *Moir v Reef Group Pension Plan and Others* 2000 6 BPLR 629 (PFA), confirming that the death benefit does not form part of the deceased fund member's estate. In *Itumeleng v SALA Pension Fund and Another* 2007 3 BPLR 311 (PFA), the Adjudicator confirmed that a benefit shall only be paid into a deceased estate if the fund has not become aware of, or has not traced, any dependant of the member within twelve months of the member's death and the member has not designated a nominee (at 311). She also held that where the fund had not taken sufficient steps to trace dependants, this conduct amounted to dereliction of duty by the board (at 312).

<sup>55</sup> In *Barrows v Metal Industries Provident Fund and Another* 2019 2 BPLR 373 (PFA), the Adjudicator was not satisfied by the fact that the fund, after the fund member's death, had paid some amounts, representing old pension service, into the deceased estate's account even though the fund member had left behind a dependant (the complainant) when he died. The Adjudicator explained that as the fund member had died in service, the fund should have paid the death benefit to his dependants under s 37C of the Pension Funds Act (in par 5.6). So the payments to the deceased's estate account should never have been made, as they infringed s 37C of the Act. She also warned that the fund must desist from the practice of making payments to the deceased estate accounts of members who die in service and are survived by dependants (in par 5.6).

<sup>56</sup> Section 37C (1) expressly states that the death benefits do not form part of the assets in the estate of a deceased fund member. So the funds available from the member's accumulated fund credit are not subject to estate duty tax or the estate fees charged by the executors. Generally, the benefits cannot be used to settle any debt in the deceased member's estate; the exception to this general rule is limited to certain cases when the distribution of death benefits involves nominees who are not dependants: for more on this aspect, see pars 2.2.2 and 2.2.3 below. The benefits are also protected by s 37A of the Pension Funds Act to ensure that they are available to people who were financially dependent on the fund member when he or she died. See Chapter 2, par 7, where s 37A of the Act is discussed. Section 37A prohibits the cession and transferability of pension benefits.

<sup>57</sup> See in this regard *Mbele v Mbele and Another* 2015 JOL 34247 (FB) in par 15.

<sup>58</sup> See *Ndlhovu and Another v Mr Price Group Retirement Fund and Another* 2015 3 BPLR 410 (PFA) at 427, where the Adjudicator accepted that the distribution of death benefits is not subject to the principles of testamentary law and is not the subject of a valid will or the intestate succession laws. See also *Bushula v Satawu National Provident Fund and Another* 2009 2 BPLR

### 2.1.3 Restrictions on applying the law of intestate succession

If a fund member dies without leaving a will, the law of intestate succession does not apply to the distribution of death benefits. The Intestate Succession Act 81 of 1987 regulates the law of intestate succession and matters related to it.<sup>59</sup> This Act

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161 (PFA), where the Adjudicator dealt with a matter in which the complainant, the brother of the deceased although not financially dependent on him, was dissatisfied with the fund decision to exclude him from the distribution and payment of the benefit even though he was nominated as an heir in the deceased's will. The fund submitted that the complainant was not considered during its investigation because he was not dependent on the deceased and was also not mentioned in the nomination form which the deceased had completed before dying. The complainant was only nominated in the deceased's will, where the deceased stated that he was to receive 10 per cent of his estate. The Adjudicator found that the fund acted reasonably and properly in excluding the complainant from the benefit allocation (at 165); and the complaint was dismissed.

<sup>59</sup> Section 1(1) of the Intestate Succession Act is provided below for ease of reference. It states the following:

“(1) If after the commencement of this Act a person (hereinafter referred to as the ‘deceased’) dies intestate, either wholly or in part, and-

- (a) is survived by a spouse, but not by a descendant, such spouse shall inherit the intestate estate;
- (b) is survived by a descendant, but not by a spouse, such descendant shall inherit the intestate estate;
- (c) is survived by a spouse as well as a descendant-
  - (i) such spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount<sup>4</sup> fixed from time to time by the Minister of Justice by notice in the *Gazette*, whichever is the greater; and
  - (ii) such descendant shall inherit the residue (if any) of the intestate estate;
- (d) is not survived by a spouse or descendant, but is survived-
  - (i) by both his parents, his parents shall inherit the intestate estate in equal shares; or
  - (ii) by one of his parents, the surviving parent shall inherit one half of the intestate estate and the descendants of the deceased parent the other half, and if there are no such descendants who have survived the deceased, the surviving parent shall inherit the intestate estate; or
- (e) is not survived by a spouse or descendant or parent, but is survived-
  - (i) by-
    - (aa) descendants of his deceased mother who are related to the deceased through her only, as well as by descendants of his deceased father who are related to the deceased through him only; or
    - (bb) descendants of his deceased parents who are related to the deceased through both such parents; or
    - (cc) any of the descendants mentioned in subparagraph (aa), as well as by any of the descendants mentioned in subparagraph (bb), the intestate estate shall be divided into two equal shares and the descendants related to the deceased through the deceased mother shall inherit one half of the estate and the descendants related to the deceased through the deceased father shall inherit the other half of the estate; or
  - (ii) only by descendants of one of the deceased parents of the deceased who are related to the deceased through such parent alone, such descendants shall inherit the intestate estate;
- (f) is not survived by a spouse, descendant, parent, or a descendant of a parent, the other blood relation or blood relations of the deceased who are related to him nearest in degree shall inherit the intestate estate in equal shares.”

uses the family tree of the deceased fund member to distribute assets to surviving spouses, descendants, and others.<sup>60</sup>

Distribution of an estate on intestacy is illustrated by *Mbele v Mbele and Another*.<sup>61</sup> While living, the deceased was a member of a pension fund, and certain benefits accrued to his beneficiaries when he died. The question arose whether benefits payable from a pension fund or provident fund formed part of the deceased estate and should thus devolve under the law of intestate succession. The court held that the member's pension fund benefit did not form part of his deceased estate and was specifically excluded from that estate by the Pension Funds Act.<sup>62</sup> This benefit could be distributed under the Pension Funds Act only, not the Administration of Estates Act 66 of 1965.<sup>63</sup>

Pension fund trustees experience challenges and frustrations in distributing retirement death benefits under section 37C of the Pension Funds Act. So it is tempting to suggest that the legislature should repeal section 37C and allow the death benefits to be distributed under the Intestate Succession Act. This step could remove the trustees' burden and potential lawsuits from aggrieved dependants and

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<sup>60</sup> Section 1(c)(iii) of the Intestate Succession Act refers to s 2 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009, which deals with the modification of customary law of succession. Section 2 of the 2009 Act states the following:

“(1) The estate or part of the estate of any person who is subject to customary law who dies after the commencement of this Act and whose estate does not devolve in terms of that person's will, must devolve in accordance with the law of intestate succession as regulated by the Intestate Succession Act, subject to subsection (2).

(2) In the application of the Intestate Succession Act-

- (a) where the person referred to in subsection (1) is survived by a spouse, as well as a descendant, such a spouse must inherit a child's portion of the intestate estate or so much of the intestate estate as does not exceed in value the amount fixed from time to time by the Cabinet member responsible for the administration of justice by notice in the *Gazette*, whichever is the greater;
- (b) a woman, other than the spouse of the deceased, with whom he had entered into a union in accordance with customary law for the purpose of providing children for his spouse's house must, if she survives him, be regarded as a descendant of the deceased;
- (c) if the deceased was a woman who was married to another woman under customary law for the purpose of providing children for the deceased's house, that other woman must, if she survives the deceased, be regarded as a descendant of the deceased.”

<sup>61</sup> *Mbele v Mbele and Another* 2015 JOL 34247 (FB).

<sup>62</sup> In par 15.

<sup>63</sup> In par 15.

nominated beneficiaries for wrongfully distributing death benefits. Yet it would also be like throwing the baby out with the bathwater, for these reasons:

- The family tree prescribed by the Intestate Succession Act differs from the meaning of a “dependant” as defined in the Pension Funds Act.<sup>64</sup>
- The family tree does not recognise the financial dependency or the financial status of the potential recipient of the inheritance as the Pension Funds Act does regarding the death benefit. Some people who do not fall under the family tree but depended financially on the fund member would then be left without financial support when that member died.<sup>65</sup>

Like the proposal made above about using beneficiary nomination forms, it is suggested that it would be inadvisable to abolish section 37C of the Pension Funds Act. Instead, what may be done is to restrict the list of potential recipients of the death benefit under section 37C.<sup>66</sup> That list should comprise people falling within the definition of a “dependant” in the Pension Funds Act.<sup>67</sup> If there are no such defined dependants, the death benefit may be transferred to the deceased member’s estate for disposal under applicable laws.

#### 2.1.4 Restrictions on the non-member spouse’s entitlement to 50 per cent of the death benefits

Under the Pension Funds Act and the Divorce Act 70 of 1979, a spouse married in community of property to a fund member is entitled to a share of the member’s pension interest on divorce.<sup>68</sup> If the fund member dies in service, though, the full

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<sup>64</sup> See par 2.2.1 below, where the meaning of a “dependant” in terms of the Pension Funds Act is discussed. The meaning of a “dependant” in the Pension Funds Act does not focus on blood or biological relations, unlike the Intestate Succession Act, which does.

<sup>65</sup> See below par 2.2.1, where the allocation of death benefits to dependants and the requirement of financial dependency are discussed.

<sup>66</sup> See par 2.1.1 above.

<sup>67</sup> See par 2.2.2 and 2.2.3 below, where the suggestion is made for the amendment of the meaning of a “dependant” in the Pension Funds Act, especially for factual dependants.

<sup>68</sup> See in this regard s 37D(4) of the Pension Funds Act and s 7(8)(a) of the Divorce Act 70 of 1979. Section 37D(4) of the Pension Funds Act states that for the purpose of s 7(8)(a) of the Divorce Act, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage is deemed to accrue to the member on the date on which the decree of divorce or decree for the dissolution of customary marriage is granted. Section 7(7)(a) of the Divorce Act states that in the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension

amount of the death benefit does not form part of the member's deceased estate.<sup>69</sup> The non-member spouse's entitlement to share in the interest then falls away because the percentage or proportion of the distribution of the death benefit is decided by the pension fund board considering equitability and other factors.<sup>70</sup> So it is possible that when a married fund member dies, the non-member spouse is not allocated a share, or is allocated a nil share, of the death benefit in the pension fund trustees' distribution under section 37C of the Pension Funds Act.<sup>71</sup> This distribution may happen if there are other dependants whose financial needs the trustees consider greater than those of the non-member spouse: if, for example, other dependants such as a girlfriend and/or minor children depended financially on the fund member before he died.

Some might argue that the death benefit payable because of the death of a fund member who was married in community of property should be divided into two

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interest of a party shall be deemed to be part of his assets. Section 7(8)(a) of the Divorce Act states that despite the provisions of any other law or of the rules of any pension fund, the court granting a decree of divorce in respect of a fund member (fund member spouse) may make an order that any part of the pension interest of that fund member spouse which by virtue of subsection (7) of the Divorce Act is due or assigned to the non-member spouse to the divorce concerned, shall be paid by the fund to the non-member spouse when any pension benefits accrue in respect of that member spouse. In terms of s 37D(4) of the Pension Funds Act, the non-member spouse no longer has to wait until the member exits the fund or retires before his or share of the pension or the pension interest accrues to the non-member according to a divorce order. See also *Ndaba v Ndaba* (600/2015) 2016 ZASCA 162, 2017 1 All SA 33 (SCA) and its academic commentaries by Maramoagae 2017 *PER* 1-22 and Mamashela 2018 *De Jure* 17-34.

<sup>69</sup> See par 2.1.2 above, where restriction on inheritance of death benefits is discussed. The provisions of s 37C(1) of the Pension Funds Act exclude any other laws in the distribution of death benefits, except under the exemptions listed in the section.

<sup>70</sup> See par 3 below, where the equitable distribution of death benefits is discussed. In *Letsoalo v Lukhaimane NO* 2018 JDR 0277 (GP) in par 18, the court referred to *Makume v Cape Joint Retirement Fund and Another* 2007 2 BPLR 174 (C), where the court held that the benefit payable by a pension fund on the death of a member has nothing to do with whether the parties were married in community of property or not. See n 79 below, where the *Makume* case is discussed.

<sup>71</sup> An estranged non-member spouse married out of community of property to a fund member, where this fund member dies before the divorce order is granted, qualifies as a "dependant" in terms of s 1 of the Pension Funds Act and stands to share from the death benefit in terms of s 37C of the Act. See in this regard *Van Vuuren v Central Retirement Annuity Fund and Another* 2000 6 BPLR 661 (PFA), where the Adjudicator ordered the fund to pay a share of the death benefit to the complainant, an estranged non-member spouse married out of community. See also *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 14, confirming that if a fund member dies while separated from the non-member spouse pending the finalisation of a divorce order, the non-member spouse will qualify as a dependant under paragraph (a) of the definition of "dependant" in s 1 of the Pension Funds Act, because at the time of the fund member's death, the divorce proceedings had not been finalised. Thus the marriage still exists (even though these spouses are separated) and so this person qualifies as the spouse of the deceased fund member.

halves — one to the surviving spouse, and the other half to be distributed under section 37C of the Pension Funds Act.<sup>72</sup> This distribution of a death benefit is possible if the fund rules so provide. Then, if the member dies while still in the service of a participating employer, the member's spouse or spouses will receive a lifelong monthly spousal pension from the fund based on 50 per cent of the total amount of the death benefit. The balance can then be distributed under section 37C of the Act as a lump sum.<sup>73</sup> It must be clear that this pension payment to the member's spouse or child is made under the particular fund rules, not section 37C of the Act.<sup>74</sup>

The non-member spouse faces challenges in claiming entitlement to a 50-per-cent share of the death benefit on the basis of a marriage in community of property. Two cases illustrating the difficulties are *Brummelkamp v Babcock Africa (1997) Pension Fund and Another*<sup>75</sup> and *Makume v Cape Joint Retirement Fund and Another*.<sup>76</sup> In

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<sup>72</sup> See *Van der Merwe and Others v Southern Life Association* 2000 3 BPLR 321 (PFA) at 330 (also cited in Chapter 2 n 115), where the Adjudicator stated: "I have been advised informally by influential persons in the pensions industry, that, where there is a spouse and more than one child the practice is for the spouse to receive at least 50% of the benefit with the balance being distributed in equal shares to the children alive at the date of death. Such an approach may be inadvisable in that it could be construed as an injudicious fettering of the board's discretion. Nevertheless, it does present something of a guideline."

<sup>73</sup> See Sentinel Retirement Fund "Sentinel Retirement Fund Rules" (August 2016) in par 6.1.3.1 for an example clause of how this rule can be formulated. The brochure is available at <https://www.sentinel.za.com/main/wp-content/uploads/Sentinel-Rules/Sentinel-Retirement-Fund-Rules.pdf> (last accessed on 30 June 2021). The clause states the following:

"6.1.3.1 On the death of a MEMBER who is survived by a SPOUSE or SPOUSES as defined in these RULES:

- (a) a PENSION and (if applicable) a FLEXIBLE ANNUITY of such amount as can be purchased by fifty per cent (50%) of the benefit determined in terms of RULE 6.1.1 shall be payable to the SPOUSE or SPOUSES; and
- (b) the balance of the benefit determined in terms of RULE 6.1.1 shall be allocated in terms of Section 37C of the ACT to the person or persons and in the proportions determined by the TRUSTEES, provided that should the TRUSTEES allocate an amount to the SPOUSE referred to in RULE 6.1.3.1(a), such SPOUSE may elect to convert such lump sum or part thereof in favour of a PENSION and (if applicable) a FLEXIBLE ANNUITY."

<sup>74</sup> Section 37C(1) of the Pension Funds Act states that its provisions do not apply where a death benefit is payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules. See also *Mofana v Mine Employees Pension Fund and Another* 2015 3 BPLR 372 (PFA) at 376, where the Adjudicator confirmed that in terms of the fund rules, the spouse's pension fell outside the ambit of s 37C of the Pension Funds Act and the board had a discretion to decide how it should devolve according to the fund rules.

<sup>75</sup> *Brummelkamp v Babcock Africa (1997) Pension Fund and Another* 2001 4 BPLR 1811 (PFA).

<sup>76</sup> See *Makume v Cape Joint Retirement Fund and Another* 2007 2 BPLR 174 (C). *Makume* is also cited in n 70 above.

*Brummelkamp* the complainant argued that the fund trustees had distributed the death benefit inequitably. She claimed that half the death benefit was automatically owed her under her marriage in community of property to the fund member (the deceased). Only half the death benefit should be available for the trustees to distribute among other beneficiaries. The fund rejected this argument. The fund decided that its discretion extended to the full benefit. The complainant had no right to half merely because of her matrimonial property regime. The complainant explained that she had not sought a divorce because of her religious convictions but that if she had, she would have managed to obtain half the deceased's death benefit. So she argued that it was *contra bonos mores* that she should be in a weaker position for not seeking a divorce.<sup>77</sup> She then complained to the Adjudicator, who rejected this argument:

It cannot be argued, therefore, that a community of property in marriage entitled the surviving spouse to 50% of a death benefit as the whole of the death benefit clearly falls outside of the assets of the estate. The whole of the death benefit is therefore available for distribution at the discretion of the trustees to such dependants as they are able to trace within a twelve month period and in such manner as they deem equitable in accordance with section 37C(1)(a).<sup>78</sup>

In *Makume v Cape Joint Retirement Fund and Another*, the High Court heard a dispute over the distribution of a death benefit.<sup>79</sup> The court held that the spouses' marriage in community of property does not entitle either of them to half the death benefit on the death of the fund member who was still in service.<sup>80</sup> The benefit does not fall into the deceased estate and must be distributed under section 37C of the Pension Funds Act. The court stated the following in this regard:

The next question considered was that of the Applicant's entitlement to 50% of the pension benefit by virtue of her marriage in community of property to the deceased. Upon the death of a party married in community of property the

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<sup>77</sup> *Contra bonos mores* is a Latin phrase meaning "against good morals; in breach of the moral law".

<sup>78</sup> *Brummelkamp v Babcock Africa (1997) Pension Fund and Another* 2001 4 BPLR 1811 (PFA) in par 7.

<sup>79</sup> See *Makume v Cape Joint Retirement Fund and Another* 2007 2 BPLR 174 (C) in par 152, where it was held that the benefit payable by a pension fund upon the death of a member has nothing to do with whether the parties were married in community of property. The applicant had contended that she was entitled to 50 per cent of the death benefit simply because she was married in community of property to the fund member before his death. The court held that the benefit must be distributed in terms of s 37C of the Pension Funds Act, and the court rejected the applicant's claim. See also *Letsoalo v Lukhaimane* NO 2018 JDR 0277 (GP) in par 18, where the High Court referred with approval to *Makume*.

<sup>80</sup> See *Makume v Cape Joint Retirement Fund and Another* 2007 2 BPLR 174 (C) at 174.

estate of such party is the joint estate which ceases to exist only once it is wound up. Section 37C of the Pension Funds Act was intended by the legislature to have the effect that any benefit will not fall into the estate of the deceased member. Notionally there is therefore only one benefit payable which arises upon death and whatever claims the Applicant may lay can only relate to some kind of alleged interest in respect of that one benefit that arose at the deceased's death, and not before that date. There is no room for an interpretation that there are two half benefits contemplated (one half benefit accruing to the deceased and the other half benefit to the Applicant by virtue of their marriage in community of property). The benefit has nothing to do with whether the deceased was married in or out of community of property – it is simply one benefit that becomes payable upon death and that single benefit has to be distributed in accordance with section 37C.<sup>81</sup>

The surviving spouse was not entitled to half the benefit.<sup>82</sup> In dismissing the application, the court referred to the decision by the Supreme Court of Appeal in *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others*.<sup>83</sup> The appeal court explained section 37C(1) of the Pension Funds Act to mean that all benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with under section 37C. In other words, none of the death benefits must fall into the estate of the deceased member save in the circumstances stated in section 37C(1)(b) and section 37C(1)(c).<sup>84</sup>

When the fund member spouse dies, then, under section 37C, pension fund trustees must consider the surviving non-member spouse among the other dependants and nominated beneficiaries for a share of the death benefit. The potential recipients of death benefits could include other dependants and nominees who may be financially independent and had not contributed a cent to the financial position of the member spouse and the non-member spouse. In Chapter 2 above, it was argued that pension benefits are deemed a deferred payment, so it is submitted that any payment to a spouse married in community of property is to the joint estate for the benefit of the spouses.<sup>85</sup> The same reasoning applies to the argument that a pension benefit is a right to property that qualifies for constitutional protection under section 25 of the Constitution.<sup>86</sup> Could one thus argue that by denying a non-

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<sup>81</sup> At 175.

<sup>82</sup> At 175.

<sup>83</sup> At 184, referring to *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 3 SA 798 (SCA) at 803.

<sup>84</sup> *Makume v Cape Joint Retirement Fund and Another* 2007 2 BPLR 174 (C) at 184.

<sup>85</sup> See Chapter 2, par 4.3 for a discussion of a retirement benefit as a deferred payment.

<sup>86</sup> In *Sebola v Johnson Tiles (Pty) Ltd and Others* 2002 3 BPLR 3242 (PFA), the Adjudicator held



member spouse married in community of property a half share of the fund member spouse's death benefits, section 37C promotes arrangements that conflict with other provisions of the Constitution such as the right to property? Chapters 1 and 2 of this thesis mentioned that setting up occupational retirement funds aims to realise a social objective. Moreover, section 37C is intended to promote a social objective and the right to social security under section 27(1)(c) of the Constitution by ensuring that the dependants of the deceased fund member should not be left destitute.<sup>87</sup> The argument that retirement benefits are protected by the Constitution under section 25 (the right to property)<sup>88</sup> and that section 37C of the Pension Funds Act is founded on the right to social security (section 27 of the Constitution) yields a legal scenario where two rights both protected by the Constitution compete against each other. The question that arises is how these rights are balanced or which of the two is stronger. The Constitutional Court recognised this dilemma in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*.<sup>89</sup> It accepted that as it is not possible in all circumstances to fully harmonise all the rights protected by the Constitution with one another, in a given case one right will have to be limited in favour of another. The right that protects the wider community (the right to social security) weighs more heavily than the right that gives individual enjoyment (the right to property or the right to freedom of contract).<sup>90</sup> It is submitted that if the spirit and social objective of section 37C of the Pension Funds Act are to be promoted (and

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that a pension benefit is equivalent to a right to property and therefore deserving of protection by the Constitution (at 3242). See Chapter 2, par 4.3 for a discussion of a retirement benefit as a right to property.

<sup>87</sup> See Chapter 1, par 2.4 and Chapter 2, par 5.2 for a discussion of the objectives of s 37C of the Pension Funds Act. See Chapter 1, n 45, where the provisions of s 27(1)(c) of the Constitution are stated. The retirement fund death benefits constitute social security in favour of the deceased fund member's dependants and nominated beneficiaries. So the fund has a constitutional obligation in terms of s 27(1)(c) of the Constitution to ensure that qualifying dependants and nominated beneficiaries, including minor children, have access to the death benefits. See in this regard Public Protector *A Costly Delay*, a report on an investigation into allegations of undue failure by Matlomosana Local Municipality to submit the deceased's beneficiaries' life assurance cover claim to the South African Local Authorities Pension Fund within the prescribed period from the date of his death (Report No 1 of 2015/16 at 29 par 8.2.1.1), although this report deals with benefits in the context of a life assurance policy. The report is available at [http://www.publicprotector.org/sites/default/files/legislation\\_report/a\\_costly\\_delay\\_1.pdf](http://www.publicprotector.org/sites/default/files/legislation_report/a_costly_delay_1.pdf) (last accessed on 8 August 2021). This report is hence referred to as "Public Protector *Costly Delay*".

<sup>88</sup> See Chapter 2, par 4.3 for a discussion of retirement benefits as property.

<sup>89</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 53.

<sup>90</sup> See par 2.1.6 below, where the balancing of these two competing rights — the right of freedom to contract and the right to social security — is discussed.

the right to property denied), then nominated beneficiaries (nominees), especially the financially independent who are not dependants of a fund member, must not compete with the dependants of the deceased fund member for the allocation of a share of the death benefit, as is currently the case under section 37C(1)(bA) of the Pension Funds Act.<sup>91</sup> In line with the social goal of establishing occupational pension funds, these death benefits must be shared solely among dependants satisfying the definition of a “dependant” in the Pension Funds Act.<sup>92</sup> The fund member may choose to bequeath the rest of his assets to whomever he likes by will.

#### 2.1.5 Restrictions on any agreements made by the fund member and/or between potential beneficiaries

When distributing a retirement fund death benefit, pension fund trustees must apply section 37C of the Pension Funds Act despite any other agreement made by the fund member with anyone before dying.<sup>93</sup> Nor may a living member make a contract with a third party under which his pension interests in the fund (the death benefit)

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<sup>91</sup> See par 2.2.3 below, where the provisions of ss 37C(1)(bA) of the Pension Funds Act are discussed.

<sup>92</sup> See par 2.2.1 below, where the meaning of a “dependant” in terms of the Pension Funds Act is discussed.

<sup>93</sup> In *Matene v Noordberg Group Life-Assurance Scheme and Another (2)* 2001 2 BPLR 1610 (PFA) (also discussed in Chapter 2, n 113), after the fund member died, the fund had resolved to distribute the death benefit to the complainant (the widow of the deceased member), Mrs P Matene (the ex-wife of the deceased fund member), and six children. The complainant (the widow), the fund, and Mrs P Matene had entered into a tripartite agreement in terms of which they agreed to the distribution made by the board. Despite the tripartite agreement, however, the complainant was dissatisfied that Mrs P Matene was allocated a portion of the death benefit even though the fund member did not maintain her when he was still alive, and they had also been divorced for some years. The fund trustees had distributed R31 277.82 of the death benefit to Mrs P Matene because R9 000 was due as a half share in a house to which she was entitled in terms of the divorce settlement, R11 387.82 was for school fees owing for the three minor children, and R10 890 was for arrear maintenance for the children. The Adjudicator found that although these creditors (for school fees, arrear maintenance, and the divorce settlement) could have had valid claims against the estate of the deceased, they could not be set off against the death benefit that was payable under s 37C of the Act. Despite the tripartite agreement mentioned above, the Adjudicator issued a rule *nisi* declaring the fund's payment to Mrs Matene unlawful and contrary to s 37C of the Act (in par 20.3.1). The *Matene* determination shows that even if the parties, the retirement funds, and the potential beneficiaries enter into an agreement confirming acceptance of the distribution of the death benefit which is or is to be made in a particular manner by the trustees, the agreement does not override the legal duties imposed on trustees by s 37C of the Act. The payment of the above-stated amounts to Mrs P Matene is an example of the kind of distributions that pension fund boards sometimes make without paying due regard to the applicable law, s 37C of the Act.

will be paid to the third party if the member dies in service.<sup>94</sup> In other words, section 37C of the Pension Funds Act overrides the general principles of contract law.<sup>95</sup>

Thus, in *Ndhlovu v Mr Price Group Retirement Fund and Another*,<sup>96</sup> the Adjudicator held that the fund could not accept the proposed allocations under a settlement agreement between the complainants and the surviving spouse. The board's acceptance would have amounted to a dereliction and a flagrant disregard of its duties. This step would have been contrary to its obligations under section 37C of the Pension Funds Act.<sup>97</sup>

In *Brummer v CSIR Pension Fund and Another*<sup>98</sup> the Adjudicator concluded that the trustees improperly fettered their discretion by relying on the terms of the settlement agreement for distributing the deceased's death benefit.<sup>99</sup> The trustees' reliance on this agreement was an abdication of their duty to properly apply their minds to relevant considerations in determining the proper allocation and distribution of the deceased's death benefit.<sup>100</sup>

In *Bester v Central Retirement Annuity Fund* the Adjudicator found that the consent form signed by a co-dependant would not entitle the other dependants to receive the benefit.<sup>101</sup> The consent form had stated that the co-dependant did not object to

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<sup>94</sup> In *Williams and Others v FFE Minerals South Africa Pension Fund and Another (2)* 2001 2 BPLR 1678 (PFA), the Adjudicator stated that even if dependants are entitled to arrear maintenance from the fund member, this does not entitle them to the death benefit *per se* (at 1685).

<sup>95</sup> See in this regard Le Roux PAK "Benefits: Sections 37C and 37D of the Pension Funds Act" (UNISA's Pension Funds Law Seminar, 16 July 2008) at 3. See below n 528; and par 2.1.6, where the supremacy of s 37C of the Pension Funds Act and the fund member's freedom to contract, respectively, are discussed.

<sup>96</sup> *Ndhlovu v Mr Price Group Retirement Fund and Another* 2015 3 BPLR 410 (PFA).

<sup>97</sup> At 420 in par 5.9. The complaint concerned the fund's distribution of a death benefit after the fund member died. Relevant to the discussion of a restriction on the agreement made by the fund member or between the potential beneficiaries was the complainants' submission that they had reached a settlement agreement with the surviving spouse in which it was agreed that the proceeds of the deceased's death benefit would be divided 60/40 per cent in favour of the complainants (in par 3.8). The Adjudicator rejected this submission. He set aside the fund's decision to allocate only 20 per cent of the proceeds of the death benefit to the complainants. The fund was also directed to re-open its investigation into the future financial dependency of the complainants and exercise its discretion again (in par 6).

<sup>98</sup> *Brummer v CSIR Pension Fund and Another* 2005 9 BPLR 797 (PFA).

<sup>99</sup> At 800.

<sup>100</sup> At 800.

<sup>101</sup> In *Bester v Central Retirement Annuity Fund* 2003 11 BPLR 5253 (PFA), the complaint related to the payment of a death benefit in terms of s 37C(1)(a) of the Pension Funds Act, in particular the exclusion of the complainants from sharing in the distribution. The deceased fund member was survived by three dependants: a wife (aged 55) and two adult children (aged 34 and 36).

the other dependants' being allocated the death benefit. The Adjudicator held that the death benefit must be paid according to section 37C of the Pension Funds Act and the fund's rules, despite any agreement between the potential beneficiaries.

In *Diergaardt v KVV-Voorsorgfonds*,<sup>102</sup> the complainant alleged that the fund member, before his death, had undertaken to provide for the educational needs of the complainant's child. The Adjudicator found no evidence of this undertaking. In any event, this claim for the educational needs of the complainant's child would lie against the deceased's estate, not the pension fund.

All the determinations discussed in this paragraph clarify that when pension fund trustees distribute retirement fund death benefits, they must apply section 37C of the Pension Funds Act despite the member's agreement with anyone before dying. And even if an agreement by the parties, the retirement funds, and the potential beneficiaries confirms the trustees' distribution of the death benefit, the agreement does not override the trustees' legal duties imposed by section 37C. The trustees' compliance with the section is mandatory.

The discussion below explores the restriction of the fund member's freedom to contract and the possible anomalies if the death benefits are distributed to potential beneficiaries in a way that does not align with the social objectives of establishing pension funds and that of section 37C of the Pension Funds Act.

#### 2.1.6 Freedom to contract versus public interest (social objectives)

Section 7(1) of the Constitution states that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality, and freedom. Under

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The two adult children were the complainants who were dissatisfied that they were excluded from the distribution. They based their contention on the nomination form and the fact that the wife of the deceased fund member had consented by signing a form confirming that the complainants should receive the death benefit (in par 9). On the strength of the signed consent, the complainants argued that they were entitled to the death benefit (in par 9). The wife explained that she was forced by one of the complainants to sign the consent form (in par 10), and the fund accepted her version that the consent form was improperly obtained and thus had no effect in law (in par 11). The Adjudicator pointed out that even if the consent had been duly obtained, any consent by a dependant to the effect that the benefit may be paid to the other dependants or other wishes of any beneficiary does not fall under the exceptions under s 37D of the Pension Funds Act (in par 15). The complaint was later dismissed (in par 17).

<sup>102</sup> *Diergaardt v KVV-Voorsorgfonds* 2001 11 BPLR 2703 (PFA) at 2704.

section 12(1)(a) of the Constitution, everyone has the right to freedom and security of the person, including the right not to be deprived of freedom arbitrarily or without just cause. In *Ferreira v Levin NO and Others* and *Vryenhoek and Others v Powell NO and Others*, the court pointed out that an individual's right to freedom must be defined as widely as possible, consonant with a similar breadth of freedom for others.<sup>103</sup> The freedom to contract falls under the rights protected by the Constitution.<sup>104</sup>

In the present discussion, freedom to contract concerns the fund member's right not to be deprived of this freedom arbitrarily or without just cause. The court in *Ferreira* stated the following:

There are other and more specific indications in the Constitution that the right to freedom is to be extensively interpreted. Section 35(1) embodies an injunction that, generally, in interpreting the chap 3 provisions, a Court of law must promote the values which underlie an 'open' and democratic society 'based on freedom and equality'. An 'open society' most certainly enhances the argument that individual freedom must be generously defined. It is a society in which persons are free to develop their personalities and skills, to seek out their own ultimate fulfilment, to fulfil their own humanness and to question all received wisdom without limitations placed on them by the State. The 'open society' suggests that individuals are free, individually and in association with others, to pursue broadly their own personal development and fulfilment and their own conception of the 'good life'.<sup>105</sup>

Under section 7(2) of the Constitution, the State must respect, protect, promote, and fulfil the rights in the Bill of Rights, including the right to freedom. It is submitted that distributing death benefits under section 37C of the Pension Funds Act undermines the right of freedom to contract. This distribution restricts retirement funds members from identifying personal ambitions and how to dispose of their hard-earned savings,

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<sup>103</sup> See *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 49.

<sup>104</sup> The freedom to contract denotes that parties are free to enter into contracts and decide on the terms of the contract. See in this regard *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 2 SA 314 (SCA) in par 23. In *Kruger v Central Retirement Annuity Fund* 2002 7 BPLR 3643 (PFA), the Adjudicator stated that the completion of a nomination form is in essence a contract between the pension fund member and his pension fund to benefit a third party. The Adjudicator held that in terms of s 37C of the Pension Funds Act, this nomination does not in itself entitle the third party to the benefit. At best, it only entitles the third party (if he or she survives the pension fund member) to be considered by the board when making an equitable distribution among the beneficiaries (at 3647).

<sup>105</sup> In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 50.

in the form of death benefits, to their identified or nominated beneficiaries.<sup>106</sup> Section 37C denies these members the opportunity to exercise their freedom to contract about the distribution of their death benefits. Section 37C ignores their wishes shown in the nomination form.<sup>107</sup>

In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*, the court cautioned that the fact that the right to freedom must be given a broad and generous interpretation must not be thought to be premised on the concept of the individual as being in heroic and atomistic isolation from the rest of humanity.<sup>108</sup> The court emphasised that a broad and generous interpretation of freedom does not deny or preclude the constitutionally valid and essential role of state intervention in the economic and civil and political spheres. State intervention is essential for resolving the paradox of unlimited freedom (where freedom ultimately destroys itself) in all these spheres. Legitimate limitations of freedom must occur through and be justified under the principles formulated in section 33(1) of the Interim Constitution, not by giving a restricted definition to the right to freedom in section 11(1) of the Interim Constitution. The court referred to Immanuel Kant, who conceptualises freedom as the “only one innate right” in these terms:

Freedom (independence from the constraint of another’s will), in so far as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity.<sup>109</sup>

Section 7(3) of the Constitution states that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.<sup>110</sup>

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<sup>106</sup> In par 54, the court defined “the right to freedom” as the right of individuals not to have “obstacles to possible choices and activities” placed in their way by the State.

<sup>107</sup> See par 2.1 above for a discussion of the restriction of fund member’s wishes. In *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 66, the court stated that the interventionist role of the State is no longer seen, in broad terms, as being limited to protecting its citizens against brute physical force and intimidation from others only, but it is seen as extending to the economic and social realm as well. The court also explained that statutory limitations on contractual freedom will be justified under s 33(1), assuming the other requirements for limitation have been fulfilled, if they are, in terms of s 33(1)(a)(ii), justifiable in an open and democratic society based on freedom and equality (in par 66).

<sup>108</sup> *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in par 52.

<sup>109</sup> In par 52, quoting Kant *Metaphysical Elements* at 43. Immanuel Kant (1724–1804) was a German philosopher and a leading figure of the Enlightenment.

<sup>110</sup> See par 1 above n 30, where the provisions of the limitation clause contained in s 36 of the

The question is whether it is justifiable for the State to undermine or limit fund members' freedom to contract and use private pension systems in the form of occupational retirement funds to alleviate poverty as the State does in section 37C of the Pension Funds Act.<sup>111</sup>

It is submitted that the fund member is denied the freedom to contract in the context of section 37C of the Act because of valid policy considerations such as the collateral social interests of the State and to prevent this right (the freedom to contract) from being used to counter the State's social objectives.<sup>112</sup> For example, if fund members enjoyed a free choice, some might disown and thus bring hardship

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Constitution are stated.

<sup>111</sup> Although in a different context, an example of a situation in which State policy overrides the member's freedom of choice was *Nair v Natal Witness Group Pension Fund and Another* 2001 1 BPLR 1500 (PFA). The fund member (the complainant) wished to access his full pension at retirement. The fund declined this request because it was against the rule which restricted the payment of full benefits to a retiring fund member. This rule was called the one-third restriction rule. The fund member requested the Adjudicator to compel the fund to pay the full benefit to him. The Adjudicator had to determine whether the rule that incorporated the one-third restriction was unreasonable and unconstitutional. He referred (at 1504) to the determination of *Probert v Malbak Group Pension Fund and Another* (PFA/KZN/9/98) (reported at [2000] 3 BPLR 292 (PFA)), where the Adjudicator had stated that the test of determining unreasonableness in our law is essentially one of proportionality. First, the objective which the rule is designed to serve must be shown to be of sufficient importance to warrant overriding the right of the complainant to individual choice and should relate to concerns of social importance in a democratic society. Secondly, the means adopted should meet the requirements of suitability, necessity, and proportionality. The Adjudicator held that although the one-third restriction rule was paternalistic, its objective was clearly aimed at protecting the pensioner (the fund member) by only allowing him access to one-third of his pension. This rule forces the pensioner to purchase a pension or another form of investment which will guarantee him an income for a specified period. This income will and should ensure the financial well-being of the pensioner. Whilst accepting the respondent's argument that one of the purposes of the above rule related to the tax exemption status of retirement funds, the Adjudicator was of the view that this was not the primary purpose of the restriction. He concluded that the object of the rule is of sufficient social importance in a democratic society to override the complainant's right to a full pension payout. It is also consistent with the provisions of the Income Tax Act. He took cognisance of the fact that only a court of the status of the High Court can set aside the provision of a statute on constitutional grounds; and the Adjudicator was barred from doing so. He nevertheless concluded that the provision (the restriction of the complainant to a one-third payout of his pension) bears a proportional relationship to that proper and legitimate policy (at 1504).

<sup>112</sup> See in this regard *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA) in par 5, where the Supreme Court of Appeal reiterated that s 37C of the Pension Funds Act removes the allocation of pension benefits on the death of a pension fund member from the unfettered choice of the member, whether by will or by nomination. Section 37C reflects a legislative decision that funds becoming available in that way should be available to be used for the benefit of the deceased's dependants so that they are less likely to be a drain on the State's resources. This outcome serves the social purpose of providing some protection for dependants without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will.

to their children when allocating death benefits.<sup>113</sup> Then the State (and the taxpayer) would have to meet these children's financial needs with social grants. In other words, freedom of contract could enable fund members to abdicate their legal responsibility and unfairly burden taxpayers and the State with their maintenance obligations — clearly an undesirable result.<sup>114</sup> So it is both consistent with State policy and reasonable to force fund members to bear their share of personal and legal responsibility for maintaining their dependants.<sup>115</sup>

There are many competing interests with regard to death benefits, and the legislature, through section 37C of the Pension Funds Act, has considered it fit to restrict the freedom to contract in this way.<sup>116</sup> If such choices were allowed, other bizarre situations could be imagined. For instance, if the deceased fund member spouse had bequeathed all his benefits to the surviving spouse, the latter might wish to claim all the benefits for herself from the fund. If this claim were allowed, the benefit would end up in the Master's Office to be treated as part of the deceased member's estate. This outcome is specifically prohibited by section 37C(1) of the Pension Funds Act. The purpose of the statutory intervention is to prevent surviving spouses from using the deceased fund member's testament to secure the death benefit for themselves and disregard the interests of other legitimate beneficiaries such as children and adopted children. The boards would struggle to balance the interests of the surviving dependants and beneficiaries if the provisions of a will also had to be executed. Section 37C(1) of the Act caters for this dilemma by removing death benefits from the administration of deceased estates. This exclusion protects the interests of dependants and other beneficiaries effectively.

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<sup>113</sup> See, for example, *Maphothoma v Telkom Retirement Fund and Another* 2016 1 BPLR 117 (PFA), where the deceased fund member had nominated his 37-year-old brother who was not financially dependent on him as his sole beneficiary to the exclusion of his two wives and five minor children.

<sup>114</sup> See also Ambachtsheer *CSPP* at 8, referring to James M Buchanan (1919–2013) (awarded the 1986 Nobel Prize in Economics), who distinguished between the respective merits of private- and public-choice models, and who concluded that the private-choice model (*in this respect freedom to contract*) should always receive preference providing it produces acceptable results. If it does not, move to the public-choice model (*in this respect social objective or public interest*) if it can be shown that it will likely produce better outcomes.

<sup>115</sup> Parliament has the right and duty to protect the public interest. In the Pension Funds Act, the legislature gave effect to this duty by protecting the rights of dependants and nominated beneficiaries. See also *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) in par 64 in this regard.

<sup>116</sup> See the comments made in par 2.1 above.



Section 37C of the Act is not the only provision in the Pension Funds Act or another statute that compels fund members to dip into their pension benefits to meet their social responsibilities such as maintenance obligations. Section 37D of the Pension Funds Act and section 24(6) of the Maintenance Act 99 of 1998 also seek to achieve the same purpose of social responsibility by attaching the retirement fund benefits of a defaulting fund member to pay for the arrear maintenance of a dependant.<sup>117</sup> These provisions apply despite any other wishes that the fund members may have for using their retirement fund benefits.

Section 37C of the Pension Funds Act prescribes how death benefits should be allocated, and it is intended to achieve the social objective of alleviating poverty.<sup>118</sup> In this way, a retirement fund is viewed as a tool for acting in the interests of the broader society rather than solely in the interests of individual retirement fund members. Why, then, is realising the social objective only relevant to section 37C and not to other benefit distributions to a member? One thinks of paying a withdrawal benefit to a member who is terminating his or her employment or membership of a fund or who is receiving a retirement benefit at the normal age of retirement. It could be argued that where withdrawal benefits and retirement benefits are paid, the member is still alive and able to decide how these benefits should be used. In that case, the dependants and nominated beneficiaries, who are usually the recipients of death benefits under section 37C, have other avenues to pursue their claims against fund members for maintenance. So these beneficiaries and dependants can approach the courts to secure the benefits in terms of section 37D of the Pension Funds Act. If a fund member dies while still in service, the State considers it proper to interfere and help the dependants and nominated beneficiaries receive what is owed them.

It was noted in Chapter 2 that occupational retirement funds are one of the three pillars to achieve the objectives of the State to ensure financial security at retirement for pensioners and prevent the destitution of dependants if the member dies. What would happen if the death benefit were simply paid into the deceased member's

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<sup>117</sup> See in this regard Sigwadi 2005 SA Merc LJ 340ff. See also Chapter 2, par 7 for a discussion of deductions in terms of s 37D of the Pension Funds Act.

<sup>118</sup> See par 2 below for a discussion of s 37C of the Pension Funds Act, and Chapter 2, par 5.2 for the objective of the section.

estate and all creditors, potential claimants, dependants, and beneficiaries had to compete against one other in claiming their shares?<sup>119</sup> Would the executor not know the circumstances of the deceased member better than the boards do? So there are policy considerations behind the existing position. For example, if the benefit were absorbed into the deceased estate, creditors would stake their claims to the deceased estate, leaving nothing for the deceased's family. Surely, when the breadwinner has died, there should be protection for the surviving spouse and dependent children.

The objective of section 37C of the Pension Funds Act is social in entitling dependants to receive death benefits if a retirement fund member dies in service. This money takes care of the dependants' financial needs. The purpose of section 37C is to ensure that no dependants are left without support. The social objective of section 37C is used as a valid reason for limiting the right of the fund member not to be deprived of the freedom to contract arbitrarily or without just cause. Given the clear purpose of section 37C, two questions arise. Why should nominees (the nominated beneficiaries) who are financially independent still be eligible to receive the death benefits? And how does that outcome align with the social objective of the section? These questions are also relevant to the death benefit being paid to a major dependant who is financially independent.

It is submitted that restricting the fund member's freedom to contract is justified because of the importance of retirement funds' social mandate. In other words, for reasons set out in the preceding paragraphs, there can be no doubt about a rational connection between the denial or restriction of freedom to contract created by section 37C of the Pension Funds Act and the legitimate governmental purpose behind its enactment. This purpose is to safeguard the interests of the surviving

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<sup>119</sup> See *Jacobs NO v Central Retirement Annuity Fund and Another* 2001 1 BPLR 1488 (PFA), where the Adjudicator held that payment of a death benefit into an estate is not possible where a dependant member exists (at 1488). The Adjudicator pointed out that there are only two scenarios in which a death benefit may be paid into the deceased's estate in terms of s 37C of the Pension Funds Act: first, where the deceased has no dependants and has not nominated a beneficiary, the benefit must accrue to the estate (s 37C(1)(c)). Secondly, where the fund has discovered no dependants within twelve months after the death of the deceased and there is a nominated beneficiary and the deceased's estate liabilities exceed its assets, the fund must pay an amount into the estate equalling the difference between the liabilities and assets subject to the amount of the death benefit (s 37C(1)(b)). The Adjudicator concluded that in *Jacobs*, because there was a dependant, neither of the above-stated provisions applied and so payment could not be made to the estate of the deceased fund member (at 1492).

dependants in the death benefits. But what happens when the distribution of the death benefits no longer aligns with the social mandate of retirement funds? Should the other rights, including the fund member's freedom to contract, that normally flow from owning property not take precedence when pension fund trustees distribute death benefits?<sup>120</sup> This possibility makes it critical that the legislation, pension funds rules, and pension fund trustees ensure that death benefits distribution aligns with the social mandate. Otherwise, the protective measures that retirement fund benefits enjoy are no longer justified.<sup>121</sup>

## 2.2 Allocation to potential beneficiaries of retirement fund death benefits

The discussion below explores the pension fund trustees' choice in allocating death benefits under section 37C of the Pension Funds Act. This section prescribes a three-stage approach: the trustees must

- identify dependants and nominated beneficiaries,<sup>122</sup>

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<sup>120</sup> See also *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) in par 43, where the Constitutional Court said that it must be accepted that, to govern a modern country efficiently and harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. The Constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the Constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner. This has been said to promote the need for a governmental action that relates to a defensible vision of the public good, and to enhance the coherence and integrity of legislation. See also Currie and De Waal *Bill of Rights* at 219 for an exposition of the rationality test.

<sup>121</sup> In *Atkinson and Others v Southern Field Staff Defined Contribution Pension Fund* 2000 4 BPLR 367 (PFA) (also cited in Chapter 2 n 135) in par 48, the Adjudicator ruled that any rule allowing the deprivation of benefits must be justifiable in an open and democratic society based on freedom and equality, and that there must be a rational connection between means and ends. In par 48, the Adjudicator also referred to *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 4 SA 1176 (CC), where the Constitutional Court stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve. The Adjudicator in *Atkinson* in par 49 stated that, in applying the rationality test, one must first identify the legislative purpose and then determine whether the rule (legislation) devised is rationally connected to the purpose.

<sup>122</sup> The Pension Funds Act distinguishes between instances when the fund member has nominated certain persons to receive benefits and instances, and when dependants must be provided for. See in this regard pars 2.2.2 and 2.2.3 below, where subsections 37C(1)(b) and 37C(1)(bA) of the Act are discussed. The challenges faced by the pension fund trustees about the definition of "dependant" under s 1(b)(i) of the Act were highlighted in *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC 156 (6 February 2019) (*Kim* also being cited in Chapter 1, n 83). The court referred to Hunter *et al Pension Funds Act*: "The board of a fund is not entitled to rely only on information in regard to potential dependants of a deceased member that is brought to its attention; it is instead required to take all reasonable steps to identify and locate such persons. What steps will be considered 'reasonable' will depend on the circumstances of

- determine an equitable distribution, and then
- determine the appropriate mode of paying the identified dependants and beneficiaries.<sup>123</sup>

These trustees must conduct proper, thorough investigations to ascertain the existence of all the deceased fund member's dependants and beneficiaries who may be entitled to share in the death benefit. After these investigations, the trustees must consider all relevant factors and ignore all irrelevant ones in exercising their discretion about the beneficiaries and the amount of the benefit.<sup>124</sup> The discussion below demonstrates that the trustees have an enormous task in following the three-stage approach.<sup>125</sup> For example, the usual challenges are the following:

- Sometimes pension fund trustees distribute death benefits without conducting a thorough investigation to identify dependants.<sup>126</sup>

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the case, but funds are expected to balance, on the one hand, the need to give effect to the section by identifying all potential beneficiaries and, on the other hand, practical considerations such as the time and cost involved of doing so." The court pointed out that pension fund trustees have a duty to investigate the facts and circumstances that will enable them to exercise their discretion about how to allocate a benefit equitably among dependants and nominees, having regard to relevant factors. The court concluded that the above submission by Hunter and others has real force because it is hard to see how the pension fund trustees can perform their functions fairly, lawfully, reasonably, and rationally without their taking reasonable steps to ascertain relevant information. This applies both to the first step of identifying any dependant and then the second step of determining how to allocate a benefit equitably among dependants and/or nominees. It is important to note that while the trustees are vested with the duty to determine the beneficiary of death benefits, they do not themselves investigate. This is a delegated function, normally to the administrators of these funds. In practice, the trustees will only be required to make a final decision on the recommendations made by the people who investigated these matters.

<sup>123</sup> See in this regard *Kitching v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* (PFA/KZN/33168/2009/RM) in par 5.3.

<sup>124</sup> See, for example, *Motsoeneng v AECI Pension Fund and Another* 2003 1 BPLR 4267 (PFA), where the Adjudicator held that s 37C(1)(a) of the Pension Funds Act required pension fund trustees to effect equitable distribution among dependants of the deceased fund member (at 4267). The fund must consider relevant factors and discard irrelevant considerations, and its decision should not reveal an improper purpose, nor should it fetter its discretion in any way (at 4267). The Adjudicator held that the fund had fettered its discretion by excluding a spouse of the deceased fund member from a distribution of the benefit because of concerns about her intended use of the benefit (at 4267). The complainant had indicated that she wanted to use the lump sum to settle the debts of the deceased estate.

<sup>125</sup> See in this regard *Kitching v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* (PFA/KZN/33168/2009/RM) in par 5.3 and *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC 156 (6 February 2019), and par 2.2 below.

<sup>126</sup> See generally the discussion of cases and determinations in this chapter, where the courts and/or the Adjudicator have set aside the distribution of death benefits because the funds have failed to conduct proper investigations to identify dependants and their financial circumstances.

- Pension funds inconsistently interpret the meaning of “dependant” as defined in section 1 of the Pension Funds Act, especially as regards the definition of a factual dependant in section 1(b)(i) of the Act.<sup>127</sup>
- Different yardsticks or tests are used by pension fund boards and the Pension Funds Adjudicator in determining the dependency level of a legal dependant and that of a factual dependant. The rationality for this differentiation is not apparent.<sup>128</sup>
- Sometimes pension fund trustees struggle to balance the interests of dependants and nominated beneficiaries. Then some pension funds’ distributions of death benefits align neither with the social purpose of section 37C of the Pension Funds Act nor with that of the State’s objectives for establishing pension funds.<sup>129</sup>
- There is a lack of clarity about the meaning of the “equitable” distribution of death benefits. Again, misaligned distributions ensue.<sup>130</sup>
- Sometimes pension funds have highlighted their lack of investigative powers under section 37C of the Pension Funds Act because it often makes it difficult for them to obtain and verify the required information.<sup>131</sup>
- Sometimes pension fund trustees delay or neglect the distribution of death benefits to the intended beneficiaries without justifiable reasons or

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See, for example, n 141, below, referring to the determination of *Mafe v Barloworld (SA) Retirement Fund* (PFA/FS/13033/07/CN) available at <https://www.pfa.org.za/Determinations/20062008/91CE88C7-E904-4F35-BB7F-F79F446D67F6.pdf> (last accessed on 20 August 2021).

<sup>127</sup> See par 2.2.1 below, where the allocation of death benefits to dependants is discussed.

<sup>128</sup> See par 2.2.1 below, where the allocation of death benefits to dependants is discussed.

<sup>129</sup> There may often be a conflict between the member’s wishes and the trustees’ duty in properly exercising the discretion given to the trustees. See par 2.2.3 below, where the allocation of death benefits to dependants and nominated beneficiaries is discussed.

<sup>130</sup> See par 3 below, where the equitable distribution of death benefits to dependants and/or nominated beneficiaries is discussed.

<sup>131</sup> See par 2.2.5.3 below, where the issue of lack of investigative powers of pension funds was raised in *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA).

explanation.<sup>132</sup> The above-stated social purpose and the State's objectives are thus negated.

- The payment mode of death benefits may not align with the above-stated social purpose and the State's objectives.<sup>133</sup>
- Non-payment of retirement benefits to members, dependants, and beneficiaries also negates the above-stated social purpose and the State's objectives.<sup>134</sup>
- There is no apparent evidence of pension fund trustees' being held accountable for failing to fulfil their responsibilities under section 37C of the Pension Funds Act.<sup>135</sup>

The issues listed above are not exhaustive and are discussed individually in the paragraphs below. Pension fund trustees must consider the following potential recipients of the death benefits when making a distribution:

#### 2.2.1 Dependants

Section 37C(1)(a) of the Pension Funds Act provides for the case in which, before dying, the deceased fund member has not nominated any beneficiary but is survived by dependants who are known or can be traced by pension fund trustees.<sup>136</sup> The first step in the trustees' distribution process is to investigate the deceased's

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<sup>132</sup> See par 2.2.5 below, where the period within which to conduct investigations and instances of unjustifiable delays by pension funds are discussed.

<sup>133</sup> See par 2.2.9 below, where the payment mode and lack of preservation of retirement fund death benefits are discussed.

<sup>134</sup> See below par 2.2.10, where the non-payment of retirement benefits to members, dependants, and beneficiaries, including the issue of unclaimed benefits, is discussed.

<sup>135</sup> See generally the discussion of cases and determinations in this chapter, where, after the courts and/or the Adjudicator have set aside the distribution of death benefits because the funds have failed to fulfil their duties in terms of s 37C of the Pension Funds Act, there are apparently no consequences for the relevant wrongdoers (the errant pension fund boards and their trustees). See also par 6 below, where remedies for dependants and/or nominated beneficiaries for the wrongful distribution of death benefits are discussed.

<sup>136</sup> See, for example, *Oosthuizen obo Breed v Mercedes Benz of South Africa Pension Fund and Another* 2000 3 BPLR 287 (PFA), where the deceased fund member had not nominated a beneficiary for his death benefit. The Adjudicator held that the benefit fell to be distributed among his dependants in terms of s 37C(1)(a) of the Pension Funds Act in such proportions as the board considered equitable (at 287 and 288). See also par 2.2.7 and n 389 below, where this determination is also discussed. Paragraph 2.2.7 discusses disputes among nominated beneficiaries and/or dependants of the deceased fund member.

dependants diligently.<sup>137</sup> The trustees have twelve months after a fund member dies to identify these dependants.<sup>138</sup> Once they have been identified, the benefit must be paid out in the manner the trustees consider equitable.<sup>139</sup> They can pay the death benefit to a single dependant or in proportions to some or to all of the dependants, as the trustees consider equitable. The key point is that the trustees must identify dependants, exercise their discretion equitably about who must receive the benefits, and determine the benefit amount.<sup>140</sup> Therefore, these trustees cannot simply lump all the dependants together and allocate the entire benefit jointly to all of them.<sup>141</sup>

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<sup>137</sup> See *CALA Dairies CC v Orion Money Purchase Provident Fund and Another (1)* 2001 11 BPLR 2676 (PFA), where a lawful wife of the deceased member was excluded from distribution. The Adjudicator found that the distribution was flawed because the trustees had failed to conduct a proper investigation to determine all dependants of the deceased fund member (at 2676). The Adjudicator also held that the board is not entitled to rely exclusively on information provided by third parties or the participating employer (at 2676). In *Mothudi v Old Mutual Staff Retirement Fund* 2002 12 BPLR 4180 (PFA), the Adjudicator dealt with a situation in which the board included a lover of the deceased fund member in the distribution of benefits without adequate proof that this person was dependent on the fund member at the time of death. The Adjudicator found that the board had failed to conduct a proper investigation and set aside the distribution.

<sup>138</sup> See par 2.2.5 below, where the twelve-month period is discussed.

<sup>139</sup> See par 3 below for a discussion of the equitable allocation of death benefits.

<sup>140</sup> See *Zikhali and Another v Metal Industries Provident Fund (1)* 2001 12 BPLR 2895 (PFA), where the Adjudicator emphasised the obligation of pension fund trustees to trace dependants. He explained in par 14 that there is a common misconception among the parties in the matter before him, and in the pension industry at large, that there is a duty on a dependant to come forward and inform the board of his or her status and potential entitlement to a death benefit. The Adjudicator reiterated that in terms of s 37C of the Pension Funds Act, the onus is squarely on the pension fund trustees to conduct an investigation to trace the deceased fund member's dependants. So in any death benefit claim arising from a pension fund organisation, the board must take all reasonable steps to locate the dependants of the deceased. See also *Kitching v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* PFA/KZN/33168/2009/RM in par 5.5, confirming that the onus is on the fund and its trustees to properly investigate the extent of dependency of the identified dependants.

<sup>141</sup> See in this regard *Mafe v Barloworld (SA) Retirement Fund* PFA/FS/13033/07/CN in par 27, where the Adjudicator found that the board that simply lumped all the dependants together and allocated the entire benefit jointly to all of them, thus failing to exercise its discretion properly over the proportions of the benefit that should have been allocated to each dependant separately. The *Mafe* determination is available at <https://www.pfa.org.za/Determinations/20062008/91CE88C7-E904-4F35-BB7F-F79F446D67F6.pdf> (last accessed on 7 August 2021).

2.2.1.1 The meaning of “dependant” in relation to a fund member for the purpose of section 37C of the Pension Funds Act

Section 37C of the Pension Funds Act must be read with the definition of a “dependant” in section 1 of the Act.<sup>142</sup> Section 1 defines a “dependant”, in relation to a member as

- (a) a person in respect of whom the member is legally liable for maintenance;<sup>143</sup>
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
  - (i) **Was, in the opinion of the board, upon the death of the member was in fact dependent on the member for maintenance;**<sup>144</sup>

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<sup>142</sup> See *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) in par 5.2, confirming that the payment of death benefits is regulated by s 37C of the Pension Funds Act read with the definition of a “dependant” in s 1. In *Cillie v Lifestyle Retirement Annuity Fund and Another* 2019 2 BPLR 393 (PFA) in par 5.5, about the definition of a “dependant”, the Adjudicator stated that the law recognises three categories of dependants based on the deceased member’s liability to maintain such a person: legal dependants, non-legal dependants, and future dependants. See also *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.5 in this regard.

<sup>143</sup> See *Van der Merwe and Others v Southern Life Association Ltd and Another* 2000 3 BPLR 321 (PFA) at 330, where the Adjudicator stated that if a person was legally married to the fund member before the member’s death, that person (the non-member spouse) would be entitled to be considered a dependant because of the existence of a legal duty of support, irrespective of this non-member spouse’s financial situation. This person would not need to prove that she was in fact dependent on the deceased for maintenance. The Adjudicator also pointed out that in terms of the definition of a “dependant” in s 1 of the Pension Funds Act, a spouse (in *Van der Merwe v Southern Life* the spouse was a married woman) is entitled to be considered a dependant even where her or his income and assets exceed those of the deceased fund member. The fact that a person is considered a dependant does not necessarily mean that this person will be allocated a benefit. The trustees, if they deem it equitable, can still allocate a nil benefit to a dependant.

<sup>144</sup> In *Khosa and Others v Palabora Pension Fund and Others* 2018 1 BPLR 95 (PFA), the complaint concerned the fund’s distribution of a death benefit after the fund member died. The deceased was not married at the time of her death and had one minor child. The deceased was survived by her mother (the first complainant) and two major siblings who were also complainants. Before her death, the deceased had completed a beneficiary form allocating 40 per cent of her benefit to her minor child and 20 per cent each to her mother and her (the fund member’s) two siblings. A total amount of close to R1 million became available for distribution as a death benefit following her death. The pension fund allocated 80 per cent to the minor child and 20 per cent to the mother of the deceased. The exclusion of the deceased’s major siblings from the allocation of the death benefit formed the subject matter of the complaint. The fund submitted that it had distributed the death benefit according to s 37C of the Pension Funds Act. It stated that it took into consideration the determination in *Maji v Cape Joint Pension Fund* 2004 4 BPLR 5624 (PFA), where two sisters of the deceased fund member were excluded from sharing in the death benefit as they were employed and married, even though these sisters were nominated as beneficiaries by the deceased fund member. The fund explained in *Khosa* that the minor child was 15 years old at the time of the fund member’s death and still had a long way to go before she could be self-supporting, and that she was under the care of an unemployed guardian. The fund determined that including major siblings in the allocation of the benefit would have depleted



- (ii) Is the spouse of the member;<sup>145</sup>
- (iii) **Is a child of the member**, including a posthumous child, an adopted child and a child born out of wedlock;<sup>146</sup>
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died”<sup>147</sup> (my emphasis).

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the money and made it difficult for the minor child to meet the daily expenses and pursue her potential prospects and could have made her destitute. The fund believed that it had acted in good faith and followed its rules and the Pension Funds Act. The Adjudicator had to determine whether the fund had distributed the deceased’s death benefit equitably by considering all relevant factors. She held that the Act recognises that a person can qualify to receive a share of a death benefit as a factual dependant of the deceased (in par 5.6). But a factual dependant must show that he or she was receiving financial support from the fund member at the time of the latter’s death (in par 5.6). The Adjudicator was satisfied that the fund had exercised its discretion equitably in allocating the death benefit of 80 per cent to the minor child and 20 per cent to the mother of the deceased fund member and in excluding of the major siblings (in par 5.8); and so she dismissed the complaint (in par 6.1). It is submitted this determination is correct and in line with the social objective of s 37C of the Act: that of ensuring that the deceased fund member’s dependants are not left destitute.

<sup>145</sup> Section 1 of the Pension Funds Act defines “spouse” as a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act 68 of 1961, the Recognition of Customary Marriages Act 120 of 1998, the Civil Union Act 17 of 2006, or the tenets of a religion. In *Esterhuizen v Central Retirement Annuity Fund and Another* 2013 3 BPLR 355 (PFA) at 360, the Adjudicator determined that for life partners, the test for dependency is whether the parties lived in a relationship of mutual dependence and ran and shared a common household. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. See in this regard *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.5.

<sup>146</sup> In *Gerber v Aberdare Cables (Pty) Ltd Provident Fund and Another* 2010 3 BPLR 275 (PFA), the complaint concerned the allocation and distribution of a death benefit in terms of s 37C of the Pension Funds Act. The issue for determination was whether a foster child (Angelique) was a dependant of the deceased fund member in terms of the Act. The Adjudicator found (in par 5.4) that Angelique relied on the deceased for maintenance needs even though she was not his child; the deceased was her primary caregiver, had included her as a beneficiary on his medical aid fund, had provided her with shelter as she was residing with him at the time of his death, had treated her as his own child, and was intending to adopt her. The Adjudicator held that the foster child was financially dependent on the deceased at the time of his death and qualified as a dependant in terms of the definition in s 1 of the Act (in par 5.5).

<sup>147</sup> See, for example, in *Wellens v Unsgaard Pension Fund* 2002 12 BPLR 4214 (PFA) at 4218, where the Adjudicator confirmed that the definition of a “dependant” includes persons who are not currently dependent on the fund member but would have been in the future if the member had not died. See also *Bakumeni v Old Mutual Staff Retirement Fund* 2001 2 BPLR 1573 (PFA) and *Fourie v Central Retirement Annuity Fund* 2001 2 BPLR 1580 (PFA), which also dealt with the definition and the determination of dependants. Pension fund trustees have an enormous task to fulfil this requirement of determining the potential beneficiaries’ future financial circumstances. In *Ndhlovu v Mr Price Group Retirement Fund and Another* 2015 3 BPLR 410 (PFA) in par 5.13, the Adjudicator stated that when a claim for a portion or the entire proceeds of a death benefit is lodged under s 1(c) of the Pension Funds Act dealing with future dependants, pension fund trustees will inevitably find it challenging to decide the distribution, and they are required to conduct a more proactive and thorough investigation into the future financial circumstances of potential beneficiaries, particularly where they are financially independent at the time of the deceased’s death. Even if the potential beneficiaries have provided the fund with information about their monthly household income and expenditure, the pension fund trustees are still obliged by s 37C of the Act, in conjunction with the definition of a “dependant” in s 1(c), to reinvestigate the possible future financial circumstances of the

Determining who is and who is not a dependant confuses pension fund trustees and often ends in legal disputes between dependants, beneficiaries, and retirement funds.<sup>148</sup> The definition of a “dependant” in section 1 of the Pension Funds Act does not rank dependants.<sup>149</sup> So everyone meeting the definition of a “dependant” in section 1 of the Act competes equally to be considered for a share of the death benefit, irrespective of whether they are legal, factual, or future dependants. It should be noted that being considered a dependant does not necessarily compel the fund to pay this person a death benefit.<sup>150</sup> Other factors are considered by the trustees when distributing the death benefit.<sup>151</sup> It will become apparent in the discussion below that determining the equitable distribution of death benefits in accordance with the guiding factors is complex, especially because of the lack of clarity in certain areas.<sup>152</sup>

It must be pointed out that the definition of a “child” under section 1(b)(iii) of the definition of “dependant” in the Pension Funds Act does not require the child of the fund member to be a minor. Nor need the child have been factually dependent on the deceased fund member to be considered for a share of death benefits.<sup>153</sup> A major child meets the definition of “dependant” and is thus eligible for consideration

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complainants, and they should not be limited only to the information that the potential beneficiaries have provided but also investigate their entire financial circumstances.

<sup>148</sup> See Downie *Essentials* at 120; and *Taljaard v Corporate Selection Umbrella Retirement Fund and Another* 2016 2 BPLR 271 (PFA), where the Adjudicator stated that the pension fund trustees’ failure to consider the dependants’ ages when distributing a death benefit renders the decision improper (at 271).

<sup>149</sup> See in this regard *Government Employees Pension Fund and Another v Buitendag and Others* 2007 4 SA 2 (SCA) in par 5. Although this case referred to the Government Proclamation, namely, the Government Employees Pension Law, 1996 that applies to the Government Employees Pension Fund (“GEPF”), the definition of a “dependant” in this Act is like the one in s 1 of the Pension Funds Act.

<sup>150</sup> See in this regard *Van der Merwe and Others v Southern Life Association Ltd and Another* 2000 3 BPLR 321 (PFA), confirming that the fact that a person is considered a “dependant” does not necessarily mean that this person will be allocated a benefit. The trustees, if they deem it equitable, can still allocate a nil benefit to a dependant.

<sup>151</sup> See par 3.2 below, where the criteria for determining equitable distribution are discussed.

<sup>152</sup> See par 3.5 below, where the unavailability of proper guidelines as well as challenges facing pension fund trustees are discussed.

<sup>153</sup> See *Mofana v Mine Employees Pension Fund and Another* 2015 3 BPLR 372 (PFA) at 379, where the Adjudicator accepted that the meaning of a “child” in terms of s 1 of the Pension Funds Act should be distinguished from the meaning the word bears in terms of the Children’s Act 38 of 2005, and that the Pension Funds Act contemplated a broad meaning of the word and does not limit it to a minor child. See also par 2.2.1.4, and n 187 below, where the requirement of financial dependency for major children is discussed.

when pension fund trustees exercise their discretion in distributing death benefits.<sup>154</sup> The definition of a “dependant” in terms of sections 1(b)(i) and 1(b)(iii) in the Pension Funds Act extends beyond individuals whom the deceased was legally obliged to support and, as stated above, includes a major child<sup>155</sup> or any person whom the deceased did support.<sup>156</sup>

The definition of a “dependant” in section 1 of the Pension Funds Act, as explained at the beginning of this paragraph and in several cases and Adjudicator’s determinations, makes it clear that the law recognises three categories of dependants that meet the definition:

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<sup>154</sup> See par 2.2.1 above for the meaning of “dependant” under s 1(b)(iii) of the Pension Funds Act, where it deals with definitions, as well as Downie *Essentials* at 120. Section 1(b)(iii) was introduced into the Pension Funds Act to include, among other people, in the definition of dependant major children who at the time of death did not depend on the deceased member for maintenance. The definition of “dependant” under s 1(b)(iii) of the Pension Funds Act refers only to “a child of the member” without distinguishing between a minor child and a major child.

<sup>155</sup> In *Matomela v SASKO Provident Fund* (PFA/WE/1003/00/NJ), the board allocated the death benefit to a spouse of the deceased member and their minor children. Later, a 23-year-old child (complainant) of the deceased fund member approached a trustee of the fund. This child indicated that he was the son of the deceased and although the deceased did not support him during his lifetime, he was struggling financially and requested that some portion of the death benefit be awarded to him and his sister. He informed the trustee that he had always lived with his natural mother’s family in the Transkei and had extremely limited contact with the fund member (deceased) during his lifetime. The fund resolved that, since the complainant and his sister had received no financial contributions from the deceased, had minimal contact with the deceased during the preceding ten years, and were major adults, no death benefit should be allocated to them. The Adjudicator found that there were deficiencies in the investigation conducted by the fund yet upheld the fund’s decision to pay the benefit to the deceased’s spouse and her minor children (in par 14). The Adjudicator stated that in any death benefit distribution, one would ideally like to award each dependant, at a minimum, an amount representing his or her financial dependency or needs (in par 14). Even so, this is not always possible, because the amount available for distribution simply does not always cover the needs of all the dependants. The Adjudicator concluded that in *Matomela*, the overall amount of R72 550.47 could not cover the needs of the spouse and her minor children. As the complainant was aged 23, even though he was then currently unemployed, the Adjudicator was of the view that, owing to his age, he had some prospect of obtaining employment (in par 14). The Adjudicator was not persuaded that the fund had acted improperly by exclusively favouring the needs of the widow and her minor children, especially in view of their close relationship with the deceased (in par 14). The Adjudicator thus dismissed the complaint. The *Matomela* determination is available at <https://www.pfa.org.za/Determinations/PRE%202003/9CBDF1FF-EA5B-4A96-A522-71BBA6F4BE1B.pdf> (last accessed on 8 August 2021).

<sup>156</sup> See *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA) in par 5.10, where the Adjudicator stated that section 1(b)(i) of the definition of “dependant” in the Pension Funds Act does not contemplate a totally or wholly dependent relationship. Any form of dependency will suffice. Yet a single payment is not enough to denote a maintenance relationship. The person alleging financial dependency must prove that she or he was left in a financial predicament.

- legal dependants,<sup>157</sup>
- factual dependants,<sup>158</sup> and
- future dependants.<sup>159</sup>

It is submitted that this definition of a “dependant” in the Act appears *prima facie* clear because it can be interpreted without difficulty. Yet case law and the Adjudicator’s determinations show otherwise. This definition has been the subject of scholarly reviews<sup>160</sup> and many disputes between potential beneficiaries of the death benefits and the retirement funds. These disputes often focus on subsection 1(b)(i) of the Act as stated earlier and repeated here for ease of reference. It states the following about the meaning of a dependant:

- (b) a person in respect of whom the member is not legally liable for maintenance, if such person—
- (i) **was, in the opinion of the board, upon the death of the member was in fact dependant on the member for maintenance** (my emphasis).<sup>161</sup>

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<sup>157</sup> See in this regard subparagraph 1(a) of the definition.

<sup>158</sup> See in this regard subparagraph 1(b) of the definition. In the case of factual dependants (non-legal dependants), where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. See in this regard *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.5.

<sup>159</sup> See in this regard subparagraph 1(c) of the definition.

<sup>160</sup> See, for example, Lehmann 2009 *SALJ* 650; Manamela 2005 *SA Merc LJ* 276 for a discussion of s 37C of the Pension Funds Act; and Mhango 2008 *SA Merc LJ* 126. All these articles were written between twelve and sixteen years ago, but the challenges facing pension fund trustees in interpreting “dependant” in the distribution of death benefit in terms of s 37C of the Pension Funds Act are still prevalent. See also Mhango 2013 *CILSA* 474ff; Mhango 2010 *PER* 183ff; Nevondwe 2010 *Pensions* 38ff; and David *Legal Obligations*.

<sup>161</sup> This subsection was inserted into the definition of “dependant” in the Pension Funds Act by s 1(i) of the Pension Funds Amendment Act 11 of 2007. The person claiming to be a factual dependant will have to prove dependency on the deceased, despite the deceased’s not having a legal duty to maintain this claimant, at the time of the member’s death. See in this regard *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.5; and also *Moyce v Lifestyle Retirement Annuity Fund and Another* 2019 3 BPLR 781 (PFA) in par 5.7. The question of whether a person was a member of this specified class (a factual dependant) is one that cannot be answered with certainty in particular situations. There is nothing in the subsection itself that indicates where the limits of the discretion conferred on pension fund trustees lie, and therefore no indication of the nature, degree, or consistency that would suffice to render a person a dependant.

The subsection quoted above, especially the phrase “*was, in the opinion of the board*”, confers a wide discretion on pension fund trustees to determine who is a dependant and who is not a dependant for the purpose of distributing death benefits in terms of section 37C of the Pension Funds Act. The intention of the legislature in subsection 1(b) of the Act is clear in that the legislature wanted the board (the pension fund trustees) to be able to pay all dependants, both legal and factual, of the deceased fund member, including those whom in normal circumstances the deceased fund member would not have been legally liable to maintain.<sup>162</sup> Despite that, the test to determine whether a person is a factual dependant appears to be subjective and is open to abuse or different interpretations by pension fund trustees,<sup>163</sup> especially where the interpretation of this subsection ends up favouring factual dependants over other dependants such as legal ones. So, for example, in *Nel v Netcare 1999 Pension Fund and Another*,<sup>164</sup> the pension fund trustees considered a 2-year-old grandchild of the fund member (the deceased) a factual dependant and allocated him all the death benefit without adequately investigating or analysing his level of financial dependency on the deceased fund member. The

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<sup>162</sup> See *Makume v Sentinel Mining Industry Retirement Fund* 2014 2 BPLR 244 (PFA) in par 5.4, where the Adjudicator stated that s 1(b) of the Pension Funds Act broadly defines “dependant” to include persons to whom the deceased was not legally liable for maintenance. The purpose of the broad definition of a “dependant” was to include persons who are factually dependent on the deceased fund member. The Adjudicator also confirmed that the issue of dependency in s 37C of the Act is not based on marriage or biological relationship. See, for example, *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC 156 (6 February 2019), where the main ground of complaint before the Adjudicator was that the fund had allocated a share of the death benefit to a minor child who was neither a nominated beneficiary nor a dependant of the deceased fund member. The Adjudicator ruled for the fund. The applicants later approached the High Court to ask the court to set aside the Adjudicator’s ruling and order the fund to pay the benefit in accordance with the nomination form. Relevant for the current discussion on the meaning of a “dependant” under the Act was whether the minor daughter was factually dependent on the deceased or not. The applicants alleged that the minor daughter was not a factual dependant at the time of the deceased’s death because she did not live with the deceased at that time and so did not fall within the definition of dependency as contemplated by s 1 and s 37C of the Act. The court pointed out that it could not accept the argument that factual dependency can never arise as contemplated by s 37C read with (b)(i) of the definition, where a person is not sharing a common household at the date of death. The court held that whether a person is in fact dependent on a deceased upon the latter’s death will always be a question to be considered in the light of the nature of any dependency. The court gave an example of factual dependency that may arise when a person pays for the living expenses or rental costs if that person lives elsewhere.

<sup>163</sup> See *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA) in par 5.10, where the Adjudicator also stated that if conflicting information is provided to the fund about whether people qualify as factual dependants, these people alleging dependency must provide proof that the deceased was financially supporting them at the time of his or her death: for example, buying groceries, clothes, and paying school fees or rent.

<sup>164</sup> *Nel v Netcare 1999 Pension Fund and Another* 2018 3 BPLR 747 (PFA). See par 2.2.8 below, where the *Nel* determination is also discussed.

fund explained to the Adjudicator that it considered the grandchild a dependant of the deceased fund member because he was staying with him in his home. The fund also relied on the affidavit from a friend of the deceased fund member alleging that the deceased intended to adopt the grandchild.

These allegations were contested by the complainant, the deceased fund member's sister. She submitted to the Adjudicator that the fund had overlooked several issues, including the following: the grandchild had his own mother and was not related to the deceased. The deceased had married a wife who had a major daughter from a previous relationship, and this major daughter was the mother of the minor son (the grandchild). The deceased never adopted the grandchild nor intended to, and the grandchild's father was still alive and should be maintaining him. The paternal grandfather had custody of the mother of the minor son (the grandchild). The mother of the minor child (the grandchild) and her boyfriend were in custody for killing both the fund member and his wife (the grandmother). Paying all the death benefit to the minor son would enable the accused to benefit directly or indirectly. That step would conflict with the *bloedige hand* principle.<sup>165</sup>

The Adjudicator set aside the fund's decision to distribute all the death benefit to the minor grandchild and ordered a proper investigation by the fund into the financial dependency of the potential beneficiaries on the fund member before his death. The Adjudicator also ordered the fund to reconsider or re-exercise its discretion in view of the findings of its investigation and the provisions of section 37C of the Pension Funds Act.

The *Ne!* determination shows that the pension fund trustees' discretion in deciding who is a dependant under section 37C is subjective and unclear. And some investigations conducted by trustees to decide whether someone is a factual dependant are inadequate, leading to disputes among potential beneficiaries and delays in distributing death benefits.

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<sup>165</sup> The fund had intended to pay the death benefit into a trust for the benefit of the minor son. See also par 2.2.8 below under the disqualification of dependants and/or nominated beneficiaries, where the *bloedige hand* principle is discussed.

2.2.1.2 *Differentiation between factual dependants and legal dependants in respect of pension fund trustees' yardstick to allocate the death benefits*

Pension fund trustees use different yardsticks to determine the financial dependency of a legal dependant and to determine factual dependency on the fund member (the deceased) at the time of the member's death.<sup>166</sup> Currently, pension fund boards, where they deem it fit, may restrict the fund member's wishes as shown on the nomination form<sup>167</sup> and/or in the last will<sup>168</sup> by denying benefits to the persons that the member intends to support from his or her death benefit. It is submitted that it is irrational to compel a fund member to support someone the member had no legal duty to support<sup>169</sup> and did not wish to support forever.<sup>170</sup> It is possible that, before dying, the fund member had provided financial support to this person, the factual dependent, out of courtesy but with no intention of assuming perpetual maintenance obligations. It can be argued that there is justified rationality in compelling a fund member to support a person who is omitted by the member from the beneficiary nomination form but whom the member, while alive, still had a legal duty to support. Lehman observed that in seeking to protect the interests of factual dependents, particularly cohabiting partners,<sup>171</sup> the reverse perhaps has led

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<sup>166</sup> As for determining who is or is not a "dependant" under s 1 of the Pension Funds Act, Lehmann eloquently illustrated the anomalies that arise in determining a "factual dependant": "the approach to factual dependence adopted in the case is difficult to reconcile with the test for legal dependency under our common law, and the result is that cohabiting partners, and 'factual' dependents more generally, may find it easier to obtain a share of the deceased's death benefits than those family members towards whom the deceased owed a legal duty of support during his lifetime. This inconsistency in approach and outcome could not have been what our legislature intended when it enacted s 37C in 1976 for the purpose of protecting the deceased's dependents" (Lehmann 2009 *SA Merc LJ* 651). She was discussing the Adjudicator's determination in *Hlathi v University of Fort Hare Retirement Fund and Others* 2009 1 BPLR 37 (PFA) about the test for determining the factual dependence of cohabittees. The Adjudicator had determined that cohabiting life partners who are financially interdependent at the time of one partner's (the deceased's) death qualify automatically to be treated as factual dependents of the deceased, and as such are entitled to be considered among the potential pool of beneficiaries when the trustees decide on an equitable distribution of the deceased's death benefits. *Hlathi* is also cited in Chapter 1, n 132.

<sup>167</sup> See also par 2.1.1 below, where the beneficiary nomination form is discussed.

<sup>168</sup> See also par 2.1.2 below, where the restriction on inheritance of death benefits is discussed.

<sup>169</sup> This person is neither a legal dependant of the fund member, nor a spouse, child, parent, sibling, nor future dependant.

<sup>170</sup> This can be seen from the fact that this person is not nominated by the fund member on the beneficiary nomination form.

<sup>171</sup> See "Cohabitation" *The Free Dictionary* available at <https://legal-dictionary.thefreedictionary.com/Cohabitation> (last accessed on 9 August 2021), stating: "Cohabitation is a living arrangement in which unmarried couple lives together in a long-term relationship that resembles a marriage".

to pension fund trustees and the Adjudicator's using yardsticks or thresholds that make it easier for factual dependants than legal dependants to receive a share of the death benefit.<sup>172</sup> This outcome could be seen from the yardsticks that pension fund trustees and sometimes the Adjudicator use to establish the existence of legal and factual dependency. Lehmann submitted that this differentiation between legal and factual dependency is inherently inequitable.<sup>173</sup> To succeed as a factual dependent, someone need only show regular payments received from the deceased fund member, irrespective of the reasons for these payments. Yet legal dependents seeking to qualify for a death benefit must show that they are indigent.<sup>174</sup> There is no legal basis for using different yardsticks to distribute the death benefit.<sup>175</sup> This outcome does not appear to be the intention of the statute, and it is not aligned with

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<sup>172</sup> See Lehmann 2009 SA *Merc LJ* at 666.

<sup>173</sup> This differentiation prejudices legal dependants and may conflict with s 9(1) of the Constitution. It can be argued that the differential treatment of legal dependants compared to factual dependants by pension funds and the Adjudicator infringes the Constitution. It is submitted that this differentiation does not bear a rational connection to a legitimate government purpose and cannot be justified as a limitation of equality under s 36 of the Constitution. To test whether the conduct of the funds and the Adjudicator differentiates between the two groups (legal and factual dependants), there should first be a preliminary enquiry. The Constitutional Court laid down the unfair discrimination test in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) as set out by Makgoka J in *Magidiwana v President of the Republic of South Africa* 2013 JDR 2358 (GNP) in par 88:

“(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of s 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination;

(b) Does the differentiation amount to an unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to ‘discrimination’. If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental, human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) Secondly, if differentiation amounts to ‘discrimination’, does it amount to unfair discrimination? If it has been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of the enquiry, the differentiation is found not to be unfair, then there will be no violation of s 9(3) and (4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause”.

<sup>174</sup> See Lehmann 2009 SA *Merc LJ* at 666.

<sup>175</sup> At 666.



the overall purpose of the pension fund.<sup>176</sup> It is submitted that a single yardstick should be used for both legal dependents and factual dependents when the trustees allocate the death benefit. For example, if trustees and/or the Adjudicator use the indigency yardstick for legal dependants, they should also use it for factual dependants.

It is submitted that the law and the pension fund rules must restrict the people who qualify under the definition of factual dependents.<sup>177</sup> If the legislature intends to ensure that particular groups of persons are not discriminated against, it is suggested that the definition of a “dependant”, in particular subparagraph 1(b)(i) of the Pension Funds Act on factual dependants, should be amended to restrict the persons who may qualify under this provision, and then the legislature could expressly include the persons that it intends to protect. Further, in this regard, the definition of a “spouse” in the Act includes a person who is a permanent life partner of a member or spouse or civil union partner under the relevant laws stated in the section.<sup>178</sup>

Alternatively, following Lehman’s suggestion that if indigency is a threshold requirement for legal dependents, it must be a threshold requirement for factual

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<sup>176</sup> At 666. In *Harksen v Lane NO and Others* 1998 1 SA 300 (CC), the Constitutional Court in pars 45 and 46 said that “if differentiation complained of bears no rational connection to a legitimate governmental purpose which is proffered to validate it, then the provision in question violates the provisions of section 8(1) of the Interim Constitution. If there is such a rational connection, then it becomes necessary to proceed to the provisions of section 8(2) to determine whether, despite such rationality the differentiation nonetheless amounts to unfair discrimination”. See also in this regard *Ramaila v Minister of Justice and Correctional Services and Others* 2019 JOL 42202 (LC), where the Labour Court referred to the *Harksen* decision (in par 64) and stated that a rational connection exists if the differentiation is an “appropriate and effective” means to achieve the measure’s legitimate objection (in par 66).

<sup>177</sup> Lehmann 2009 SA *Merc LJ* at 665 states the following dangers of a broad or generous interpretation of “dependent”: “Various factors militate against a broad or generous interpretation of ‘dependent’. The first is the practicalities — trustees could quite possibly be faced with a myriad of potential claimants, ranging from employees to colleagues and friends, as long as the deceased was providing some form of financial support to each of them. If the definition of dependent does include any- and everyone to whom the deceased was giving money on a regular basis, the prospective pool of claimants could be so large as to make the definition and requirement of dependency virtually meaningless. In most situations, trustees are already required to distribute a relatively small sum of money amongst a relatively large pool of competing claimants. The sum available is rarely large enough to meet the needs of each of the claimants, and it is rarely large enough to prevent a dip in the fortunes of the claimants, however even-handed and equitable the trustees seek to be.”

<sup>178</sup> See n 145 above, where the full definition of a spouse is provided.

dependents as well,<sup>179</sup> it is suggested that the trustees should have guidelines on how to interpret this subsection. These should apply across all pension fund boards or at least restrict the category of persons that can qualify as factual dependants under the definition of a “dependant” in the Pension Funds Act for the distribution of the death benefit under section 37C of the Act.<sup>180</sup>

### 2.2.1.3 A child’s right to maintenance

It is submitted that in determining the dependency status of the minor children of a deceased fund member, the fact that this member was not meeting maintenance obligations before dying should not be used by pension fund trustees as a reason not to allocate a death benefit to these minor children. In *Van der Merwe v Central Retirement Annuity Fund and Fourie*, the Adjudicator found it illegal for the trustees to disregard children’s right to maintenance from their deceased father just because he had failed to meet his maintenance obligations before dying.<sup>181</sup> The Adjudicator stated that the rights sought to be protected were for the maintenance and welfare of the two children, one still a minor and thus incapable for all practical purposes of enforcing those rights himself. The Adjudicator criticised the fund and the trustees’ disregarding the children’s needs and entitlements. The Adjudicator believed that the history of the father’s non-compliance with his maintenance obligation was a factor that must count strongly with pension fund trustees when exercising their

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<sup>179</sup> See Lehmann 2009 *SALJ* at 666, stating that an “anomalous situation could arise that a relative who is within one of the eligible degrees, and who is in straitened circumstances but who is not desperately impoverished, would not qualify as a legal dependent, while a person whom the deceased has voluntarily chosen to assist financially would for that reason alone qualify as a factual dependent, irrespective of the degree of financial support given and irrespective of the purpose for which it has been given”.

<sup>180</sup> See in this regard Chapter 6, par 5.12 for the suggested restrictions. It is also worth noting that the recommendation to amend the definition of a “dependant” by removing the discretion that the pension fund trustees currently enjoy in distributing death benefits to what are termed “factual dependants” is like what is being considered in Eswatini under The Retirement Funds Amendment Bill, 2019. The Bill proposes to restrict the distribution of death benefits to legal dependants only. Section 2 of this Bill deals with interpretations. It states that a “dependant” means in relation to a member a person in respect of whom the member is legally liable for maintenance and includes:

- (i) a spouse as a result of a marriage in terms of the Marriage Act 1964, the common law or any customary or religious union;
- (ii) a child of the member, including a posthumous child; and
- (iii) an adopted child.”

<sup>181</sup> *Van der Merwe and Another v Central Retirement Annuity Fund and Another* 2005 5 BPLR 463 (PFA) in par 19.

discretion in distributing the death benefit.<sup>182</sup> It is submitted that if these trustees require minor dependants who fall under subparagraph 1(a) of the definition of a “dependant” in the Pension Funds Act to prove financial dependency on the deceased fund member, the trustees may prejudice the children who needed the member’s financial support most and never received it. If minor dependants must provide proof that they were supported by the deceased fund member in order to receive a death benefit, this requirement can prolong the suffering of dependants who should have been supported by the fund member but were not. This outcome will in effect mean that the same dependants who struggled to receive maintenance from the deceased fund member cannot prove their financial dependency, while other people (the factual dependants) whom the fund member supported out of courtesy or generosity can do so. The challenges facing pension fund trustees in this respect are obvious.

The parents’ duty to support a child does not cease when the child reaches a particular age, such as the age of majority. The duty ends only when the child becomes self-supporting.<sup>183</sup> Thus, major children could also be dependants of the fund member if they depended financially on the member for maintenance when the latter died.<sup>184</sup> These major dependants or nominees are paid death benefits in cash unless they agree to another mode of payment, such as by instalments.<sup>185</sup>

#### *2.2.1.4 The financial status of a major child*

In *Government Employees Pension Fund and Another v Buitendag and Others*,<sup>186</sup> the Supreme Court of Appeal set aside the pension fund trustees’ decision to award the gratuity to the husband and stepson of the deceased fund member where the trustees were ignorant of the existence of major children of the deceased fund

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<sup>182</sup> In par 19.

<sup>183</sup> See *Kanis v Kanis* 1974 2 SA 606 (RA) at 611.

<sup>184</sup> See in this regard the definition of a “dependant” under s 1(b)(i) of the Pension Funds Act.

<sup>185</sup> See par 2.2.9.1 below, where the payment mode to major dependants or major nominees as well as the lack of preservation of death benefits are discussed. See also *Maluleke v Fundsatwork Umbrella Provident Fund and Another* 2019 2 BPLR 473 (PFA) in par 5.9 on payment of the death benefit to major dependants; and *Esterhuizen and Another v Old Mutual Superfund Provident Fund and Others* (PFA/GP/00070963/2020/SB), confirming that as a general principle, if the board of trustees decide not to pay a benefit allocation to a major dependant or major beneficiary in a lump sum, written prior consent must be given by that dependant or beneficiary.

<sup>186</sup> *Government Employees Pension Fund and Another v Buitendag and Others* 2007 4 SA 2 (SCA).

member who also qualified as dependants. In exercising their discretion in allocating death benefits under section 37C of the Pension Funds Act, pension fund trustees must consider everyone who qualifies as a dependant of the deceased fund member.<sup>187</sup> Still, before these trustees can allocate the death benefit to a major child, the latter must provide the fund with a detailed motivation and proof of financial dependency on the deceased fund member.<sup>188</sup>

In *Nielsen v Alexander Forbes Retirement Fund (Provident Section)*,<sup>189</sup> the fund member (the deceased) was in a relationship and living with Ina at the time of his death. He was also survived by two adult sons who were not financially dependent on him. The deceased did not complete any beneficiary nomination form and, after his death, a death benefit for R310 337 became payable to his beneficiaries. The complainant, the deceased's son, submitted that the fund's decision to award Ina the entire benefit was incorrect because the deceased was survived by himself (the complainant) and his brother John, who were both dependants of the deceased in terms of section 1 of the Pension Funds Act. The complainant requested the Adjudicator to investigate the matter and order the fund to reconsider its decision and allocate the death benefit to him and John. The Adjudicator had to determine whether the fund had failed to comply with its duties under the Act to pay a death benefit to the deceased's beneficiaries. So the Adjudicator pointed out that in terms

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<sup>187</sup> Financial dependency is not a requirement for a major child to be considered by the board as a potential beneficiary, but it is needed for the actual allocation of a benefit to that major child by the board. In other words, the board must consider any dependant of the deceased fund member, irrespective of that dependant's financial status. At the same time, after the board has considered a dependant, it will then need proof of financial dependency to allocate a benefit to a major child.

<sup>188</sup> For example, in *Mashaba v Larimar Group Provident Fund and Another* 2019 3 BPLR 740 (PFA), the complaint before the Adjudicator concerned the allocation and distribution of a death benefit after the death of the fund member (the deceased). The fund submitted that the deceased's children, who were all majors, were all legal dependants of the deceased; and that, although some of the children were employed and others were not, given their age, the board was of the view that they should be able to find employment and should not be allocated large portions of the death benefit. Thus, the fund had made a gratuitous payment of 5 per cent each to the major dependants. The Adjudicator, however, held that the major beneficiaries were not financially dependent on the deceased and should therefore have been excluded (in par 5.10), as they had not been nominated by nor were they factually dependent on the deceased. They should therefore not have been included in the allocation (in par 5.11). The Adjudicator set aside the fund's decision to make gratuitous payments to major dependants who were not financially dependent to the fund member because the Adjudicator was not satisfied that the fund had conducted a proper investigation in terms of s 37C of the Pension Funds Act (in par 5.11). The Adjudicator ordered the fund to reconsider the allocation that was made to the major beneficiaries (in par 5.10).

<sup>189</sup> *Nielsen v Alexander Forbes Retirement Fund (Provident Section)* 2018 1 BPLR 183 (PFA).

of the definition of a “dependant” in section 1 of the Act, there are three kinds of dependants.<sup>190</sup> The complainant and his brother were children of the deceased and were correctly identified as dependants by the fund. The deceased and Ina were in a relationship and lived together at the time of the deceased’s death. Thus they shared a common household.

The fund later allocated the entire death benefit (R310 337) to Ina and excluded the complainant and his brother. The fund submitted that although the two sons were identified as dependants of the deceased, they were not dependent on the deceased, as both were employed and financially stable.

The primary object of section 37C is to protect the financial dependants of the deceased. In doing so, the financial position of the identified beneficiaries is paramount. Before deciding on the allocation of the death benefit, the fund needs to obtain all the information about each dependant’s financial position. The complainant submitted that the deceased could not have maintained Ina financially on his income. He submitted that Ina had two houses that were paid off, and she received a substantial amount from a life policy that the deceased had provided for her. The Adjudicator pointed out that the fund’s response did not indicate that it had considered this information. She concluded that the fund’s failure to consider Ina’s financial position meant that it could not hold that the death benefit was allocated equitably among the deceased’s dependants. In her view, had the fund considered Ina’s financial position in detail, it could have arrived at a different allocation. So all these potential beneficiaries qualified as the deceased’s dependants under the definition of a “dependant” in the Pension Funds Act and had to be considered in the allocation of the death benefit. What is key here is the extent of dependency, which is based on assessing a dependant’s financial position. The Adjudicator found that the fund’s decision in *Van Vuuren v Central Retirement Annuity Fund and Another* to allocate the entire death benefit to Ina and exclude the complainant and his brother was unreasonable and unjustified.<sup>191</sup> She thus set aside the fund’s

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<sup>190</sup> In par 5.6. See par 2.2.1, where the three kinds of dependants are discussed. See also in this regard *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.5.

<sup>191</sup> *Nielsen v Alexander Forbes Retirement Fund (Provident Section)* 2018 1 BPLR 183 (PFA) in par 5.9.

decision and ordered it to re-exercise its discretion and consider the concerns that she (the Adjudicator) raised over Ina's financial position.<sup>192</sup> The fund was also ordered to provide its decision, reasons, and factors considered in writing to the Adjudicator and the complainant.

#### *2.2.1.5 Consideration of other payments that are made or to be made to potential beneficiaries*

In *Van Vuuren v Central Retirement Annuity Fund* the Adjudicator stated that trustees should consider other payments that are made to dependants, as any receipt of a cash benefit directly affects the dependant's financial status and future earning capacity — two of the relevant considerations to be taken into account when making an equitable distribution.<sup>193</sup> The question about the *Van Vuuren* determination is how pension fund trustees should treat matters of this nature. Should they postpone their section 37C distribution subject to the finalisation of all other pending potential payments? If the deceased was a member of three or more different retirement funds, then perhaps the board (the pension fund trustees) of one fund may distribute the death benefit differently from the boards of the other funds. This outcome may affect the financial status of the dependants. It is therefore suggested that the boards of the three retirement funds should work together to distribute the death benefit to achieve or determine an equitable distribution.<sup>194</sup>

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<sup>192</sup> In par 5.10.

<sup>193</sup> In *Van Vuuren v Central Retirement Annuity Fund and Another* 2000 6 BPLR 661 (PFA), a complaint was lodged with the Adjudicator in terms of s 30A(3) of the Pension Funds Act. The complainant requested the Adjudicator to review the trustee's decision in awarding a death benefit. The Adjudicator held that the trustees must also investigate how the other assets of the deceased are being distributed, as this investigation may help them to determine the current and future financial needs of potential dependants and beneficiaries. The determination of financial needs of potential beneficiaries is necessary in assisting the trustees to make equitable distributions. Failure to do so may be a material flaw that affects their discretion (in par 23). The Adjudicator held that the board's failing to consider the liquidation and distribution account of a deceased's estate amounted to the board's failing to consider relevant factors, and that constituted grounds for setting aside the trustees' decision (in par 23). The Adjudicator set aside the decision of the fund (in par 28) and substituted it with his in the interest of a speedy resolution of the dispute and the fact that sufficient material was before him to decide the matter (in par 30).

<sup>194</sup> In *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) at 296, the complainant argued that the fund, when allocating a portion of a death benefit to him, by factoring in other possible payments from a retirement annuity fund that could be made to him had made uninformed or unconfirmed assumptions, as there were no guarantees that the annuity fund would pay its benefits according to those assumptions. The Adjudicator accepted this argument (in par 5.13) and concluded that the fund improperly applied its mind in concluding that each of the children of the deceased fund member would receive certain amounts from a retirement annuity fund. The *Whitcombe* determination demonstrates some of the challenges

Otherwise, each fund may well await the distributions by the other two, and this Gordian Knot will remain uncut. These questions highlight some of the challenges that pension fund trustees may face in applying the recommendation suggested in *Van Vuuren v Central Retirement Annuity Fund*. These trustees should also consider the future earning potential of dependants in determining their financial status.<sup>195</sup> It is submitted that this exercise (considering the beneficiaries' future earning potential) may be complicated and subjective. The pension fund trustees exercising their discretion may consider factors (such as future earning potential) that may not materialise in the future. Dependants may also appear to be gainfully employed and financially secure in a particular period, but with the high rate of job losses because of the underperforming economy of the country there are no assurances that these dependants will remain financially independent.<sup>196</sup> It may happen that the financial circumstances of a potential beneficiary change, but, by then, the death benefit has been distributed to other beneficiaries.

#### *2.2.1.6 The personal relationship between the dependants and the deceased fund member*

If the fund member dies leaving more than one dependant, the pension fund trustees must distribute the death benefit to the dependants in an equitable manner<sup>197</sup> and must consider relevant factors. One of these factors is the relationship between the

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that trustees could face in finding out about and verifying all other payments that may be made to potential recipients of the death benefits.

<sup>195</sup> See *Taljaard v Corporate Selection Umbrella Retirement Fund and Another* 2016 2 BPLR 271 (PFA), where the Adjudicator found that the board had allocated the death benefits improperly because it failed to consider the ages of the dependants when it made its decision (at 271). See also *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) at 299 (par 5.12), where the Adjudicator confirmed that the financial affairs of the dependants, including their future earning capacity potential, are some of the factors that need to be considered by pension fund trustees when distributing death benefits. See also *Swart NO (né Van der Merwe) and Others v Lukhaimane NO and Others* 2021 JOL 49952 (GP), where the High Court (in pars 25, 47, and 51.3) confirmed that a fund must investigate the financial affairs of all dependants by considering, among other things, financial statements, bank statements, proof of income, proof of expenses, insurance proceeds, maintenance requirements, and employment status.

<sup>196</sup> There are also the effects of unforeseen matters such as the Coronavirus COVID-19 pandemic. From March 2020 the Republic of South Africa imposed restrictions by regulations issued under the Disaster Management Act 57 of 2002. This step placed severe strain on the economy, which led to many business closures and job losses. These regulations are still in force as of June 2021. See in this regard, for example, the Department of Co-Operative Governance "Disaster Management Act, 2002: Amendment of Regulations issued in terms of Section 27(2)" GN 1346 *Government Gazette* 43997 of 15 December 2020 available at [https://www.gov.za/sites/default/files/gcis\\_document/202012/43997gon1346s.pdf](https://www.gov.za/sites/default/files/gcis_document/202012/43997gon1346s.pdf) (last accessed on 30 June 2021).

<sup>197</sup> See par 3 below, where the equitable distribution of death benefits is discussed.

dependants and the deceased fund member.<sup>198</sup> It must be clear that this relationship must not be used as a basis by the pension fund trustees not to consider a potential dependant. Once pension fund trustees identify a person as a dependant, they are bound to consider this person for the allocation of the death benefit.<sup>199</sup> Whether or not the dependant is “worthy” of receiving a benefit is not one of the requirements for consideration. In *Dickson v ABSA Group Pension Fund*, pension fund trustees in distributing the death benefit had excluded a spouse of the deceased member because of marital problems between the spouses at the time of the member’s death.<sup>200</sup> The Adjudicator held that the exclusion on that basis was not justifiable in terms of section 37C(1)(a) of the Pension Funds Act.<sup>201</sup>

The preceding discussion shows that pension fund trustees must identify persons who were dependants of the deceased fund member at the time of death. The trustees must also seek relevant information to establish the level of financial dependency (if any) on the deceased member at the time of death by the potential recipient of the death benefit. It is also important to consider the relationship

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<sup>198</sup> In *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA), the complaint concerned the board’s resolution not to allocate any share of the death benefit to two major children of the deceased fund member. The complainant was one of these two major children who were excluded from the death benefit distribution. The board indicated that in excluding the two major children in the allocation of the benefit, it considered the degree of dependency on the deceased and the wishes of the deceased. It considered that the two were major children of the deceased; however, neither was nominated as a beneficiary; it was the deceased’s explicit wish that neither of them should receive a share of the death benefit, as the deceased did not have a good relationship with them; and they were both employed and not dependent on the deceased at the time of his death, and they were self-supporting. The Adjudicator was cognisant of the fact that one of the important considerations in distributing death benefits is the relationship between the dependants and the deceased. In *Makhubele*, the relations between the deceased and the complainant were strained, judging by his express declaration that the two major children must not be allocated a share of the death benefit in the event of his death. The Adjudicator found that the board had properly applied its mind and considered relevant factors in deciding to allocate the entire benefit in the manner it did to the exclusion of the complainant (in par 5.8). The Adjudicator took into account the factors taken into consideration by the board in distributing the death benefit and found that the board had discharged its duties in terms of the Pension Funds Act when distributing the death benefit. She held that there was no basis for her to interfere with the fund’s decision to allocate the death benefit in the manner it did; and she dismissed the complaint (in pars 5.10 and 6.1).

<sup>199</sup> See s 37C(1)(a) of the Pension Funds Act. See par 2.2.1 of this Chapter, and *Van der Merwe v Southern Life* 2000 3 BPLR 321 (PFA), where it was explained that there is a difference between considering a dependant as a potential beneficiary and paying the death benefit to this dependant. The trustees can identify and consider a dependant but still allocate a nil benefit to this dependant if they deem it equitable to do so.

<sup>200</sup> *Dickson v ABSA Group Pension Fund* 2001 6 BPLR 2062 (PFA).

<sup>201</sup> At 2062.



between the dependants and the deceased fund member for the purpose of determining an equitable distribution of death benefits.

As the fund's decision significantly affects the constitutional rights<sup>202</sup> of the dependants and other beneficiaries, the fund has to investigate the circumstances of the dependants properly. In doing so, the pension fund trustees should not rely only on one source of information, but where necessary, they must allow each potential beneficiary to be heard.<sup>203</sup> This approach will ensure that pension fund trustees understand the factual circumstances of the potential beneficiaries, not only from one source. It is highly likely that a person who stands to gain (or benefit) from the death benefit will be inclined not to disclose full information to the trustees that may put that person in a disadvantaged position in so far as sharing the payment of the death benefit is concerned.

#### 2.2.2 Nominees (nominated beneficiaries)

Section 37C(1)(b) of the Pension Funds Act applies where the deceased fund member nominated a beneficiary who is not a dependant, and pension fund trustees do not become aware of and cannot trace any of the member's dependants.<sup>204</sup> If pension fund trustees cannot identify any dependant of the member within twelve

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<sup>202</sup> See Chapter 2, pars 4.3 and 5, where the constitutional rights of fund members and beneficiaries are discussed.

<sup>203</sup> The right to be heard is part of the *audi alteram partem* rule. See par 6.3 below, where the rule is discussed. In *Alant v Pension Fund for the Financial Services Board and Another* 2000 8 BPLR 821 (PFA), the Adjudicator did not deal directly with the distribution of death benefits, as it was the amount of the salary that was in dispute. But this matter emphasises the responsibility of the trustees to be proactive in the performance of their duties. The Adjudicator held that, where the amount of the pensionable remuneration and thus the benefit payable was disputed by a member, the management committee was obliged to investigate the amount of the pensionable remuneration and not simply abdicate its discretion by unquestionably accepting the employer's view, as had happened in that case. A trustee must be satisfied that only members and their beneficiaries benefit from the fund's assets. Thus, the trustees must ensure that any person they regard as a beneficiary is indeed a beneficiary and is correctly entitled to benefits. So, for example, the trustees must receive adequate confirmation that anyone claiming to be a dependant or a nominee is therefore entitled to receive the death benefit. See also Hanekom *Manual* at 104-105 in this regard.

<sup>204</sup> See *Krishnasamy and Others v ABI Provident Fund* 2004 2 BPLR 5471 (PFA), confirming that the only persons that may benefit from a death benefit distribution are "dependants" as defined in s 1 of the Pension Funds Act, nominees, and the estate of the deceased fund member subject to certain conditions. If there are dependants and nominees, the nomination only entitles a nominee to be considered by the board when making a distribution among the beneficiaries. Nominees stay nominated until their nomination is rescinded. The Adjudicator found that the fact that the deceased's relationship with his girlfriend had been ended did not revoke her entitlement to be considered a beneficiary.

months of his or her death, and this member had designated to the fund in writing a nominee who is not a dependant of the member to receive the benefit or a portion of the benefit, the benefit must be paid to the nominee.<sup>205</sup> Pension fund trustees must distribute the benefit to the nominated beneficiary on the expiry of this period.<sup>206</sup> In this situation, the trustees have no discretion in determining who should receive the death benefit but have to pay the benefit or the indicated portion of the benefit to the nominee according to the wishes of the deceased fund member.<sup>207</sup>

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<sup>205</sup> Section 37C(1)(b) of the Pension Funds Act. See in this regard *Hunter et al Pension Funds Act* at 686; and *Zulu v Illovo Sugar Provident Fund* 2002 2 BPLR 3129 (PFA) in par 12.

<sup>206</sup> In *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 39, the Adjudicator confirmed that in terms of the section dealing with nominees, the board does not have to exercise any discretion in that regard. The board's function is purely administrative or ministerial. It must merely satisfy itself that the twelve-month period has lapsed, and a nominee has been designated in writing. If the two preconditions are met, the nominee is entitled to payment and thus a duty to pay arises once the twelve-month period expires. The Adjudicator also stated that any delay in payment to the nominee once the period has expired will place the fund in *mora ex re* and the nominee shall be entitled to claim interest from that date. *Mora ex re* means default resulting from the expiry of the term set in the contract.

<sup>207</sup> See, for example, in *TWC and Others v Rentokil Pension Fund and Another* 2000 2 BPLR 216 (PFA), where the Adjudicator stated (at 223) that s 37C(1)(b) of the Pension Funds Act governs the situation in which the trustees of a pension fund cannot trace a dependant, but the member has nominated a beneficiary. In the absence of dependants, a nominated beneficiary is the only person likely to gain from the distribution of the death benefit. In this event the benefits are payable to the beneficiary in terms of the nomination, unless the deceased's estate is insolvent. In that case the nominated beneficiary's entitlement will be reduced by the amount needed to balance the assets and liabilities in the estate. This proviso does not apply when there are dependants. The Adjudicator also stated (at 223) that this interpretation is supported by the policy and purpose of s 37C of the Act as whole. The aim of s 37C is to limit a pension fund member's freedom of testation in relation to his pension benefits. Pension benefits accumulate favourably because of the advantageous tax treatment of contributions to the fund. In return the State hopes to ensure that there are fewer persons dependent on it for social security. For this reason, the legislature has given preference to dependency over freedom of testation. As a result, pension benefits are excluded from the estate of a deceased and are applied to support the deceased's dependants. If there are no dependants, the pension benefit can devolve entirely on a nominated beneficiary. In this event, because of the proviso, the beneficiary falls to compete with the creditors of the deceased, where the estate is insolvent. In other words, the creditors of the deceased are preferred to a nominated beneficiary when the deceased's estate is insolvent and the deceased has no dependants. The Adjudicator held (at 223) that in the matter of *TWC and Others v Rentokil*, while the deceased's estate could be insolvent, the deceased had dependants as defined in the Act and the trustees had to distribute the benefit exclusively to the dependants and nominated beneficiary. So the trustees were not obliged to transfer any portion of the benefit to the insolvent estate. The fifth respondent (a creditor) also had no claim to the death benefit, being neither a dependant nor a nominated beneficiary. The fifth respondent was a creditor of the insolvent deceased estate, not of the death benefit. Basically, this means that a nominated beneficiary may be in a better position where there are also dependants or a dependant: then s 37C(1)(bA) of the Act will apply rather than s 37C(1)(b), and so the nominated beneficiaries do not have to compete with the creditors for a share of the death benefit. It is not clear why the legislature has chosen to distinguish the situation in which there is a nominated beneficiary and also a dependant from the situation in which there is no dependant. Could it have been possible for s 37C(1)(bA) to create an environment in which the portion of the death benefit that is allocated to the dependant remains inaccessible to creditors as it is in the current position, but to open room for creditors to compete with the nominated beneficiary for that share or portion that has been allocated to him or her in terms of s 37C(1)(bA)? The Adjudicator noted

Section 37C(1)(b) of the Pension Funds Act does not require pension fund trustees to make payments in an *equitable* manner in the same manner as is prescribed in sections 37C(1)(a) and (bA). Then what happens if the deceased fund member has nominated more than one beneficiary? Would the trustees slavishly follow the member's allocations in distributing the death benefit, or are they required to exercise their discretion in an equitable manner? It is submitted that the provisions of section 37C(1)(b) of the Act do not make room for the equitable distribution of death benefits to nominees by the trustees, and they have to follow the wishes of the deceased fund member.<sup>208</sup>

The fund member's nominee to receive death benefits can be any individual of any age or financial status and need not be a dependant of or related to the deceased fund member.<sup>209</sup> Then how does the allocation of death benefits to a nominee who

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that "all the parties further agreed that should the second respondent meet an early death prior to the exhaustion of his portion of the benefit, it would be just for any remaining monies to be paid for the benefit of the first to fourth complainants" (at 226). The Adjudicator directed (at 226) that the part of the benefit payable to the second respondent be held in trust with the object of meeting his living and medical expenses. On the death of the second respondent, the trustees would have to distribute any remaining balance to the first to fourth complainants. It is not clear from the determination which provision of s 37C of the Pension Fund Act the Adjudicator relied on to make the latter arrangement or order. See also *Mabaso v Assmang Provident Fund and Another* 2019 2 BPLR 448 (PFA) in par 5.9, referring to *Krishnasamy and Others v ABI Provident Fund* 2004 2 BPLR 5471 (PFA).

<sup>208</sup> The provisions of s 37C(1)(b) of the Pension Funds Act say nothing about "equitable" distribution of death benefits.

<sup>209</sup> The Pension Funds Act contains no definition of a "nominee", but the provisions of section 37C(1)(b) and section 37C(1)(bA) make it clear that a nominee is someone whom the member has designated in writing to the fund to receive the benefit or a portion of it. See in this regard *Gowing v Lifestyle Retirement Annuity and Others* 2007 2 BPLR 212 (PFA). In *Dekker and Others v Lifestyle Retirement Annuity Fund and Another* (PFA/WC/00040044/2017/TD), the complaint concerned the distribution of a death benefit by the fund following the death of the fund member. The deceased was a member of the fund during his lifetime, and the complainants were the deceased's three major children. The subject of the complaint was the allocation of a portion of the death benefit to the deceased's ex-wife, who had been nominated by the deceased as a beneficiary. The complainants contended that the ex-wife was not financially dependent on the deceased and so could not be considered in the distribution of the death benefit. The Adjudicator held that the nominee was not entitled to be considered as a beneficiary because she was financially dependent on the deceased but rather because she was nominated by the deceased and nothing more was needed. A nominee did not have to prove that she was financially dependent on the deceased at the time of death: in this regard the Adjudicator referred to *Gowing v Lifestyle Retirement Annuity Fund and Others* (in par 5.9). The Adjudicator also stated that it is important to note that any decision which favours dependants over nominees in the distribution of the death benefit would be unreasonable and unjustifiable (in par 5.10). She was satisfied that the fund considered relevant factors and ignored irrelevant ones and did not fetter its discretion in the allocation of the death benefit (in par 5.11). She concluded that the death benefit was allocated properly to the dependants of the deceased and that there was no reason to set aside the fund's decision (in par 5.11). The complaint was dismissed (in par 6). The determination in the *Dekker* matter can be accessed at

is not a dependant and who may also be financially independent further the social objectives of the State in establishing retirement funds? Put differently, are there any social goals that are achieved by allocating death benefits to nominees who are not dependants?<sup>210</sup>

In *Dobie NO v National Technikon Retirement Pension Fund* the Adjudicator said the following:

Section 37C(1)(b) which provides that an exclusive distribution to a nominee may take place only after the expired 12 month waiting period has produced no dependants. The purpose then is to advance the need principle by only giving effect to the deceased member's nomination of a non-dependant when no dependants have been traced in the 12 month period.<sup>211</sup>

The fund member in *Dobie NO*, while still alive, had nominated his estate as the beneficiary of the death benefit. This he is not allowed to do.<sup>212</sup> In *Muir v Mutual and Federal Pension Fund* the complainant was the only dependant of the deceased fund member, whose nomination form read: "I would like the full amount to go into

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<https://www.pfa.org.za/Determinations/2018/Dekker%20and%202%20Others%20v%20Lifestyle%20Retirement%20Annuity%20Fund.pdf> (last accessed on 9 August 2021).

<sup>210</sup> See Chapter 1, par 2.4 for the objectives of retirement fund establishment. It is submitted that the underlying purpose of s 37C of the Pension Funds Act is to benefit the deceased member's dependants which would reduce the State's liability and promote social protection. The social purpose of s 37C of the Act is achievable under s 37C(1)(a) because the death benefits are paid to *dependants of the fund member* and not so achievable under ss 37C(1)(b) and (c), where the death benefit is *paid to a nominee who is not a dependant*.

<sup>211</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 13. Section 37C of the Pension Funds Act does not contain s 37C(1)B. It is assumed that the Pension Funds Adjudicator intended to refer to s 37C(1)(b) of the same Act.

<sup>212</sup> A member cannot bypass the restrictions of s 37C of the Pension Funds Act by nominating his or her estate as the recipient (nominee) of the death benefit. See in this regard *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W). In *Calitz v Iscor Selector Pensioenfonds and Another* 2000 6 BPLR 579 (PFA), the Adjudicator held that the provisions of s 37C of the Pension Funds Act preclude the transfer of a death benefit into a deceased estate (at 579). In *Martin v Beka Provident Fund* 2000 2 BPLR 196 (PFA), the Adjudicator found that the nomination of an estate as beneficiary of pension benefits was *in fraudem legis* of s 37C(1) of the Act, which excludes pension benefits from the estate of a deceased (at 199). In *Martin* the Adjudicator held (at 200) that the trustees had allowed their subjective opinion of the complainant's motive for claiming the lump sum benefit and his earlier intention not to claim, to cloud their judgement and fetter their discretion. There was no rational basis for the inference they had drawn that the complainant did not depend on the deceased. The Adjudicator found that the trustees' decision not to regard the complainant as a dependant and thus the later payment of the death benefit to the deceased estate instead of the dependant (complainant) was unreasonable and improper, and thus amounted to maladministration of the fund. The complainant was in a same-sex relationship with the deceased fund member, and they had lived together for a period of at least three years before the death of the fund member. *In fraudem legis* is Latin referring to conduct with the intention of evading a law.

my estate.”<sup>213</sup> The fund later treated this estate as a nominee and distributed the benefit among the complainant and certain selected beneficiaries of the estate at its discretion. However, the Adjudicator held that a deceased estate could not be a nominee and then awarded the entire death benefit to the complainant.

What happens if the fund member dies first and then the dependant or nominated beneficiary dies within months of the member’s death; or if a nominee dies while the fund member is still alive and the fund member does not update the nomination form to remove or replace the deceased nominee? In both cases, the fund cannot pay any of the benefit to the estate of the deceased nominee or dependant.<sup>214</sup> The nominee or dependant of the deceased member must be alive to be considered for the allocation of a share of the death benefit.<sup>215</sup> The crucial stage is the time of distribution of the death benefit, not the time of death of the fund member. So, when

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<sup>213</sup> *Muir v Mutual and Federal Pension Fund* 2002 9 BPLR 3864. See also Myrdal S and Jeram N “Death Benefits – Interpretation of Section 37C through Recent Adjudicator Cases” (Unpublished presentation at the Pension Lawyers Conference), available at <http://www.pensionlawyers.co.za/downloads/files/suenaleen.pdf> (last accessed 30 November 2020).

<sup>214</sup> See *Kruger v Central Retirement Annuity Fund* 2002 7 BPLR 3643 (PFA), where the Adjudicator stated that in terms of s 37C of the Pension Funds Act, nomination by the fund member does not entitle the third party (the nominated person) *per se* to the benefit. At the very best, it only entitles the third party, provided that he or she survives the pension fund member, to be considered by the board when making an equitable distribution among the beneficiaries. The only exception to this is when the death benefit is regulated by the provisions of s 37C(1)(b) of the Act. That is where the deceased is survived by no dependants and there is only one nominee (and the deceased requested this person to receive 100 per cent of the benefit), subject to the assets of the deceased’s estate exceeding the liabilities of the estate or, where there is a deficit, the value of the death benefit less the deficit of the estate will accrue by right to the nominee (at 3647).

<sup>215</sup> In *Ellis NO v Lifestyle Retirement Annuity Fund* 2001 5 BPLR 2021 (PFA), although the fund member (the deceased) had before her death nominated her mother as the beneficiary of the three life policies issued to her by the fund, she was predeceased by her mother. The fund had established that the deceased had no dependants at the time of her death. As the deceased mother had predeceased her, the fund decided to pay the benefit into the fund member’s estate. The Adjudicator held that a proper reading of s 37C of the Pension Funds Act showed that it only deals with how the benefit is to be distributed and could not be seen as regulating the computation of the death benefit (at 2021). The Adjudicator pointed out (at 2022) that s 37C establishes a mandatory scheme in terms of which a death benefit must be distributed. For a natural person to qualify as a beneficiary, he or she must either be a dependant as defined in s 1 of the Act, or a nominee appointed by the deceased. The executor of the estate is not a dependant, nor may he qualify as a nominated beneficiary. So the provision regulating the distribution of the death benefits is s 37C(1), in terms of which, where the member has no dependants or nominees, the benefit must be paid to the estate of the member. This rendered the executor entitled to death benefits, and this entitlement or right to the benefits could not be overridden by any other law. However, as the benefit had to be computed in terms of the Pension Funds Act and the Income Tax Act 58 of 1962, the result was that only a refund of the member’s contributions was payable as a benefit in this case. The complaint was accordingly dismissed.

paying out the death benefits, pension fund trustees should ensure that the dependants and nominated beneficiaries they have identified are still alive.<sup>216</sup>

### 2.2.3 Allocation to nominees and dependants

Section 37C(1)(bA) of the Pension Funds Act provides for the case where the deceased fund member has a dependant and has also designated in writing to the fund a nominee, who is not his or her dependant, to receive the benefit or a portion of the benefit. Within twelve months of the member's death, the fund must pay the benefit to the dependant or nominee in the proportions the board deems equitable.<sup>217</sup> Pension fund trustees must decide to distribute and then make their distribution within the twelve months. The payment of the death benefit becomes due and enforceable once the trustees take their decision. In *Dobie NO v National Technikon Retirement Pension Fund*,<sup>218</sup> the Adjudicator pointed out that the death benefit payment becomes due and enforceable against the pension fund when the duty to pay arises. He stated that a due debt is not enforceable before the time set for the performance agreement or, if no time is set by agreement, before a reasonable time has elapsed.<sup>219</sup>

Section 37C(1)(bA) of the Act creates a situation in which pension fund trustees may have to apportion the death benefit between dependants and nominees. The section requires the trustees to exercise their discretion in an equitable manner.<sup>220</sup> It is

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<sup>216</sup> In *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA), the Supreme Court of Appeal confirmed that the proper construction of s 37C(1)(a) of the Pension Funds Act is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and that the person concerned must still be a beneficiary and alive when the distribution is made (in par 25). That is the only way to ensure that the persons identified as dependants are those whose interests the section seeks to protect. See also par 2.2.1 above, where the definition of a "dependant" is discussed.

<sup>217</sup> See s 37C(1)(bA) of the Pension Funds Act. Section 37C(1)(bA) only applies to the designation of a nominee made on or after 30 June 1989. The Act also specifically provides that a fund is, in respect of a designation made on or after the latter date, not prohibited from paying the benefit, either to a dependant or a nominee or, if there is more than one dependant or nominee, in proportions to any or all of those dependants and nominees.

<sup>218</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA).

<sup>219</sup> At 36.

<sup>220</sup> See, for example, *Mthabela v SAPPI Provident Fund* 2004 7 BPLR 5915 (PFA), where the Adjudicator found (in pars 23-24) that the board here was "under the mistaken impression that once dependency is established, that is the end of the enquiry. However, section [37C(1)(bA)] requires the board not only to distribute the benefit to the deceased's dependants ... but also to effect an *equitable* distribution to those dependants and nominees. To arrive at equity the board must determine the respective needs of the dependants and nominees and weigh them up against each other. In other words, the investigative action required by the board in terms of

submitted that the level of dependency and need for support are key to determining who should receive the death benefit and the amounts payable to a particular recipient.<sup>221</sup> The provisions of this section imply that even though the objective of section 37C of the Act is to achieve a social purpose to ensure that the dependants of the fund member are not left destitute, this purpose is not limited to providing financial support to dependants only but also extends to nominees. This is so because a nominee (for example, a friend<sup>222</sup> or a colleague<sup>223</sup> nominated by the fund member) who is not financially dependent on the deceased fund member could still qualify to receive a death benefit under 37C, while a dependant (for example, a major child of the fund member) who is also financially independent is allocated a nil benefit.<sup>224</sup>

A beneficiary's nomination by the fund member does not guarantee that this nominee will receive all, or part, of the death benefit, as the board cannot merely follow the nominations.<sup>225</sup> The social protection objective, as advanced by section

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section [37C(1)(bA)] goes beyond merely establishing dependency" (at 5918) (original emphasis).

<sup>221</sup> See, for example, *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA), where the board had to distribute the death benefit between dependants and a nominee.

<sup>222</sup> See, for example, in this regard *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA), where the nominee was a friend and was neither the deceased fund member's partner nor did he live with him. See par 2.2.3 below, where this determination is discussed.

<sup>223</sup> See, for example, in this regard *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM), where the nominee was a colleague and was neither the deceased fund member's partner nor did she live with her. See n 281 below, where this determination is discussed. The *Khulu* determination is available at <https://www.pfa.org.za/Determinations/20062008/22FFC53C-0495-4DEE-8762-4D3450FBF6C4.pdf> (last accessed on 30 June 2021).

<sup>224</sup> For an example of where the death benefit is paid to a nominated beneficiary who is financially independent to the exclusion of a major dependent who was also financially independent, see *Karam v Amrel Provident Fund* 2003 9 BPLR 5098 (PFA). In this matter, the complainant (Jason), the son of the deceased fund member (the deceased), was dissatisfied with the distribution of a death benefit effected by the fund, in particular his exclusion from sharing in the benefit. As the son of the deceased, the claimant qualified as her dependant. Although the deceased had at first nominated the complainant, she (before her death) later changed her nomination, replacing the complainant with her sister (Charmagne) as the only nominated beneficiary. The fund member also made a last will in which she bequeathed all her assets to her sister (Charmagne). Both the deceased's son and the deceased's sister were not financially dependent on the deceased at the time of her death. So the financial circumstances of the two parties did not play a role in the board's distribution of the whole death benefit to the sister. The board had considered the fact that the son was estranged from the deceased at the time of death. The Adjudicator upheld the decision of the board (in par 11), finding that the trustees acted equitably by excluding the complainant from the distribution and that the board had considered all relevant factors and ignored the irrelevant ones.

<sup>225</sup> It should be noted that there is difference between payment of death benefit in terms of s 37C(1)(b) and s 37C(1)(bA) of the Pension Funds Act. Under the former, the trustees follow

37C of the Act, is left in the hands of the pension fund trustees to implement.<sup>226</sup> Still, a fund member can nominate a beneficiary who also happens to be a dependant.<sup>227</sup> Then the pension fund trustees must consider this person under the category of a “dependant” in section 37C(1)(a) of the Act. The Adjudicator in *Nieuwenhuizen v SAB Staff Provident Fund and Another*<sup>228</sup> explained:

Section 37C(1)(a) deals with the distribution amongst dependants and section 37C(1)(b) deals with the distribution in the event of there being a nominee and no dependants. This provision contemplates the designation of nominees by members, but such nominees are specifically required not to be a dependant of the member. In the light of this clear distinction drawn by the legislature, it is not possible for any one person to qualify as a dependant and a nominee.<sup>229</sup>

The Adjudicator held that the complainant in *Nieuwenhuizen* did not qualify as a nominee by virtue of qualifying as a dependant. In exercising their discretion while allocating death benefits, the pension fund trustees must consider all identified dependants of the deceased fund member, irrespective of whether they were nominated by the member in the beneficiary nomination form.<sup>230</sup> If there are dependants as well as nominated beneficiaries who are not dependants, the pension fund trustees must consider both categories.<sup>231</sup> Section 37C(1)(a) of the Pension Funds Act appears to favour dependants over nominated beneficiaries, in that dependants should be paid within twelve months, whereas, under section 37C(1)(b), no benefit can be paid to nominated beneficiaries before the expiration of a twelve-month period. The twelve-month waiting period is to satisfy pension fund

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the nomination but, under the latter, the distribution must be equitable, which could mean disregarding the nomination form or reducing the shares or percentages indicated by the fund member on the form. See par 2.1 above for a discussion of beneficiary nomination forms. See also *Mphahlele v Aon Umbrella Fund and Another* 2015 3 BPLR 403 (PFA) at 403, where the Adjudicator found that being a nominee guarantees that the person will be considered when the distribution is made but not that the nominee will be awarded a benefit.

<sup>226</sup> See Chapter 2, par 5.2 for a discussion of the objectives of s 37C of the Pension Funds Act. See, for example, *Williams and Others v FFE Minerals South Africa Pension Fund and Another (1)* 2001 2 BPLR 1678 (PFA), where the Adjudicator stated that the common theme resonating through s 37C of the Act is that of dependency, which is left in the hands of the pension fund trustees to protect (at 1682). See also *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) in par 20, stating that the social protection policy advanced by the legislature is left in the hands of the trustees to implement.

<sup>227</sup> Section 37C(1)(b) of the Pension Funds Act expressly excludes nominated beneficiaries who also happen to be dependants from its provisions.

<sup>228</sup> *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) in par 20.

<sup>229</sup> In par 21.

<sup>230</sup> See s 37C(1)(a) of the Pension Funds Act.

<sup>231</sup> See s 37C(1)(bA) of the Pension Funds Act.



trustees that the deceased fund member had not left out any dependants.<sup>232</sup> Trustees are empowered to delay paying any benefits for up to twelve months in order to trace dependants and to be able to make a considered determination.<sup>233</sup> It has been suggested that “dependants will normally take precedence over any non-dependant persons who may have been nominated by the deceased member to the extent that, in the opinion of the trustees, the needs of dependants have been reasonably provided for” and “only then will any nominated non-dependant persons be considered”.<sup>234</sup> This view appears correct if one examines section 37C(1)(a) and section 37C(1)(b) of the Pension Funds Act. However, after the amendment and inclusion of subsection (bA) in section 37C(1) of the Act, the view that dependants will normally outrank a non-dependant nominated person is no longer correct. Section 37C(1)(bA) does not require pension fund trustees to distinguish dependants from non-dependant nominated beneficiaries when distributing a death benefit. The emphasis of section 37C(1)(bA) is on the payment of the death benefit or such portion of the benefit to this dependant or nominee in such proportions as the pension fund trustees may deem *equitable*.<sup>235</sup> The section mentions two categories of potential recipients of the death benefit: dependants and nominated beneficiaries, with no order of priority. It is submitted that the distinction (preferring a dependant over a nominated beneficiary) may not be wrong if one considers the social purpose of section 37C of the Act. Yet it is important to point out that this is not what the current provisions of section 37C(1)(bA) prescribe, and there is a lack of clarity and certainty in the relevant provision.

It is submitted that if pension fund trustees have to distribute the death benefit to dependants and nominees who are all self-supporting, the trustees may decide that

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<sup>232</sup> See, for example, in *Morgan v SA Druggists Provident Fund and Another (1)* 2001 4 BPLR 1886 (PFA), where the Adjudicator held that the dependants of the deceased fund member should be objectively determined and given priority in effecting the distribution (at 1886). He also held that reliance on the nomination form of the deceased despite the existence of a dependant amounted to maladministration (at 1886).

<sup>233</sup> See *Mphahlele v Aon Umbrella Pension Fund and Another* 2015 3 BPLR 403 (PFA) at 409, where the Adjudicator held that where there were indications that the distribution was likely to be contested, the board’s delay was reasonable under the circumstances.

<sup>234</sup> For an example of this suggestion, see Liberty’s document prepared for claimants of death benefits titled “Benefits Payable on the Death of a Member from a Retirement Annuity, Pension or Provident Fund” at 1, available at <http://www.liberty.co.za/Documents/claimant-statement-for-death-claim.pdf> (last accessed on 30 June 2021).

<sup>235</sup> See par 1 above for the provisions of s 37C(1)(bA) of the Pension Funds Act.

it is fair to allocate a nil portion to specific dependants or nominees.<sup>236</sup> The merits of each claim will help inform or guide pension fund trustees on how much of and to whom the benefit should be allocated. The distinction between nominees and dependants was thoroughly analysed in *Nieuwenhuizen v SAB Staff Provident Fund and Another*,<sup>237</sup> where one of the issues before the Adjudicator related to the complainant's dissatisfaction with the fund's distribution of a death benefit.<sup>238</sup>

Pension fund trustees sometimes struggle to balance the interests of dependants and nominated beneficiaries. So the funds' distributions of death benefits are in line neither with the social purpose of section 37C of the Pension Funds Act nor with the State's objectives in the establishment of pension funds. The case law and the Adjudicator's determinations discussed below illustrate times when pension fund trustees struggled to make an equitable distribution to both dependants and nominated beneficiaries. It is apparent that the trustees' approach to distributing death benefits to both dependants and nominated beneficiaries is not clear-cut.

The allocation and distribution of the death benefit between these recipients led to the dispute in *Harmse and Others v Sentinel Retirement Fund*.<sup>239</sup> The complainants were the mother, father, and brother of the deceased fund member, who had nominated them as beneficiaries when he was still alive. Upon his death, a death benefit of R947 657.43 became available for distribution to the beneficiaries of the deceased. The fund later resolved to allocate 100 per cent of the death benefit to the spouse and a nil benefit to the three nominated beneficiaries (the complainants). The gist of the complaint was that the spouse had filed for divorce a few months before the fund member died, that she was employed at the time, and that she had received a payment from the deceased's life insurance policy. She also received the

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<sup>236</sup> See *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) in par 21. See also *Van Schalkwyk v Mine Employees Pension Fund and Another* 2003 8 BPLR 5087 (PFA), where the board allocated a nil portion to two major dependants after the death of their father who was a fund member (at 5092). See also *TWC and Others v Rentokil Pension Fund and Another* 2000 2 BPLR 216 (PFA), where the Adjudicator stated that each party's needs should be properly weighed and considered before a distribution was made. Taking into account all considerations, the benefit could be shared between some or all of the dependants and nominated beneficiaries to the exclusion of others (at 217).

<sup>237</sup> *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) in par 21.

<sup>238</sup> *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) in par 1.

<sup>239</sup> *Harmse and Others v Sentinel Retirement Fund* (PFA/WC/00031141/2017/YVT) available at <https://www.pfa.org.za/Determinations/2018/Harmse%20and%20Others%20v%20sentinel%20Retirement%20Fund.pdf> (last accessed on 10 August 2021).

deceased's vehicle, house, and other personal belongings. The deceased's mother alleged that the deceased (while still alive) supported her and that she was financially dependent on him. However, the fund was not satisfied that she had proved her dependency on the fund member at the time of his death. The other two nominated beneficiaries (the brother and father) did not claim to be financially dependent on the fund member before his death. The fund submitted that the complainants as nominated beneficiaries qualified to be considered in the benefit allocation but that it was within the fund's discretion to allocate a nil portion where it deemed it equitable to do so. The fund indicated that the spouse did not deny that she had filed for divorce, but both she and the deceased had gone for counselling and after that she advised her attorney to cease the divorce proceedings. The fund submitted that the complainants assumed that the spouse was disqualified from receiving benefits because she had filed for divorce. The fund pointed out that the spouse was married to the deceased when he passed away and that he had previously notified the fund of her status, so she qualified automatically for a spouse's pension in terms of the fund rules. Since she qualified as a dependant, the fund had to take her into account in allocating the lump sum death benefit. The issues to be determined were whether the complainants were entitled to a part of the deceased's death benefit in terms of section 37C of the Pension Funds Act and the fund rules. The Adjudicator explained that section 37C of the Act governs the disposition of death benefits. She also explained that the board may not unduly fetter its discretion by following a rigid policy that does not consider the personal circumstances of each beneficiary and the prevailing situation.<sup>240</sup>

The Adjudicator held in this regard that the fund has to determine the level of dependency of the identified dependants based on their financial needs.<sup>241</sup> The spouse qualified as a legal and factual dependant in terms of the definition of "dependant" in section 1 of the Pension Funds Act: she was married to the deceased when he died. The fund therefore had decided to allocate her the entire benefit. The Adjudicator found that although the spouse qualified as a legal dependant, the fund failed to determine the extent of her financial dependency.<sup>242</sup> The Adjudicator thus

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<sup>240</sup> In par 5.2.

<sup>241</sup> In par 5.7.

<sup>242</sup> In par 5.7.

ordered the fund to reconsider the allocation made to the spouse based on her needs, taking into account the amount available for distribution and the fact that she was already receiving a spouse's pension and the proceeds of the deceased's life insurance policies.<sup>243</sup>

As the Adjudicator explained, under section 37C(1)(bA) of the Pension Funds Act, if a member has a dependant and has also designated a nominee in writing, the board should consider the allocation of the death benefit to these dependants and/or nominees.<sup>244</sup> Reference was made to *Gowing v Lifestyle Retirement Annuity and Others*,<sup>245</sup> where the Adjudicator stated that the fund in *Gowing* was wrong in assuming that once a dependant is identified, the claim of a nominee need no longer be entertained. This is simply incorrect law. The Adjudicator also noted that the fund had in this way entrenched this misconception (that once a dependant is identified, the claim of the nominee does not need to be entertained any longer) by requiring that the complainant (the nominee) provide the fund with evidence of her factual or legal dependence in order to be considered. The Adjudicator found that this confuses the nature of the respective type of beneficiary. A nominee is not entitled to be considered as a beneficiary because of being financially dependent on the deceased. Instead, the entitlement flows from the fact that the person concerned was nominated by the deceased. No more is required.<sup>246</sup> The Adjudicator in

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<sup>243</sup> In par 5.7.

<sup>244</sup> In par 5.8.

<sup>245</sup> *Gowing v Lifestyle Retirement Annuity and Others* 2007 2 BPLR 212 (PFA).

<sup>246</sup> See *Nhlumayo v SAMSA Provident Fund and Another* (PFA/FS/00032601/2017/YVT) in par 5.8, referring to *Gowing* with approval. The *Nhlumayo* determination is available at <https://www.pfa.org.za/Determinations/2018/Nhlumayo%20v%20SAMSA%20Provident%20Fund%20and%20another.pdf> (last accessed on 10 August 2021). In this regard see also *Damoense v Absa Pension Fund and Another* (PFA/NC/00042103/2018/MD), where the complainant was a former life partner of the deceased fund member. For this matter, see <https://www.pfa.org.za/Determinations/2018/Damoense%20v%20Absa%20Pension%20Fund%20and%20Another.pdf> (last accessed on 10 August 2021). Following the fund member's death, a death benefit for just over a million rand became available for distribution to the fund member's beneficiaries and dependants in terms of s 37C of the Pension Funds Act. The complainant was dissatisfied with the board's decision to pay the entire benefit to the deceased's mother to the exclusion of the complainant. The complainant stated that as a nominee on the deceased's beneficiary nomination form, she should have been considered by the fund. The Adjudicator held that the fund should have considered the complainant because she was a nominee. The complainant did not have to prove that she was financially dependent on the deceased for her to be considered: her mere status as a nominee compelled the fund to consider her situation together with the other relevant factors (in par 5.12). The Adjudicator found that the board had failed to fulfil its duties as required by s 37C(1)(bA) of the Act (in par 5.12). The Adjudicator held that when a board fails to conduct a thorough investigation with respect to the personal circumstances of each beneficiary, as was evident in this matter, there is a greater

*Harmse*<sup>247</sup> concluded that the complainants' financial dependency on the deceased was irrelevant, as they were nominees. It was therefore unnecessary for the complainants to prove their financial dependency on the deceased. The fund was ordered to reconsider its allocation as the complainants' entitlement arose from their nomination by the deceased, and no more was required. The Adjudicator in *Harmse* consequently found that the spouse was to receive the proceeds of the deceased's estate. Further, she had already received the proceeds of life insurance policies for R1 071 255 and R650 000. The Adjudicator also noted that the deceased did not nominate the spouse as his beneficiary in his nomination of May 2016. The Adjudicator concluded that the spouse's benefit in terms of section 37C of the Pension Funds Act was limited to the loss of financial dependency that the spouse could prove, while the nominees (the complainants) need not prove any dependency on the deceased nor hardship in terms of loss of support from his demise. The Adjudicator found that the fund had acted irrationally and misdirected itself in applying the legal framework to the facts of the case.<sup>248</sup> She thus ordered the fund to reconsider the distribution.

The consequence of this determination in *Harmse*<sup>249</sup> justifies the assumption that if the fund member has left dependants and also nominated beneficiaries (or a beneficiary) that are not dependants, the dependants appear to have a bigger hurdle

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likelihood of the objectives of s 37C being subverted (in par 5.13). She set aside the fund decision and ordered the fund to re-exercise its discretion. See also Sheik S "Pension Funds Adjudicator Press Release regarding Damoense and ABSA Pension Fund and Another" *CompliNEWS* (8 March 2019) Issue no. 61 available at <https://jutacomplines.co.za/diary/complines/story/pension-funds-adjudicator-press-release-regarding-damoense-and-absa-pension-fund-an-another/> (last accessed 19 September 2020).

<sup>247</sup> *Harmse and Others v Sentinel Retirement Fund* (PFA/WC/00031141/2017/YVT).

<sup>248</sup> In par 5.9. See in this regard *Marais v Sasol Pension Fund and the Adjudicator* (PFA/WC/0025499/2016) in par 5.11, where the Adjudicator held: "The deceased's children were his nominated beneficiaries and not financially dependent on him. The board considered their ages and future earning potential and resolved to allocate them a portion of the death benefit. However, the deceased's children were majors and his nominees. This is a case in point where a board has misdirected its investigation efforts and seeks to prejudice nominees by not limiting the extent of a beneficiary not nominated by the deceased to their actual loss of maintenance". See <https://www.pfa.org.za/Determinations/20142016/Marais.pdf> (last accessed on 20 August 2021).

<sup>249</sup> *Harmse and Others v Sentinel Retirement Fund* (PFA/WC/00031141/2017/YVT).

to overcome because they have to prove financial dependency and nominees do not.<sup>250</sup>

In *Moyce v Lifestyle Retirement Annuity Fund and Another*, the fund member nominated four beneficiaries before his death:<sup>251</sup> his father, mother, spouse, and sister, who was a major. The fund's investigation under section 37C of the Pension Funds Act revealed these facts: the spouse was financially dependent on the fund member before his death. His mother and father were also financially dependent on him, although to a limited extent. And his sister was working and not financially dependent on the deceased. A death benefit of R622 650 became available for distribution. At first, the fund allocated it to the deceased's beneficiaries on 26 October 2016 as follows: spouse (the complainant) 70 per cent, father 15 per cent, and mother 15 per cent. After the deceased's sister objected to the allocation of the death benefit, the fund reviewed its decision and allocated the death benefit on 16 February 2017 as follows: spouse (the complainant) 85 per cent, father 5 per cent, mother 5 per cent, and sister 5 per cent.

The complainant opposed the allocation and lodged a complaint with the Adjudicator. The issue for the Adjudicator was whether the fund had complied with its duties under the Pension Funds Act to pay a death benefit to the deceased's beneficiaries. The deceased was married to the complainant, and they shared the same household at the date of death. The complainant was a dependant of the deceased under section 1(a) of the Act: he had a duty to maintain her. And his parents qualified as factual dependants under section 1(b)(i) of the Act: they relied on him for financial assistance.

The Adjudicator found that the fund had allocated 5 per cent of the death benefit to the deceased's sister even though she informed the fund that she was not financially dependent on him and was working. Despite the amount available for distribution being so little, the fund failed to provide the Adjudicator with compelling reasons for allocating the 5 per cent of the death benefit to the deceased's sister, except to

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<sup>250</sup> See par 2.2.1 above, where the distribution of death benefit to dependants was discussed. See also in this regard Lehmann 2009 SA Merc LJ at 666, who addressed the unfairness of pension fund trustees and the Adjudicator's using different yardsticks for legal dependants and factual dependants to distribute death benefits.

<sup>251</sup> *Moyce v Lifestyle Retirement Annuity Fund and Another* 2019 3 BPLR 781 (PFA).

mention that she was nominated by the deceased in his will.<sup>252</sup> The Adjudicator stated that as the deceased had contributed to his parents' medical aid fees, they were entitled to a more generous distribution of the death benefit to ensure that they were not left destitute as a result of the deceased's death.<sup>253</sup> She found that the fund's decision to allocate 5 per cent of the death benefit to the deceased's sister, who was not financially dependent on the deceased, was irrational on the evidence submitted.<sup>254</sup>

The Adjudicator also found that even though the deceased had nominated the complainant, his parents, and his sister as beneficiaries, the fund was not bound by his nomination form. Instead, the nomination form serves merely as a guide to help the fund exercise its discretion.<sup>255</sup> Dependency is the key factor in allocating the death benefit.<sup>256</sup> The Adjudicator was not satisfied that the fund had considered relevant factors and ignored irrelevant ones in allocating the deceased's death benefit.<sup>257</sup> The death benefit was not properly allocated to the dependants of the deceased.<sup>258</sup> The fund's decision to allocate 5 per cent of the death benefit to the deceased's sister was set aside. And the Adjudicator ordered the fund to reconsider its decision on the allocation and distribution of the death benefit to the deceased's beneficiaries, based on the reasons mentioned above, within four weeks of the determination.<sup>259</sup>

In *Gowing*,<sup>260</sup> the Adjudicator held that a nominee does not have to be financially dependent to qualify for a death benefit. However, in *Moyce*,<sup>261</sup> the Adjudicator stated that the fact that the deceased's sister was nominated was not enough to

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<sup>252</sup> In par 5.9.

<sup>253</sup> In par 5.10.

<sup>254</sup> In par 5.10.

<sup>255</sup> In par 5.11, referring to *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) at 3705-3706.

<sup>256</sup> *Moyce v Lifestyle Retirement Annuity Fund and Another* 2019 3 BPLR 781 (PFA) in par 5.11.

<sup>257</sup> In par 5.14.

<sup>258</sup> In par 5.14.

<sup>259</sup> In pars 6.1.1 and 6.1.2.

<sup>260</sup> *Gowing v Lifestyle Retirement Annuity and Others* 2007 2 BPLR 212 (PFA).

<sup>261</sup> *Moyce v Lifestyle Retirement Annuity Fund and Another* 2019 3 BPLR 781 (PFA).

qualify her to receive the death benefit, and financial dependency should be established.

In *Nhlumayo v SAMSA Provident Fund and Another*,<sup>262</sup> the complainant was the brother of the fund member (the deceased). She had nominated these people to receive her death benefit: WP Nhlumayo (her niece aged 29) to receive 40 per cent, Z Nqoko (her niece aged 14) to receive 40 per cent, and Mr SP Ngwenya (her life partner aged 63) to receive 20 per cent. It was alleged that at the date of her death, she was in a relationship with another person, Mr T Ngele. The deceased and Mr Ngwenya (her life partner who was 63 years old and employed) were interdependent, the deceased being his companion and partner. A death benefit for R4 606 269.46 was distributable to the deceased's beneficiaries under section 37C of the Pension Funds Act. The fund resolved to allocate the death benefit to various beneficiaries, including 33 per cent to Mr Ngwenya. The complainant was aggrieved by the fund's decision to allocate a portion of the death benefit to Mr Ngwenya and objected to the board's decision. He requested the Adjudicator to order the fund to reinvestigate the matter and consider the deceased's beneficiary nomination form.

The Adjudicator had to determine whether the fund had failed in its duties to investigate dependants of the deceased properly under section 37C of the Pension Funds Act. She noted that section 37C(1)(bA) provides that if a member has a dependant and has designated a nominee to the fund in writing, the board should consider allocating the death benefit to these dependants and/or nominees. She decided that Mr Ngwenya should be considered as a nominee of the deceased. The Adjudicator referred to *Gowing v Lifestyle Retirement Annuity and Others*<sup>263</sup> and held that Mr Ngwenya's financial dependency on the deceased was irrelevant because he was a nominee. It was, therefore, unnecessary for Mr Ngwenya to prove his financial dependency on the deceased. Mr Ngwenya was nominated by the deceased to receive 20 per cent of the death benefit. The Adjudicator held that a nominee may be allocated less than he has been nominated for if the dependants' needs are greater, but he cannot receive more than he has been nominated for,

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<sup>262</sup> *Nhlumayo v SAMSA Provident Fund and Another* (PFA/FS/00032601/2017/YVT).

<sup>263</sup> *Gowing v Lifestyle Retirement Annuity and Others* 2007 2 BPLR 212 (PFA).



even if the dependants' needs are less.<sup>264</sup> Still, the fund had decided to allocate him 33 per cent of the death benefit, more than he was nominated to receive. The Adjudicator found that the fund had failed to consider all the factors, including the extent of Mr Ngwenya's financial dependency on the deceased.<sup>265</sup> She ordered the fund to reinvestigate his financial dependency on the deceased, considering his age, his relationship with the deceased as she was in a relationship with Mr Ngele, and the fact that Mr Ngwenya was employed, if the board wanted to grant him more than he was nominated for.<sup>266</sup> She consequently set aside the decision of the fund.<sup>267</sup>

In *Norris v University of Kwazulu-Natal Pension Fund and Another*,<sup>268</sup> the complainant was a friend of the fund member, who passed away on 5 January 2016. The deceased had nominated the complainant as a sole nominee on his beneficiary nomination form signed on 13 December 2015. Following the deceased's demise, a death benefit for R917 373.60 became available for distribution to his dependants and beneficiaries under section 37C of the Pension Funds Act. The fund resolved to allocate the entire death benefit to the deceased's mother (Mrs Roche), and excluded the complainant, the sole nominee. The complainant was dissatisfied with the allocation and distribution of the death benefit. He stated that as he was the sole nominee, the fund should have respected the deceased's wishes and allocated the death benefit to him. He stated that Mrs Roche was not a dependant of the deceased, and so she should not have been allocated the death benefit. He requested the Adjudicator to reverse the allocation made to Mrs Roche and pay it to him. The fund's investigation established that the deceased was not married and had no children. The complainant was neither the deceased's partner nor lived with him. The fund asserted that the complainant indicated that he was not financially dependent on the deceased and did not rely on him for any form of support. The fund considered the complainant as a nominee and resolved not to allocate him a share of the death benefit, as he could not prove a relationship of mutual dependence with the deceased and did not live with him. The fund considered that the deceased was survived by a brother, a sister, and an 85-year-old mother, Mrs

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<sup>264</sup> *Nhlumayo v SAMSA Provident Fund and Another* (PFA/FS/00032601/2017/YVT) in par 5.8.

<sup>265</sup> In par 5.8.

<sup>266</sup> In par 5.8.

<sup>267</sup> In pars 5.10 and 6.1.1.

<sup>268</sup> *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA).

Roche, who lived in an old age home in KwaZulu-Natal and suffered from poor health. The fund contended that it was clear from the interviews and statements obtained during the investigation that Mrs Roche would have depended on the deceased had he not died, considering the rising costs of her care and the fact that her savings were running out. The fund considered that Mrs Roche did not have any future earning potential, and her other children lived in England and Australia and had their own children to look after. It was against this background that the fund resolved to allocate the entire death benefit to her.

The Adjudicator had to determine whether the fund had considered all the relevant factors in distributing the death benefit. The Adjudicator concluded that if Mrs Roche could not take care of herself, she would have resorted to the deceased for support. This made her a dependant of the deceased as contemplated in section 1(c) of the Pension Funds Act.<sup>269</sup> The Adjudicator was satisfied that here, Mrs Roche was correctly found to be a factual dependant of the deceased as contemplated in terms of section 1(c) of the Pension Funds Act, and she rejected the complainant's assertion to the contrary.<sup>270</sup>

The Adjudicator noted that the main thrust of the complainant's contention was that the deceased's beneficiary nomination form was not considered by the fund even though he was the sole nominee.<sup>271</sup> She pointed out that the board is not bound by the nomination form completed by the deceased; instead, the nomination form serves merely as a guide to assist it in exercising its discretion.<sup>272</sup> So the fund was not bound to follow the deceased's wishes.<sup>273</sup>

The Adjudicator stated that the rationale behind the enactment of section 37C of the Pension Funds Act was to ensure that all those who were financially dependent on the deceased are not left destitute when the fund member dies. In this case, the complainant was a nominee. There was no onus on him to prove that he was

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<sup>269</sup> In par 5.5.

<sup>270</sup> In par 5.5.

<sup>271</sup> In par 5.6.

<sup>272</sup> In par 5.6, referring to *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) at 3705-3706.

<sup>273</sup> *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA) in par 5.6.

financially dependent on the deceased or had a relationship with him for him to be allocated a share of the death benefit.<sup>274</sup>

The Adjudicator noted that the fund resolved to allocate the entire death benefit to Mrs Roche because she was in poor health and there was a possibility that her savings could run out.<sup>275</sup> Yet the fund did not demonstrate that Mrs Roche was financially dependent on the deceased during his lifetime. Furthermore, the contention that Mrs Roche's savings were running out appeared to be speculative. There was no indication of the amount of her savings or of the tools used to determine that she might be unable to take care of herself in future. The Adjudicator concluded that the fund did not consider that, despite having their own families, Mrs Roche's other children also had a responsibility to take care of her if she were to run into financial problems. Whether or not they would fall short in discharging this responsibility was not investigated by the fund. The fact that the deceased did not have children and his siblings had families to support did not make it the deceased's responsibility to take care of his mother; the Adjudicator found that, in fact, by even considering this as a reason to ignore the equal duty of the deceased's siblings to take care of their mother, the fund totally misdirected itself. The Adjudicator found that the fund had failed to investigate and consider all the relevant factors before deciding to allocate the entire death benefit to Mrs Roche. The Adjudicator held that when a fund does not thoroughly investigate the personal circumstances of each beneficiary, as evident in this matter, there is a greater likelihood of the objectives of section 37C being subverted.<sup>276</sup>

The Adjudicator held that the fund is vested with discretionary powers to decide on an equitable distribution of the death benefit. Only when it has exercised its powers unreasonably and improperly, or unduly fettered their exercise, may its decision be reviewed.<sup>277</sup> The fund did not conduct a proper investigation and failed to apply its

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<sup>274</sup> In par 5.7.

<sup>275</sup> In par 5.8.

<sup>276</sup> In par 5.9.

<sup>277</sup> In par 5.10, referring to *Mongale v Metropolitan Retirement Annuity Fund* 2010 2 BPLR 192 (PFA).

mind when it resolved to allocate the entire amount of the death benefit to Mrs Roche, excluding the complainant.<sup>278</sup>

The Adjudicator set aside the decision of the fund to allocate the entire amount of the death benefit to Mrs Roche, to the exclusion of the complainant, without considering the relevant factors she stated.<sup>279</sup> She directed the board to re-exercise its discretion in terms of section 37C of the Pension Funds Act, considering the issues raised in her determination.<sup>280</sup>

In *Khulu v Mangxola and Others*,<sup>281</sup> the complaint concerned the alleged improper distribution of a death benefit by the fund following the death of the complainant's mother, Ms SE Khulu. Before she died, she had completed a nomination form on which she nominated the first respondent (Mangxola), a friend and a colleague, to receive 80 per cent of her death benefit. The form also allocated 20 per cent of her death benefit to the complainant: her daughter, a minor at the time of death. Under section 37C of the Pension Funds Act, the trustees decided to allocate 60 per cent of the death benefit to the first respondent and 40 per cent to the complainant. The complainant alleged that the trustees had erred in allocating 60 per cent of the death benefit to the first respondent. The complainant contended that the fund was not authorised to pay the first respondent a portion of the death benefit, as the first respondent was not related to the deceased. The complainant submitted that she was entitled to the death benefit, as she was the deceased's child and a minor at the time of her death. The question before the Adjudicator was whether the trustees had exercised their duties properly by allocating the death benefit in these proportions. She found that they had breached their duty in terms of section 37C of the Act. She set aside their decision<sup>282</sup> and returned the matter to the trustees to exercise their discretion afresh having regard to her decision.<sup>283</sup>

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<sup>278</sup> *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA) in par 5.10.

<sup>279</sup> In par 6.1.1.

<sup>280</sup> In par 6.1.2.

<sup>281</sup> *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM). The total amount of the death benefit involved was R253 347.94.

<sup>282</sup> In par 5.11.

<sup>283</sup> In par 5.11.

The conduct and the rationality of the trustees in *Khulu*,<sup>284</sup> in allocating 60 per cent of the death benefit to a friend and a colleague of the deceased and 40 per cent to the deceased's child who was a minor at the time of death, are questionable. Although the beneficiary nomination form is not binding, it may still be used to guide the trustees. The fund member had of her own accord allocated 80 per cent of the death benefit to a colleague who was also a friend and only 20 per cent to her own minor daughter. This is a classic illustration of the consequences of unclear or uncertain laws, as it leaves room for pension fund trustees to make distributions that are not in line with the social purpose of section 37C of the Pension Funds Act. It also shows that where the law does not limit the category of persons that can be nominated as beneficiaries, it also allows fund members to make nominations that are not in line with the social purpose of section 37C. If the complainant (the minor daughter of the deceased fund member) had not approached the Adjudicator in this case, this distribution could have been finalised even though it did not align with the purpose of section 37C. The question that arises is how many other distributions in this fund or other funds are finalised by pension fund boards even though they are not aligned with the purpose of section 37C and are also not in the best interests of child dependants and other beneficiaries.

In *Damoense v Absa Pension Fund and Another*,<sup>285</sup> the Adjudicator held that nominees do not have to prove financial dependency,<sup>286</sup> and in *The Municipal Workers Retirement Fund v Mabula and Another*,<sup>287</sup> the Gauteng North High Court (per Murphy J) stated the following:

The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. Section 37C(1)(bA) in particular does not oblige the fund to give a nominee the portion of the benefit stipulated by the

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<sup>284</sup> *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM).

<sup>285</sup> In *Damoense v Absa Pension Fund and Another* (PFA/NC/00042103/2018/MD), the Adjudicator held that "the board should have considered the complaint on the basis that she was a nominee. The complainant did not have to prove that she was financially dependent on the deceased for her to be considered, the mere status of being a nominee compelled the fund to consider her situation together with the totality of other relevant factors". *Damoense* is also cited in n 246 above.

<sup>286</sup> See *Pretorius v The Pension Funds' Adjudicator and Others* (PFA58/2019) in par 36, where the Financial Services Tribunal held that the daughters of the deceased fund member in this matter, besides being dependants of the deceased, were also his nominees. It held that nominees do not have to prove that they were dependent on the deceased for support to share in the allocation of the death benefit.

<sup>287</sup> *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP) in par 8.

member when making the nomination. Nominees are to be treated as if they were dependants when the board determines what it regards as an equitable allocation of shares of the benefit. This means that, while they must be considered as potential beneficiaries, they are not entitled to be allocated any share of the benefit if it is apparent that there are other potential beneficiaries with greater financial needs.<sup>288</sup>

It is submitted that the above exposition of the legal position of nominated beneficiaries versus dependants is correct in law. Yet there is a contrast between what was said above in *Damoense*, that a nominated beneficiary need not prove financial dependency on the deceased, and what was said in *Mabula*, where Murphy J stated that nominated beneficiaries must be treated as if they were dependants when the board makes an equitable allocation. How will the board determine that other potential beneficiaries have greater financial needs if it has not ascertained the financial needs of the nominated beneficiaries? The different interpretations of section 37C(1)(bA) of the Pension Funds Act by the pension fund boards, the Adjudicator, and the courts lead to different outcomes and do not provide clarity.<sup>289</sup>

It is evident from the discussion above that the provisions of section 37C(1)(bA) of the Act are unclear and are also not aligned to the objectives of pension funds' establishment. It was also pointed out that in the cases and determinations discussed in this chapter, the pension fund trustees appear to interpret the provisions of section 37C(1)(bA), involving the distribution of death benefit where there are both dependants and nominated beneficiaries, differently. This confusion is exacerbated by the determinations of the Pension Funds Adjudicator that are sometimes inconsistent. For example, some think that if the fund member dies while still in service, survived by dependants and nominated beneficiaries, the requirement to consider the potential beneficiary's financial status and financial dependency applies only to dependants (both legal and factual), not nominated

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<sup>288</sup> In par 8.

<sup>289</sup> See Lehmann 2009 *SA Merc LJ* at 663, stating that the Adjudicator's decisions in *Thene v Bidcorp Group Provident Fund* (PFA/GA/6863/05/LCM) and *Hlathi v University of Fort Hare Retirement Fund and Others* (PFA/EC/9015/2006) (reported at 2009 1 BPLR 37 (PFA)) appear to support the test that for a legal dependant to receive the benefit, he or she must show that he or she is indigent, while a factual dependant only has to show that he or she has suffered a dip in lifestyle. The Adjudicator recognised that the issue of factual dependency is not clear-cut, and that the broader the pool of prospective dependants, the more complex and difficult the issues from the perspective of both principle and policy (at 664).

beneficiaries.<sup>290</sup> So a nominated beneficiary need not prove any financial dependency on the deceased fund member at the time of death. This requirement only applies to factual and legal dependants that need to prove financial dependency.<sup>291</sup> On the other hand, others think that the requirement of financial dependency applies to both dependants and nominated beneficiaries.<sup>292</sup> However, if nominated beneficiaries must show financial dependency, and can do so, under the wide definition of “dependant” in section 1(b)(i) of the Pension Funds Act, then they qualify as factual dependants, irrespective of being nominated.<sup>293</sup> And if that is the case, why the need for beneficiary nomination forms? Should the same requirement to prove financial dependency apply to both nominated beneficiaries and factual dependants, it would be unnecessary to retain the distinction between the two groups. The pension fund trustees’ burden of balancing the interests of these two categories of potential beneficiaries — dependants and nominated beneficiaries — is heavy. The Adjudicator has also found that if the deceased fund member has left behind dependants and nominated beneficiaries, the beneficiaries cannot be paid more than is stated in the beneficiary nomination form, irrespective of their financial circumstances, but can be paid less if the needs of “true” dependants are greater.<sup>294</sup>

As long ago as 1999, in *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others*<sup>295</sup> the Supreme Court of Appeal held that the

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<sup>290</sup> See, for example, *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA) in par 5.5. See *Hlathi v University of Fort Hare Retirement Fund and Others* 2009 1 BPLR 37 (PFA).

<sup>291</sup> Dependency is the main issue in the allocation of the death benefit. See, for example, *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA), where the Adjudicator stated that the litmus test in issues relating to the distribution of death benefits is whether a party was financially dependent on the deceased member and whether because of his or her death, this party stands to suffer financial prejudice (in par 5.9).

<sup>292</sup> *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP) in par 8.

<sup>293</sup> See par 2.2.1 above, where the provisions of s 1(b)(i) of the Pension Funds Act are stated.

<sup>294</sup> *Nhlumayo v SAMSA Provident Fund and Another* (PFA/FS/00032601/2017/YVT) in par 5.8.

<sup>295</sup> See *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 3 SA 798 (SCA). In this case the fund member was a member of two funds managed by Liberty Life. In terms of the rules of the funds, he nominated his children (two minor sons) as the beneficiaries in respect of each fund in case of his death. He also created a trust for the benefit of each son. On his death, he was survived by three dependants, the two minor sons and his widow, who was not the mother of the two minor sons. Liberty Life, instead of acting in terms of the nominations, allocated the benefits payable by the funds to all three dependants. The joint trustees of the trust sought an order in the High Court to declare that the benefits should have been paid only to the minor sons, to the exclusion of the widow. The High Court (per Goldstein J) held that Liberty Life, in distributing the benefits as it did, followed the law, and the trustees of

provisions (expressing the social purpose) of section 37C of the Pension Funds Act supersede the wishes of the fund member expressed in the nomination forms and the last will. It is suggested that the inclusion and the current use of nominated beneficiaries in the distribution of the death benefits do not serve the social purpose of section 37C of the Pension Funds Act as articulated in *Mashazi*.<sup>296</sup> In *Mashazi* the court held that the purpose of section 37C is to ensure that the dependants of a fund member are not left destitute on the death of the fund member while still in service. The focus of section 37C must be on the surviving dependants of the deceased fund member. So it is suggested that nominated forms (if used) should restrict potential beneficiaries to persons who qualify under the definition of a “dependant” in the Pension Funds Act.<sup>297</sup> There is also a need to ensure that the definition of “dependant” in section 1 of the Act is not too wide and too generous to include all who can prove that they received some payment from the fund member at the time of death, irrespective of the purpose of the payment. In the interests of clarity and to avoid any ambiguity or controversy over interpreting and applying this subsection, and to ensure that the distribution process of the retirement fund death benefit is aligned to the objectives of pension fund establishment, the provisions of section 37C(1)(bA) of the Act should be deleted.<sup>298</sup>

In Chapter 6 and paragraph 5 below, a recommendation is made to ensure the accountability of pension fund trustees. This recommendation is to include an express provision in the Pension Funds Act for pension fund trustees’ civil and criminal liability for breach of duties in some cases. Introducing this liability requires

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the trust were, therefore, refused relief. The trustees of the trust appealed the judgment to the Supreme Court of Appeal. The crucial question was whether the Pension Funds Act overrode the nominations. The Supreme Court of Appeal considered the provisions of s 37C of the Pensions Funds and held that Liberty Life was correct in distributing the death benefits in terms of s 37C and not following the wishes of the deceased fund member as expressed in the nomination form. The Supreme Court of Appeal agreed with the decision of the court *a quo* (the High Court) and dismissed the appeal with costs. It should be noted that in this case, even though his widow was not nominated as a beneficiary, as a widow she was a dependant of the deceased fund member. The same applies to the two minor sons who, despite being nominated as beneficiaries, were also dependants of the fund member at the time of his death. It is submitted that this decision is in line with the objective of s 37C of ensuring that dependants of a fund member are not left destitute if a fund member dies in service.

<sup>296</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) (*Mashazi* is also cited in n 12 above).

<sup>297</sup> See par 2.1.1 above, dealing with beneficiary nomination forms, where this suggestion is also made.

<sup>298</sup> See Chapter 6, par 5.14 for a suggested formulation of the new s 37C of the Pension Funds Act.



that these trustees be certain of what the law expects them to do and not to do in complying with their duties. Liability if the law is ambiguous and subject to different interpretations will not serve justice and may deter individuals from making themselves available to serve as pension fund trustees. At the same time, if the law or discretionary power is subject to abuse or different interpretations and does not achieve the intended purpose of section 37C of the Act, that outcome does not serve pension fund members, dependants, beneficiaries, or the State.

#### 2.2.4 Allocation in the absence of dependants and nominees

The objective of section 37C of the Act is to protect the interests of dependants by ring-fencing death benefits against potential claims by creditors that could have left the dependants with nothing.<sup>299</sup> Creditors can claim from other assets in the deceased estate without interfering with the retirement fund death benefits reserved for dependants and nominated beneficiaries.<sup>300</sup> This objective falls away if the deceased fund member has no dependants and section 37C(1)(b) of the Act applies.<sup>301</sup> And in terms of section 37C(1)(c), if the fund fails to identify or does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and the member has not designated a nominee, or if the member designated a nominee in writing to the fund to receive only part of the benefit, then the benefit or the remaining portion of the benefit after payment to the designated nominee must be paid into the estate of the deceased member, or if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act 66 of 1965, into the Guardian's Fund or Unclaimed Benefit Fund.<sup>302</sup> The fund can pay the death

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<sup>299</sup> See ss 37A and 37D of the Pension Funds Act.

<sup>300</sup> The provisions of s 37C of the Pension Funds Act are clear that this section applies to the benefit of dependants and beneficiaries.

<sup>301</sup> Section 37C(1)(b) of the Pension Funds Act states: "Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee".

<sup>302</sup> See s 37C(1)(c) of the Pension Funds Act. See also *Sanlam Umbrella Provident Fund v The Pension Funds Adjudicator and Others* PFA16/2020 (The Financial Services Tribunal, 24 April 2020), where the applicant (Sanlam Umbrella Provident Fund) applied to the Tribunal for the reconsideration of the decision by the Adjudicator in terms of s 230 of the FSRA against the Adjudicator's determination dated 18 November 2019. The matter dealt with the meaning of a "dependant" for the purposes of s 37C of the Pension Funds Act as well as the right of the heirs.

benefit into the deceased's estate only if there are no dependants and/or nominees or if a nominee has been allocated a portion of the death benefit and the remaining balance is to be paid into the deceased's estate.<sup>303</sup>

In *Jelal v KwaZulu-Natal Municipal Pension Fund and Another*,<sup>304</sup> the complainant was the former spouse of the fund member, who passed on in July 2015. The complainant and the deceased fund member were divorced in March 2011, and the complainant had then received 50 per cent of the deceased's pension interest. An amount of about R1,4 million was available for distribution as the death benefit. The complainant was aggrieved that the fund had decided to pay the death benefit into the estate of the deceased fund member. The complainant acknowledged that she was not a dependant, spouse, or life partner of the deceased, but she based her claim on her nomination as a beneficiary by the deceased. The fund submitted that the deceased did not complete a nomination form and had no dependants — the reason the fund resolved to pay the entire death benefit into the deceased's estate. The Adjudicator had to determine whether the pension fund board had failed to carry

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The determination followed a complaint lodged by the second respondent about the allocation of a death benefit. At the time of his death, the deceased had two daughters from whom he was estranged. They were not dependent on him. His wife predeceased him, and he was cared for by his sister-in-law's children, one being the second respondent. The deceased did not designate a nominee but left his estate to the latter two (the heirs) in his will. The heirs did not depend on him and were also not beneficiaries in terms of the death benefit. The Tribunal in par 10 held that "once the estate becomes the beneficiary the death benefit becomes part of the estate which means that it must be used to pay taxes, costs of administration, the master's fees, secured creditors, other creditors, legatees and then heirs". The fund submitted that the two daughters of the deceased fell within the definition of a "dependant" although the deceased was "not legally liable for their maintenance" (in par 11). The Tribunal found that the Adjudicator erred in holding that the daughters were not the deceased's legal dependants (in par 12), and the Tribunal set aside the determination (in par 15). The matter was returned to the Adjudicator for reconsideration. See also par 2.2.1 above, where the definition of a "dependant" in s 1 of the Pension Funds Act is discussed. It was also pointed out in the same paragraph that the definition of a "dependant" is not clear and is the source of interpretational challenges for retirement funds, as well as the Adjudicator sometimes. This decision of the Tribunal in *Sanlam Umbrella Provident Fund* illustrates the kinds of challenges. The purpose of the Guardian's Fund "is to protect the funds of minors, persons lacking legal competence and capacity, known or unknown, absent as well as untraceable heirs. It is important to note that money which remains unclaimed in the Guardian's Fund for a period of 30 years as from the date, upon which the person became entitled to claim it, is forfeited to the state" (see The Master of the High Court "Master/Guardians and Custodians" (DO&JCD no date) available at <https://www.justice.gov.za/master/guardian.html> (last accessed 20 August 2021)).

<sup>303</sup> See in this regard *Diener v PSG Wealth Retirement Annuity Fund and Another* 2019 2 BPLR 400 (PFA) in par 5.10; and par 2.2.2 above, where the distribution of death benefit to nominees is discussed. *Diener* is also discussed in n 6 above.

<sup>304</sup> *Jelal v KwaZulu-Natal Municipal Pension Fund and Another* 2019 2 BPLR 407 (PFA).

out its duties in terms of section 37C of the Pension Funds Act.<sup>305</sup> The Adjudicator found that in the absence of dependants and nominees, the board was correct in paying the entire death benefit into the estate of the deceased fund member. The complaint was dismissed.<sup>306</sup>

Section 37C(1)(c) of the Act does not prescribe a time frame for paying the death benefit to the estate. One assumes that the estate is thus entitled to payment on the expiry of the twelve-month period.<sup>307</sup> The difference between the Guardian's Fund and the Unclaimed Benefit Fund is that the trustees of the latter must trace beneficiaries regularly.<sup>308</sup> It is submitted that this obligation to trace beneficiaries to ensure they receive any benefits due to them is aligned with the objective of retirement funds of ensuring that no dependant is left destitute.<sup>309</sup>

## 2.2.5 Period within which to conduct investigations and instances of unjustifiable delays by pension funds

### 2.2.5.1 *Period within which to conduct investigations*

Section 37C(1)(a) of the Pension Funds Act provides for a twelve-month period within which the fund should trace and pay dependants.<sup>310</sup> The duty to pay depends

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<sup>305</sup> In par 5.1.

<sup>306</sup> In pars 5.6 and 6.1.

<sup>307</sup> See ABSA "Guidelines for the Distribution of Death Benefit" available at <http://www.easyinfo.co.za/htm/custom/absa/distribt.htm> (last accessed on 30 June 2021).

<sup>308</sup> See par 2.2.10 below for a discussion of unclaimed benefits.

<sup>309</sup> See in this regard par 1 above, and Chapter 2, par 5.2.

<sup>310</sup> See sections 37C(1)(a), 37C(1)(b), 37C(1)(bA), and 37C(1)(c) of the Pension Funds Act, where a period of twelve months is referred to. The period of twelve months or twenty-four months that pension fund trustees have to investigate dependants and nominated beneficiaries in terms of s 37C of the Pension Funds Act begins from the date that the pension fund is notified of the death of the fund member. This requirement emphasises the duty of an employer to communicate or notify an employee's (the fund member's) death to the fund as soon as possible so that the fund may determine the benefits that are payable. See in this regard *Rwexwana v Idaho Spur Provident Fund and Others* 2005 7 BPLR 640 (PFA) at 642. See also *Masindi v Chemical Industries National Provident Fund* 2017 JDR 0480 (GJ) in par 27, where Epstein AJ stated, "Whilst section 37C(1) does not expressly state that the 12 month investigation period to trace the dependants of a deceased only commences once the Fund has obtained knowledge of the death of the deceased, the only logical interpretation of this section is that a Fund cannot comply with its obligation if the legislative requirement for its imposition, namely the death of a member, is not made known to the Fund". The fund must also alert the beneficiaries to submit outstanding documents for the fund to facilitate the payment. If the fund does nothing to alert the beneficiaries in this regard, the board would have failed to comply with its duties. See in this regard *Khalo v Metal Industries Provident Fund and Another* 2019 2 BPLR 418 (PFA) in par 5.9. Khalo's complaint concerned the fund's delay in paying a death benefit after its member died.

not only on the expiry of the twelve-month period but also on whether the pension fund trustees are satisfied that they have investigated and considered the matter before them with due diligence and can make an equitable allocation.<sup>311</sup> If the fund learns of or traces a dependant or dependants, section 37C(1)(a) does not prohibit the fund from paying the death benefit to such dependant or dependants before the twelve months expire. In that case, the trustees need to be satisfied that no other dependants exist.<sup>312</sup> In other words, where section 37C(1)(a) of the Act applies, pension fund trustees have twelve months to trace and pay the dependants. If the fund does not pay the death benefits after twelve months, there must be a good reason why the benefits have not been paid. One such reason could be that the pension fund trustees have not yet completed their investigations. Still, this does not give pension fund trustees who conduct inadequate investigations and/or do nothing in the twelve-month period an excuse.<sup>313</sup> Their unjustifiable delay in distributing the death benefits may constitute maladministration.<sup>314</sup> The relevant question will thus always be whether the trustees took all reasonable steps to identify and trace all possible dependants so as to allow the trustees to distribute the benefit in the most equitable manner to correctly identified dependants.<sup>315</sup>

If the fund is unaware of or unable to trace any dependants of the deceased fund member, it is required to pay the benefit or a portion of this benefit to the nominated beneficiary on the expiry of the twelve-month period.<sup>316</sup> These trustees should not

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<sup>311</sup> In *Zinduna v Amplats Group Provident Fund and Others* 2013 3 BPLR 447 (PFA) at 447, the Adjudicator remarked that over four years had passed since the death of the deceased, and the fund had still not finalised its investigation and the distribution of the death benefit. The question was whether there were any exceptional circumstances that existed to require an extension of the prescribed twelve-month period. The fund's explanation of the complexities involved in this case was found to be acceptable to the Adjudicator, who concluded that the delay could not be ascribed solely to the fund.

<sup>312</sup> *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA).

<sup>313</sup> The Adjudicator held (in *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 38) that a board which sits back and does nothing for twelve months and then distributes the benefit to a single dependant of whom it is aware will not be insulated against a claim of maladministration or impropriety lodged by an undiscovered dependant who could have been traced had reasonable steps been taken by the board.

<sup>314</sup> See in this regard *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 38.

<sup>315</sup> In *Khutswane v Malbak Group Pension Fund and Another* 2000 12 BPLR 1354 (PFA), the question was whether the fund had acted reasonably in distributing the benefit twelve months after the death of the fund member. The distribution was delayed pending investigation into the possible existence of other dependants. The Adjudicator held that the fund had acted reasonably and within its fiduciary duty (at 1354). See also *Nevondwe* 2010 *Pensions* 38 at 42.

<sup>316</sup> See s 37C(1)(b) of the Pension Funds Act.

do so before the twelve-month period expires.<sup>317</sup> The consequence of distributing a death benefit to a nominated beneficiary before the expiry of this period is that the pension fund trustees may incur delictual liability for maladministration if a dependant whom the trustees ought reasonably to have traced or been aware of comes forward either before or after the distribution.<sup>318</sup> So, in a situation where section 37C(1)(b) of the Pension Funds Act applies (payment only to nominees), the fund should wait for a period of twelve months before paying the nominees. This period is for pension fund trustees to make absolutely sure that they have not left out any dependants.<sup>319</sup> In *Ledwaba v Imperial Group Pension and Provident Fund and Another*,<sup>320</sup> the Adjudicator dealt with a situation in which the fund had taken more than two and half years to pay a death benefit. The Adjudicator criticised the board for not conducting their own investigations; they had merely sent requests for further information to the employer.<sup>321</sup> The Adjudicator stated that section 37C clearly requires the trustees, not the employer, to conduct a proper investigation to identify the deceased's dependants.<sup>322</sup> If there is conflicting information from the

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<sup>317</sup> See *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 38; and Sanlam "Death Benefits and Section 37C: The Burden on the Board of Trustees" (30 June 2014) available at <https://www.sanlaminvestments.com/mediacentre/media-category/media-releases/Death%20Benefits%20and%20Section%2037C;%20The%20Burden%20on%20the%20Board%20of%20Trustees> (last accessed on 10 August 2021). In *Mthiyane v Fedsure Life Assurance Ltd and Others* 2001 7 BPLR 2230 (PFA), the Adjudicator dealt with the pension fund trustees' exclusion of two minor children from the distribution of the death benefit after the passing on of their father who was a fund member (the deceased). The fund made it clear that it had made the distribution in terms of the deceased's nomination form and that it had been unaware of the existence of the deceased's children until after the distribution. The fund argued that the distribution was accordingly not unlawful. The Adjudicator held that the trustees had misconstrued the requirements of s 37C of the Pension Funds Act by distributing the benefit to nominees before the expiration of the twelve-month period, contrary to the provisions of s 37C(1)(b) of the Pension Funds Act (at 2231). The Adjudicator faced the challenge that the distribution had already taken place. She ordered the complainant to prove that her children (the two minor dependants) were dependants of the deceased fund member. She also ordered an award of damages against the fund for maladministration.

<sup>318</sup> See in this regard *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 40.

<sup>319</sup> At 40.

<sup>320</sup> *Ledwaba v Imperial Group Pension and Provident Fund and Another* (PFA/GA/10594/2006/RM) in par 5.5. See <https://www.pfa.org.za/Determinations/20062008/F9E17D74-09AE-44BC-B88B-406F756A0AD7.pdf> (last accessed on 10 August 2021).

<sup>321</sup> In par 5.5.

<sup>322</sup> See also *Itumeleng v SALA Pension Fund and Another* 2007 3 BPLR 311 (PFA), where the complaint was about the distribution of the proceeds of a death benefit, particularly the fund's payment of the benefit into the deceased's estate after the expiry of a period of twelve months from the date of the deceased's death. The Adjudicator commented that pension fund trustees should appreciate the actual role they should play in terms of s 37C of the Pension Funds Act in that they themselves and not the employer should be the ones to conduct diligent investigations (at 317 in par 32). In *Itumeleng*, the Adjudicator found that the steps taken by the pension fund

potential beneficiaries, it is the board's duty to investigate and resolve these issues within a reasonable time. The pension fund trustees' failure to conduct proper investigations and tracing of dependants prejudices potential beneficiaries, and this conduct could amount to maladministration.<sup>323</sup>

However, in terms of section 37C(1)(bA) of the Pension Funds Act, if there is a nominee in addition to dependants, then payment must be made within twelve months. In this instance, the statutory compulsion to pay within twelve months will be an important consideration in assessing the reasonableness of the investigation.<sup>324</sup>

#### *2.2.5.2 Instances of unjustifiable delays by pension funds in distributing the death benefit*

In some instances, pension funds delay distributing retirement death benefits to potential beneficiaries without having any justifiable reason for waiting. These delays prejudice dependants and/or nominated beneficiaries and negate the social purpose of section 37C of ensuring that surviving dependants of pension fund members have financial support on the death of the fund member. The discussion below highlights some cases and determinations where the delay in paying the death benefit was an issue.

In *Mohatla v Metal Industries Provident Fund*,<sup>325</sup> a lump sum death benefit became available for distribution, but it had not been distributed 42 months after the fund member's death. The deceased had passed away almost four years previously, yet the fund had neither completed its investigation nor explained the delay to the Adjudicator. The Adjudicator observed that the complainant and her two minor children had suffered prejudice, in that they had potentially been denied access to benefits that might have become available to them had the investigation been completed within a reasonable time. The Adjudicator ordered the fund to exercise

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trustees fell short of what was required to trace the dependants of the deceased and ordered the fund to pay the complainant the amounts that she would have had received if the trustees had conducted a proper investigation.

<sup>323</sup> *Ledwaba v Imperial Group Pension and Provident Fund and Another* (PFA/GA/10594/2006/RM) in par 5.5.

<sup>324</sup> See *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 39; and *Jacobs NO v Central Retirement Annuity Fund and Another* 2001 1 BPLR 1488 (PFA).

<sup>325</sup> *Mohatla v Metal Industries Provident Fund* 2004 6 BPLR 5797 (PFA).

its discretion under section 37C of the Pension Funds Act and to effect payment within six weeks.<sup>326</sup>

Delay in paying a death benefit was also the complaint in *Lebeko v Mineworkers Provident Fund*.<sup>327</sup> The complainant was the spouse of the fund member (the deceased) who died on 4 February 2009, more than eight years before 2017 when the complaint was lodged with the Adjudicator. The Adjudicator determined that prescription was interrupted in this matter because the fund acknowledged the debt. Following the fund member's death, a death benefit in the amount of R436 233.27 became payable by the fund to his dependants. The complainant was dissatisfied with the delay in the payment of the death benefit. Whenever she contacted the fund, she was told that it was still busy with the report on the distribution of the death benefit. As she had a child with the deceased and found it challenging to take care of herself and this child's needs, she requested the Adjudicator to investigate the complaint so that she could be paid the death benefit by the fund. The fund responded that it had received incomplete claim documents. The issue for determination was whether the fund was justified in delaying the payment of the death benefit. The Adjudicator found the explanation for the delay unacceptable.<sup>328</sup> The fund had known about the deceased's death for over eight years but had failed to take proactive steps to ensure that it conducted the investigation within the time

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<sup>326</sup> At 5797. See also *Kambule v NBC Umbrella Retirement Fund and Another* (PFA/GP/00030472/2017/CMC) [https://www.pfa.org.za/Determinations/2018/Kambule v NBC Umbrella Retirement Fund and Another.pdf](https://www.pfa.org.za/Determinations/2018/Kambule%20v%20NBC%20Umbrella%20Retirement%20Fund%20and%20Another.pdf) (last accessed on 14 January 2021), where the complaint concerned the fund's delay in paying the death benefits. The fund member (the deceased) passed on in February 2015, and the death benefit was still unpaid to the beneficiaries by January 2017. In May 2017, the fund advised the complainant that it had paid all the beneficiaries except one minor child, where it claimed to have been awaiting the necessary document (consent to pay the benefit into a beneficiary fund). The issue to be determined was whether the fund had failed to carry out its duties in terms of s 37C of the Pension Funds Act. The Adjudicator found that the fund could not provide any good reasons for delaying the payment other than that it was waiting for some documentation from beneficiaries (in par 5.6). The fund also failed to indicate to the Adjudicator the reasonable steps that it had undertaken to receive the outstanding documentation (in par 5.6). The Adjudicator noted that two years and two months had passed since the death of the fund member, and the death benefit was still not paid (in par 5.6). As a result of the fund's conduct, the beneficiaries had suffered prejudice by not being entitled to access the death benefits that were due to them (in par 5.5). The fund was ordered to contact the mother of the minor beneficiary to arrange for the submission of outstanding forms (in par 6.1.2). The fund was also ordered that if this mother refused or was unable to submit the outstanding documents, the fund should investigate her capability to manage the death benefits and decide on the mode of payment (in par 6.1.4).

<sup>327</sup> *Lebeko v Mineworkers Provident Fund* 2020 1 BPLR 114 (PFA).

<sup>328</sup> In par 5.15.

frame allowed by legislation and could not provide a cogent reason why the death benefit had not been paid. The Adjudicator found that the fund had grossly failed to finalise the distribution of the death benefit within the legislated time frame<sup>329</sup> and could not show that it had taken any steps in trying to comply with section 37C of the Pension Funds Act. The fund knew of the deceased's death and sat idly by instead of being proactive. The delay in finalising the investigation and payment of the death benefit was unreasonable and unjustifiable.<sup>330</sup> The Adjudicator ordered the fund to investigate, allocate, and pay the death benefit to the deceased's beneficiaries under the pension fund rules together with interest.<sup>331</sup>

In *Masoka v Metal Industries Provident Fund and Others*,<sup>332</sup> the complainant was the surviving spouse of the fund member (the deceased), who passed away on 31 August 2014. When lodging the complaint, she said that she and other beneficiaries of the deceased had not received a death benefit. She requested the Adjudicator to investigate the matter so that she and the other beneficiaries of the deceased could be paid a full death benefit. The fund claimed that the identified beneficiaries, who were major children of the deceased, had not applied for the payment of the death benefit even though shares of the death benefit were provisionally allocated to them. The fund was still waiting for the remaining children of the deceased to complete the dependency affidavits. So the Adjudicator had to determine whether the fund was justified in delaying the payment of the death benefit, which had not been finalised more than two years after the member's death. The Adjudicator noted that the fund knew of the potential beneficiaries but did not take any further steps to obtain the relevant information from them other than to indicate that it was waiting for them to submit their claims.<sup>333</sup> She held that under section 37C of the Pension Funds Act, the fund is enjoined to take an active role in investigating who the potential beneficiaries and dependants of the deceased member are and not to sit idly waiting for information to be brought to it. When the identified beneficiaries failed to submit

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<sup>329</sup> In par 5.16.

<sup>330</sup> In par 5.16.

<sup>331</sup> In par 6.1.1.

<sup>332</sup> *Masoka v Metal Industries Provident Fund and Others* (PFA/KN/00030418/2017/MD). See <https://www.pfa.org.za/Determinations/2018/Masoka%20v%20Metal%20Industries%20Provident%20Fund%20and%20Others.pdf> (last accessed on 10 August 2021).

<sup>333</sup> In par 5.9.



the required information, it was incumbent on the fund to go and conduct a thorough investigation and obtain the necessary information. In the circumstances, the delay in finalising the death benefit was not in the best interests of the deceased's beneficiaries. The Adjudicator found that the fund had not advanced convincing reasons why it had not conducted a proper investigation as required by section 37C of the Pension Funds Act and paid the death benefit, other than to state that it was waiting for the necessary claim documentation about the identified beneficiaries. She found the continued delay in paying the death benefit grossly unreasonable and unjustifiable, and ordered the fund to pay the complainant and another beneficiary the portions of the death benefit allocated to them without further delay, as the fund possessed their claim documents.<sup>334</sup> She found that the board's resolution had not shown the basis for the allocation that was made to all beneficiaries. Apart from two of them,<sup>335</sup> it could not show the basis for allocating the death benefit to the other beneficiaries. She noted that the deceased's children were majors, and the fund needed to ascertain whether they remained dependants. She found that in this regard, the fund had failed to discharge its duty to conduct a thorough investigation into the personal and financial circumstances of each of the deceased's dependants as section 37C of the Pension Funds Act required.<sup>336</sup> The Adjudicator ordered the fund to investigate, allocate, and pay the death benefit, considering the issues that she raised above, that was owed to the deceased's beneficiaries in terms of section 37C(1) of the Act.<sup>337</sup> The fund was also directed to report its decision, the reasons for it and all factors considered in its decision, in writing, to the Adjudicator and the complainant, within twelve weeks of the determination, and to provide the complainant and the Adjudicator with a detailed breakdown of the death benefit paid within two weeks of making the payments.

Another complaint about the fund's delay in payment following the member's death featured in *Village Trustees obo Lawan v Private Security Sector Provident Fund and Another*.<sup>338</sup> The Village Trustees complained on behalf of Mrs Lawan, the

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<sup>334</sup> In par 5.9.

<sup>335</sup> In par 5.10.

<sup>336</sup> In par 5.10.

<sup>337</sup> In par 6.1.

<sup>338</sup> *Village Trustees obo Lawan v Private Security Sector Provident Fund and Another* 2019 2 BPLR 577 (PFA).

deceased's surviving spouse. The deceased was employed by the second respondent (the employer) from 1 March 2010 until his death on 6 September 2014. He and Mrs Lawan had no children. He had completed a beneficiary nomination form on 21 July 2010, naming her the 100 per cent beneficiary of his death benefit. Following his death, a death benefit became due and payable in terms of the fund rules. The Adjudicator received the complaint on 27 January 2017, asking her to help Mrs Lawan obtain the deceased's death benefit from the fund. The Adjudicator found that the fund knew of the deceased's death, as a claim form with supporting documents had been completed and sent to it.<sup>339</sup> The fund had also acknowledged that a death benefit was due and payable to Mrs Lawan under the pension fund rules. The Adjudicator noted that more than two years had passed since the fund member died,<sup>340</sup> and the fund had provided no reason for the delay in paying the death benefit. She found that as a result of the fund's dilatory conduct, the deceased's beneficiary had suffered prejudice in that she had been potentially denied access to benefits that were available to her had the fund complied with its duty in this regard.<sup>341</sup> The Adjudicator held that the fund had failed to act in terms of section 37C of the Pension Funds Act<sup>342</sup> and ordered the fund to complete its investigation (if any) and consider the relevant factors for an equitable distribution of death benefit to the deceased's beneficiary without any further delay.<sup>343</sup> The Adjudicator stated that her office (the Tribunal), like any court of law, has the power to grant compensatory damages to mark its displeasure with the conduct of the pension fund board in appropriate circumstances.<sup>344</sup> She ordered the fund to pay the complainant R10 000 in compensation for unreasonably delaying the payment of the death benefit.<sup>345</sup> This payment was over and above the death benefit that was due to the complainant. The Adjudicator also directed the fund to provide her office and the complainant with a report explaining the allocation and distribution of the

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<sup>339</sup> In par 5.6.

<sup>340</sup> In par 5.8.

<sup>341</sup> In par 5.8, referring to *Mothala v Metal Industries Provident Fund* 2004 6 BPLR 5797 (PFA).

<sup>342</sup> *Village Trustees obo Lawan v Private Security Sector Provident Fund and Another* 2019 2 BPLR 577 (PFA) in par 5.9.

<sup>343</sup> In par 5.9.

<sup>344</sup> In par 5.9, referring to *Claase v Information Officer, SA Airways (Pty) Ltd* 2007 5 SA 469 (SCA) at 475 and *PM v Eskom Pension and Provident Fund* 2008 3 BPLR 240 (PFA).

<sup>345</sup> *Village Trustees obo Lawan v Private Security Sector Provident Fund and Another* 2019 2 BPLR 577 (PFA) in par 5.9.

deceased's death benefit under section 37C within five weeks of the date of the determination.<sup>346</sup>

In *The Municipal Workers Retirement Fund v Mabula*,<sup>347</sup> the applicant, the Municipal Workers Retirement Fund, applied in terms of section 30P of the Pension Funds Act to have the Adjudicator's determination set aside and substituted with an order dismissing the complaint of the first respondent, Mr Mabula. His complaint concerned the payment of a death benefit payable to the dependants of the complainant's deceased brother, who had been a member of the fund. The complainant was aggrieved that he was nominated by the deceased as a sole beneficiary and had not been paid a death benefit, despite his many attempts to obtain it. The Adjudicator identified the issue as being whether the fund was justified in delaying the payment of the death benefit. She found that the death benefit had still not been paid by the fund to the dependants four years after the deceased member's death, to the dependants' prejudice. She also found that the fund had not advanced convincing reasons why a proper investigation had not been carried out or why it had been delayed for so long. The court referred to paragraph 5.8 of the Adjudicator's determination where she made the following finding on the fact that the benefit had still not been distributed to the dependants:

It appears that the first respondent (the fund) has been sitting idly for almost four years, instead of proactively conducting an investigation in terms of section 37C of the Act, which is a travesty of justice to the deceased's beneficiaries ... [T]he delay in the payment of the death benefit for almost four years from the date of the deceased's death is grossly unreasonable and unjustifiable. In the circumstance, the first respondent must be ordered to finalise its investigation within a specified period.<sup>348</sup>

The court noted that the Adjudicator's determination was merely to direct the fund to take a decision to distribute the death benefit among the potential beneficiaries (the dependants and the nominee complainant), to make payment without further undue delay, and to give the fund directions regarding the status of the complainant and the relevant factors to be considered in making an equitable distribution. But the fund had chosen to appeal the determination under section 30P of the Pension Funds Act. The court considered that the fund should have appreciated the

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<sup>346</sup> In par 6.1.2.

<sup>347</sup> *The Municipal Workers Retirement Fund v Mabula* 2017 JDR 2056 (GP).

<sup>348</sup> In par 13.

Adjudicator's assistance rather than being aggrieved by the determination. The court held that pension funds are established precisely for the purpose of providing benefits and paying them when they become due and payable. The failure to pay a death benefit in good time relates to the administration of the fund, and paying the benefits established by the fund rules is an essential part of that administration. The court also held that a complaint about the unreasonable delay in payment, in essence, alleges an improper exercise of power or prejudice because of maladministration by an act of omission, as contemplated in paragraphs (a) and (b) of the definition of a complaint. The court referred to *Cape Furniture Workers Union v McGregor NO*<sup>349</sup> and concluded that it is clear that a complaint about the non-payment of a benefit relates to either the administration of the fund or the application of its rules and alleges an improper exercise of power or prejudice caused by maladministration. A complaint that a benefit payable to a destitute family has not been paid four years after the deceased's death is self-evidently prejudicial. The court concluded that it appeared from the founding affidavit that the decision to distribute the benefit to the deceased's dependants to the exclusion of the complainant was made after the Adjudicator's determination was issued: that rendered the application moot or of no practical effect. The court held that the fund had done what the Adjudicator ordered, or at least appeared to have complied with her order. The court dismissed the application.

#### 2.2.5.3 Pension funds' lack of investigative powers

The plight faced by pension fund trustees in conducting a thorough investigation of dependants and nominated beneficiaries was highlighted by the respondent fund in *Tabane v Superfund Provident Fund and Another*.<sup>350</sup> The complaint concerned the fund's distribution of a death benefit following the death of a member. The fund pointed out common challenges that the funds face when investigating the circumstances of potential beneficiaries. For example, the investigations to verify the validity of the deceased's customary marriage to the deceased fund member and whether a child is the deceased's child often prove cumbersome. Sometimes it is not easy to obtain the co-operation of potential witnesses, and the deceased's

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<sup>349</sup> *Cape Furniture Workers Union v McGregor NO* 1930 TPD 682.

<sup>350</sup> *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA).

family members often contest the complainant's allegations. The fund stressed that the absence of investigative powers for a pension fund under section 37C of the Pension Funds Act often makes it very difficult to obtain the required information.<sup>351</sup> Pension funds lack powers to subpoena witnesses or compel witnesses to provide information and answer questions, especially when the credibility of witnesses is at stake as it was in *Tabane*.<sup>352</sup> The fund explained that when pension funds face this dilemma, they can appoint an independent investigation agency to investigate the matter, but this step comes at a cost to the fund.<sup>353</sup> Sometimes alleged dependants are willing to take part in paternity testing, but the deceased's family may be reluctant to do so. The funds may approach the Adjudicator for directives which the Tribunal deems appropriate. In *Tabane*, the fund was of the view that without proof of dependency on the deceased, it was not in a position to consider the complainant and her son as factual dependants and allocate them a portion of the death benefit.<sup>354</sup> The Adjudicator ordered the complainants to provide the fund with information supporting financial dependency and also ordered the fund to conduct an investigation to establish dependency and then pay the beneficiaries. This matter shows the difficulties that pension fund trustees, in some cases, must go through to obtain the information necessary for making an informed decision and an equitable distribution. Even worse: for the information they need, these trustees mostly have to rely on the same people that, directly or indirectly, stand to benefit if the death benefit is allocated in a particular manner. It is submitted that these people are more likely to withhold certain information from the trustees that may put them at a disadvantage regarding the death benefits.<sup>355</sup>

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<sup>351</sup> In par 4.5.

<sup>352</sup> In par 4.5. The deceased was a member of the fund during his lifetime. He was survived by a sister, a customary law wife, two major sons, and a minor son. A death benefit for R372 984.09 became available for distribution in terms of s 37C of the Pension Funds Act. The fund allocated a death benefit of 15 per cent to one major son, 80 per cent to the minor son, and 5 per cent to the sister of the deceased. The fund excluded the customary law wife and her major son. The complainant submitted that she was the deceased's customary law wife and that her son was his child. But the deceased family members refuted the complainant's claims. The deceased's former employer also indicated that it had no knowledge of the complainant and her son (in par 4.5).

<sup>353</sup> In par 4.7, where the fund indicated that it was not clear whether the complainant was residing with the deceased at the time of death. The fund also stated that the complainant's son was willing to take part in paternity testing, but the deceased's family was reluctant to do so.

<sup>354</sup> In par 5.10.

<sup>355</sup> See Chapter 6, par 5.3, where it is suggested that, besides the option that pension fund boards have of approaching the Adjudicator requesting directives to compel uncooperative witnesses

#### 2.2.5.4 Advertisements calling on potential beneficiaries of the death benefit

In *Dijane v Tiger Oats Provident Fund*,<sup>356</sup> the complaint concerned a death benefit payable under section 37C of the Pension Funds Act. The question was whether Ms E Dijane and her son qualified as dependants as defined in the Act. The fund's investigation could not locate the nominated beneficiaries (Ms E Dijane and her son). The fund held the death benefit in abeyance for a certain period, allowing dependants to come forward. At the same time, the fund advertised in the local newspaper, calling on Ms E Dijane to contact the fund. The notice read:

In the matter of resolving the Estate, will Elizabeth Dijane alleged wife of the deceased (date of birth): 1996/09/05 please come in contact with Mr G Heinlein, Accountant, at the following telephone number: (016) 976-0726/7/8. If no contact is made on or before 14 days of the date of this Notice, the parent/s of the deceased will be regarded as Beneficiary of benefits due from the Provident Fund the deceased contributed to.

As a result of this advertisement, Ms E Dijane came forward and submitted the necessary documents to support her claim. Advertising is just one initiative that funds can use to widen their search for dependants.<sup>357</sup> It is suggested that, besides the investigations conducted by the pension fund boards, the FSCA should make it compulsory for all pension funds to place a notice or advertisement calling on all potential beneficiaries of a particular death benefit to come forward within a particular period.<sup>358</sup> This initiative could reduce the chances of leaving out qualifying

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to provide information relating to the distribution of death benefits, the FSCA, through the suggested central supervisory body, should be accorded powers to subpoena witnesses to provide information or appear before the relevant pension fund boards.

<sup>356</sup> *Dijane v Tiger Oats Provident Fund* 2003 6 BPLR 4773 (PFA).

<sup>357</sup> See also *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA), where the Adjudicator recognised (at 41) that there is a legitimate concern about the practical difficulties of tracing dependants. He suggested that one solution may be for s 37C of the Pension Funds Act to identify more precisely the steps required to be taken, including an appropriate form of publication, and then allowing for a final distribution to known dependants and nominees on the expiry of a reasonable period ending in indemnification of the board against further claims. But he acknowledged that further discussion and consideration were obviously required. This observation was made in 1999, more than 20 years ago in 2021, and pension fund trustees still face the challenge of tracing dependants and nominated beneficiaries. See par 2.2.10 below, where the non-payment of retirement death benefits (unclaimed benefits) is discussed.

<sup>358</sup> See in this regard *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 41, where the Adjudicator made a similar suggestion. The requirement for funds to place a notice or advertisement calling on all potential beneficiaries of a particular death benefit

and deserving dependants and help protect pension funds and their board members against possible legal claims by aggrieved dependants and nominated beneficiaries.<sup>359</sup>

The discussion above has shown that pension fund trustees must complete their investigations within the period set by section 37C of the Act. However, in some cases where it is justified, pension fund trustees can still distribute the death benefit outside the prescribed period, especially when their investigations are not yet complete. But pension fund trustees do sometimes delay or neglect the distribution to the intended beneficiaries without any justifiable reason or explanation.<sup>360</sup> This conduct goes against the social purpose of section 37C of the Act<sup>361</sup> and the

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to come forward within a particular period would not be unique in South African law. Section 34(1) of the Insolvency Act 24 of 1936 states:

“If a trader transfers in terms of a contract any business belonging to him, or the goodwill of such business, or any goods or property forming part thereof (except in the ordinary course of that business or for securing the payment of a debt), and such trader has not published a notice of such intended transfer in the *Gazette*, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on, within a period not less than thirty days before the date of such transfer, the said transfer shall be void as against his creditors for a period of six months after such transfer, and shall be void against the trustee of his estate, if his estate is sequestrated at any time within the said period”.

This sale or intended sale has to be published in the *Government Gazette*, and in two issues of an Afrikaans and two issues of an English newspaper circulating in the district in which that business is carried on. The advertisement must be made within a period at least 30 days and not more than 60 days before the date of the transfer. In addition, s 29 of the Administration of Estate Act 66 of 1965 requires that the executor upon receipt of letters of executorship must advertise a notice in a local newspaper as well as the *Government Gazette*, calling on all debtors and creditors to lodge their claims either in favour of or against the estate, within a period of 30 days from date of publication of the advertisement. The costs to place a notice or an advertisement in a local (South African) newspaper vary between R1 000 and R1500, depending on the publication selected and the size of the advertisement. See in this regard “Newspaper Advertising Rates South Africa” (*Arena Holdings Advertising Room*, 13 September 2015) available at <http://adroom.arena.africa/portfolio/newspaper-advertising-rates-south-africa/> (last accessed on 30 June 2021).

<sup>359</sup> It is noted that there may be valid concerns that the advertisement of death benefits and calling for potential beneficiaries may open the floodgates to an unlimited number of people claiming to be beneficiaries. See Chapter 6, par 5.3, where a suggestion is made in this regard. See above, pars 2.1.1, 2.2.1, 2.2.3, and Chapter 6, pars 5.6 and 5.12, where suggestions are made about the use of the benefit nomination form as well as the amendment of the definition of a “dependant” in s 1 of the Pension Funds Act; these suggestions will help reduce the pool of such potential beneficiaries

<sup>360</sup> The determinations discussed in the preceding paragraphs, namely, *Mohatla*, *Lebeko*, *Masoka*, and *Lawal*, are all classic examples of where the conduct of the funds and their trustees clearly disregards their duties, to the detriment or prejudice of the deceased’s beneficiaries. In some cases, pension funds delay payment of death benefits to potential beneficiaries without any justifiable reasons. In instances like these, where the aggrieved beneficiaries were able to lodge complaints with the Adjudicator or go to court, pension funds can be compelled to make the distributions.

<sup>361</sup> See Chapter 2, par 5.2, where the social purpose of s 37C of the Pension Funds Act is discussed. The purpose of s 37C of the Pension Funds Act is to ensure that dependants of a

objectives of the State in the establishment of pension funds.<sup>362</sup> In this situation, the people who suffer are the potential beneficiaries. The question is what should happen to the relevant pension fund trustees (the wrongdoers) responsible for unjustifiable delays and perpetual prejudice to the dependants and nominated beneficiaries. It is suggested that there should be effective sanctions to ensure compliance with duties and accountability by the wrongdoers, who are usually the pension funds and their trustees.<sup>363</sup>

#### 2.2.6 Deductions from death benefits before allocation

When a fund member dies while still in service, there may be pending requests for deductions against the retirement death benefits in terms of section 37D of the Pension Funds Act.<sup>364</sup> These deductions may include sharing a pension interest on divorce,<sup>365</sup> maintenance obligations, theft from the employer, housing loans, or any other deductible expense in terms of the section.<sup>366</sup> In this situation, the board

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fund member who dies in service are not left destitute. When the fund takes many years (in one instance, about eight years) to pay the death benefit to the dependants and nominated beneficiaries, this conduct clearly goes against the objectives of the establishment of pension funds.

<sup>362</sup> See Chapter 1, par 2.4, where the State's objectives for pension fund establishment are discussed.

<sup>363</sup> See in this regard par 6.5.5 below, where the liability of pension funds and that of their trustees are discussed. See also par 6.5.5.1 below, where suggestions to strengthen the accountability of pension fund trustees are made.

<sup>364</sup> See *Coopman v Corporate Selection Retirement Fund and Others* 2014 3 BPLR 359 (PFA), where the Adjudicator confirmed that the fund had complied with the requirements of s 37D(1)(b)(ii) of the Pension Funds Act in withholding the payment of the death benefit, as there was a case pending against the deceased's estate for alleged damages against the employer (at 360). The Adjudicator found that there was nothing that indicated that the fund had exercised its power or discretion in that regard unreasonably, and the Adjudicator dismissed the complaint (at 360).

<sup>365</sup> See, for example, *Maluleke v Fundsatwork Umbrella Provident Fund and Another* 2019 2 BPLR 473 (PFA), where the complaint before the Adjudicator concerned non-payment of pension interest and death benefit after the fund member died. The complainant was a former spouse of the fund member. The fund member passed away on 29 October 2015. On 26 March 2012, the marriage between the complainant and the deceased was dissolved by a decree of divorce (a divorce order). The settlement agreement provided for payment of 50 per cent of the fund member's pension interest to the non-member spouse (the complainant). Following the death of the fund member, a death benefit for R413 343.08 became available from the fund for distribution to his beneficiaries and dependants in terms of s 37C of the Pension Funds Act. On 5 May 2017, the complainant was paid the pension interest assigned to her in terms of the divorce order for R20 669.54.

<sup>366</sup> Section 37D of the Pension Funds Act lists permissible deductions where retirement benefits can be attached for various purposes, such as payment of member's housing loans; maintenance in terms of the Maintenance Act; debts to the employer, where the employee has admitted liability in writing and there is a court judgment against him or her in favour of the employer; damage caused to an employer; medical aid subscriptions (s 37D(1)(c)(i)); insurance;



should refrain from paying any death benefits until the deductions have been finalised.<sup>367</sup> Under section 37C(1) of the Act, allocating a death benefit to the dependants and nominees of a deceased member is made explicitly subject to prior deduction of amounts deductible in terms of sections 19(5)(b)(i), 37A(3), and 37D.<sup>368</sup> So, before pension fund trustees may start the process of distributing the death benefits, they must determine whether there are any pending deductions under section 37D of the Pension Funds Act from the deceased member's benefit. Pension fund trustees must ensure that all these deductions satisfy sections 19(5)(b)(i), 37A(3), and 37D.<sup>369</sup> Trustees have a duty to protect the interests or benefits of fund members, dependants, and beneficiaries under section 7(C)(2) of

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housing loans (s 19(5)(a)); and other deductions that are approved by the Registrar (s 19(5)(a)).

<sup>367</sup> See, for example, *Consol Ltd t/a Consol Glass v Momentum Fundsatwork Umbrella Provident and Another* 2008 2 BPLR 130 (PFA), where the Adjudicator dealt with a situation in which the employer charged an employee who was also a fund member with fraud. The employee was suspended but died before his disciplinary inquiry could be held. The employer requested the fund to deduct amounts of about R3 million, which was deemed to be the loss that it suffered because of the fraud. The fund argued that since there was no admission of liability for fraud by the deceased and there was no court judgment in favour of the complainant, the provisions of s 37D of the Pension Funds Act were not complied with, and so it could not deduct the requested amounts. The fund decided to distribute the deceased's death benefit to all identified dependants in terms of s 37C of the Pension Funds Act but decided to withhold this distribution pending a ruling by the Adjudicator. The Adjudicator ordered the fund to distribute the death benefit to all identified beneficiaries in terms of s 37C of the Pension Funds Act, and the Adjudicator dismissed the employer's complaint (at 136).

<sup>368</sup> Section 37C(1) of the Pension Funds Act, as an exception to the general rule, does allow three types of deduction, namely, a pledge in accordance with s 19(5)(b)(i), the provisions of s 37A(3) and s 37D of the Pension Funds Act. See also *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 12; and *Jacobs NO v Central Retirement Annuity Fund and Another* 2001 1 BPLR 1488 (PFA) at 1492 (also cited in n 119 above), where the Adjudicator held that the fact that the second respondent had lodged a claim against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 had no bearing on the payment of a death benefit arising from the rules of a pension fund. The payment of the death benefit is regulated exclusively by s 37C of the Pension Funds Act, regardless of any other law or rules of the fund. Such a claim, at the very best, could only be a relevant factor to be considered when making an equitable distribution among dependants (including a spouse) and nominees (at 1492). See also in this regard s 37D deductions discussed in Chapter 2 par 7, and *Hunter et al Pension Funds Act* at 684.

<sup>369</sup> See Chapter 2, par 7 for a discussion of s 37D of the Pension Funds Act.

the Act.<sup>370</sup> Any deductions that are made from fund members' benefits that do not fall under sections 19(5)(b)(i), 37A(3), and 37D are *ultra vires* and illegal.<sup>371</sup>

In *Mark Shaw v The Government Employees Pension Fund*, the court held that it is incumbent on a pension fund to inquire into the merits and validity of the debt. Mere reliance on the documents submitted by an employer does not constitute proof of the debt owed by a member.<sup>372</sup> The State, retirement funds, and pension fund trustees have moral and legal obligations to ensure that members' benefits are protected and are used for the purposes for which they are intended, and that funds have sufficient money to pay these benefits to the fund member's dependants and nominated beneficiaries if the member dies while still in service.<sup>373</sup> Failure to meet these obligations may significantly reduce the death benefit available for distribution to the dependants and nominated beneficiaries. That outcome defeats the social objective of the section and could be regarded as maladministration leading to the liability of the fund and its board members.<sup>374</sup>

#### 2.2.7 Disputes among nominated beneficiaries and/or dependants of the deceased fund member

It may happen that while the pension fund trustees are distributing a death benefit, a dependant or beneficiary lodges a dispute with the fund or the Adjudicator or institutes a court action. In this situation, the trustees should postpone the

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<sup>370</sup> See *Tom v Private Security Sector Provident Fund and Another* 2009 3 BPLR 350 (PFA), where the Adjudicator dealt with an issue regarding deductions of pension fund benefits that arose from a housing loan (at 355). The fund had continued with the deductions even though the housing loan had already been settled by the fund member (at 355 and 357). The Adjudicator held that the deductions were unlawful and that the trustees had failed to comply with their duties in terms of s 7C of the Pension Funds Act, which requires them to protect the interests of fund members (at 356 and 358). See also in this regard Khumalo S "S37D Deductions: Consumer Protection Angle: A Paradigm Shift in Consumer Protection" (Unpublished Pension Lawyers Association Conference 2011) presentation at 4 and 5 available at <http://www.pensionlawyers.co.za/downloads/2011/SandileKhumalo.pdf> (last accessed on 30 June 2021) (hence "Khumalo S37D Deductions").

<sup>371</sup> See *Odayan v Orion Money Purchase Pension Fund and Another* (PFA/KZN/1839/2004/SG) available at <https://www.pfa.org.za/Determinations/20032005/DBAC0400-A987-4D33-8806-F59A14BC936E.pdf> (last accessed on 11 August 2021). See also in this regard Khumalo S37D Deductions at 4 and 5.

<sup>372</sup> See *Shaw v Government Employees Pension Fund* 2005 11 BPLR 924 (T) in par 36.2.

<sup>373</sup> See National Treasury *Retirement Fund Reform 2004* at 40-48 for a more detailed discussion of the deduction of retirement benefits in terms of s 37D of the Pension Funds Act.

<sup>374</sup> See Chapter 2, par 5.2 for a discussion of the social objective of s 37C of the Pension Funds Act; and par 6 below on the liability of funds and their board members for wrongful distribution of death benefits.

distribution and take no further action pending the outcome of the dispute.<sup>375</sup> In *Dobie NO v National Technikon Retirement Pension Fund*, the Adjudicator said that where a reasonable investigation reveals that there may be some doubt about the circle of dependants, the fund will be well advised to postpone the distribution until it has taken reasonable steps to remove that doubt.<sup>376</sup>

However, in a case where there is an urgent need for payment to a particular beneficiary (or beneficiaries), pension fund trustees may consider paying all or a portion of the death benefit to a dependant or dependants to alleviate any possible hardship pending the settlement or resolution of the dispute.<sup>377</sup> The trustees' discretion should then be exercised with caution to avoid any potential claims against the fund and its trustees by other dependants and potential beneficiaries who feel that the benefits that could have due to them have been reduced or depleted.<sup>378</sup>

In *D v M and Others*<sup>379</sup> the fund member (the deceased) died having nominated no one as a beneficiary on the pension fund nomination form nor left behind any dependant, except for a minor son whose paternity was disputed.<sup>380</sup> A death benefit to the amount of R2 000 000 was payable in terms of the fund's rules to the member's dependant, or failing any dependant or nominated beneficiary, to his estate, or where applicable to the Guardian's Fund. The Fund had determined that the minor child was a dependant in terms of its rules and would be the beneficiary

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<sup>375</sup> See in this regard *Whitcombe v Momentum Provident Preservation Fund and Another* 2016 2 BPLR 290 (PFA) at 301, where the fund indicated that it was mindful of the fact that in so far as is possible, death benefit distributions are to be finalised within twelve months of the death of the member. But as there was a complaint pending, the fund undertook to act on the decision once the Adjudicator had ruled on the complaint. See also *Tlou v Amplats Mines Retirement Fund and Another* 2011 3 BPLR 439 (PFA) at 439 (also cited in n 39 above), where the pension fund trustees indicated that it had come to their attention that the deceased's mother had contacted their fund's pension administrator to inform it that the deceased fund member had a son out of wedlock. The trustees decided to withhold payment of the benefit pending an affidavit from the deceased's mother about the non-marital child.

<sup>376</sup> See *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) at 39.

<sup>377</sup> See, for example, *Bosch v White River Toyota Provident Fund* 2001 3 BPLR 1702 (PFA) at 1705, where the trustees made a R30 000 interim payment to the widow of the fund member and the complainant pending the resolution of a dispute over the distribution of a death benefit. The interim payment to the widow was to alleviate any possible financial hardship that she and her children might have experienced pending settlement. The Adjudicator commended arrangements of this nature.

<sup>378</sup> See par 6.5.5 below for a discussion of liabilities of funds and that of their board members.

<sup>379</sup> *D v M* 2016 JDR 0067 (GJ).

<sup>380</sup> In par 21.

of the death benefit. One of the questions before the High Court was whether a fund could compel the mother and her minor child to undergo paternity (DNA) tests when there was a dispute over the child's paternity. The applicant submitted various arguments to support doubts about the paternity of the minor child and stated that the deceased no longer maintained the minor child when he began to doubt that he was the father. The court was not convinced by the minor child's mother, as her responses to the applicant's averments were lacking in particularity.<sup>381</sup>

In opposing the application, the minor child's mother argued that there was no legal basis for her and her child to be subjected to DNA tests: while alive, the deceased fund member had accepted that he was the child's father. The respondents also invoked the Constitution, contending that the relief sought would infringe the mother and her child's rights to privacy. The court rejected this argument and referred to the judgments of *Botha v Dreyer* and *M v R* in concluding that justice and the importance of the child's knowing the truth justified that the mother and the minor child should subject themselves to paternity testing.<sup>382</sup> The court explained that *Botha v Dreyer* dealt with the law on compulsory blood or DNA testing in parental disputes, and concluded that the court is clothed both inherently and constitutionally with jurisdiction to order parties to have blood tests if it finds that the competing rights and interests of the parties require the truthful verification of paternity by scientific methods.<sup>383</sup> In reaching that conclusion, the court agreed with the view adopted in *M v R* that a court could order an adult to have blood tests because it was in the child's best interests to obtain reliable information to gain clarity on the question of paternity. The court further agreed with *Botha v Dreyer* and *M v R* that, depending on the circumstances and within reasonable limits, the privacy rights of a non-consenting adult must yield to the demands of discovering the truth in the best interests of the administration of justice.<sup>384</sup> It concluded that the relatively minor infringement of the mother and her minor child's privacy should not trump the discovery of the truth. Failure to seek the truth in circumstances like these would not be in the best interests of the administration of justice.<sup>385</sup> The court held that a

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<sup>381</sup> In pars 12 and 14.

<sup>382</sup> In par 30, referring to *Botha v Dreyer* 2008 JOL 22809 (T) and *M v R* 1989 1 SA 416 (O).

<sup>383</sup> *D v M* 2016 JDR 0067 (GJ) in par 29.

<sup>384</sup> In par 29.

<sup>385</sup> In par 30.

scientific determination of the minor child's paternity would be in his best interests and that the order sought by the applicant should be granted.<sup>386</sup> The court ordered the first respondent to submit herself and her minor son to DNA tests to determine whether the deceased fund member was the biological father of the minor child, within thirty days.<sup>387</sup>

This judgment of the High Court in *D v M*<sup>388</sup> is also in line with other determinations of the Pension Funds Adjudicator about submitting potential dependants or complainants for testing to determine the paternity of a potential beneficiary. For example, in *Oosthuizen obo Breed v Mercedes Benz of South Africa Pension Fund and Another*,<sup>389</sup> a dispute over the paternity of a minor child, the Adjudicator granted the complainant an order that the child be submitted to a paternity test. The Adjudicator stated that submitting the child to this test was an invasion of privacy but still a reasonable and justifiable order on the legitimate grounds of convenience to resolve the dispute quickly and economically.<sup>390</sup> He added that in the interests of fairness, the fund should bear the cost of the DNA test, and that this amount should be deducted from the benefit payable to the dependants.<sup>391</sup>

It should also be noted that the definition of a "dependant" in terms of section 1 of the Pension Funds Act is based not on biological ties or relationships but on financial dependency.<sup>392</sup> Irrespective of this definition, it is also clear from the case law and

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<sup>386</sup> In par 31.

<sup>387</sup> In par 33.

<sup>388</sup> *D v M* 2016 JDR 0067 (GJ).

<sup>389</sup> See, for example, *Oosthuizen obo Breed v Mercedes Benz of South Africa Pension Fund and Another* 2000 3 BPLR 287 (PFA).

<sup>390</sup> At 290.

<sup>391</sup> At 290.

<sup>392</sup> *Nel v Netcare 1999 Pension Fund and Another* 2018 3 BPLR 747 (PFA) in par 5.9; *Nkosi v Mpumalanga Parks Board Provident Fund and Another* 2019 3 BPLR 805 (PFA) in par 5.13; *Makume v Sentinel Mining Industry Retirement Fund* 2007 2 BPLR 174 (C) in par 5.4 (*Makume* also being cited in n 162 above), where the Adjudicator in all these three stated determinations confirmed that a biological relationship is not the sole factor considered in the distribution of a death benefit. The Pension Funds Act provides for dependency, rather than a biological relationship, as a crucial factor in determining whether anyone should be allocated a death benefit (*Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.8). See also *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA) in par 5.9, where the Adjudicator noted that a person need not be a biological child of the deceased to be allocated a death benefit. The question is whether a child will be deprived of support because of the deceased's death. Dependency is therefore the main issue in the allocation of a death benefit. The Adjudicator stated that the litmus test in issues relating to the distribution of death benefits is whether a party was financially dependent on the deceased

other determinations above that, where necessary, the courts and/or the Adjudicator may compel a potential beneficiary to undergo paternity testing.

It is wise for pension fund trustees to circulate the provisional allocation of death benefits for comment to all the interested parties. In my view, this circulation allows interested parties to raise objections or concerns that could be addressed before the final allocation of the death benefits.<sup>393</sup>

#### 2.2.8 Disqualification of dependants and nominated beneficiaries

Section 37C of the Pension Funds Act should incentivise participating members of retirement funds, dependants, and nominated beneficiaries to behave in a manner consistent with the objectives of establishing retirement funds and not contrary to public policy. So a situation in which the retirement policies and the law do not support these objectives is not ideal and should be avoided where possible. One example of such behaviour that goes against the good morals and the objectives of establishing a retirement fund is when a dependant or nominated beneficiary wrongfully brings about the fund member's death.<sup>394</sup> This dependant or nominated

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member and if because of his or her death this party stands to suffer financial prejudice (in par 5.9). In *Tabane*, the Adjudicator found that the complainant did not show her financial dependence on the deceased (in par 5.9).

<sup>393</sup> See *Ndlovu v The Tongaat-Hullet Sugar Retirement Benefit Provident Fund* 2010 2 BPLR 203 (PFA), where the Adjudicator found that the complainant may raise an objection to the distribution within a reasonable time and preferably before the payment of the death benefit. In *Ndlhovu*, the Adjudicator found that an extensive period (three years) had elapsed without the complainant's raising an objection against the board's decision to distribute the death benefit, and that a letter which the complainant signed, specifying the respective beneficiaries and the amounts to be distributed to each one of them, was effectively a waiver of her rights to object to or challenge the distribution (at 207). It is noted that the suggestion to circulate the provisional allocation of death benefits for comments to all the interest parties may in other instances cause delays in distributing and paying death benefits to the qualifying or deserving beneficiaries. The delays can be minimised by ensuring that trustees should also stipulate the date (for example, the date can be set within a period of three months from the date of receiving the draft resolution) by which the affected parties that are not satisfied should respond to the fund with their concerns regarding the suggested distribution of death benefits.

<sup>394</sup> The question is whether the *bloedige hand* principle applies to both intentional and negligent conduct by the potential beneficiary of the death benefit. In other words, the question is whether this principle applies only against a potential beneficiary who intentionally causes the death of the fund member or whether the principle should also apply when the beneficiary's negligent conduct causes the death of the fund member (by culpable homicide). For example, where a son or daughter (a potential beneficiary of the death benefit), while driving a motor vehicle with his or her father or mother (a fund member) in it, causes an accident leading to the death of the father or the mother, the question is whether this son or daughter should be disqualified from the allocation of the death benefit. It is submitted that the *bloedige hand* principle should not apply when the beneficiary's negligent conduct causes the death of the fund member but should apply, as in *Makhanya v Minister of Finance and Others* 2001 2 SA 1251 (D), where the cause of death was the dependant's intentional conduct. *Makhanya* is discussed below in n 395. It is

beneficiary is consequently disqualified from being able to claim a share in the resultant death benefit. There are instances in which beneficiaries who in terms of the law are entitled to receive benefits can be denied those benefits, such as through the principle that *de bloedige hand en neemt geen erffenis*. According to this principle, a beneficiary who intentionally causes the death of the fund member by an unlawful act may be denied benefits.<sup>395</sup> It is submitted that this principle is necessary and deters dependants and potential beneficiaries from intentionally causing the death of the fund member by an unlawful act. A contrary interpretation would defeat the objective of section 37C of the Pension Funds Act, which is to promote social values. Therefore, in exercising their discretion when distributing death benefits, pension fund trustees must also consider whether a potential beneficiary is not for any reason disqualified from receiving a benefit.<sup>396</sup> When a

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conceded that the weight of authority in South Africa is against the argument that the *bloedige hand* principle should not govern negligent conduct (see the discussion below).

<sup>395</sup> For this maxim of Roman-Dutch law (literally meaning “The bloody hand does not take an inheritance”), see Van der Walt and Sonnekus 1981 *TSAR* 30 at 30 n 4. And for the Roman-Dutch and other old authorities who supported this exclusion see Van der Walt and Sonnekus at 32-33 for the list at the beginning of the study; reference is also made to the ordinances (*Keuren*) of Zeeland, one of the provinces of the Netherlands. In *Makhanya v Minister of Finance and Others* 2001 2 SA 1251 (D), the deceased had been murdered by his wife. The deceased, at the time of his death, was employed by the South African Police Service and upon his death certain benefits became payable in terms of the regulations made under the Government Service Pension Act 57 of 1973. The court applied the established rule of South African law that *de bloedige hand en neemt geen erffenis*. In terms of this rule, a person who unlawfully causes the death of another is disqualified from taking a benefit under his victim’s will and from receiving any intestate benefit. The court was of the view that the principle and public policy require that the rule be extended to cover any benefits, including statutory benefits, accruing to a person, where he or she caused the deceased’s death. The court compared the provisions of the preamble to and s 4(1) of the Forfeiture Act 1982 (c. 34) in England. In other words, a person who in terms of s 37C of the Pension Funds Act is identified as a dependant or a nominee will be disqualified from receiving a benefit if he or she has unlawfully caused the deceased’s death.

<sup>396</sup> Applying the *bloedige hand* principle is not clear in some cases, for example, where the potential beneficiary has caused the death of the fund member but was acquitted by a court of law on the basis of technicalities; or where a non-member spouse kills the fund member spouse as a defence or where the fund member was abusive. Should the non-member spouse be disqualified from receiving the death benefits and, if so, is the fund equipped to make this kind of decision? In the first place, applying the *bloedige hand* principle is much clearer where the potential beneficiary has been found guilty by a court of law of *intentionally* causing the death of the fund member by an unlawful act. See in this regard *Makhanya v Minister of Finance and Others* 2001 2 SA 1251 (D). Note that “only a competent court and not, for instance, the Master, has the capacity to make a factual finding that one person has caused the death of another (see, eg, *Ferreira v Die Meester* 2001 (3) SA 365 (O) ... and has done so intentionally. Therefore, until a competent court has made such a finding by, for instance, finding the person in question guilty of an offence, it is premature to determine the validity of such persons claim to be entitled to the benefits flowing from the deceased’s death. This appears by analogy from the decision in” *Groenewald and Another v Swanepoel* 2002 6 SA 724 (E): see “Groenewald & Another v Swanepoel 2002 (6) SA 724 (ECD)” 2002 *Juta’s Insurance Law Bulletin* 130 at 130.

Secondly, in *Casey NO v The Master and Others* 1992 4 SA 505 (N), the Natal Provincial Division (per McLaren J) had to decide whether a husband who *negligently* shot and killed his

fund member dies of unnatural causes, these trustees may not distribute the death benefits “until the cause of death has been established, or the police have confirmed that no one who is to receive the benefit or part of the benefit was involved in the member’s death”.<sup>397</sup> It is submitted that the same principles should apply if a potential beneficiary of a death benefit intentionally causes the death of another potential beneficiary by an unlawful act in the hope of being allocated all or an increased portion of the death benefit.

In *Nel v Netcare 1999 Pension Fund and Another*,<sup>398</sup> the Adjudicator dealt with a situation in which the fund awarded 100 per cent of the death benefit of R2 263 973.17 to the deceased’s grandchild (a two-year-old) despite the child’s parent being accused of the member’s murder. The issues to be determined were whether the fund had not carried out its duties under section 37C of the Pension Funds Act. The complainant submitted that both the minor’s mother and father had

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wife might benefit under her will. The husband had pleaded guilty and was convicted of culpable homicide. The court found that it would be unjust to allow the husband to benefit from his actions. The court thoroughly considered the South African common law on the application of the *bloedige hand* principle to negligence. No reported case was directly relevant to whether the negligent causer of another’s death was entitled to benefit under the deceased’s will. Roman-Dutch law and *dicta* in the reported cases precluded the negligent causer’s inheriting from the deceased’s estate (Van der Walt and Sonnekus 1981 TSAR 30 at 36; “Legacy to a Homicide” 1913 SALJ 460 (Van Leeuwen RDL 3.3.9); *L Taylor v A E Pim* 1903 NLR 484 at 491, 492 (Bale CJ), 496-497 (Finnemore J); *Ex parte Steenkamp and Steenkamp* 1952 1 SA 744 (T) at 748C read with 752G-H (Steyn J); *Caldwell v Erasmus NO and Another* 1952 4 SA 43 (T) at 49D-G (Blackwell J preferring the English ground of public policy as stated in *Estate of Julian Bernard Hall, Deceased. In the Estate of Hall, Hall v Knight and Baxter* [1914] P 1 (CA) mentioning *In the Estate of Crippen* [1911] P 108); *Nell v Nell en ’n Ander* 1976 3 SA 700 (T) at 702F-H (Human J referring to Blackwell J’s *Caldwell* judgment); *Gafin NO v Kavin* 1980 3 SA 1104 (W) at 1107B-C (Esselen J citing *Steenkamp*; in *Gafin* the murdering husband was found by the court to be mentally ill at the time of the murders and was held not to be disqualified from inheriting from his murdered wife’s estate). Public policy dictated the *bloedige hand* rule (*Parity Insurance Co Ltd v Marescia and Others* 1965 3 SA 430 (A) at 435F (Steyn CJ); *Nell* at 703A-B; *Corbett et al The Law of Succession in South Africa* at 73; Van der Merwe, Rowland and Cronje *Die Suid-Afrikaanse Erfreg* at 106). Public policy also formed the basis of the relevant English law (McLaren J quoted *Hall* at 6 (Cozens-Hardy MR) and 7 (Hamilton LJ) and cited *Re Callaway (deceased)*; *Callaway v Treasury Solicitor* [1956] 2 All ER 451 (Ch) at 452I; *Re Dellow’s Will Trusts*; *Lloyds Bank Ltd v Institute of Cancer Research and Others* [1964] 1 All ER 771 (Ch) at 773B; and *Re Giles, Giles v Giles* [1972] Ch 554 at 552B-553A). Rejecting the argument that the *bloedige hand* maxim was obsolete in so far as it applied to a person who had negligently caused another’s death (counsel having relied on De Villiers CJ’s ruling in *Green v Fitzgerald and Others*; *Fitzgerald v Green and Others* 1914 AD 88 at 102 about adultery), McLaren J held that if the application of the maxim to a case where, for instance, the death resulted from negligent driving would be “harsh and out of touch with the spirit of the times”, then “the Legislature should intervene and make provision for the relaxation of the maxim” (*Casey* at 510).

<sup>397</sup> See in this regard Allan Gray *Understanding the Death Claim Process of Retirement Funds* in par 1, also cited in n 25 above.

<sup>398</sup> *Nel v Netcare 1999 Pension Fund and Another* 2018 3 BPLR 747 (PFA).



a *bloedige hand* in the matter and would thus benefit indirectly from the deceased's death benefit. The fund had resolved to pay the death benefit into a trust fund for the benefit of the minor child. The Adjudicator later confirmed that the established common-law legal principle *de bloedige hand en neemt geen erffenis* applies to pension funds. The Adjudicator referred to *Makhanya v Minister of Finance and Others*<sup>399</sup> and *Danielz NO v De Wet and Another*<sup>400</sup> which dealt with this established common-law legal principle and concluded that the fund should withhold the

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<sup>399</sup> See *Makhanya v Minister of Finance and Others* 2004 3 BPLR 5514 (D). In *Makhanya*, the court held that this legal principle or maxim could also be applied to benefits conferred by statute. Thus, although the matter related to the GEPF, the principle should also be extended to the Pension Funds Act, and the public policy principle should apply. It is important to preserve the *boni mores* of society, and it is unlikely that the legislature, when drafting s 37C of the Pension Funds Act, would have intended the section to go against or contradict public policy.

<sup>400</sup> In *Danielz NO v De Wet and Another, De Wet v Danielz NO and Another* 2008 4 All SA 549 (C), the court held that any person who deliberately participates in a vicious assault on another person which ultimately caused his death cannot benefit. Thus, on the grounds of public policy, the widow could not benefit from the life policy. The court also held that the maxim has been part of our common law since Roman times. The decision is critically discussed by Wood-Bodley 2010 SALJ 30.

It should be noted that Barns and Thompson 2014 *Acta Juridica* 123 at 127 argue: "A reliance on public policy and general notions of 'equity' and 'good manners' to determine legal rights does not sit well with the Supreme Court of Appeal, as can be seen in the recent case of *Potgieter and Another v Potgieter NO and Others*" 2012 1 SA 637 (SCA) in par 34. The authors add (128): "Significantly in *Du Plessis NO v Strauss* [1988 2 SA 105 (A) at 149], Corbett JA (as he then was), in a separate but concurring judgment, made certain pronouncements on the hierarchy of sources of South African law: 'To the extent that the law and practice of other countries having cognate legal systems, such as, for example, Friesland, France and the principalities of Germany, may have differed from that in Holland, preference must be given to the latter since Holland is from where our common law derives. This rules out reliance upon the views of such authorities as *Huber, Sandé, Gail* and *Domat*, to mention but a few.'" The *indignus* principle "that where a person's conduct so offends the notions of public policy, he or she may be deemed unworthy to take an inheritance" was advanced by the French jurist Jean Domat and relied on in *Danielz* in par 38 and by the Durban court in *Pillay and Others v Nagan and Others* 2001 1 SA 410 (D) at 424, and it was cited in *Taylor v Pim* at 493 (Barns and Thompson at 123). The authors continue (124): "We submit that this reliance on Domat and the conclusion that the *indignus* principle exists in South African law are both unwarranted and jurisprudentially unsound. The judgments that have relied on Domat draw inspiration from the early 20th century case of *Taylor v Pim*. However, as will be demonstrated, the court in *Taylor's* case did not endorse the views of Domat. The facts of the case were such that the finding of the court fell squarely within the overarching Roman-Dutch principle that no one may benefit from his or her own wrongdoing, and not within a generalised *indignus* principle." The *Taylor* court at 491 gave the following authority for the Roman and Roman-Dutch principle *nemo ex suo delicto meliorem suam conditionem facere potest*: Van Leeuwen 3.3.9; Code 6.33; Voet 34.9.6 (Barns and Thompson at 125). The origin is D 50.17.134.1 (*Oosthuizen v Homegas (Pty) Ltd* 1992 3 SA 463 (O) at 475, Smuts JP then listing various authorities quoted to him where the principle had been applied or considered). For a recent mention, see *Wimbledon Lodge (Pty) Ltd v Gore NO and Others* 2003 5 SA 315 (SCA) in par 10. It is submitted that the force of Barns and Thompson's argument at 107 against reliance on general notions of "equity" is reduced by Kotzé JA's holding that the rule he was discussing "rests on an equitable foundation, and is simply a branch of the still wider equitable rule that no one can take advantage of his own wrong to the loss or injury of another ('*Nemo ex suo delicto meliorem suam conditionem facere potest*,' says *Ulpian* in *Dig. 50.17.134.1*)" (*MacDuff & Co Ltd (In Liquidation) v Johannesburg Consolidated Investment Co Ltd* 1924 AD 573 at 611).

payment of benefits under section 37C of the Pension Funds Act allocated to the accused person pending the outcome of a criminal or civil investigation and proceed with allocating the death benefit to the other beneficiaries of the deceased. Once the accused had been prosecuted or acquitted, the allocation of the balance of the death benefit should be finalised. As a result, only once the accused was found not guilty could a portion of the death benefit allocated be paid to her or him; otherwise, it should be reallocated to the other beneficiaries not implicated in the deceased's death.<sup>401</sup>

The Adjudicator noted that in *Nel*, although a death benefit was not allocated to the accused, she was the biological mother of the minor child and might gain access to his award.<sup>402</sup> The Adjudicator held that the fund needed to ascertain the level of dependency of the identified dependants. The complainant provided the fund with various affidavits from the deceased's siblings. However, the board could not merely rely on affidavits and needed to conduct a proper investigation in terms of section 37C of the Pension Funds Act into the extent of the financial dependency of the beneficiaries on the deceased. The Adjudicator was of the view that the fund had failed to consider the extent of the financial dependency of the minor child on the deceased. So she set aside the decision of the fund in *Nel* to allocate and distribute the death benefit.<sup>403</sup>

The discussion in the preceding paragraph and the *Nel* determination make it clear that the *bloedige hand* principle applies to pension funds. However, it is also apparent from the *Nel* determination that when the accused stands to benefit directly or indirectly from killing the fund member, the legal position is not clear-cut.<sup>404</sup> The

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<sup>401</sup> *Nel v Netcare 1999 Pension Fund and Another* 2018 3 BPLR 747 (PFA) in par 5.8.

<sup>402</sup> In par 5.9. The minor son was also the grandchild of the fund member, and his mother was the stepdaughter (the accused) of the fund member. The stepdaughter was in custody, accused of killing the fund member. The fund had intended to pay the death benefit into a trust for the benefit of the minor child.

<sup>403</sup> In pars 5.12 and 6.1.

<sup>404</sup> In pars 5.12 and 6.1. It should be noted that after the fund was given an opportunity to reinvestigate the allocation and to consider the minor child and the deceased's siblings as potential beneficiaries, the fund declared that the siblings were not dependants of the deceased and confirmed the decision of the fund to allocate 100 per cent of the death benefit to the minor child. The fund concluded that the minor child was the only dependant, and the siblings of the deceased did not prove financial dependency on the deceased. After that, the siblings launched an application to review the decision of the fund, and this application is reported as *Nel and Others v Netcare 1999 Pension Fund and Others* 2021 2 BPLR 362 (GP). The High Court dismissed the application of review and held that the *bloedige hand* principle does not extend

public morals in such situations are also debatable, but this aspect is not explored further.

#### 2.2.9 Payment mode and lack of preservation of retirement fund death benefits

The relevant provisions that prescribe the mode of payment of death benefits are subsections (3) and (4) of section 37C of the Pension Funds Act. The mode of paying death benefits under section 37C differs, depending on whether the recipient (the dependant or nominated beneficiary) of the benefit is a minor<sup>405</sup> or a major.<sup>406</sup>

##### 2.2.9.1 Major beneficiary

If a beneficiary is a major dependant or major nominee, payment is made in cash unless the beneficiary agrees to another mode of payment, such as by instalments.<sup>407</sup> Payment by instalments is allowed if the major dependant or nominee has consented to this in writing.<sup>408</sup> In *Mahomed v Argus Provident Fund*,<sup>409</sup> the Adjudicator dealt with the question of whether an adult dependant or nominated beneficiary could be compelled to receive her death benefit in the form of an annuity instead of a lump sum. The Adjudicator found that the fund could not compel the major dependant or beneficiary to buy an annuity. The death benefit should be paid in cash unless the beneficiary had provided prior written consent (agreement).

Under section 37C(4)(a)(ii) of the Pension Funds Act, such agreement by the major beneficiary may be cancelled by either party on 90 days written notice. If this agreement is cancelled, the beneficiary must receive the balance in full.<sup>410</sup>

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down the bloodline to exclude anyone other than the *bloedige hand* from receiving the benefit (in par 28).

<sup>405</sup> Section 37C(3) of the Pension Funds Act applies. See also par 2.2.9.2 below, where payment to minor beneficiaries is discussed; and par 1 above, where the full provisions of the relevant s 37C, including all the subsections referred to in this part dealing with the discussion of payment mode of benefits, are discussed.

<sup>406</sup> Section 37C(4) of the Pension Funds Act applies.

<sup>407</sup> A lump sum payment is the payment of the entire balance of the death benefit in the account of the dependant or beneficiary.

<sup>408</sup> See s 37C(4)(a) of the Pension Funds Act. See also, in this regard, Nevondwe 2010 *Pensions* 38 at 45, also cited in n 315 above.

<sup>409</sup> *Mahomed v Argus Provident Fund* 2016 1 BPLR 101 (PFA).

<sup>410</sup> See s 37C(4)(b) of the Pension Funds Act.

It should be noted that section 37C(4) of the Act is silent about considering the major beneficiary's ability or inability to manage his or her finances as a requirement to determine whether the death benefit should be paid in cash or instalments. The pension fund trustees have no discretion in this respect, and the exemption occurs only when there is consent from the major not to receive the benefits in cash.

#### 2.2.9.2 Minor beneficiary

If a beneficiary (dependant or nominee) is a minor, death benefits are paid by the fund directly to the beneficiary's guardian.<sup>411</sup> This mode of payment is the standard mode unless exceptional circumstances warrant the fund's deviation from the norm.<sup>412</sup> The death benefit may be paid in more than one payment, in such amounts as pension fund trustees may from time to time consider appropriate and in the best interests of this dependant or nominee.<sup>413</sup> Interest (investment interest) is paid on

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<sup>411</sup> Ordinarily, a benefit that is due to a minor child is paid to the guardian of the minor: see in this regard *Nzimande v Construction Industry Retirement Benefit Fund and Another* 2010 2 BPLR 214 (PFA); *Maluleka and Another v NEHAWU National Provident Fund* 2005 5 BPLR 415 (PFA); and *Baloyi v Ellerine Holdings Limited Staff Pension Fund* 2005 7 BPLR 606 (PFA), where the Adjudicator sets out the mechanisms for payment of a minor beneficiary's benefit. Factors to be considered are the amount of the benefit, the competence or ability of the guardian to administer the moneys, the qualifications, or lack thereof, of the guardian to administer the moneys, and the need to use the benefit so it can provide for the minor until she attains majority.

<sup>412</sup> See in this regard *Moralo v Holcim South Africa Provident Fund and Others* (PFA/GA/5400/2005/ZC) at <https://www.pfa.org.za/Determinations/20062008/FA484BC3-F631-41E7-BE17-E5322436C89F.pdf> (last accessed on 10 August 2021); *Kowa v Corporate Selection Retirement Fund* (PFA/GA/14151/2007/SM) in par 18 <https://www.pfa.org.za/Determinations/20062008/EC25DBED-F16D-4664-B67E-51F924532A61.pdf> (last accessed on 10 August 2021); and *Mafe v Barloworld (SA) Retirement Fund* (PFA/FS/13033/07/CN) in par 31. See also Mhango and Dyani 2009 *PER* 143-168, discussing the criteria under which a guardian can be deprived of the right to administer death benefits on behalf of his or her minor child.

<sup>413</sup> See in this regard s 37C(3) of the Pension Funds Act. In *February v Cummins South Africa Umbrella Pension Fund and Others* 2018 1 BPLR 58 (PFA), the complaint concerned the allocation, distribution, and mode of payment of a death benefit following the death of the fund member (the deceased). The complainant was the surviving spouse of the deceased fund member. She complained that the fund had paid the allocation made to her minor child to the beneficiary fund, which she was not happy about. She contended that the fund wanted to control her financial affairs and she did not understand why the amount allocated to her minor child could not be paid to her. She stated that she could manage her own financial affairs and wanted the fund to be ordered to pay her all the funds due to her, including the funds paid into the beneficiary fund in respect of the minor child. The Adjudicator had to decide whether the fund had failed to comply with its duties in terms of the Pension Funds Act with regard to the payment of a death benefit to the deceased's beneficiaries and also whether the fund had acted reasonably in placing the death benefit allocated to the minor child in a beneficiary fund. The Adjudicator found that the fund had discharged its duties in terms of the Pension Funds Act when distributing the death benefit and she could not interfere with its decision to allocate the death benefit in the manner it did (in par 5.11). She held that the fund had established that the complainant did not understand financial principles and was not better placed to manage the minor child's finances (in par 5.13). The Adjudicator considered that the complainant was

the capital balance.<sup>414</sup> The pension fund trustees have a discretion, and no consent is required; the best interest of the minor beneficiary is the guiding consideration. This position is in contrast to the payment to a major beneficiary, where the trustees have no discretion not to pay in cash unless the major dependant has agreed not to receive the benefits in cash.<sup>415</sup> At the date on which a dependant or nominee attains majority or dies, whichever occurs first, any balance owing to him or her must be paid in full.<sup>416</sup>

Pension fund trustees have a duty to effect an appropriate mode of payment to minor beneficiaries under section 37C of the Pension Funds Act in relation to the social, financial, and other circumstances of a particular case.<sup>417</sup> In *Maluleka and Another v NEHAWU National Provident Fund*,<sup>418</sup> the Adjudicator stated that the first mode of payment of a death benefit to a minor, which is payment directly to the minor's guardian, although it is not spelt out in the Pension Funds Act, is a natural consequence of guardianship: namely, the common-law duty of a guardian to take charge of the financial affairs of the minor under his or her guardianship.<sup>419</sup> The

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allocated a substantial amount of the death benefit as a cash lump sum, the complainant was unemployed, and the minor daughter was still young and would require a lot of financial assistance until she became self-supporting. The Adjudicator was therefore of the view that the fund had acted reasonably and prudently by examining the personal circumstances of the complainant before deciding the mode of payment of the death benefit and eventually deciding to pay the minor's child benefit into a beneficiary fund (in par 5.13). The Adjudicator held that she was satisfied that the fund had acted in the best interest of the minor child; and the relief sought by the complainant was not granted (in par 5.13). This determination is welcome and is in line with the social purpose of s 37C of the Pension Funds Act and the State's objectives in the establishment of pension funds.

<sup>414</sup> See s 37C(3) of the Pension Funds Act.

<sup>415</sup> See par 2.2.9.1 above, where payment to a major beneficiary is discussed.

<sup>416</sup> See s 37C(3) of the Pension Funds Act, which reads as follows: "Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee:

Provided that interest at a reasonable rate, having regard to the fund return earned by the fund, shall be added to the outstanding balance at such times as the board may determine:

Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full."

<sup>417</sup> The funds must investigate the right way in which the death benefits should be paid to recipients, considering their individual circumstances. They should consider factors such as age, mental capacity, and level of appreciation of the benefit; in other words, the likelihood of the recipient's retaining the paid money for the intended purpose. See in this regard Hanekom *Manual* at 224.

<sup>418</sup> *Maluleka and Another v NEHAWU National Provident Fund* 2005 5 BPLR 415 (PFA).

<sup>419</sup> At 417. See also in this regard *Malatjie v Idwala Provident Fund* 2005 1 BPLR 45 (PFA), where the Adjudicator held that it is a common-law right for a guardian to administer the financial affairs of a minor child. There should be no grounds for depriving the guardian of this right except if the fund finds that the guardian is incompetent. So the fund should not deprive a guardian of

Adjudicator in *Maluleka* was satisfied that the fund had exercised its discretion properly, and found that the fund was correct in paying the benefits to a trust and dismissed the complaint.<sup>420</sup>

It is not easy for pension fund trustees to deprive a guardian of the control of a death benefit that is due to a minor child, and common law and case law support the expectation that these benefits must automatically be administered by the child's guardian.<sup>421</sup> This approach prompts the question of what happens where the death benefit that is due to a minor dependant is paid as a lump sum to the parent or legal guardian of this dependant and this parent or legal guardian becomes insolvent or misspends the money, to the disadvantage of the beneficiary.<sup>422</sup>

In *Lebepe v Premier Foods Provident Fund and Others*<sup>423</sup> the fund had argued that establishing an endowment policy in the name of the complainant (the mother) funded by the minor children's death benefit would have the effect of changing the "ownership nature" of the children's benefit, which would conflict with the trustees' original intended allocation. So, to the extent that the beneficiaries would be divested of the ownership of the benefits, the trustees expressed their serious reservations and concerns.<sup>424</sup> Despite the trustees' concerns, the Adjudicator set aside the fund's decision to place the three minor children's benefit in a trust. The fund was ordered to pay the remaining amounts to the complainant.<sup>425</sup>

It is submitted that the question that needs to be answered by pension fund trustees is whether it would be more beneficial for the child if the death benefits were not

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the right to administer the minor children's financial affairs unless there is reason to believe that the guardian is incapable of handling the minor children's financial affairs.

<sup>420</sup> *Maluleka and Another v NEHAWU National Provident Fund* 2005 5 BPLR 415 (PFA) at 420.

<sup>421</sup> See *Baloyi v Ellerine Holdings Limited Staff Pension Fund* 2005 7 BPLR 606 (PFA).

<sup>422</sup> In some instances, the death benefit paid as a lump sum or cash to major beneficiaries or the legal guardians of minor beneficiaries may be the highest amount that this person has ever handled or managed. It is submitted this situation increases the likelihood of the lump sum being dissipated within a short space of time. Similarly, if the recipients of the death benefit are to be compelled not to receive their benefits in the form of a lump sum or cash, the authorities and the Regulator (the FSCA) should ensure that the method used to make these payments is reliable and that the interests of the beneficiaries are protected. See in this regard Chapter 2, n 317, where the Fidentia debacle is briefly discussed.

<sup>423</sup> *Lebepe v Premier Foods Provident Fund and Others* 2007 3 BPLR 325 (PFA).

<sup>424</sup> At 328.

<sup>425</sup> At 333.

paid to the guardian.<sup>426</sup> Section 7 of the Pension Funds Act makes it clear that pension fund trustees paying out benefits have a fiduciary duty towards beneficiaries,<sup>427</sup> not the guardian of such minor beneficiaries.<sup>428</sup> When distributing death benefits to minors, pension fund trustees experience challenges because of the expectation that the death benefit that is due to a minor beneficiary should be paid to the guardian. The trustees' primary concern should be to see that the death benefit caters for the minor children's general maintenance and well-being. This approach requires sufficient funds (the death benefit) to be retained and be available for minor children's ongoing maintenance and education.<sup>429</sup> The approach accords with section 28(2) of the Constitution, which requires that the best interests of the child (here, the minor beneficiaries) be considered and protected.<sup>430</sup> Pension fund trustees must protect the child's best interests when distributing and paying the death benefits. The protection of the best interests of the child by section 28 of the Constitution is re-echoed in Article 3(1) of the United Nations Convention on the Rights of the Child (1989) ("CRC"). This Article provides:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>431</sup>

In *Tshabalala v Municipal Employees Pension Fund and Another*,<sup>432</sup> the complaint concerned, among other things, the fund's payment of the death benefit to the complainant and her three children following the death of the fund member. The complainant was the deceased's partner and father to her three children. Following

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<sup>426</sup> Bechard M "Wrestling Control from Guardians" (22 November 2014), quoting Jonathan Mort. The article is available at <http://www.iol.co.za/business/personal-finance/retirement/wrestling-control-from-guardians-1784552> (last accessed on 30 June 2021).

<sup>427</sup> See s 7C(f) of the Pension Funds Act.

<sup>428</sup> Funds must ensure that the best interests of the child (*not of the guardian*) are protected when guardians receive death benefits that are meant to support minor dependants and minor nominated beneficiaries, because it is the minor beneficiaries who suffer prejudice where these benefits are depleted in a short period. See Public Protector *Costly Delay* at 30, par 11.1.3. This report is also cited in n 87 above.

<sup>429</sup> See, for example, *Mafe v Barloworld (SA) Retirement Fund* (PFA/FS/13033/07/CN) in par 10.

<sup>430</sup> See, for example, *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) in par 1, where the Constitutional Court stated that s 28(2) of the Constitution requires that the best interests of the child be given paramountcy in all matters affecting children.

<sup>431</sup> See also Public Protector *Costly Delay* at 30, par 8.2.3. The Republic of South Africa signed Article 3(1) in 1993 and ratified it in 1995. The fund has a duty to protect the best interests of minor children when making a distribution and deciding on the mode of payment.

<sup>432</sup> *Tshabalala v Municipal Employees Pension Fund and Another* 2019 2 BPLR 570 (PFA).

the death of the deceased, a total death benefit for R247 706.64 became due and payable to the deceased's beneficiaries under section 37C of the Pension Funds Act. The benefits allocated to the children were placed in a trust for their benefit. The fund concluded that the death benefit was paid in terms of the fund's rules.

The eldest of the three children, Thokozile, was paid a lump sum amount of R15 000 on the grounds that she was 20 years old when the fund member (the deceased) passed away. She also received monthly payments that the fund stopped on the sole basis that she had turned 21. The Adjudicator pointed out that in terms of the fund rules, an annuity payable to a child should cease when he or she dies or when he or she is no longer a child in terms of the rules. In terms of the definition of a "child" in the pension fund rules, a beneficiary is regarded as a child if under the age of 21 and unmarried. A beneficiary is also regarded as a child if under the age of 23 and in full-time education. The Adjudicator found that the fund acted contrary to its rules by stopping payment to Thokozile at the age of 21 without establishing whether she was receiving full-time education. The Adjudicator ordered the fund to investigate Thokozile's financial circumstances and determine whether she was receiving full-time education.<sup>433</sup>

It is apparent from the *Tshabalala* determination that pension fund trustees have a duty to ensure that the payment method they choose, especially for minor beneficiaries, should be aligned to the pension fund rules and comply with applicable laws. Trustees must also not exercise their discretion of stopping pension benefits for minors who reach the age of majority without establishing whether the child is receiving full-time education.

In *Mbatha v Transport Sector Retirement Fund and Another*,<sup>434</sup> the High Court dealt with the distribution of death benefits under section 37C of the Pension Funds Act. It confirmed, among other issues, that when paying a benefit to a minor dependent, the pension fund board has a discretion to pay the guardian of the minor, or it may

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<sup>433</sup> In pars 6.1.2 and 6.1.3. Paragraph (a)(iii) of the fund's rules defines a child to be "under the age of twenty-three years, unmarried and, in the opinion of the COMMITTEE, is receiving full-time education. Provided further that the COMMITTEE may for reasons considered by it in its absolute discretion as conclusive, apply this clause by substituting the age of twenty three years, with an age higher than twenty three years but not exceeding twenty five years" (in par 5.10).

<sup>434</sup> *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020).



establish a trust from which a monthly income is paid to the guardian (section 37C(2)), or it may hold the moneys in the fund's portfolios and make monthly and *ad hoc* payments to the guardian (section 37C(3)).

In *Mbatha*, following the fund member's death, a death benefit became payable to be allocated and distributed under section 37C of the Act. The fund allocated the benefit, *inter alia*, to the deceased's minor children and the applicant, Ms Mbatha, their mother. The fund paid the applicant the portion of the death benefit allocated to her but decided to administer the benefits of the minor children in terms of section 37C(3) of the Act. The applicant sought an order that the death benefit allocated to the minor children be paid to her as their legal guardian and caregiver, and to have the decision of the fund to administer the death benefits of the minor children in terms of section 37C(3) set aside. Her attack was based first on an argument that the fund did not act within its powers lawfully conferred on it and was legally obliged to pay the death benefits allocated to the minor children to her, as the "only primary care giver and manager of the affairs of [her] minor children". Secondly, she contended that it was not in the best interests of the minor children for the fund to administer their death benefits instead of paying the full amount over to her. The court considered relevant cases (including *Mashazi*)<sup>435</sup> as well as the relevant provisions of section 37C of the Pension Funds Act, and later stated:

The final task of the board is to determine an appropriate mode of payment ... In summary, when paying a benefit to a minor child, the board essentially has three options. That is, it may effect payment to the guardian of the minor or it may establish a trust, wherefrom a monthly income is paid to the guardian (section 37C(2) or it may hold the monies in the fund's portfolios and effect an instalment payment to the guardian (section 37C(3)). On a plain reading of the relevant subsections, it is apparent that, before the board considers an alternative mode of payment, there must be good reason in law and fact as to why the option of direct payment should not be followed.<sup>436</sup>

The court held that section 37C(3) of the Pension Funds Act vests the fund with the discretion to administer benefits payable to minor dependents within the fund. The fund, therefore, has the discretion to administer a minor dependant's benefit and,

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<sup>435</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703.

<sup>436</sup> See *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020) in par 4, referring to *Ramanyelo v Mine Workers Provident Fund* 2005 1 BPLR 67 (PFA) pars 9 and 13; and *Baloyi v Ellerine Holdings Limited Staff Pension Fund* 2005 7 BPLR 606 (PFA) in par 14.

among other things, to make monthly payments and *ad hoc* payments “as the board may from time to time consider appropriate and in the best interests of such dependant or nominee”.<sup>437</sup> The statutory power to decide which of the three payment methods to follow in paying the death benefits of the minor children is that of the fund. The court in *Mbatha* held that there was no merit in the contention that the fund did not have the power to resolve to administer the death benefits of the minor children within the fund. The court also held that the applicant had failed to put up the requisite primary facts in support of her conclusion that it was not in the best interests of the minor children for the fund to administer their death benefits and not to pay the full amount directly over to her. And the applicant had omitted to set out primary facts in her founding affidavit as to why it would serve the interests of the minor children best if she were to administer their death benefits and not the fund and why it would not serve their best interests if the fund, among other things, made monthly and *ad hoc* payments as the board might from time to time consider appropriate and in their best interests. The court dismissed the application.

In previous determinations of the Adjudicator, section 37C(3) of the Pension Funds Act was interpreted to mean that funds have a discretion to pay the death benefit due to a minor beneficiary in any of three payment modes prescribed in the Act. In *Nelson v Tiger Brands Provident Fund and Another*,<sup>438</sup> she held that common law and case law support the principle that the death benefits due to a minor beneficiary must be paid to the guardian of the minor, unless the fund has reason to believe that payment to a guardian will not be in the best interests of the child. By contrast,

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<sup>437</sup> See s 37C(3) of the Pension Funds Act.

<sup>438</sup> See in this regard also, *Nelson v Tiger Brands Provident Fund and Another* 2008 3 BPLR 221 (PFA), where the Adjudicator held that the minor children’s benefit should be paid to the legal guardian in the ordinary course of events unless there are cogent reasons for depriving the parent of the duty to take charge of his minor children’s financial affairs, and the right to decide how the funds due to the minor children should be utilised in the best interests of the minor children. The fund had paid the death benefit of a minor child into a trust without consulting or obtaining consent from her father after the death of her mother, who was the fund member. One of the other questions before the Adjudicator was whether the board exercised its discretion properly and reasonably in deciding to place the minor children’s share in a trust. The Adjudicator found that the board had fettered its discretion by failing to investigate the circumstances of the father before placing the minor children’s share in a trust (at 227). The Adjudicator ordered the board to re-exercise its discretion and determine whether the complainant should be deprived of the right to administer the moneys on behalf of the minor children (at 227). See also n 589 below, where this determination is explored.

in *Mbatha*,<sup>439</sup> the fund and the High Court interpreted section 37C(3) to mean that the fund would pay the death benefits that were due to the minor beneficiaries into a beneficiary fund unless the guardian could show that the payment to the beneficiary fund would not be in the best interests of children.<sup>440</sup>

It is correct that the payment of the death benefit that is due to a minor child in the form of monthly payments (beneficiary fund) will usually be the choice that serves his or her best interests. However, the judgment in *Mbatha* serves to confirm the need for clarity in the law. It is submitted that if the law were clear in this regard, the applicant in *Mbatha* would not have approached the courts to dispute the payment of her child's death benefit to a beneficiary fund.

It is also submitted that payment of death benefits that are due to minor beneficiaries as a lump sum to their legal guardians does not guarantee that these benefits will be used for the intended purposes of ensuring that the surviving dependant of the deceased fund member is not left destitute.<sup>441</sup> The pension fund boards and/or the FSCA lacks efficient mechanisms or authority to monitor how the legal guardian uses the death benefits paid in cash or a lump sum.<sup>442</sup>

#### *2.2.9.3 Payment to a trust, or caregiver (custodian), or a beneficiary fund*

In addition to the above-stated methods of payment, pension fund trustees may also pay the benefit of a dependant or nominee allocated in terms of section 37C of the Pension Funds Act to a trustee appointed in terms of the Trust Property Control Act 57 of 1988, or a caregiver, or a beneficiary fund.<sup>443</sup> For pension fund trustees to pay the death benefit into a trust, it should have been nominated by the member; or by

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<sup>439</sup> *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020).

<sup>440</sup> In par 7, where the applicant stated that the fund had made the decision to pay her child's death benefit to the beneficiary fund without approaching her or determining her capability to handle her finances.

<sup>441</sup> See Chapter 2, par 2.3, where the relative financial literacy of pension fund members and the population in general in South Africa was briefly discussed.

<sup>442</sup> It is submitted that there may be instances in which legal guardians of minor beneficiaries access the death benefits that have been paid in cash or as a lump sum for their own personal use. In these instances, the best interests of the minor beneficiary or beneficiaries are not served or protected.

<sup>443</sup> See s 37C(2)(a)(i) of the Pension Funds Act; and n 449 below for circumstances in which payment due to a major person may be paid into a trust.

a major dependant or nominees, subject to s 37C(2)(a)(i)(cc) of the Pension Funds Act; or by a person recognised in law or appointed by a court as a person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee not able to manage his or her affairs or meet his or her daily care needs.<sup>444</sup>

Pension fund trustees may pay the death benefit into a beneficiary fund registered under the Pension Funds Act.<sup>445</sup> Beneficiary funds were introduced in 2009 by section 15(a) of the Financial Services Laws General Amendment Act 22 of 2008 to extend the protection of death benefits to benefits that are not distributed as a lump sum to the beneficiary under the Pension Funds Act. The death benefits paid to a trust, caregiver (custodian), or a beneficiary fund are deemed to be payments to the dependant or nominee.<sup>446</sup>

#### *2.2.9.4 Alignment of death benefit payment modes with the objective of section 37C of the Pension Funds Act*

The objective of paying death benefits to dependants and nominated beneficiaries is not to secure retirement income but to provide them with financial means in the form of the continuous support that they would have received if the deceased fund member were still alive.<sup>447</sup> The question is whether the options that retirement funds have for paying death benefits are aligned with the objective of section 37C of the Pension Funds Act. This is especially pertinent where these benefits are paid in the form of a lump sum to major beneficiaries, or to minor dependants through their legal guardians, and where beneficiary funds pay death benefits to minor beneficiaries when these beneficiaries attain the age of majority.<sup>448</sup> The forms of

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<sup>444</sup> See s 37C(2)(a)(ii) of the Pension Funds Act.

<sup>445</sup> See s 37C(2)(a)(iii) of the Pension Funds Act.

<sup>446</sup> See s 37C(2)(a) of the Pension Funds Act, and also *Lumbela v Mineworkers Provident Fund and Another* 2016 1 BPLR 84 (PFA), where the Adjudicator dealt with a matter where the fund had paid death benefits that were due to minors to a beneficiary fund without properly investigating whether this was the appropriate method of payment in the particular instance. She set aside the decision of the fund and remitted the matter to the fund to re-exercise its discretion (at 84). See also *Mahomed v Argus Provident Fund* 2016 1 BPLR 101 (PFA), where the Adjudicator also set aside the decision of the fund that compelled a minor beneficiary to receive a death benefit that was due to him in the form of an annuity instead of a lump sum.

<sup>447</sup> See Chapter 1, par 2.4, where the objectives of establishing a retirement fund are discussed.

<sup>448</sup> See *Van Baalen v Mittal Steel SA Selector Pension Fund and Others* 2007 3 BPLR 385 (PFA), where the Adjudicator dealt with a dispute over the manner of payment of a death benefit to a surviving spouse after her fund member husband passed away. The surviving spouse (the

paying death benefits to dependants and nominated beneficiaries are relevant to the discussion of the distribution of benefits, in particular to whether the objectives of the State in the establishment of retirement funds will be realised.<sup>449</sup> This affects whether the recipients of these benefits will be guaranteed an appropriate income for more extended periods.<sup>450</sup> If a dependant or a beneficiary receives a death benefit in the form of a lump sum which is depleted in just a matter of weeks or months, he or she may have to rely on the State's social grants.<sup>451</sup> Dependency on social grants goes against the objectives of establishing retirement funds, which are to ensure that fund members or their dependants can sustain themselves financially on retirement or on the death of a fund member without relying on a social grant from the State.<sup>452</sup> The forms of payment and the choices available to recipients of death benefits should align with the goal of the overall retirement funding system and at the same time consider other relevant factors or challenges.

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beneficiary) wanted the death benefit to be used to purchase a living annuity for herself to avoid tax liability on the lump sum payment. The Adjudicator held that the rules of the fund did not confer on the beneficiary of a death benefit the right to elect that it be transferred into an annuity (at 385). The Adjudicator determined that where a beneficiary of a death benefit is entitled to a lump sum benefit in terms of the rules, this benefit will accrue to this beneficiary. The beneficiary is then free to decide how to invest the money (at 387).

<sup>449</sup> In *Mafe v Barloworld (SA) Retirement Fund* (PFA/FS/13033/07/CN) in par 29, the Adjudicator said that the mode of payment of death benefits is payment directly to the dependant. The Adjudicator held that this mode of payment recognises that a major person has a right and a duty to manage his or her own legal and financial affairs, and this should be the default position that may only be departed from if one of the other two options is more appropriate. In this regard he referred to *Baloyi v Ellerine Holdings Limited Staff Pension Fund* 2005 7 BPLR 606 (PFA), where a similar determination was made. The Adjudicator decided that any deviation from this mode of payment must be justified on legal and factual grounds. The payment of a major's benefit into a trust can only be resorted to if direct payment of the benefit to the major and payment of the benefit from the fund in instalments are not appropriate in the circumstances. For example, the rules of certain funds have provisions which authorise the board, when the member or beneficiary is labouring under a legal disability, to pay the benefit into a trust. However, the fund must also consider the cost implication of paying a benefit into a trust as opposed to other modes of payment.

<sup>450</sup> See in this regard, Antolin P "Policy Options for the Payout Phase" (*OECD Working Papers on Insurance and Private Pensions* No. 25 OECD Publishing 2008) available at <https://www.oecd.org/finance/private-pensions/41407986.pdf> (last accessed on 30 June 2021) at 3.

<sup>451</sup> See, for example, par 2.2.3, where *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA) is discussed.

<sup>452</sup> See Chapter 1, par 2.4 for a discussion of the objectives of a retirement fund. Some of the implications of not preserving withdrawal benefits and pension benefits (payouts) are that when these benefits are depleted, members of funds and their dependants will depend on the State older person's grant or on family members for support, or work longer beyond the normal retirement age, or downgrade their living standards.

The discussion above points out that sometimes death benefits are paid to dependants and beneficiaries as a lump sum. The question is whether permitting this payment is consistent with the objective of establishing retirement funds, which is to provide financial support on retirement or the death of a member while in service.<sup>453</sup> The payment of death benefits by retirement funds in the form of a lump sum is not a problem in itself: the problem arises when the recipients do not preserve the benefits. At times the payment of lump sum death benefits to dependants after the passing away of a breadwinner serves the purpose of mitigating the hardship brought by the death.<sup>454</sup> However, there is a need to improve the preservation of retirement fund death benefits.<sup>455</sup>

The primary purpose of a retirement fund is to provide income on retirement to members and to dependants if a fund member dies in service. It is, therefore, part of the responsibilities of pension fund trustees to guide members, dependants, and nominated beneficiaries through the process of converting their death benefit into a sustainable income.<sup>456</sup> This mission will accord with the recommendation or suggestion of the *Social Security and Retirement Reform: A Second Discussion Paper* (2007).<sup>457</sup> This discussion paper proposes that

a consistent approach be applied to the payment of retirement, death and disability benefits by pension, provident and retirement annuity funds. Regulations should allow for the payment of a modest proportion of the benefit

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<sup>453</sup> In *Nieuwenhuizen v SAB Staff Provident Fund and Another* 2000 12 BPLR 1413 (PFA), the trustees faced a situation in which the deceased fund member had three dependants: the widow and two minor children who were under the age of 13. The fund member had nominated his widow to be allocated 100 per cent of the benefit and left nothing to the minor children. The trustees concluded that the minor children would need a great deal of money to have sufficient income to see them through their schooling, and the trustees were concerned that in the past, where a member had nominated his spouse to be allocated 100 per cent of the benefit (and no benefit to the minor children), the trustees had found that in a relatively short period the spouse has squandered the entire benefit, leaving the minor children destitute. The Adjudicator referred to the determination in *Moir v Reef Group Pension Plan and Others* 2000 6 BPLR 629 (PFA) and held (in par 20) that the mere fact that the deceased had nominated the complainant as a sole beneficiary did not *per se* entitle her to the entire benefit. The Adjudicator in *Nieuwenhuizen* was satisfied that the trustees had made an equitable distribution as required by s 37C(1)(a) of the Pension Funds Act (in par 22), and the Adjudicator dismissed the complaint (in par 26).

<sup>454</sup> See Moore *Distributions* at 99, stating that policies that promote the preservation of retirement assets, allowing access only for substantial economic hardship, would ensure that the funds are available for future financial security. Although Moore was referring to the position in the United States of America, it is submitted that his comments are just as applicable in South Africa.

<sup>455</sup> See in this regard the National Treasury *2014 Budget Update on Retirement Reforms* (14 March 2014) at 3, referring to the 2014 Budget Speech by the Minister of Finance.

<sup>456</sup> National Treasury *2013 Retirement Reform Proposals for Further Consultation* (2013) at 11.

<sup>457</sup> National Treasury *Social Security and Retirement Reform 2007*.

in the form of a lump sum, with the balance being used to secure a conventional annuity, except for benefit values below a certain threshold.<sup>458</sup>

The lack of preservation and the sustainability of death benefits are some of the factors that affect the efficiency of retirement funds and the realisation of the objective of section 37C of the Pension Funds Act.<sup>459</sup>

The Taxation Laws Amendment Act 15 of 2016 states that pension funds and provident funds must preserve two-thirds of retirement benefits as annuities on retirement.<sup>460</sup> It is submitted that the provisions compelling preservation of retirement benefits should also apply to the mode in which the death benefit is distributed. This is crucial when minor beneficiaries are involved. As stated in the preceding paragraph, pension funds (pension fund trustees), after paying the lump sum to the guardian or surviving spouse or any beneficiary, lack any authority, arrangement, or mechanism for checking whether these benefits are being used for their intended purpose. If the death benefits are misspent, this outcome defeats the objectives of the establishment of retirement funds as well as that of section 37C of preventing the destitution of surviving dependants.<sup>461</sup>

#### 2.2.10 Non-payment of retirement benefits to members, dependants, and beneficiaries

##### 2.2.10.1 *Unclaimed pension benefits*

Pension fund boards' duties include taking reasonable steps to ensure that accrued benefits are paid to members, dependants, and beneficiaries.<sup>462</sup> So boards are required to make a reasonable effort to trace members and former members to pay

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<sup>458</sup> In par 111.

<sup>459</sup> See Chapter 1, par 2.4 on the objectives of a retirement fund.

<sup>460</sup> The implementation of the relevant provision of the Taxation Laws Amendment Act 25 of 2015 was meant to be in 2018, but the Government backtracked after resistance from the unions. It has now been replaced by the Taxation Laws Amendment Act 34 of 2019, which does not have similar provisions.

<sup>461</sup> See Chapter 2, par 5.2 for a discussion of the objective of s 37C of the Pension Funds Act. It is also submitted that if the legislature, through s 37C of the Pension Funds Act, deems it necessary to restrict the wishes of the fund member about how the death benefits should be allocated in the event of the member's dying in service, there seems to be no reason why the payment of death benefits in the form of lump sum cannot be restricted in law for major and minor beneficiaries.

<sup>462</sup> Section 7C(f) of the Pension Funds Act states that pension fund boards have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit.

out the benefits that are due to them.<sup>463</sup> But a significant number of retirement fund members are not paid their retirement fund benefits upon leaving service for various reasons, including the inefficiencies of the boards and their benefits administrators, and in other instances, the ineptitude and complicity of these retirement fund members and sponsoring employers.<sup>464</sup>

The same (non-payment of benefits) applies to massive amounts of death benefits that remain unpaid after the death of a fund member. In the case of a member's death, dependants and nominated beneficiaries that cannot be traced are denied an opportunity to be considered by pension fund trustees when they exercise their discretion to distribute the death benefits. This non-payment of a death benefit that is due to a dependant and/or nominated beneficiary defeats the objective of section 37C of the Pension Funds Act: namely, providing financial security to the dependants of a fund member who dies while still in service.<sup>465</sup>

It could happen that members leave their funds without fully knowing what is owed to them, when it should be paid, or how important it is to "claim" their benefits. Similarly, dependants or nominated beneficiaries may not be familiar with the details of a retirement fund that their deceased parent or guardian or spouse used to be a member of and also may not fully know of the amounts that could perhaps be due to them.<sup>466</sup> Pension fund trustees must be more proactive in identifying potential

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<sup>463</sup> See the National Treasury *Retirement Fund Reform 2004* in par 3.14, where unclaimed benefits are discussed.

<sup>464</sup> The Financial Sector Conduct Authority *Annual Report 2018/2019* at 62 states that the aggregate amount of unclaimed benefits reported by retirement funds regulated and supervised under the Pension Funds Act as at 31 March 2019 was R42 830 721 831. The number of beneficiaries for whom unclaimed benefits were held was 4 770 895. The report is available at <https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202018-19.pdf> (last accessed on 30 June 2021). These statistics do not paint a good picture of the retirement fund industry as a whole or the role that pension fund trustees are playing to ensure that pension fund members and their dependants receive the pension fund (death) benefits that are due to them. See also Mbatha *Implementation* at 58; in addition, Asher *Design* at 35 states that "large numbers of retirement fund beneficiaries do not claim. Illiteracy plays a role, as does the cultural reluctance of men to let their wives know of potential life cover benefits".

<sup>465</sup> Some retirement fund benefits remain unclaimed, either because the fund's records are inadequate to facilitate tracing former members or their dependants, or because members have failed to maintain contact with the fund or employer. See National Treasury *Social Security and Retirement Reform 2007* in par 117. See also National Treasury *Retirement Fund Reform 2004* at 40.

<sup>466</sup> See IR Focus *Management Model* at 70.



dependants and beneficiaries of the deceased fund member to minimise situations in which the death benefits remain unpaid.

For these reasons, an Unclaimed Benefit Fund is established to receive benefits that are not claimed by members, dependants, or other beneficiaries.<sup>467</sup> This fund administers unclaimed benefits and traces members to enable the payment of these benefits.<sup>468</sup> Once the transfer of a member's or beneficiary's benefits to an Unclaimed Benefit Fund has been completed, the original retirement fund is no longer liable for payment of the benefit to dependants and beneficiaries. The obligation to pay benefits to dependants and beneficiaries then falls on the central Unclaimed Benefit Fund. The usual rules of prescription apply, meaning that the right of the fund members, dependants, and nominated beneficiaries to claim the benefit lapses after three years, provided that the claimant had been aware of his or her right to claim a benefit and had failed to exercise that right.<sup>469</sup>

Retirement funds and their administrators are sometimes guilty of not conducting a proper investigation in tracing the beneficiaries and of poor record-keeping as to the personal details (names, physical address, contact details) of their members, the details of the pension benefit, and the nomination forms completed by the members.<sup>470</sup> This situation is evident from the high number of unclaimed benefits,

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<sup>467</sup> An "unclaimed benefit" is defined by s 1 of the Pension Funds Act as (a) any benefit which has, within a period of 24 months from the date on which it became legally due and payable, not been paid by the fund to a member, or former member or beneficiary or (aA) "a death benefit payable to a beneficiary under section 37C not paid within 24 months from the date on which the fund became aware of the death of the member, or such longer period as may reasonably justified by the board of the fund in writing". The definition of "unclaimed benefit" in terms of s 1(aA) of the Pension Funds Act includes a death benefit payable to a beneficiary under s 37C. See also IR Focus *Management Model* at 69, stating that "a more basic and socially acceptable definition is money that should be in the hands of former members or dependants that remains in the reserve accounts of funds".

<sup>468</sup> Financial Services Board (FSB) *Annual Report 2009* at 71.

<sup>469</sup> See ss 11(d) and 12(3) of the Prescription Act 68 of 1969. Section 11(d) states that the period of prescription of debts shall be three years save where an Act of Parliament provides otherwise. Section 12(3) states: "A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arise: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care." Section 13(1)(a) of the Prescription Act 68 of 1969 provides that prescription could be delayed in certain circumstances, including where the creditor is a minor or an insane person. See also National Treasury *Retirement Fund Reform 2004* at 40 to 41 for a discussion of unclaimed benefits.

<sup>470</sup> See, for example, in *Bonugli v Unibank Provident Fund and Others* 2011 2 BPLR 151 (PFA) at 151, where, on the fund member's request for payment of her paid-up benefits, the fund and the administrator advised that they had no records of her benefits or of her being a paid-up member

and it reflects negatively on the retirement fund industry.<sup>471</sup> It also prejudices members who contributed their life savings to these funds, without themselves or their dependants or nominated beneficiaries ultimately receiving any of the benefits.<sup>472</sup>

#### 2.2.10.2 *Non-payment of contributions by employers*

Section 13A of the Pension Funds Act regulates the payment of contributions and certain benefits to pension funds. Subsection 13A(1) states the following:

(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely –

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member's remuneration and

(b) any contribution for which the employer is liable in terms of those rules.

The employees make contributions to their employers to secure pension benefits for themselves or their dependants. However, despite these provisions of 13A of the Pension Funds Act, there are cases in which some employers receive pension contributions from their employees but do not pay them over to the relevant pension funds.<sup>473</sup> As a result, these employees are not members of any fund, and when they

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of the fund. The Adjudicator later ordered the fund to pay the complainant her early retirement benefit with all investment returns (at 156).

<sup>471</sup> The first scenario is where the board does not pay a fund member the retirement or withdrawal benefits due to him or her; and the second is where the fund fails to pay death benefits that are due to a dependant and/or a nominated beneficiary.

<sup>472</sup> See, for example, *Khoza v Metal Industries Provident Fund and Another* 2012 1 BPLR 47 (PFA), where the fund allocated a death benefit to a minor child but, after alleging that it was unable to trace the child, it redistributed the child's share to the surviving spouse. The mother of the child lodged a complaint with the Adjudicator, who later found that the fact that for eight years after the deceased's death the trustees were unable to contact the complainant or her son was an indication that, even though the boy qualified as a dependant, he was not factually dependant on his late father and dismissed the complaint (at 47).

<sup>473</sup> Sections 13A(8), (9), and (10) of the Pension Funds Act include certain measures to alleviate the difficulties suffered by employees when employers default on their pension contributions. Section 13A prescribes personal liability to the relevant persons for failure to comply with the section (subsections (8) and (9)). The board must also report non-payment of the contributions by the employer to the FSCA. Piercing of the corporate veil in the form of personal liability of relevant persons is embedded in sections 13A(8) and (9) of the Pension Funds Act. If the board does not report non-compliance in accordance with the provisions of section 13A(10), there are currently no other early warning systems in s 13A. The non-payment of contributions is often discovered when the fund member retires or dies, and this outcome results in the retirement funds being unable to pay out benefits to the members and/or their dependants when they fall due. See in this regard *Sakhwe v Security Employees National Provident Fund and Another; Mpondombini v Security Employees National Provident Fund and Another* 2005 6 BPLR 527

retire or die, they receive no pension benefits from the funds of which they were supposed to have been members. In *Mothibeli v Metal Industries Provident Fund and Others*,<sup>474</sup> the complaint concerned the failure by the employer to pay all provident fund contributions on behalf of the fund member when he was still alive, leading to the non-payment of his full death benefit. The Adjudicator had to determine whether the employer should be held accountable for failing to pay all provident fund contributions due on behalf of the deceased, which led to the non-payment of his full death benefit. The Adjudicator found that the employer owed certain provident fund contributions on behalf of the deceased and was liable for the outstanding contributions for the period.<sup>475</sup> She also found that the employer had been liquidated, and so the Adjudicator's office could not issue an order against the entity that was not operating a viable business. She held that the outstanding contributions due by the employer were no longer recoverable from the employer. She suggested other remedies to the complainant, such as pursuing a civil action in a court of law against the employer, even though it was liquidated.<sup>476</sup>

The discussion above has shown that at times some employers and/or pension fund trustees conduct themselves in a manner that clearly disregards their duties, to the detriment or prejudice of a deceased's beneficiaries. In instances like these where the aggrieved beneficiaries can lodge complaints with the Adjudicator, pension funds can be compelled to make the distributions, and employers can be ordered to pay the outstanding contributions.<sup>477</sup> The State objectives of establishing pension funds were explained in Chapter 1 of this thesis,<sup>478</sup> and the social purpose of section

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(PFA) in par 1, where the Adjudicator highlighted that he had, over the years, received many complaints dealing with employers' failure to pay contributions to the retirement fund. See also in this regard Marumoagae 2015 *Speculum Juris* 3.

<sup>474</sup> *Mothibeli v Metal Industries Provident Fund and Others* 2018 1 BPLR 164 (PFA).

<sup>475</sup> In par 5.7.

<sup>476</sup> In par 5.9.

<sup>477</sup> Section 13A(8) and (9) of the Pension Funds Act provides for the personal liability of various persons at the employer for the non-payment of contributions, as required by s 13 of this Act. Furthermore, non-compliance with s 13A of the Pension Funds Act that deals with payment of contributions to the fund is a criminal offence in terms of s 37(1)(a) of this Act. Section 37 deals with penalties. The subsection dealing with penalties was inserted into the Act by s 49(b) of the Financial Services Laws General Amendment Act 45 of 2013. See par 6.5.5.1 and n 959 below, where the provisions of s 37 of the Pension Funds Act are discussed.

<sup>478</sup> See Chapter 1, par 2.4, where the social objectives of establishing retirement funds are discussed. In terms of reg 33(5) of the Pension Funds Regulations under the Pension Funds Act, if the employer fails to pay over the contributions to the fund within 90 days, the monitoring person must inform the Registrar of Pension Funds (the FSCA).

37C of the Pension Funds Act was also highlighted in this chapter.<sup>479</sup> The realisation of these objectives lies in the hands of pension fund trustees (the pension fund boards), who are the controlling body of their pension funds.<sup>480</sup> It is imperative that trustees understand or appreciate the social role that they have to play;<sup>481</sup> otherwise, the policies behind the establishment of pension funds and of section 37C of the Pension Funds Act become meaningless. So their role is critical in ensuring the realisation of the social purpose of pension funds.

The next section examines the discretionary powers conferred on pension fund trustees to effect an “equitable distribution” of the death benefits.

### **3 EQUITABLE DISTRIBUTION OF DEATH BENEFITS, DISCRETIONARY POWERS, AND LACK OF LEGISLATIVE CLARITY**

#### *3.1 Equitability and the provisions of the Pension Funds Act*

The Pension Funds Act states that pension fund trustees must allocate the death benefit in a manner deemed “equitable” by the fund.<sup>482</sup> Under sections 37C(1)(a) and 37C(1)(bA) of the Pension Funds Act, pension fund trustees need to make an equitable distribution among the dependants (subsection (a)), as well as among dependants and nominees (subsection (bA)). It is crucial that pension fund trustees, dependants, and nominated beneficiaries understand the meaning and the correct interpretation of equitable allocation or equitable distribution. The Pension Funds Act does not, however, prescribe how and when an allocation of a death benefit will be equitable. In *Van der Merwe and Others v Southern Life Association Ltd and*

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<sup>479</sup> See par 1 above, and Chapter 2, par 5.2 where the social purpose of s 37C of the Pension Funds Act is discussed.

<sup>480</sup> See Chapter 2, par 6.4, where the role of pension fund trustees in this regard is discussed. The principal officer of a fund in terms of s 13A(6) of the Pension Funds Act and pension fund trustees have an important role in monitoring and ensuring compliance with this section by the employer. Section 13A(10) of the Pension Funds Act states: “A board of a fund must report any non-compliance with the provisions of this section, in accordance with such conditions and in the format as may be prescribed.”

<sup>481</sup> See also below *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC 156 (6 February 2019), where Cowen AJ made a similar remark about the social function that pension funds should serve when trustees make distributions in terms of s 37C of the Pension Funds Act. See also *Itumeleng v SALA Pension Fund and Another* 2007 3 BPLR 311 (PFA), where the Adjudicator reiterated the role that trustees should play in terms of s 37C of the Pension Funds Act.

<sup>482</sup> See in this regard par 3.6, below for the meaning of the term “equitable distribution”, as well as the provisions of s 37C of the Pension Funds Act.

Another<sup>483</sup> the Adjudicator pointed out that section 37C of the Act does not specify criteria to assist the board of a fund in exercising its discretion to distribute the benefit other than to require the board to act equitably.<sup>484</sup>

### 3.2 *Criteria to determine equitable distribution*

Over the years, the courts and the Adjudicator have developed specific criteria that funds must use in determining an equitable allocation:<sup>485</sup>

- the ages of the dependants;<sup>486</sup>
- the relationship of the parties to the deceased;
- the extent of dependency;<sup>487</sup>
- the wishes of the deceased as stipulated either in the beneficiary nomination form or the deceased's last will;

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<sup>483</sup> *Van der Merwe and Others v Southern Life Association* 2000 3 BPLR 321 (PFA).

<sup>484</sup> At 330.

<sup>485</sup> In *Sithole v ICS Provident Fund and Another* 2000 4 BPLR 430 (PFA) in pars 24 and 25, the Adjudicator listed factors that the board has to consider when making an "equitable distribution" among the dependants. These factors were also reiterated in *Brummer v CSIR Pension Fund and Another* 2005 9 BPLR 797 (PFA); *Koekemoer v Macsteel Group Retirement Plan and Others* 2004 2 BPLR 5465 (PFA); and *Nel v Netcare 1999 Pension Fund and Another* (PFA/GP/00027413/2016/YVT) in par 5.4.

<sup>486</sup> See, for example, in *Magwaza v BB Cereals Provident Fund* 2002 1 BPLR 2978 (PFA), where the distribution of the death benefit was set aside because the board did not exercise its discretion properly in that it did not consider the ages of the dependants (at 2977).

<sup>487</sup> In some cases, children over the age of 18 years but below the age of 25 could have qualified as dependants because they were registered students but did not qualify because the fund member when still alive did not support them — the reason they failed to register to further their studies. See, for example, *Khoza v Metal Industries Provident Fund and Another* 2012 1 BPLR 47 (PFA), where the Adjudicator found that the fact that for eight years after the deceased's death the trustees were unable to contact the complainant or her minor son was an indication that, even though the boy qualified as a dependant, he was not factually dependant on his late father; and the Adjudicator dismissed the complaint (at 47). See n 471, where *Khoza v Metal Industries* is also discussed. The Supreme Court of Appeal in *South African Local Authorities Pension Fund v Mthembu* 2015 JDR 2655 (SCA) dealt with the payment of a child's pension to the member's dependent children under the pension fund rules of the appellant. The legal question was the interpretation of the word "full-time student". The Supreme Court of Appeal emphasised that when dealing with the definition of a full-time student to determine whether the child qualified for receipt of pension benefits, the fund must look at the nature of the student's study commitments rather than any classification of them by a particular institution (in par 16). So the fund is required to examine each case on its merits and, while this may add to the fund's administrative burdens, it is what its rules require (in par 17).

- the financial status of the dependants, including their future earning capacity and/or future earning potential;<sup>488</sup> and
- the amount available for distribution.

Even though these guidelines are available to pension fund trustees, they are not the only factors that can or must be considered when determining the allocation of death benefits.<sup>489</sup> These guidelines are not exhaustive and do not replace pension fund trustees' discretion in distributing the death benefit in an equitable manner.

In *Nkosi v Mpumalanga Parks Board Provident Fund and Another*,<sup>490</sup> the pension fund trustees considered the amount available for distribution and the ages of the beneficiaries. But they failed to consider all the other factors, including the extent of the dependants' dependency on the deceased. The Adjudicator had to determine whether the fund had carried out its duties under section 37C of the Pension Funds Act in allocating and distributing the death benefit. The complainant was the son of the deceased and had complained on behalf of himself and his two siblings, SR Nkosi (aged 25) and SM Nkosi (aged 19). These three people were legal dependants of the deceased as defined in paragraph (a) of the definition of "dependant" in the Pension Funds Act.<sup>491</sup> The deceased had been living with his partner and his minor child, Mbali (aged 11). In making a distribution, the fund had included Mbali, paying her the largest benefit because of her age. The complainant

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<sup>488</sup> See, for example, in *TWC and Others v Rentokil Pension Fund and Another* 2000 2 BPLR 216 (PFA), where the pension fund trustees conceded that apart from the second respondent, they had failed to give proper consideration to the financial circumstances of the deceased's dependants in deciding to distribute the benefit the way they did and agreed that their decision should be overturned and substituted by an order of the Adjudicator. The Adjudicator rejected the argument that s 37C(1)(b) of the Pension Funds Act obliged trustees to liquidate a member's estate to meet creditors' claims where the debts in the member's estate exceeded the assets (at 217). The Adjudicator pointed out that the section only applied when a dependant could not be traced but a beneficiary has been nominated (at 217). In *TWC*, the deceased did have dependants who had been located, and the trustees were, therefore, obliged to distribute the benefit exclusively to the dependants and the nominated beneficiary. The Adjudicator was of the view that in terms of s 37C(1)(bA) of the Pension Funds Act, where there are dependants, a nominated beneficiary falls to be classed as a dependant for the purpose of distribution of benefits (at 217).

<sup>489</sup> This may be subject to s 19(5) and s 37D of the Pension Funds Act. See also Hendricks J "Death Benefit Apportionment and Distribution: The Dilemma" at 1, an unpublished paper available at <http://fedgroup.co.za/wp-content/uploads/Death-Benefit-1.pdf> (last accessed on 30 June 2021).

<sup>490</sup> *Nkosi v Mpumalanga Parks Board Provident Fund and Another* 2019 3 BPLR 805 (PFA). See n 392, where *Nkosi* is also cited.

<sup>491</sup> See par 2.2.1 above, where the full definition of a "dependant" in terms of s 1 of the Pension Funds Act is provided.

alleged that Mbali was not a biological child of the deceased and had her own father who supported her financially. The complainant requested the Adjudicator to investigate the matter and order the fund to reallocate the death benefit and distribute it between him and his two siblings only. The fund submitted that its investigation established that the deceased was at the time of his death living with his partner and a child, Mbali. The Adjudicator stated that the biological relationship is not the sole factor considered in the distribution of a death benefit.<sup>492</sup> The Pension Funds Act speaks of dependency, rather than a biological relationship, as a crucial factor in determining whether anyone should be allocated a death benefit.<sup>493</sup> She thus concluded that if Mbali was living with the deceased at the date of his death and was financially dependent on him, she qualified at least as a factual dependant as defined in paragraph (b) of the definition of “dependant”.<sup>494</sup> The Adjudicator found that the fund had considered the amount available for distribution and the ages of the beneficiaries but had failed to consider all the other factors, including the extent of the dependency of the dependants (including Mbali) on the deceased.<sup>495</sup> As a result, the Adjudicator was not satisfied that the fund had conducted a proper investigation under section 37C of the Pension Funds Act and consequently found that the fund had unduly fettered its discretion in allocating the death benefit. She accordingly set aside the fund’s decision.<sup>496</sup> She ordered the fund to re-investigate the allocation of the death benefit in terms of section 37C of the Pension Funds Act in respect of Mbali, considering her relationship with the deceased and the extent of her financial dependency on him, within twelve weeks from the date of the determination.<sup>497</sup> The fund was also ordered to proceed with distributing the death benefit within two weeks after completing its investigation and

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<sup>492</sup> *Nkosi v Mpumalanga Parks Board Provident Fund and Another* 2019 3 BPLR 805 (PFA) in par 5.13.

<sup>493</sup> In par 5.13, referring to *Kekana v Nedcor Defined Contributions Provident Fund* 2010 3 BPLR 295 (PFA).

<sup>494</sup> See par 2.2.1 above, where the full definition of a “dependant” in s 1 of the Pension Funds Act is provided.

<sup>495</sup> *Nkosi v Mpumalanga Parks Board Provident Fund and Another* 2019 3 BPLR 805 (PFA) in par 5.13.

<sup>496</sup> In par 5.14.

<sup>497</sup> In par 6.1.2.

provide the Adjudicator and the complainant with its report within two weeks after finalising the investigation.<sup>498</sup>

In *Zakwe and Others v Discovery Preservation Pension Fund and Another*,<sup>499</sup> following the fund member's death, a death benefit for R973 317.57 became available for distribution to the deceased's dependants and beneficiaries in terms of section 37C of the Pension Funds Act. The Adjudicator had to determine whether the fund had fettered its discretion in allocating and distributing the death benefit. The fund had indicated that if its investigation revealed potential beneficiaries (children) that were still studying, it used a specialised actuarial calculation to calculate an equitable allocation of benefits to qualifying dependants based on an age-determining factor. This calculation was used to estimate the amount that the child would need for educational expenses, taking into account his or her current age, using the maximum age of 24 as the time that an average child would need to complete his or her tertiary education. The Adjudicator was concerned about the method used by the fund — the specialised actuarial calculation — to calculate an equitable allocation to the dependants. The Adjudicator was of the view that even though she could not prescribe to the fund how it must exercise its discretion in determining an equitable distribution, the fund must guard against surrendering its vested discretion to an automated tool that might lead to an unjust and inequitable distribution.

The difficulty that pension fund trustees face is that determining whether factors are relevant or irrelevant is a subjective process, leaving too much discretion in the trustees' hands. Their decisions on the death benefit distribution are also subject to different interpretations by potential beneficiaries, the courts, and the Adjudicator. It is submitted that this combination contributes to the high number of disputes between potential beneficiaries and pension funds.

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<sup>498</sup> In pars 6.1.3 and 6.1.4.

<sup>499</sup> *Zakwe and Others v Discovery Preservation Pension Fund and Another* 2019 2 BPLR 588 (PFA).



### 3.3 Pension fund trustees to effect equitable distributions

Pension fund trustees should prioritise efforts to ensure that payment of the death benefit is efficient and that the criterion they use for granting and denying benefits to potential beneficiaries are equitable. At the same time, as with the exercise of any discretionary power, the trustees are required to exercise that power properly, act within their powers, and not unduly fetter their discretionary powers.<sup>500</sup> Essentially, pension fund trustees must consider all the relevant factors and exclude irrelevant ones from consideration.<sup>501</sup>

Sections 37C(1)(a) and 37C(1)(bA) of the Pension Funds Act state that the death benefit must be paid to dependants of the member or nominee in such proportions

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<sup>500</sup> See, for example, *Brummer v CSIR Pension Fund and Another* 2005 9 BPLR 797 (PFA) at 800. In *Morgan v SA Druggists Provident Fund and Another (1)* 2001 4 BPLR 1886 (PFA), the Adjudicator stated that equity requires that the needs of all claimants be properly weighed and considered, and all relevant considerations be taken into account (at 1886). He held that if the fund's exercise of discretion is found to be improper or irregular, the decision taken will be reviewable and will constitute maladministration of the fund causing prejudice to the beneficiaries (at 1886). The fund in *Morgan* had given primary consideration to the nomination form completed by the fund member (the deceased) while he was still alive. The Adjudicator concluded that the purpose of s 37C of the Pension Funds Act is to give preference to dependants over other potential beneficiaries. In his view, although the deceased's nomination was certainly a relevant consideration, it was secondary to the consideration of dependency. When there are needy dependants, the form should be ignored or given minimal consideration. He found that the fund did not exercise its powers properly. He set aside the decision of the fund on the grounds that its action constituted an improper exercise of powers as well as maladministration causing prejudice to the deceased's son in breach of the fund's statutory duties. In determining an appropriate remedy, the Adjudicator noted that the distribution had already been made, and he awarded damages to the complainant against the fund. He also granted an interim order to allow the parties to make recommendations pending the final order (at 1887).

<sup>501</sup> In *Gwebu v Assupol Retirement Fund and Others* (PFA/WE/1679/02/CN), the Adjudicator considered the duty of pension fund trustees to conduct diligent investigations before the allocation of death benefits. The pension fund paid out the death benefit to the sole nominated beneficiary (a paternal cousin of the deceased) without conducting any investigation into the existence of other dependants. The Adjudicator found that to be unsatisfactory, as it would have been quite easy for the pension fund to find out from the former employer whether the deceased had any possible dependants (in par 7). The Adjudicator held that in that case the fund had miserably failed to fulfil the obligation placed on it by s 37C of the Pension Funds Act to effect an equitable distribution of the death benefit (in par 7). He concluded that the fund, by not conducting a diligent investigation, had unduly fettered its discretion by simply following the wishes of the deceased (in par 8). The Adjudicator set aside the decision of the fund to award the entire insured part of the death benefit to the cousin of the deceased. The Adjudicator directed the fund to conduct a diligent investigation into the complainant's status as a dependant of the deceased, and the extent thereof, and to decide upon an equitable distribution of the death benefits. The Adjudicator also warned that if the fund should fail to act, he would substitute the trustees' decision with his and also report the matter to the relevant authorities for further investigation into their conduct (in par 12). The *Gwebu* determination is available at <https://www.pfa.org.za/Determinations/20032005/B17A748A-260A-40F9-BE6B-66BD9B08C361.pdf> (last accessed on 11 August 2021).

that the fund “*may*” deem equitable. In the two scenarios mentioned, where there are dependants (37C(1)(a)) and where there are both dependants and nominated beneficiaries (37C(1)(bA)), it is submitted that the fund is not given a choice of whether or not to make an “equitable distribution”. However, the use of the word “*may*” in the two subsections stated appears to give a discretion to the fund to decide whether it should apply equitable distribution. It is questionable, though, whether pension fund trustees would have a discretion or a choice not to make an equitable distribution. It is possible that the pension fund’s investigations may reveal that the deceased fund member had a few dependants or had a dependant or dependants and nominated beneficiaries. In this event, it is submitted that despite the use of the word “*may*”, the fund would not have a discretion not to make an equitable distribution of the death benefit. Therefore, even though section 37C of the Pension Funds Act states that the fund “*may*” make an equitable distribution, it is submitted that if the pension fund trustees were to choose not to make an equitable distribution under the stated subsections, they would infringe section 37C of the Pension Funds Act. What is important, though, is that if the trustees were to make a distribution under the two subsections without considering equity, they could run the risk of breaching their fiduciary duty to act in the best interests of the pension fund and also fail to comply with the requirements of the Pension Funds Act.<sup>502</sup> The use of the word “*may*” in these two subsections should therefore be clarified by the legislature in the interests of legal certainty.<sup>503</sup>

### 3.4 *The failure of pension fund trustees to effect equitable distributions*

Failure on the part of pension fund trustees to exercise their discretion in a manner that achieves objectively equitable results leads to many complaints against the fund by potential beneficiaries. The basis of the complaints is usually that of maladministration, breach of duties, and wrongful distribution of death benefits by the fund.<sup>504</sup> For example, in *Oosthuizen obo Breed v Mercedes Benz of South Africa*

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<sup>502</sup> These duties are prescribed to pension fund trustees by s 7C of the Pension Funds Act. Refer to par 5 below, where these duties are discussed. Section 37C of the Pension Funds Act prescribes how retirement fund death benefits must be distributed, and it is obligatory for pension fund trustees to follow these provisions.

<sup>503</sup> See Chapter 6, par 5.14 for the suggested new formulation of these two subsections, 37C(1)(a) and 37C(1)(bA) of the Pension Funds Act.

<sup>504</sup> See par 6 below, where the liability of funds and their trustees is discussed.

*Pension Fund and Another*,<sup>505</sup> pension fund trustees distributing the death benefit had awarded each dependant 50 per cent of the benefit in a “rule of thumb” approach which did not comply with the statutory duties imposed on trustees in determining the distribution of death benefits.<sup>506</sup> The complainant argued that this distribution was inequitable. The Adjudicator held that the fund had failed to exercise its discretion properly in determining the distribution of the death benefit. He substituted his own decision for that of the fund.<sup>507</sup>

### 3.5 *The lack of proper guidelines, and challenges facing pension fund trustees*

As stated in the preceding paragraphs, situations in which pension fund trustees fail to exercise their discretion properly are made worse because the Pension Funds Act does not provide any guidelines on how equitable distribution should be achieved. This situation contributes to all too many unnecessary complaints being lodged with the Adjudicator or claims being instituted in courts by dependants and nominated beneficiaries who disagree with how the fund has distributed the death benefits. David<sup>508</sup> explains that many of these claims should never have arisen or could have been easily resolved by a proper exercise of discretion on the part of the board, or a better understanding of section 37C of the Pension Funds Act by the public. She notes that the problem is that complaints arising from a proposed distribution result in the money being held back, often to the detriment of the deceased’s family. She also comments that without established and regulated guidance or directives on how they should make an equitable distribution and how they should apportion the benefit, trustees need to rely on industry best practices and value judgements to make a determination. This process can be highly subjective and is often fraught with difficulty.<sup>509</sup> These comments by David are, in my view, correct, and the Pension Funds Act and retirement fund rules must be clear about how the death benefit should be apportioned among dependants and beneficiaries if a fund member dies while still in service. Currently, the Pension Funds Act leaves this apportionment to the discretion of pension fund trustees. This

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<sup>505</sup> *Oosthuizen obo Breed v Mercedes Benz of South Africa Pension Fund and Another (2)* 2000 11 BPLR 1284 (PFA).

<sup>506</sup> At 1284.

<sup>507</sup> At 1284.

<sup>508</sup> See David *Onus* (also cited in Chapter 2, par 2.2, n 26).

<sup>509</sup> David *Onus*.

situation is unfair, creating uncertainties for members, dependants, beneficiaries, and pension fund trustees. The Pension Funds Act and fund rules should specify the scope and limitation of pension fund trustees' discretion and thus clarify the position for members. The fund rules should follow applicable laws, including section 37C of the Act. As a result, the need for clarity and precision in the provisions of section 37C cannot be overemphasised.

The lack of proper guidelines to what constitutes an "equitable allocation" contributes to the uncertainties for pension fund trustees, dependants, and nominated beneficiaries about identifying the beneficiaries and the amount they should receive on the fund member's death.<sup>510</sup> This lack also contributes to the unpredictability of the outcome of the Pension Funds Adjudicator's determinations and courts' decisions in matters relating to the distribution of death benefits in terms of section 37C of the Act. And it makes it difficult for pension fund trustees to decide, as they cannot second-guess or predict the views of the courts and the Adjudicator in these matters. This situation delays the distribution of the death benefit, as pension fund trustees may have to approach the courts and the Adjudicator for guidance on the correctness of their distributions. It may also require the funds to seek costly opinions from lawyers before distributing benefits.<sup>511</sup> The current position thus does not promote legal certainty and the timely allocation of death benefits to the dependants and nominated beneficiaries.

Several court decisions and Adjudicator's determinations have indicated the approach to interpreting the law in cases on the pension fund trustees' duty to investigate and to make equitable allocations.<sup>512</sup> Despite the guidance, the high

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<sup>510</sup> See above, par 3.3, discussing equitable allocations and the associated challenges. Worse still, the definition of a "dependant", especially in terms of s 1(b)(ii) of the Pension Funds Act, is so wide that it broadens the scope of potential beneficiaries to include any person who may prove that he or she receives any form of support from the fund member when this member was still alive. It is submitted that some of these people that may qualify as dependants could be persons that the fund member while he or she was still alive neither had any obligation to maintain nor ever imagined being compelled to maintain.

<sup>511</sup> This may not be necessary where the law is clear on how the death benefit should be allocated and potential beneficiaries are clearly identifiable.

<sup>512</sup> See par 3.2 above, where these guidelines or criteria to determine equitable distribution were discussed. In *Stacey v Old Mutual Protektor Preservation Pension Fund and Others* (PFA/GA/1681/03/Z/CN) the Adjudicator endorsed the view that where the fund has no conclusive evidence of dependency, that should encourage the fund to investigate the situation more thoroughly. Where it does not appear as if the fund conducted a diligent investigation of material factors which are highly relevant in deciding on an equitable distribution, this failure

number of disputes before the courts and the Adjudicator and the distributions that the Adjudicator and the courts often set aside or send back to pension fund trustees for reconsideration<sup>513</sup> suggests that the legal position is not as certain as it should be.<sup>514</sup> It is submitted that clarity is required in the legislation since the current arrangement almost implies decision-making at a philosophical level.<sup>515</sup>

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*prima facie* points towards a failure to effect an equitable distribution of the death benefit. In *Stacey*, the Adjudicator commented that where the fund's investigation falls short of the required standard of diligence, the pension funds would be ordered to set aside the distribution of the death benefit and conduct a proper investigation in accordance with the guidelines and to effect an equitable distribution. The determination is available: <https://www.pfa.org.za/Determinations/20032005/B5B50F0D-4A0E-471C-8E89-AE650ABC31A5.pdf> (accessed 25 December 2020). See also in this regard *Mothudi v Old Mutual Staff Retirement Fund* 2002 12 BPLR 4180 (PFA) (also cited in n 137 above); *Robinson v Central Retirement Annuity Fund and Another (2)* 2001 10 BPLR 2628 (PFA); and *Calitz v Central Retirement Annuity Fund and Another* 2005 4 BPLR 302 (PFA), where the Adjudicator set aside the decisions of the funds to award death benefits to particular "dependants" on the grounds that the funds had taken these decisions without making proper investigations. In *Modise v Central Retirement Annuity Fund and Others* (PFA/GA/3391/01/CN), the trustees of the fund excluded the complainant from the distribution that formed the basis of the complaint. The Adjudicator concluded that the correspondence received from the underwriter and administrator of the fund indicated that very little if any independent investigation into the circle of the deceased's dependants was undertaken. As a result of that, the Adjudicator found that the fund did not effect an equitable distribution of the death benefit, and the Adjudicator set aside the decision of the fund. The *Modise* determination is available at <https://www.pfa.org.za/Determinations/20032005/6A5C21EB-8AF2-4D06-AF02-3C5094534328.pdf> (last accessed on 11 August 2021). In *Maake v Old Mutual Superfund Provident Fund and Another* (PFA/LP/00001145/2012/TKM), the trustees allocated a death benefit to a supposed "customary wife" and her children without verifying or investigating the correctness of the claim of dependency. The trustees had considered the customary wife without establishing the existence of the alleged marriage and whether she was in fact a dependant of the deceased fund member. The trustees had also considered three children of the "customary wife" as dependants without any supporting evidence but on the strength of an emergency form purportedly signed by the deceased fund member six years before his death. The Adjudicator noted that had the trustees not allocated the death benefit to the alleged "customary wife" and her children, there would have been enough money to allocate to the true dependants (in par 5.17). She found that the trustees had not exercised their duties properly (in par 5.17) and set aside the distribution and instructed the fund to place the true dependants in the financial position that they would have been in but for the incorrect distribution (in pars 5.17 and 6). See <https://www.pfa.org.za/Determinations/20122014/Maake%20MJ.pdf> (last accessed on 30 June 2021). See also *Skhosana v Amplats Mines Retirement Fund and Another* 2019 2 BPLR 545 (PFA), discussed below under par 5.3.1, dealing with the duty of care, diligence, and skill. In *Skhosana*, the fund had allocated a portion of the death benefit (30 per cent) to the supposed deceased's father whose name was unknown to the fund and there was also no proof that he was dependent on the deceased at the time of his death.

<sup>513</sup> See, for example, *Guarnieri v Fundsatwork Umbrella Pension Fund* 2018 JDR 0740 (GP); and *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019), as well as the determinations discussed above in par 2, where the courts and the Adjudicator set aside funds' decisions.

<sup>514</sup> See Chapter 1, n 11 for statistics.

<sup>515</sup> For example, if a similar set of facts is given to two different pension fund boards to make a death benefit distribution, there is no guarantee, or it is highly unlikely, that the two boards will distribute the death benefit in the same manner. Furthermore, even if the names of parties in the first scenario are changed and the same pension fund board is asked to re-exercise the discretion, there is no guarantee that this board will distribute the death benefits in the same

### 3.6 The meaning of the term “equitable” distribution of death benefits

The term “equitable” distribution is not defined in the Pension Funds Act and is open to a wide variety of interpretations; it can denote fairness and justice. The word “equitable” is often defined in dictionaries as meaning, among other things, the body of principles constituting what is fair and right; or recourse to principles of justice to correct or supplement the law as applied in particular circumstances.<sup>516</sup> The two principles (fair and right) are often used together in a phrase such as “fair and equitable” or “just and equitable”.<sup>517</sup> For example, section 172(1)(b) of the Constitution provides that when deciding a constitutional matter within its power, a court may make an order that is “just and equitable”.<sup>518</sup>

The principles that govern the actions of a person who holds a position of trust towards another were adopted in South Africa from the equitable remedies of the English law.<sup>519</sup> It is important to note that in England, the judges of the Equity Courts used their discretion to interpret the meaning of “equity” and determine equitable remedies.<sup>520</sup> Now pension fund trustees in South Africa must make an equitable distribution of death benefits considering the circumstances of individual cases or situations. The level of understanding of laws and principles applicable to equity by judges in England contrasts with that of most pension fund trustees in South Africa.<sup>521</sup> This thesis has already alluded to the questionable competency of some pension fund trustees in South Africa.<sup>522</sup> It is also interesting to note that the statutory provisions and the *lump sum death benefit distribution rule* in the United Kingdom are silent on requiring or do not expressly require trustees to distribute the

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way. This example is to illustrate that the discretion of the boards is sometimes exercised in a philosophical manner.

<sup>516</sup> Bolton *Regulation* at 95.

<sup>517</sup> Bolton *Regulation* at 95.

<sup>518</sup> Bolton *Regulation* at 95.

<sup>519</sup> See in this regard *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 1 All SA 150 (SCA) in par 30.

<sup>520</sup> See in this regard Akehurst 1976 *ICLQ* 801.

<sup>521</sup> In the United Kingdom, most judicial posts require a relevant legal qualification that has been held for either five or seven years. See in this regard Courts and Tribunals Judiciary “Becoming a Judge” available at <https://www.judiciary.uk/about-the-judiciary/judges-career-paths/becoming-a-judge/> (last accessed on 12 August 2021).

<sup>522</sup> See Chapter 2, par 6.4, where the appointment and competence of pension fund trustees in South Africa are discussed.

lump sum death benefits in an equitable manner.<sup>523</sup> It becomes doubtful whether the rules of equity as applied in England can assist pension fund trustees in South Africa to interpret and apply the term “equitable distribution” in the context of retirement fund death benefits.<sup>524</sup>

The reason for pension fund trustees to make an equitable distribution is that the dynamics of a fund member’s family and/or relationships may be so diverse that it is impossible to make any general law or rule that will apply in all circumstances and not fail in some situations.<sup>525</sup> Equitable distribution is meant to correct this situation. The challenge to pension fund trustees, fund members, and their dependants and nominated beneficiaries is that it is not easy to answer the question of what exactly should be understood under equitable distribution or what the discretionary powers of pension fund trustees entail. As stated above, these terms are not defined in the Pension Funds Act. The problem with the term “equitable” as provided for in the Act is that it is difficult to predict with certainty how pension fund trustees will exercise their discretion to distribute the death benefits in an equitable manner. It is submitted that the question should not only be about whether pension fund trustees act fairly in applying the law and in defining the meaning of equitable distribution. It should also be whether the law itself, here section 37C, in identifying potential recipients of the death benefit, is fair in its rationale, reach, and impact. And even more importantly, the question should be whether section 37C, as it is, is aligned to its stated purpose and to the State’s objectives in the establishment of occupational retirement funds.

The sources of pension fund trustees’ powers are discussed below.

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<sup>523</sup> See Chapter 4, par 5 for a discussion of the United Kingdom laws in this regard.

<sup>524</sup> The Pension Funds Act has recently conferred “equity” powers or jurisdiction on the Pension Funds Adjudicator in South Africa. Section 30D(2)(a) of the Pension Funds Act provides that the Adjudicator in disposing of complaints must now apply principles of equity, where appropriate. The equitable jurisdiction of the Adjudicator was added by the FSRA in 2017. This power relates to equity remedies that the Adjudicator can now award to complainants. Equitable distribution in so far as it relates to s 37C of the Pension Funds Act is about the discretionary powers that the pension fund trustees have in distributing death benefits.

<sup>525</sup> See also Le Roux *Benefits* at 5, where the author is of the opinion that the reason the term “equitable” is not defined in the Pension Funds Act is that the legislature has seen fit to defer to the board and not impose requirements which might not fit every situation that a board will probably face in its deliberations. See also the preamble to PF 130 in par 1, which states that a pension fund board may be required to act with a degree of discretion in making decisions and therefore not all circumstances may be circumscribed or clearly defined within a legal framework.

#### 4 THE SOURCES OF PENSION FUND TRUSTEES' DISCRETIONARY POWERS IN DISTRIBUTING DEATH BENEFITS

Section 7C(1) of the Pension Funds Act vests pension fund trustees with powers to direct, control, and oversee the operations of a fund according to the applicable laws and rules of the fund.<sup>526</sup> These powers capacitate the trustees to execute the mandate of helping the State realise its objectives for establishing retirement funds.<sup>527</sup> Here the discussion focuses on the trustees' discretionary powers in distributing death benefits. The extent and scope of these powers are determined by the rules of the particular pension fund,<sup>528</sup> the relevant statutes,<sup>529</sup> and, in so far as it may be necessary, the common law.<sup>530</sup> So it is important that in distributing death benefits, pension fund trustees must act in accordance with their retirement fund rules as far as these comply with the law generally and the Pension Funds Act<sup>531</sup> and the Constitution specifically. These trustees should also be aware of the provisions of the Constitution so as not to infringe any of the fundamental rights it protects.<sup>532</sup>

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<sup>526</sup> Pension fund trustees are bound to do what is contained in the fund rules. See in this regard s 13 of the Pension Funds Act; *Tek Corporation Provident Fund and Others v Lorentz* 2000 3 BPLR 227 (SCA) at 239; and *Sauermann v Quantum Elite Group Pension Fund* 2012 3 BPLR 343 (PFA) in par 5.6.

<sup>527</sup> See Chapter 1, par 2.4 for a discussion of the objectives of retirement funds.

<sup>528</sup> Section 37C(1) of the Pension Funds Act confirms the supremacy of the Pension Funds Act over pension fund rules or any other laws on the distribution of death benefits. It begins: "Notwithstanding anything to the contrary in any law or in the rules of a registered fund...". See par 1 above for the full provisions of s 37C of the Pension Funds Act. See *Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd* 2022 JDR 0467 (GJ), where the supremacy of s 37C of the Pension Funds Act is also canvassed.

<sup>529</sup> See par 4.1 below for a brief discussion of various statutes that apply to pension fund trustees when they distribute the death benefits.

<sup>530</sup> In *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA), the Supreme Court of Appeal confirmed that at common law, trustees must act in the best interests of the fund. This duty precludes them from exercising their discretion to promote their own interests or the interests of third parties, such as the contributing employer. See *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ) in par 9, where the High Court also confirmed that in a pension fund, the powers and duties of its trustees and the rights and obligations of its members and the employer are governed by the rules of the fund, the relevant legislation, and the common law.

<sup>531</sup> Section 13 of the Pension Funds Act confirms the binding force of the fund rules. Section 37C of the Pension Funds Act restricts pension fund trustees from formulating rules that are contrary to its provisions. See in this regard s 37C(1) of the Pension Funds Act. In *Hattingh and Others v Hattingh and Others* 2003 4 BPLR 4539 (PFA), the definition of a "dependant" in the fund's rules did not correspond with the definition of a "dependant" in s 1 of the Pension Funds Act (at 4539). The Adjudicator held that where there is conflict between a provision of the rules of a fund and those of the Pension Funds Act, the provisions of the Act prevail (at 4539).

<sup>532</sup> See par 4.3 below, where the Constitution is discussed.



#### 4.1 Statutes

Some of the key South African statutes applicable to pension fund trustees when they are distributing death benefits are as follows:

- the Pension Funds Act,
- the Financial Sector Regulation Act 9 of 2017,
- the Financial Institutions (Protection of Funds) Act 28 of 2001,
- the Financial Advisory and Intermediary Services Act 37 of 2002, and
- the Constitution.

The relevant provisions of these statutes that deal with the distribution of death benefits are explored below.<sup>533</sup>

#### 4.2 The common law

The Pension Funds Act, the Financial Institutions (Protection of Funds) Act, and the other statutes listed in the preceding paragraph do not constitute a complete codification of the law that applies to pension fund trustees when distributing death benefits.<sup>534</sup> Common-law principles relating to trusts and fiduciary obligations should always be seen as the wider backdrop.<sup>535</sup> Section 8(3)(a) of the Constitution states that when applying a provision of the Bill of Rights to a natural person or juristic person in terms of subsection (2) in order to give effect to a right in the Bill, a court must apply or if necessary develop the common law to the extent that

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<sup>533</sup> See pars 2 and 3 above, discussing s 37C of the Pension Funds Act, and par 5 below, discussing other statutes that apply to the distribution of death benefits.

<sup>534</sup> See par 5.5 below, where the effect of the codification of duties is discussed; and Davis *et al Companies* at 139, stating that “a distinction should be drawn between complete codification and partial codification. Complete codification entails the creation of a finite body of rigid rules. Complete codification cannot accommodate an environment that keeps changing, because in a complete codified system, if a specific rule does not prohibit a particular action, that action is permissible simply because it is not specifically prohibited. In other words, in a completely codified system there is no room for application of a legal principle, only the application of a specific rules. Partial codification, however, entails adopting the general principles of law, which allows some room for the development of the common law by the application of legal principles”.

<sup>535</sup> See Dewar *et al Practical Guide* at 124-125, where the relevancy of the common law in pension fund matters is also discussed.

legislation does not give effect to that right. The Bill of Rights and the Constitution apply to retirement funds and their trustees.<sup>536</sup>

#### 4.3 *The Constitution*

The Pension Funds Act and retirement fund rules must be consistent with the provisions of the Constitution and the principles of equality and fairness that it enshrines, as well as any other provisions of relevant statutes.<sup>537</sup> Pension fund trustees have to bear the importance of the Constitution in mind in their conduct and administration of the fund: the distribution of death benefits to beneficiaries and retirement fund rules must be interpreted in accordance with the spirit, purport, and objectives of the Bill of Rights.<sup>538</sup> Court decisions and determinations of the Adjudicator indicate instances when pension fund trustees seem to fail to incorporate the spirit of the Constitution when distributing death benefits.<sup>539</sup> It is acknowledged that pension fund trustees and their fund administrators cannot take the law into their own hands and make payments contrary to the rules and the law.<sup>540</sup>

The Constitution confers basic rights on every person, rights governed by the Bill of Rights. The Bill of Rights constitutes a cornerstone of democracy in South Africa. It

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<sup>536</sup> The Bill of Rights binds a natural or a juristic person (including a retirement fund) if and to the extent that it applies, considering the nature of any duty imposed by the right. In Chapter 2, pars 4.3 and 5, it is argued that retirement fund death benefits are a component of social security and qualify as a right to property which is protected by the Constitution. The right to property and the right to have access to social security form part of the socio-economic rights that are protected by the Bill of Rights. See in this regard *Manzini v Metro Group Retirement Funds and Another (1)* 2001 12 BPLR 2808 (PFA) at 2820, par 51.

<sup>537</sup> Section 9 of the Constitution deals with equality. For example, *Wiese v GEPE and Others* 2011 4 All SA 280 (WCC), where the constitutionality of a provision of the Government Employees Pension Law 21 of 1996 was challenged as being contrary to the equality clause of the Constitution. Under the relevant provision, the non-member spouse's benefit would be frozen on the divorce until any pension benefit accrued to the member spouse. This provision differed from a counterpart under the Pension Funds Act, where non-member spouses were afforded rights to access their allocated pension interest at the time the divorce order was granted. In 2011, Parliament passed the Government Employees Pension Law Amendment Act 19 of 2011 to cure the defects in the Government Employees Pension Law.

<sup>538</sup> Section 39(2) of the Constitution. See also Chapter 2, n 30 in this regard.

<sup>539</sup> See this chapter for a discussion of some cases in which the boards were considered not to have upheld the provisions of the Constitution.

<sup>540</sup> See *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ) in par 27, where the High Court emphasised this point by stating that pension fund trustees are not there to dispense largesse on behalf of the fund. On the contrary, they occupy a strict fiduciary position and are bound strictly to apply the rules of their funds and the provisions of the Pension Funds Act when taking decisions.

enshrines the rights of all people in the country and affirms the democratic values of human dignity, equality, and freedom.<sup>541</sup> The Constitution regulates the relationship between citizens, corporations, the State, and bodies performing public duties, including retirement funds, and so the Constitution has fundamental implications for the distribution of death benefits. Two examples of its sections that directly or indirectly influence how death benefits are distributed are sections 9<sup>542</sup> and 28 of the Constitution. Section 9 is the equality clause,<sup>543</sup> and section 28(2) deals with the paramount importance of a child's best interest in every matter concerning a child, including the right to maintenance from a pension benefit.<sup>544</sup> Section 27(1)(c) of the Constitution protects the right of all persons to access social security and appropriate social assistance if they are unable to support themselves and their dependants.<sup>545</sup> The discussion above on retirement funds and the Constitution cements these principles about retirement fund death benefits:

- they play a vital role in the provision of social security,<sup>546</sup> and

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<sup>541</sup> See in this regard s 7(1) of the Constitution.

<sup>542</sup> On the right to equality in s 9 of the 1996 Constitution, see generally Albertyn *Equality*; Albertyn and Goldblatt *Equality*; and Currie and De Waal *Bill of Rights* Chapter 9. See, for example, in *Hoffman v South African Airways* 2000 12 BLLR 1365 (CC) in par 72, where the Constitutional Court interpreted the meaning of "unfair discrimination" in terms of s 9 of the Constitution in the context where the employer refused to employ the applicant because he was HIV-positive.

<sup>543</sup> The Constitution must be the basis of the laws and principles that are considered by pension fund trustees when distributing death benefits and trustees are bound to comply with its provisions when distributing death benefits to fund members' dependants and nominated beneficiaries. Before the promulgation of the Constitution, pension fund trustees in distributing retirement benefits considered other factors now regarded as discriminatory in terms of the Constitution, such as the strict definition of the meaning of the words "dependant" or "spouse". Trustees are obliged not to unfairly discriminate dependants and nominated beneficiaries on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. See s 9(3) of the Constitution.

<sup>544</sup> On the rights of children under s 28 of the 1996 Constitution, see generally Sloth-Nielsen *Children*; Friedman, Pantazis and Skelton *Children's Rights*; and Currie and De Waal *Bill of Rights* Chapter 27. See, for example, *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) in par 1. *Bannatyne* is also cited at n 430 above.

<sup>545</sup> On the rights to access social security and social assistance under s 27(1)(c) of the 1996 Constitution, see generally Van Bueren *Health and Social Security*; Swart *Social Security*; and Currie and De Waal *Bill of Rights* Chapter 27. See also Mpedi 2014 *De Jure* 47, discussing *Malatji v Gauteng Building Industry Provident Fund and Others* (PFA/NP/9447/2011/PM) at 8, where he states that social security is a human right protected by the Constitution and that this right is crucial in assisting individuals and their families to enjoy other fundamental rights such as human dignity under s 10 of the Constitution, and life under s 11 of the Constitution. See [https://www.pfa.org.za/Determinations/20122014/MALATJI%20M%20S%20\(2\).pdf](https://www.pfa.org.za/Determinations/20122014/MALATJI%20M%20S%20(2).pdf) (accessed on 21 August 2021).

<sup>546</sup> See Chapter 2, par 5, where the notion of "social security" is discussed.

- pension fund trustees must follow the principles enshrined in the Constitution when exercising their discretion in distributing retirement fund death benefits.<sup>547</sup>

#### 4.4 The rules of pension funds

##### 4.4.1 Pension fund constitutions

The rules of a retirement fund are crucial for its functioning, as they amount to its constitution.<sup>548</sup> The rules, and any changes to the rules, must be registered by the FSCA.<sup>549</sup> These rules are binding on the fund itself, its board, its members, the employer who participates in the fund, and any person who claims under the rules or whose claim derives from a person so claiming.<sup>550</sup> Pension fund trustees must distribute the death benefits in terms of the Pension Funds Act and their pension fund's rules, and so they should be familiar with everything contained in those rules.<sup>551</sup> The rules are subject to the Pension Funds Act, which prevails in a conflict between them.<sup>552</sup> So the rules must not contravene the Act or any other legislation,

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<sup>547</sup> See par 1 above, where the supremacy of the Constitution is discussed. See also Currie and De Waal *Bill of Rights* at 9 (also cited in Chapter 2, n 135), where the authors discussed the supremacy of the Constitution in South Africa.

<sup>548</sup> See in this regard, *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) at 78; *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ) in par 9; and *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA) in par 30. See also par 1 above; and s 37C(1) of the Pension Funds Act, confirming that a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund must be dealt with in terms of pension fund rules.

<sup>549</sup> Section 12 of the Pension Funds Act regulates the amendment of fund rules. Regulation 30 of the Pension Funds Act deals with the rules and their amendments and prescribes what should be in the rules.

<sup>550</sup> See s 13 of the Pension Funds Act in this regard, confirming the binding force of pension fund rules. In *Baloyi v South African Transport and Allied Workers Union National Provident Fund and Others* 2016 2 BPLR 190 (PFA) at 191, the Adjudicator confirmed that the rules of a fund are supreme and binding on its officials, members, shareholders, and beneficiaries, and anyone so claiming from the fund. Once an employee becomes a member of a retirement fund, this member is bound by the rules of this retirement fund. See also in this regard *Tek Corporation Provident Fund and Others v Lorentz* 2000 3 BPLR 227 (SCA) at 239.

<sup>551</sup> The fund's most important document is its rules. All appraisals of the trustees' behaviour and appropriate management of the fund are conducted in terms of its rules. The courts, the Pension Funds Adjudicator, and the FSCA all use the fund's rules to determine whether the trustees acted within their powers, in other words, *intra vires* and not *ultra vires*. See in this regard Downie *Essentials* at 71 and 72. The *ultra vires* principle is discussed below in par 4.4.2.

<sup>552</sup> See in this regard, s 37C(1) and s 7D(1)(f) of the Pension Funds Act, as well as the determinations of *ABT v Nedcor Defined Contribution Provident Fund/Nedbank Group Limited/Old Mutual* (PFA/GA/1016/2005/LCM) and *Sesedi v Sentinel Retirement Fund* 2019 3 BPLR 850 (PFA) in par 5.7, referring to *Group of Concerned SAPREF Pensioners v SAPREF Pension Fund and Others* 2000 1 BPLR 44 (PFA). The *ABT* determination is available at <https://www.pfa.org.za/Determinations/20062008/45B3BA52-C098-4523-A09A->

including the Constitution.<sup>553</sup> Pension fund trustees are required to monitor their fund rules constantly so that they are amended to comply with new applicable laws where necessary.<sup>554</sup> The fund rules are indispensable for establishing any entitlement to a death benefit.<sup>555</sup>

#### 4.4.2 *Ultra vires*

It is an established principle that any act done by the pension fund trustees which conflicts with the pension fund rules, including the distribution of a death benefit, is *ultra vires* and null and void.<sup>556</sup> This means that in exercising their discretion to distribute death benefits, pension fund trustees are required to act only within the powers conferred on them by the fund rules.<sup>557</sup> The *ultra vires* principle applies to

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ECDD74254283.pdf (last accessed on 12 August 2021).

<sup>553</sup> Pension Funds Regulation 30(2) states that the rules of a pension fund should not be inconsistent with the Pension Funds Act and the Regulations. The Regulations contain several provisions dealing with the rules of a fund and prescribing what the rules should contain. In *Sesedi v Sentinel Retirement Fund* 2019 3 BPLR 850 (PFA), the Adjudicator found that rules which conflict with the Pension Funds Act can be declared invalid (in par 5.7).

<sup>554</sup> Section 7D(1)(f) of the Pension Funds Act provides that there is a duty on pension fund trustees to ensure that the rules of the fund comply with the Pension Funds Act. It reads: "The duties of a board shall be to— ... ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act, 2001 (Act No 28 of 2001), and all other applicable laws". Hunter *et al Pension Funds Act* at 59 state that the rules of a pension fund are the main source of rights and obligations that regulate the relationship between funds and their members. See also in this regard *Chemical Industries National Provident Fund v Sasol Ltd and Others* 2014 4 SA 205 (GJ) in which the court in par 30 referred to the statement by Hunter *et al* with approval.

<sup>555</sup> See in this regard *Mntseu v Mineworkers Provident Fund* 2005 4 BPLR 339 (PFA) at 341 in par 8.

<sup>556</sup> See in this regard *Johannesburg Municipal Pension Fund and Another v NBC Employee Benefits and Another* (74/01) 2001 ZAGPHC 2 (11 April 2001) at 13; and *Chemical Industries National Provident Fund v Sasol Ltd and Others* 2014 4 SA 205 (GJ) in pars 30 and 43.

<sup>557</sup> See in this regard *Tek Corporation Provident Fund and Others v Lorentz* 2000 3 BPLR 227 (SCA); and Hanekom *Manual* at 89. The importance of fund rules is also seen in the definition of a "complaint" in the Pension Funds Act. Section 1 of the Pension Funds Act defines a "complaint" to mean

"a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging-

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant".

retirement funds and their trustees.<sup>558</sup> It is essential that pension fund trustees understand both the extent and limits of their powers when distributing death benefits so that they avoid liability for their funds and themselves personally.<sup>559</sup>

#### 4.5 Case law, Pension Funds Adjudicator's determinations, FSCA Tribunal directives

Case law, Pension Funds Adjudicator's determinations, and FSCA Tribunal directives play a role in guiding trustees to understand some of their powers including that which include the distribution of death benefits. The differences between case law, Pension Funds Adjudicator's determinations, and the FSCA Tribunal directives are that case law is binding, especially the decisions of High Courts, the Supreme Court of Appeal, and the Constitutional Court, whereas the determinations of the Adjudicator and the directives of the FSCA Tribunal do not create binding precedent. Even though the determinations of the Adjudicator do not create binding precedent, that does not mean that they are irrelevant. They do

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The definition of a "complaint" contains issues similar to the elements of a delict. See par 6.5.2.1 below, where the elements of delict are discussed.

<sup>558</sup> In *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 13, where the trustees had deducted money from a death benefit to pay for funeral expenses, the Adjudicator held that s 37D of the Pension Funds Act does not permit the fund to deduct funeral expenses from the death benefit. Such a claim would lie against the deceased's estate. The Adjudicator found that the payment conflicted with s 37C of the Pension Funds Act and was thus unlawful. This amount that was paid for funeral expenses should have formed part of the death benefit distribution to dependants and nominees. See in this regard s 13 of the Pension Funds Act; *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) at 79; and *Chairman of the Board of Sanlam Pensioenfondse (Kantoorpersoneel) v Registrar of Pension Funds* 2007 3 SA 41 (T). See, for example, *Gravett v Allianz Pension Fund* 2002 11 BPLR 4033 (PFA), where the Adjudicator held that the payment of any benefit by a pension fund is regulated by the rules of the fund, and any conditions or options associated with the benefit also must be authorised by the rules. Conduct by trustees which is not authorised by the rules is *ultra vires*. It is incorrect to assume that if something is not specifically prohibited by the rules, it is permissible (at 4033).

<sup>559</sup> In *Lamparelli and Another v Eskom Pension Fund* 2002 2 BPLR 3087 (PFA) in par 10, the court noted that the courts have consistently held that unless the conduct of the board of a fund is authorised by the rules of the fund, this conduct will be *ultra vires*, as with any other corporate entity. See also in this regard *Chemical Industries National Provident Fund v Sasol Limited and Others* 2014 4 SA 205 (GJ) in par 32, where the Gauteng High Court referred to *Lamparelli* with approval. Sasol took the judgment of *Chemical Industries National Provident Fund v Sasol Limited and Others* on appeal, where the Supreme Court of Appeal confirmed the decision of the court *a quo* and dismissed the appeal. The judgment of the Supreme Court of Appeal is reported as *Sasol Limited and Others v Chemical Industries National Provident Fund* 2015 JOL 33910 (SCA). *ABSA Bank Ltd v SACCAWU National Provident Fund (under curatorship)* 2012 1 All SA 121 (SCA) involved the conduct of a principal officer instead of pension fund trustees. The Supreme Court of Appeal held that the rental agreements for office equipment signed only by the principal officer were invalid because the rules of the fund required a meeting of trustees and the contract to be signed by three trustees. Although the conduct of the principal officer of the provident fund was the matter, the decision still shows the importance of compliance with pension fund rules in administering pension fund matters and that failure to comply can lead to the particular act being considered *ultra vires* and thus unenforceable.

provide guidance to trustees on how to exercise their discretion to distribute death benefits.<sup>560</sup>

The discussion above has highlighted various sources, such as the common law, legislation, the Constitution, and the rules of retirement funds, which equip pension fund trustees with the powers to administer the business of their pension funds, including the distribution of death benefits. The ultimate source of pension fund trustees' power to distribute death benefits is section 37C of the Pension Funds Act, prescribing how the trustees should allocate death benefits to dependants and/or nominees of the deceased fund member. The trustees are also guided by retirement fund rules, the Constitution, the common law, and other applicable legislation. However, in exercising their power to decide on the allocation of the death benefit among the deceased member's dependants and nominated beneficiaries, the trustees are not entitled to fetter their discretion by referring to any rules of the fund

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<sup>560</sup> See, for example, *Sithole v ICS Provident Fund and Another* 2000 4 BPLR 430 (PFA) in pars 24 and 25, where the Adjudicator listed factors that the board has to consider when making an "equitable distribution" among the dependants. These factors were also reiterated in *Brummer v CSIR Pension Fund and Another* 2005 9 BPLR 797 (PFA); *Koekemoer v Macsteel Group Retirement Plan and Others* 2004 2 BPLR 5465 (PFA); and *Nel v Netcare 1999 Pension Fund and Another* (PFA/GP/00027413/2016/YVT) in par 5.4. See also Khumalo *Jurisprudential Role*, discussing in detail the jurisprudential role played by the Adjudicator.

or any common law, customary law,<sup>561</sup> or legislative provisions inconsistent with section 37C of the Pension Funds Act.<sup>562</sup>

It is submitted that the effectiveness and efficiency of section 37C of the Pension Funds Act in achieving the objectives of the establishment of retirement funds depend on the role of pension fund trustees in exercising their duty of satisfactorily distributing death benefits. These trustees are granted discretionary powers to distribute death benefits under section 37C of the Act because the legislature trusted

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<sup>561</sup> In *Sithole v ICS Provident Fund and Another* 2000 4 BPLR 430 (PFA), the Pension Funds Adjudicator set aside the fund's decision because it relied on customary law instead of s 37C of the Pension Funds Act to distribute the death benefit, and he ruled that s 37C specifically takes precedence over any law, which includes customary law. The Adjudicator held that the decision of the fund was flawed because it in effect made payment based on the system of customary law rather than s 37C of the Pension Funds Act (at 437). He found that s 37C overrides the law of succession in all its forms, and if the right of testation of those subject to Roman-Dutch law can be modified by s 37C, there can be no objection to the statute doing likewise in relation to customary law. There is no reason in law why the provisions of customary law should override the will of Parliament as expressed in s 37C (at 437). The Adjudicator also held that the law is clear that the distribution of a death benefit should be done in terms of s 37C of the Pension Funds Act, and where the fund had substituted the provision with customary law, this was an error in law which rendered its decision unlawful (at 437). He held that the incorrect exercise of the discretion by the trustees through their misreading of the Pension Funds Act amounted to an improper exercise of power or maladministration of the fund by the trustees. As a result of this, the complainant and her children had sustained prejudice. He held that the liability of the fund in this matter was analogous to delictual liability, in that the fund or its trustees had wrongfully and negligently exercised a discretion in a way that caused harm to the complainant. Had the delict not occurred, the complainant and the children would have received the entire benefit or a substantial portion of it. The appropriate relief for the complainant and her three minor children was to put them back in the position they would have been in had the delict not been committed (at 437). He stated that in so far as the fund was a defined contribution fund and claimed to have had no reserves to pay the benefit, the fund did have certain remedies. It could bring an action to recover the moneys from the grandmother under the principles of unjustified enrichment. Alternatively, the fund had a remedy under s 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984, in terms of which the trustees could be held personally liable (at 438). The Adjudicator held that in terms of s 2(a) of the Financial Institutions (Investment of Funds) Act, any person who administers any funds of the financial institution must observe the utmost good faith and exercise proper care and diligence. The trustees in *Sithole* who had made the decision on the distribution had failed to exercise proper care and diligence in doing so. As a result, they could have breached their statutory duties and be held personally liable for any damages suffered by the fund or a beneficiary of the fund. In summary, then, the fund could recover the moneys from the relevant trustees or the person (the grandmother) who was incorrectly paid the benefit to the extent to which she was unjustifiably enriched. Therefore, the remaining members of the fund ultimately would not bear the liability of the order made by the Adjudicator (at 439). The *Sithole* determination confirms that there are certain instances (such as when the fund is a defined contribution fund) in which if the boards make a wrongful distribution, their funds may not have reserves to put the claimants into the position that they would have been in but for the negligence of the trustees, unless insurance or fidelity covers the matter. Even the costs of pursuing other recipients of a wrongful benefit impoverish the fund; similarly, the costs of paying fidelity insurance and professional insurance also impoverish the fund: hence the emphasis on compliance with the required duties as well as the rules of the fund and more importantly s 37C of the Pension Funds Act to avoid all these unnecessary costs.

<sup>562</sup> See in this regard also Hunter *et al Pension Funds Act* at 683.



them to exercise their discretion properly. This discretionary power is susceptible to abuse by the trustees. Their fiduciary obligation to their pension funds, fund members, dependants, and nominated beneficiaries is “the law’s blunt tool of the control” of the trustees’ discretionary powers.<sup>563</sup> The fiduciary obligations of pension fund trustees comprise a specific set of duties under the common law and statutory law: and these duties are now discussed below.

## **5 THE DUTIES OF PENSION FUND TRUSTEES CONCERNING THE DISTRIBUTION OF DEATH BENEFITS**

### *5.1 The duties of pension fund trustees*

The powers to distribute retirement fund death benefits conferred on pension fund trustees by section 37C of the Pension Funds Act were discussed in the preceding paragraphs.<sup>564</sup> In addition to these specific powers, trustees have a range of duties that derive from various sources, including the Pension Funds Act, the Financial Institutions (Protection of Funds) Act 28 of 2001, the Constitution of the Republic of South Africa, 1996, the rules of retirement funds, and the common law. Trustees’ discretionary powers over the distribution of death benefits are subject to these duties.<sup>565</sup>

Various duties apply to pension fund trustees when they exercise their discretionary powers in distributing death benefits in accordance with section 37C of the Pension Funds Act and other applicable laws.<sup>566</sup> These trustees must comply with the duty of care, skill and diligence, and with the fiduciary obligations as provided in the common law<sup>567</sup> and statutory provisions when the trustees distribute death benefits

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<sup>563</sup> See also in this regard Flannigan 1989 *Oxf J Leg Stud* 285 at 307, referring to Weinrib 1975 *UTLJ* 1 at 7.

<sup>564</sup> See Chapter 2 par 5.2; and above in par 3.

<sup>565</sup> Pension fund trustees must ensure that they properly understand the provisions of s 37C of the Pension Funds Act, as well as what their duties entail, as non-compliance may lead to fund liability and to the trustees’ personal liability for wrongful distribution of death benefits. See par 6 below for a discussion of the liability of funds as well as that of trustees in their personal capacity for the wrongful distribution of death benefits.

<sup>566</sup> Pension fund trustees should not look at s 37C of the Pension Funds Act in isolation, but should also consider all available legislation, the common law, and the principles of good corporate governance of retirement funds as set out in the King Reports, especially King IV.

<sup>567</sup> Downie *Essentials* at 88 states that common-law principles “are laws that have been decided by the courts, as opposed to statutory laws that are ratified by Parliament. Many of these principles are based on laws that have developed over time in other legal and even ethnic systems. In South Africa, common law is a mixture of Roman-Dutch law, British law, and local law.

to dependants and nominated beneficiaries. It is, therefore, necessary to explore and determine these duties in relation to the trustees' discretionary powers to distribute the death benefits. It is submitted that pension fund trustees' complying with these duties improves the efficiency of these trustees and protects pension funds and their trustees against unnecessary litigation by aggrieved parties and the liability that could follow for wrongful distribution of benefits.<sup>568</sup> As for the distribution of death benefits, the basis of aggrieved parties' claims against the pension funds is often that the pension fund trustees breached their duties because they failed to exercise their discretion properly, fairly, equitably, and judiciously in making this distribution.<sup>569</sup> So complying with these requirements in distributing death benefits under section 37C of the Pension Funds Act is crucial.<sup>570</sup> These duties provide more protection to the rights of retirement fund members, dependants, and nominated beneficiaries against trustees' negligence, dishonest conduct, and abuse of powers when exercising their discretion in distributing the death benefits.<sup>571</sup>

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Alternatively, common law refers to commonly or generally acceptable behaviour. Often, if one behaves in a generally unacceptable way, the behaviour is punishable in court – however, common law extends further than just the court system”.

<sup>568</sup> See *Thipe v SAMWU National Provident Fund* 2009 1 BPLR 80 (PFA), where the Adjudicator ordered the fund to pay the death benefit to a dependent child even though the fund had already paid the money to that child's aunt (at 85). When the father (the fund member) died, the complainant was still a minor, and the fund had decided to allocate the benefit to her, but it took too long, six years, to pay the money. When the money was paid to the aunt, the dependent child was already 22 and no longer a minor. The Adjudicator found that the fund had failed to comply with its duties by nevertheless continuing to pay the death benefit to the aunt instead of the child who was then already a major (at 85).

<sup>569</sup> See in this regard *Berge v Alexander Forbes Retirement Fund (Pension Scheme) and Another* (04/31647) 2006 ZAGPHC 241 (18 April 2006) in par 8. Refer in this regard to par 6 below, where the remedies available to dependants and nominated beneficiaries against the fund and its trustees are discussed. See, for example, in *Sithole v ICS Provident Fund and Another* 2000 4 BPLR 430, where the Adjudicator held that the trustees' incorrect exercise of the discretion by their misreading of the Pension Funds Act amounted to an improper exercise of power or maladministration of the fund by the trustees. See also n 561 above, where this determination of *Sithole* is discussed.

<sup>570</sup> See, for example, *Zwane v Wiseman and Others* 2005 1 BPLR 92 (PFA), where the Adjudicator dealt with a situation in which there was a dispute among trustees over the distribution of a death benefit. The Adjudicator pointed out that the way in which death benefits are distributed is a matter for the trustees' discretion. The trustees must exercise their discretion properly and in good faith, and if they do so, the Adjudicator will not interfere just because it, or another party, prefers a different outcome.

<sup>571</sup> See par 6 below for a discussion of the liability of funds and that of pension fund trustees in their personal capacity. One of the bases for liability could be that pension fund trustees have breached their duties, fiduciary duties and/or the duty of care.

The duties of pension fund trustees are grouped into two categories: the duty of care, diligence, and skill; and fiduciary obligations.<sup>572</sup> At times these duties appear to overlap.<sup>573</sup> Both categories of duties originate from common law and express statutory provisions.<sup>574</sup> The duties of care, diligence, and skill, as well as the fiduciary obligations, are discussed separately below under two categories: the common law and statutes.<sup>575</sup> The discussion of the two categories follows the discussion in the next paragraph on the beneficiaries of pension fund trustees' duties.

## 5.2 *The beneficiaries of pension fund trustees' duties*

A fiduciary duty imposes on its bearer a duty to act in the best interests of the person or persons to whom the duty is owed. In the context of retirement funds, pension fund trustees have fiduciary obligations to their funds and to fund members who have accrued benefits.<sup>576</sup> The death benefits payable to the dependants and other

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<sup>572</sup> See *Bristol and West Building Society v Mothew (t/a Stapley and Co)* [1996] 4 All ER 698 (CA) at 711, referring with approval to *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109 (WASC) at 157, where Ipp J said that it is essential to bear in mind that the existence of a fiduciary relationship does not mean that every duty owed by a fiduciary to the beneficiary is a fiduciary duty. A trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty.

<sup>573</sup> See, for example, s 7C(2)(b) of the Pension Funds Act, stating that the board in pursuing its object must act with due care, diligence, and good faith. It is clear in the discussion below (in par 5.3.2.1) that "good faith" is one of the components of fiduciary duties.

<sup>574</sup> See in this regard Havenga *Fiduciary Duties* at 1. Although she was referring to the position of company directors, it is submitted that the principles she alluded to are just as applicable to the pension fund board members' duties. In *McDonald and Others v Horn and Others* [1995] 1 All ER 961 (CA) it was stated that pension funds are such a special form of trust and the analogy between them and companies with shareholders is much stronger than for ordinary trusts.

<sup>575</sup> The Mouton Committee *Report* at 178-180 explained the common-law duties of retirement fund trustees in detail.

<sup>576</sup> Section 7C(2)(f) of the Pension Funds Act explicitly requires trustees to exercise a fiduciary duty towards the fund and to members who have accrued benefits. This section limits the application of this provision to accrued benefits and does not apply to the assets of the fund as described in s 5 of the Pension Funds Act. See generally Marumoagae 2021 SALJ 818-843. Section 7C(2)(f) of the Pension Funds Act is discussed further in par 5.4.1 below. There have been many debates in the past by academics, judges, and the Pension Funds Adjudicator over whether pension fund trustees owe fiduciary duties to both the fund and members of the fund: see, for example, Marumoagae 2012 PER 2. See *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood & Allied Workers Union* 2007 28 ILJ 2701 (W), where the court explained that members' trustees and employers' trustees share the common duty to act in the best interests of the fund, its members, and beneficiaries. See in this regard *Tek Corporation Provident Fund and Others v Lorentz* 2000 3 BPLR 227 (SCA) in par 15, where the court confirmed that pension fund trustees owe a fiduciary duty to the fund and to its members and other beneficiaries. In *Sage Schachat Pension Fund Others v Pension Funds Adjudicator and Others* 2004 5 SA 609 (C) in par 80, the court confirmed that pension fund trustees owe a fiduciary duty to their members and other beneficiaries, and a duty of good faith to the employer.

beneficiaries on the fund member's death qualify as "accrued benefits".<sup>577</sup> Pension fund trustees have to comply with their fiduciary obligation to ensure that these accrued benefits in the form of death benefits have been allocated and paid to the rightful dependants and beneficiaries in accordance with section 37C of the Pension Funds Act. The trustees also owe fiduciary duties to potential beneficiaries in the form of dependants or nominees.

The nature of a duty has implications for its enforcement and the possible remedies available to aggrieved parties. For example, claimants who base their actions on the breach of fiduciary duties may have to institute a different action from claimants who base their actions on the breach of the duty of care.<sup>578</sup> Pension fund trustees have relationships with various stakeholders.<sup>579</sup> The scope of this thesis is limited to the trustees' duties to the fund, fund members, dependants, and nominated beneficiaries regarding the distribution of retirement fund death benefits.<sup>580</sup> The

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<sup>577</sup> A retirement fund death benefit is an accrued benefit. It accrues in terms s 37C of the Pension Funds Act when the fund member dies. See Chapter 4 par 3, where the nature of pensions as a form of deferred pay in the United Kingdom is discussed. An accrued benefit is defined as the money an employer owes to an employee as a pension, which is based on the amount of time the employee has worked for the employer (See the definition of "accrued benefits" from the *Cambridge Business English Dictionary*© Cambridge University Press available at <https://dictionary.cambridge.org/dictionary/english/accrued-benefits> (last accessed on 30 June 2021).

<sup>578</sup> For example, where the duty of care and skill is breached, the action is based on delict, and where fiduciary duties are breached, the action is *sui generis*. The action may also be delictual in other instances such as in *Cohen NO v Segal* 1970 3 SA 702 (W). Remedies and enforcement for wrongful distribution are explored in par 4 below. See *Bristol and West Building Society v Mothew (t/a Stapley and Co)* [1996] 4 All ER 698 (CA) at 712, stating: "The nature of the obligation determines the nature of the breach. The various obligations of a fiduciary merely reflect different aspects of his core duties of loyalty and fidelity. Breach of fiduciary obligation, therefore, connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty".

<sup>579</sup> For example, relationships with the participating employer; providers of products and services to the fund; administrator; actuary; auditor; investment manager; insurer; broker; lawyer and so forth. King IV (Part 6 *Retirement Fund Sector Supplement*) (Principle 16) at 102 addresses stakeholder relationships and states that the stakeholders of a retirement fund include, among others, the members of the fund, their dependents and nominees, the participating employer, the sponsor (if different from the participating employer), the Registrar of Pension Funds (now the FSCA), and the respective service providers. PF 130 in par 3 states that stakeholders in the governance of the fund are the fund members (pensioners, former members, deferred pensioners, dependents, nominees of the members and beneficiaries), employer, sponsor, and the Registrar (now the FSCA).

<sup>580</sup> See National Treasury *Retirement Fund Reform 2004* at 55-61 which made extensive recommendations about members of pension fund boards, including that there should be a statement in the statute that trustees of funds owe a fiduciary duty to their funds and a duty of good faith to all stakeholders. Some of these recommendations were incorporated into the Pension Funds Act by the Financial Services Laws General Amendment Act 45 of 2013.

specific duties that apply to the trustees' distribution are discussed below, starting with duties under the common law and then under statutory provisions.

### 5.3 *The duties of pension fund trustees under the common law*

#### 5.3.1 The duty of care, diligence, and skill

Under the common law, a trustee has a duty in respect of trust property: to observe greater care in dealing with trust property than he or she does when dealing with his or her own property.<sup>581</sup> It is submitted that this common-law duty also applies to the relationship between pension fund trustees and members of retirement funds.<sup>582</sup> Khumalo succinctly summarises the duty of care and diligence as follows:

Duty of care and diligence is required when pension fund boards deal with the property of the fund, including its assets. The law expects pension fund boards to protect the pension funds' assets, guard them against risks, and to ensure that they are available to meet objectives of the fund. The law requires pension fund board members to be extra careful, vigilant, and to act with reasonable skill. This is a higher standard than standard expected of a person dealing with own assets. While a person can be careless, wasteful and indulgent with own assets, not so with assets, property and information belonging to fund. Fruitless and wasteful expenditure not allowed. Careless use of assets not allowed, lack of accountability not allowed and pension fund boards should not make (disproportionately) risky investments.<sup>583</sup>

In *Connery v Old Mutual Life Assurance Co. (SA) Ltd and Another*,<sup>584</sup> the Adjudicator stated that the duty to act with care and diligence requires the fund and administrators not to act carelessly and without diligence. He also noted that the *Concise Oxford English Dictionary* (10th edition) defines the word "carelessly" as meaning "without giving sufficient attention or thought to avoiding harm or mistakes".<sup>585</sup>

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<sup>581</sup> See in this regard *Tijmstra NO v Blunt-MacKenzie NO and Others* 2002 1 SA 459 (T) at 472; and Cheadle, Thompson & Haysom *Accountability* at 10 and 18, which is also cited in Chapter 2, n 242.

<sup>582</sup> See *Sackville West v Nourse and Another* 1925 AD 516 at 533-534, where the court held that the duty of care should be extended to all persons who administer the affairs of others.

<sup>583</sup> *Khumalo Management* at 5. See also *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA) at 256, where the Adjudicator stated that a trustee must consider that he is not dealing with his own money but that of the fund, and thus greater care and caution is required than when he deals with his own property.

<sup>584</sup> *Connery v Old Mutual Life Assurance Co (SA) Ltd and Another* 2002 6 BPLR 3544 (PFA).

<sup>585</sup> At 3550.

According to the Mouton Committee *Report*, the standard of care expected of a trustee is greater than that of a reasonable person. The trustee is required to “ensure the above standard of care when matters relevant to the fund’s administration and management are being considered”.<sup>586</sup> The report also states that the trustees must keep members fully acquainted with matters relevant to their status, such as changes to benefit structures, legislation, and their rights and obligations.<sup>587</sup>

Pension fund trustees owe a duty of care and skill to the fund, its members, and other beneficiaries.<sup>588</sup> As is the case with all their duties, these trustees should exercise due care and diligence when distributing death benefits. Benefits must be paid in accordance with the fund’s rules and applicable legislation, particularly section 37C of the Pension Funds Act. Pension fund trustees should ensure that the payee is, in fact, entitled to this payment and that the amounts being paid are correct.<sup>589</sup> Failure to do so may be considered a breach of duty by the trustees, and aggrieved parties may challenge their distribution of death benefits in courts or before the Adjudicator.<sup>590</sup> Where pension fund trustees negligently pay an incorrect amount to a dependant or nominated beneficiary, or pay a person not entitled to such a benefit, the fund may be held liable to put the rightful dependant or

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<sup>586</sup> The Mouton Committee *Report* at 178. See also in this regard Hanekom *Manual* at 105. An example of a pension fund board that was deemed to have failed to fulfil its duties was seen in *Alant v Pension Fund for the Financial Services Board and Another* 2000 8 BPLR 821 (PFA), discussed in n 203 above, in which the amount of salary payable to a member was in dispute.

<sup>587</sup> The Mouton Committee *Report* at 178-179.

<sup>588</sup> See PF 130 in par 3, stating that “other beneficiaries” refer to the members’ dependants, where applicable, and nominees. As for the question to whom the duty of care is owed, in *Donoghue v Stevenson* [1932] AC 562 (HL) at 580, Lord Atkin stated the following: “You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.” See the summary of Lord Atkin’s speech and this quotation in “Legal Skills and Debates in Scotland” (*OpenLearn*) available at <https://www.open.edu/openlearn/society-politics-law/law/legal-skills-and-debates-scotland/content-section-overview> (last accessed on 20 December 2020).

<sup>589</sup> See, for example, *Nelson v Tiger Brands Provident Fund and Another* 2008 3 BPLR 221 (PFA), where the fund had paid an amount of R20 000 that was due to a minor beneficiary to a business account of a close corporation. The intended recipient, who was the father of the minor child, disputed receipt of the money. The Adjudicator found that the board had breached its duties of care and diligence by depositing the money into the business account instead of the personal account of the father (at 225). The Adjudicator ordered the fund and the administrator to pay the complainant the R20 000 with interest (at 227). *Nelson* is also discussed in n 438 above.

<sup>590</sup> Remedies available to aggrieved parties are discussed below in par 6.

beneficiary in the financial position that he or she would have been in but for the incorrect payment.<sup>591</sup> Pension fund trustees may also be sued personally by aggrieved parties, and their fund may also hold them personally liable to make good the loss to the fund.<sup>592</sup>

In *Skhosana v Amplats Mines Retirement Fund and Another*,<sup>593</sup> following the fund member's death, the fund allocated the death benefit to various dependants. The deceased's mother (the complainant) was dissatisfied with the allocation of 30 per cent to the deceased's father. The Adjudicator had to determine whether the fund had paid the death benefit in accordance with the fund's rules. The fund could not provide the name of the deceased's father even though it had allocated the death benefit to him. The fund's reason was that the deceased's employer had conducted the investigation. The Adjudicator stated that under section 37C of the Pension Funds Act, pension fund trustees have a duty to trace dependants of the deceased as defined in section 1 of the Pension Funds Act.<sup>594</sup> In other words, the fund needs to conduct an investigation and take all reasonable steps necessary to locate the dependants of the deceased.<sup>595</sup> The fund has to satisfy itself that it has investigated and considered the matter with due diligence to make an equitable allocation. The Adjudicator found that the fund had abdicated its duty to conduct investigations to the deceased's employer — a conflict with section 37C of the Act.<sup>596</sup> Because of this abdication and reliance, the fund did not establish that the deceased's father was dependent on the deceased in order to be allocated a portion of the death

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<sup>591</sup> See, for example, *Van Rooyen v ICS Pension Fund and Another* 2004 10 BPLR 6168 (PFA), where the Adjudicator dealt with a matter about the incorrect calculation of the death benefit payable to the complainant (the wife) after the death of her husband, who was a fund member. The rules provided that the calculation of the death benefit should be based on the salary of the fund member as at the date of death, but the fund based its calculation on the salary earned by the fund member in the last full month, and this was incorrect (at 6169). The Adjudicator directed the fund to pay the complainant the difference (at 6170). See also *Mlungisi v Anglo American Property Services Provident Fund (1)* 2001 4 BPLR 1882 (PFA), where the board had awarded the complainant 20 per cent of the death benefit but only paid 11.6 per cent of the benefit to him. The fund conceded that an error was made but did not take any steps to rectify or reconcile the error (at 1883). The Adjudicator held, while granting a rule *nisi*, that there was no reason in fact, law, or otherwise why the complainant should not be paid the balance (at 1878).

<sup>592</sup> See par 6 below, where the liability for wrongful distribution of retirement funds and that of their board members is explored.

<sup>593</sup> *Skhosana v Amplats Mines Retirement Fund and Another* 2019 2 BPLR 545 (PFA).

<sup>594</sup> In par 5.5.

<sup>595</sup> In par 5.5.

<sup>596</sup> In par 5.6, referring to *Itumeleng v SALA Pension Fund and Another* 2007 3 BPLR 311 (PFA).

benefit or even that he existed.<sup>597</sup> The fund could not provide the Adjudicator with an explanation for allocating a portion of the death benefit to the deceased's father or with proof that he was financially dependent on the deceased.

The Adjudicator was concerned that the failure of the fund to conduct its own investigations before allocating the death benefit had the potential to affect not only the beneficiaries in this complaint but also other beneficiaries of the section 37C benefit.<sup>598</sup> She stated that although it was understandable that a large fund could, to a certain extent, rely on the information given to it by the employer, this does not exempt the fund from conducting its own investigation. At the very least, the board could be expected to verify the information provided by the deceased's employer. She said that the fund's failure to conduct its own investigations could not be condoned. Its conduct was unacceptable and amounted to a gross dereliction of its duties. She further mentioned that her ruling should send a clear warning to all boards of different funds to perform their statutory duties with due care and diligence.<sup>599</sup> She concluded that allocating a portion of the death benefit to the deceased's father, whose name was unknown to the fund, was irrational in the absence of any proof that he was dependent on the deceased at the time of his death.<sup>600</sup> She found that the fund had failed to act in the best interest of the deceased's beneficiaries, and she was not satisfied that the board had considered relevant factors and ignored irrelevant ones in allocating the deceased's death benefit. She concluded that the death benefit was not properly allocated to the dependants of the deceased, and she set aside the board's decision to allocate 30 per cent of the death benefit to the deceased's father.<sup>601</sup> The fund was ordered to reallocate 30 per cent of the death benefit allocated to the deceased's father and pay this to the deceased's other identified beneficiaries within four weeks of the determination.<sup>602</sup>

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<sup>597</sup> *Skhosana v Amplats Mines Retirement Fund and Another* 2019 2 BPLR 545 (PFA) in par 5.6.

<sup>598</sup> In par 5.7.

<sup>599</sup> In par 5.7.

<sup>600</sup> In par 5.8, referring to *Fourie v Central Retirement Annuity Fund* 2001 2 BPLR 1580 (PFA).

<sup>601</sup> *Skhosana v Amplats Mines Retirement Fund and Another* 2019 2 BPLR 545 (PFA) in par 5.8.

<sup>602</sup> In par 6.1.2.



The conduct of the fund in *Skhosana* is one example in which pension fund trustees distributed death benefits without paying regard to the provisions of section 37C of the Pension Funds Act or to complying with their duties. The next paragraph discusses the fiduciary duties of pension fund trustees under the common law.

### 5.3.2 Fiduciary duties

The relationship between a pension fund trustee and his or her pension fund is recognised and accepted as a fiduciary relationship in South African law.<sup>603</sup> It is essential to understand the nature of a fiduciary relationship between pension fund trustees and their funds and that of trustees to members of funds and/or other beneficiaries.<sup>604</sup> The term “fiduciary” is not defined in the Pension Funds Act.<sup>605</sup> A “fiduciary” can be defined as a “person who undertakes or assumes responsibility, or is required by law to act on behalf of and in the interests of another person”.<sup>606</sup> A fiduciary relationship refers to a position of trust and confidence,<sup>607</sup> and it is applied to a large number of persons in diverse capacities who resemble each other in that

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<sup>603</sup> See s 7C of the Pension Funds Act. This section is discussed further in par 5.4.1 below.

<sup>604</sup> See Havenga *Fiduciary Duties* Chapters 2 and 3 for a full analysis of fiduciary duties and her sources there.

<sup>605</sup> Finn 1989 *UNSWLJ* at 83 states: “A fiduciary, ordinarily, is obliged to act in the beneficiary’s interests in some particular matter or matters and can be relied upon for that.” Finn adds (at 83): “When we describe a relationship as being fiduciary, we are saying not only that it possesses certain characteristics but also that we wish to exact a particular standard of conduct (*i.e.* loyalty) from one or both parties to it” (original italics). Frater at 7 states that “the understanding of ‘fiduciary’ is broad, and South African law does not provide any specific interpretation. Interpretations ascribe fiduciary duty to four main areas: – 1. Acting in good faith, and in the best interests of the fund; 2. Not exercising the powers conferred on them for purposes different from those for which they were conferred. Not to have conflicts of interest. This is an interesting area, which would indicate that there is clear separation between how the trustee divides his/her role as a member of management/workforce/union, from being a trustee on a fund where they have to represent the best interests of beneficiaries (both current & future); 3. Not to exceed the limitations of their power- in the case of pension fund, not to exceed the constraints placed on the trustee by the rules of the fund; 4. To maintain unfettered discretion (remain independent).”

<sup>606</sup> In *Bristol and West Building Society v Mothew (t/a Stapley and Co)* [1996] 4 All ER 698 (CA) at 711-712, a fiduciary was described as “someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. The fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary”. See also in this regard Pretorius *Removal* at 10 n 10.

<sup>607</sup> *Bristol and West Building Society v Mothew (t/a Stapley and Co)* [1996] 4 All ER 698 (CA) at 711.

each of them has duties to another, though each of those duties may vary and differ in many respects.<sup>608</sup> Pension fund trustees occupy a position of trust, so they must conduct the affairs of a fund in accordance with the common law applicable to the fiduciary duties of those who occupy positions of trust in the broad sense.<sup>609</sup>

The discussion below focuses on the fiduciary relationship between pension fund trustees, their funds, and the fund members. The fiduciary obligation is imposed in these relationships to ensure that the fiduciary (the pension fund trustee) serves honestly and diligently.<sup>610</sup> Fiduciary duties comprise various components such as the duty of good faith, the duty to act in the fund's best interest, the duty to avoid conflicts of interest, and the duty to act with impartiality towards all members and beneficiaries. Pension fund trustees distributing death benefits should always ensure that these duties are met.<sup>611</sup> These components are discussed below.

#### 5.3.2.1 *The duty to exercise powers in good faith (bona fide)*

One of the basic categories of fiduciary duties confirms that pension fund trustees must exercise their powers in good faith.<sup>612</sup> It was affirmed by the Supreme Court of Appeal in *Da Silva and Others v CH Chemicals (Pty) Ltd* that the duty of directors to exercise their power in good faith and in the best interest of the company is a

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<sup>608</sup> See Havenga *Fiduciary Duties* at 19. A person who stands in a fiduciary relationship may not (a) exceed his or her powers; (b) exercise his or her powers for improper or collateral purpose; (c) fetter his or her discretion; or (d) place himself in a position in which his or her personal interest may possibly conflict with his or her duties to the other. See also in this regard *Watson NO and Another v Shaw NO and Others* 2008 1 SA 350 (C) at 370-371, quoting Blackman *Companies* in par 116. Blackman was referring to the fiduciary relationship between a company and its directors. It is submitted that the relationship between a pension fund trustee and a pension fund is no different in principle from the relationship between a director and a company: the trustee stands in a fiduciary relationship to the pension fund, members, and other beneficiaries. See also Finn 1989 *UNSWLJ* at 85, stating that "the categories of fiduciary relationship are not closed".

<sup>609</sup> See, for example, *Tatiya and Others v Liquor and Catering Trade (Cape) Pension Scheme and Others* 1999 11 BPLR 315 (PFA). Austin *Moulding* at 158 states that "it is now generally accepted that: a fiduciary (a) cannot misuse his position, or knowledge or opportunity resulting from it, to his own or to a third party's possible advantage; or (b) cannot in any manner falling within the scope of his service, have a personal interest or an inconsistent engagement with a third party – unless this is freely and informedly consented to by the beneficiary or is authorized by law".

<sup>610</sup> See Flannigan 1989 *Oxf J Leg Stud* at 291.

<sup>611</sup> See the Mouton Committee *Report* at 178-183 for more discussion of some of these basic categories.

<sup>612</sup> See Havenga *Fiduciary Duties* at 62. Although she was referring to the fiduciary duties of company directors, it is submitted that the principles she alludes to are just as applicable to the position of pension fund trustees.

well-established duty under the common law.<sup>613</sup> This is the overarching and paramount fiduciary duty of directors from which all the other fiduciary duties flow.<sup>614</sup> This duty applies equally in the context of pension funds. Good faith demands that fiduciaries always observe the highest standards of integrity. Pension fund trustees must not use their position on the board for personal gain, nor must they receive or earn secret payments or any undue benefits from anyone, including potential beneficiaries of the death benefits.<sup>615</sup> Some potential beneficiaries might be tempted into improperly influencing pension fund trustees to make decisions that favour these beneficiaries — a danger prevented by the duty of good faith requiring the trustees to act honestly without regard to their self-interest. The duty of good faith thus provides a significant limitation to the self-interested conduct of pension fund trustees.<sup>616</sup> The trustees exercising the power to distribute death benefits must do so *bona fide* in the best interests of the fund and the dependants without any ulterior motives.<sup>617</sup>

Pension fund trustees act lawfully when they exercise a power conferred on them by section 37C of the Pension Funds Act and the pension fund rules, and, in doing so, meet the standard imposed by section 7C of the Act and other applicable statutes. Then a dependant or nominated beneficiary who is prejudiced by the decision cannot complain that the decision is unfairly prejudicial to him or her. In *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others*,<sup>618</sup> the court in this regard was of the view that the circumstances must be rare in which the action of a

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<sup>613</sup> *Da Silva and Others v CH Chemicals (Pty) Ltd* 2008 6 SA 620 (SCA) in par 18. See also *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC) in par 45, where the court reiterated the same principle: namely, that the board's discretion must be exercised in what the directors *bona fide* consider to be the best interests of the company, not for an improper or collateral purpose. Although the Supreme Court of Appeal's judgment in *Da Silva* and that of the High Court in *Visser Sitrus* referred to the fiduciary duties of company directors, it is submitted that the principles alluded to there are just as applicable to the position of pension fund trustees.

<sup>614</sup> See *Havenga Fiduciary Duties* at 332; *Cassim Critical Analysis* at 234-235; and *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC) in par 80.

<sup>615</sup> *Khumalo Management* at 5.

<sup>616</sup> Pension fund boards should act in good faith and in accordance with the Constitutional principles enshrined in the Bill of Rights. See in this regard *Manzini v Metro Group Retirement Funds and Another (1)* 2001 12 BPLR 2808 (PFA), and Chapter 1 n 82, where *Manzini* is also cited.

<sup>617</sup> On the fiduciary duties of pension fund trustees to act in the best interests of the pension fund, see s 7C of the Pension Funds Act; and par 5.4.1 below, where this matter is discussed further. Pension fund trustees who exercise their power to distribute death benefits for an improper purpose or for ulterior reasons may be found to have breached their fiduciary duties.

<sup>618</sup> *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC).

board action could be regarded as producing “unfair” prejudice where the directors have exercised their powers in good faith, for a proper purpose, in the best interest of the company and so forth.<sup>619</sup> Although the *Visser Sitrus* judgment referred to the fiduciary duties of company directors, it is submitted that the principles are just as applicable to pension fund trustees.

It is submitted that the test to determine whether a pension fund trustee has acted in good faith in distributing a death benefit is like this one succinctly summarised by Cassim in the context of the duty of company directors to act in good faith:

The duty of good faith is a subjective duty. As laid down in *Re Smith & Fawcett Ltd* [[1942] Ch 304 (CA) at 306] directors are bound to exercise the powers conferred upon them *bona fide* in what they, and not what a court may, consider is in the interests of the company. It is not for the courts to review the merits of a decision that the directors arrived at in honesty. While the test for good faith is subjective, and not objective, there must nevertheless be reasonable grounds for the directors’ belief that they were acting in the best interests of the company.<sup>620</sup>

The test of good faith as articulated above by Cassim is similarly applied to pension funds. As a rule, the courts and the Adjudicator also do not undertake a retrospective examination of the trustees’ state of mind in exercising discretion, especially if this discretion was exercised in good faith.<sup>621</sup> In assessing the duty to exercise their powers *bona fide* in the best interests of the fund and other beneficiaries, the court will be reluctant to interfere with the board’s decision.

#### 5.3.2.2 *Duty to act in the best interests of the retirement fund, fund members, and other beneficiaries*

At common law, trustees are obliged to act in the best interests of the trust beneficiaries.<sup>622</sup> This duty precludes pension fund trustees from exercising their

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<sup>619</sup> In par 59.

<sup>620</sup> See Cassim *Critical Analysis* at 235-236 as well as authorities referred there, though in relation to the position of company directors.

<sup>621</sup> See par 6.5.1.4 below, where non-interference by courts and/or the Adjudicator with the decisions of pension fund trustees is discussed.

<sup>622</sup> South African courts have confirmed many times that a trustee is under an absolute obligation to conduct trust administration in the best interest of the trust beneficiaries. See, for example, *Jowell v Bramwell-Jones and Others* 1998 1 SA 836 (W) at 891 and 894; *Bafokeng Tribe v Impala Platinum Ltd and Others* 1999 3 SA 517 (BH) at 545-546; *Land and Agricultural Development Bank of SA v Parker and Others* 2004 4 All SA 261 (SCA) at 267 (also cited in Chapter 2, n 101); *Nel and Others v Metequity Ltd and Another* 2007 3 SA 34 (SCA) at 38; and *Browne v South African Retirement Annuity Fund and Others* 2006 4 BPLR 311 (PFA) for more

discretion in order to promote their own interests or those of third parties such as the contributing employer, or unduly taking sides in disputes between potential beneficiaries.<sup>623</sup> In *Meyer v Iscor Pension Fund*,<sup>624</sup> the court confirmed that the trustees have a fiduciary duty to act in the members' best interest, mentioning *Tek Corporation Provident Fund and Others v Lorentz* as one of the authorities for this view.<sup>625</sup> The trustees' duty to act in the best interests of the retirement fund, fund members, and other beneficiaries involves balancing competing interests of potential recipients of the death benefit and that of the fund.<sup>626</sup>

### 5.3.2.3 *The duty to exercise an unfettered discretion*

Under the common law, pension fund trustees have a fiduciary duty to exercise an unfettered discretion or a duty to exercise an independent judgement.<sup>627</sup> As a rule, this duty prohibits the trustees from undertaking or otherwise agreeing in advance to exercise their discretionary powers in a particular way. This duty is not explicitly referred to in the Pension Funds Act, which refers to the duty of pension fund trustees to act independently.<sup>628</sup> In distributing death benefits independently, the trustees have a duty to exercise an independent judgement and not to consider irrelevant factors. The duty to exercise an unfettered discretion is often mentioned

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sources and discussion of the best interests of a fund member. See also Du Toit 2007 *JBL* 91 at 92-93.

<sup>623</sup> See generally *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 4 SA 159 (SCA). See also *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU)* 2008 2 SA 351 (W), where the court held that pension fund trustees owe fiduciary duties to the fund, fund members, and other beneficiaries, and not to the union which appointed them (the trustees).

<sup>624</sup> *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) at 730 in par 22. Meyer contended that when trustees exercise the discretion afforded to them in terms of the rules of the fund, they are bound by the rights vested in members, including their right to be treated with impartiality (in par 21). Trustees are bound to comply with their fiduciary duties and duties of care when exercising their discretionary powers.

<sup>625</sup> *Tek Corporation Provident Fund and Others v Lorentz* 1999 4 SA 884 (SCA) at 898; and *Sage Schachat Pension Fund and Others v Pension Funds Adjudicator and Others* 2004 5 SA 609 (C).

<sup>626</sup> See *Cameron et al Honoré* at 497.

<sup>627</sup> See in this regard *Fisheries Development Corporation of SA Ltd v Jorgensen and Another; Fisheries Development Corporation of SA Ltd v AWJ Investments (Pty) Ltd and Others* 1980 4 SA 156 (W) at 163; and *Mthimunya-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 6 SA 338 (WCC) at 340. "Unfettered" means not influenced or limited by rules, regulations or any other outside influence (see *Legal English Dictionary* "unfettered" *TransLegal* at <https://www.translegal.com/dictionary/en/unfettered/adjective/?to=en> (last accessed on 13 August 2021)).

<sup>628</sup> See par 5.4 below, where the statutory duties of pension fund trustees are discussed.

in the determinations of the Pension Funds Adjudicator in South Africa and those of the Pension Ombudsman in the United Kingdom.<sup>629</sup> This duty is a critical element in the proper and effective discharge of pension fund trustees' functions generally. In fettering their discretion, trustees might, in effect, be preventing themselves from ensuring that they act *bona fide* in the best interest of the fund and other beneficiaries. So the court will determine the trustees' motive for fettering the discretion.<sup>630</sup>

In *Lazarus and Another v Central Annuity Retirement Fund and Another*,<sup>631</sup> the complainants were the deceased fund member's two adult children. Of the net amount of R1 105 639 which became payable after the member's death, the fund paid R700 000 to the spouse and R200 000 each to the major son and daughter. Dissatisfied with the distribution, the children complained to the Adjudicator that the fund's decision was biased and unduly favoured the surviving spouse. They requested the Adjudicator to set aside the fund's decision and award them the death benefit, to the exclusion of the spouse. The fund contended that the distribution was made fairly and equitably. The Adjudicator had to decide whether the fund had fettered its discretion in distributing the death benefit. She found that the fund had overlooked the fact that the surviving spouse was employed at the time. This state of affairs lent credence to the complainants' allegations of bias by the fund and the employer, which they should guard against as they were bound by the law.<sup>632</sup> So when a fund fails to investigate each beneficiary's circumstances thoroughly, as was evident here, there is a greater likelihood of the objectives of section 37C of the Pension Funds Act being subverted.<sup>633</sup> The fund's decision was set aside, and the matter was remitted to the fund to re-exercise its discretion under section 37C of the Act. The fund had to consider the issues raised in the determination regarding the spouse's employment status and her future earning capacity.<sup>634</sup>

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<sup>629</sup> See Chapter 4 par 5.4, where the law in this regard in the United Kingdom is discussed.

<sup>630</sup> See Cassim *Critical Analysis* at 240-241 and the authorities cited there, where she discusses the duty to exercise unfettered discretion, although in the context of the directors of companies.

<sup>631</sup> *Lazarus and Another v Central Annuity Retirement Fund and Another* 2019 2 BPLR 431 (PFA).

<sup>632</sup> In par 5.11.

<sup>633</sup> In par 5.11.

<sup>634</sup> In par 6.1.

#### 5.3.2.4 *The duty to avoid conflicts of interest*

One of the basic categories of fiduciary duty is that the fiduciary's interests should not conflict with those of the duty's beneficiary.<sup>635</sup> The common-law fiduciary duties of trustees were summarised as follows in the Mouton Committee *Report*:

The trustee is required to maintain an independent and dispassionate interest in the affairs of the fund and at the same time, promote the interests of its various beneficiaries to the exclusion of all else. This duty includes the obligation to disclose any conflict of interest. This means that a trustee may not make any profit during his term of administration except as may be regarded as remuneration under the rules and in particular, he may not benefit himself as a member at the expense of other beneficiaries and members. As a corollary, common law requires him to account for, and to pay to the fund, any profit he may have derived.<sup>636</sup>

The duties of trustees that are stated in the preceding quotation also apply to trustees of pension funds. These trustees should avoid conflicts of interest between them and their funds and their fund members with accrued benefits.<sup>637</sup> This duty overlaps with some other duties that form the components of a fiduciary duty, such as the duty of disclosure, the duty to act in good faith, and the duty to act in the best interests of the fund and of the fund members with accrued benefits.

#### 5.3.2.5 *The duty to act with impartiality in respect of all members and beneficiaries*

The Mouton Committee *Report* suggests the following about the duty to act with impartiality: "all members must receive equal and objective treatment from the trustee. A trustee may not discriminate or act against the interests of one member to the benefit of others."<sup>638</sup> The duty of impartiality requires that pension fund

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<sup>635</sup> See *Mthimunye-Bakoro v Petroleum and Oil Corporation of South Africa (Soc) Ltd and Another* 2015 6 SA 338 (WCC) at 340, citing *Bray v Ford* [1896] AC 44 (HL) at 51, where Lord Herschell said that "human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect". Although this case was in the context of the corporate governance of company directors, the principles canvassed there apply to pension fund boards and their individual trustees.

<sup>636</sup> Mouton Committee *Report* at 179. See also Finn 1989 UNSWLJ at 83, stating that a fiduciary is accountable for profit made from a breach of fiduciary duty.

<sup>637</sup> In *Randfontein Estates Gold Mining Co, Ltd v Robinson* 1921 AD 168 at 177-180, the court held that a person who stands in a position of confidence involving a duty to protect the interests of another is not allowed to make a secret profit at the other person's expense or place himself in a position where his interests conflict with his duty towards another person.

<sup>638</sup> See Mouton Committee *Report* at 180. Section 9 of the Constitution guarantees the right to equal treatment and equal protection of the law. Thus, where pension fund trustees differentiate between individuals (*dependants v nominated beneficiaries*; or *factual dependants v legal dependants*), the trustees must do so in a manner that is not arbitrary or irrational. See also

trustees not discriminate unfairly between potential beneficiaries<sup>639</sup> but exercise their discretion impartially and equitably. This would mean, for example, that trustees must consider an allocation not only to legal dependants (spouses, children, grandparents, grandchildren, and unborn children) but also to factual dependants (such as common-law spouses and partners in same-sex relationships).<sup>640</sup> When these trustees are deemed to have discriminated unfairly against other beneficiaries in making a distribution, this distribution would have breached their fiduciary duty. Trustees could also be deemed to have considered irrelevant factors in making a distribution contrary to the equitability requirements in section 37C of the Pension Funds Act.<sup>641</sup>

The paragraphs above have discussed the duty of care and skill and the fiduciary duties that pension fund trustees must meet under the common law when

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*Harksen v Lane NO and Others* 1998 1 SA 300 (CC) in par 42, where the Constitutional Court said that where the equality clause is invoked to attack a legislative provision or executive conduct on the grounds that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question whether the impugned provision differentiates between people or categories of people. If it does so differentiate, then in order not to fall foul of s 8(1) of the Interim Constitution there must be a rational connection between this differentiation and the legitimate governmental purpose that it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of s 8(1) of the Interim Constitution. The *Harksen* judgment was decided under the Interim Constitution of the Republic of South Africa Act 200 of 1993.

<sup>639</sup> *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) at 730. The duty of impartiality means that pension fund trustees should avoid discriminating unfairly against any particular fund member or group of members for whatever reason. In *Meyer*, the Supreme Court of Appeal held that it is inherent in the proper exercise of any discretion that it should be done with impartiality. Since the promulgation of the Pension Funds Amendment Act 22 of 1996, the board has, in terms of s 7C of the Pension Funds Act, a specific duty not to prejudice fund members, their dependants and nominated beneficiaries by maladministering the fund or by exercising power improperly. Section 2 of the Pension Funds Amendment Act 22 of 1996 introduced s 7C into the Pension Funds Act, which deals with the object of a pension fund board. See also *Sage Schachat Pension Fund Others v Pension Funds Adjudicator and Others* 2004 5 SA 609 (C) in par 80. Pension fund trustees, where applicable, should declare their closeness with beneficiaries and not take part in the decision-making. But a trustee who has relevant other information that can help the board to decide can bring it to the attention of the board. If the deceased fund member has left behind more than one dependant and nominated beneficiary, the pension fund trustees should not unfairly favour one beneficiary or group of beneficiaries over another but should treat them all impartially. See in this regard *Cameron et al Honoré* at 316, also cited in Chapter 2, n 217.

<sup>640</sup> The trustees must ensure that their definition and interpretation of the word “spouse” follows the applicable laws in South Africa. See n 145 above, where the definition of a “spouse” in s 1 of the Pension Funds Act is provided.

<sup>641</sup> See par 3 above, where the equitable distribution of death benefits is discussed. See also par 6.5.1.2 below and the cases cited there stating that in terms of s 6(2)(e)(iii) of the PAJA, the consideration of irrelevant factors by a decision maker is a ground for a review under the PAJA.



distributing death benefits to dependants and nominated beneficiaries. The next paragraph discusses the same duties under statutory provisions.

#### 5.4 *The duties of pension fund trustees under statutory law*

Some of the statutory provisions relating to the duties of pension fund trustees tend to restate the common-law principles applicable to fiduciary relationships.<sup>642</sup> These statutory provisions, in most respects, codify the common law that applies to the duty of care and skill and the duty of fiduciary obligations.<sup>643</sup> The specific provisions of various statutes, pension fund circulars, and Codes of Corporate Governance that prescribe and/or recommend specific duties that pension fund trustees should meet when distributing death benefits under section 37C of the Pension Funds Act are discussed below. The effect of the codification of duties in terms of the Pension Funds Act is also explored, the focus being whether this codification replaces or merely restates the common-law duties.<sup>644</sup>

##### 5.4.1 The duties prescribed by the Pension Funds Act

Section 7C of the Pension Funds Act does not categorise duties in terms of the duty of care and skill or the fiduciary duties.<sup>645</sup> Instead, the Act lists all the duties that pension fund trustees are expected to meet, irrespective of whether they fall under the duty of care and skill or the fiduciary duties. Only in section 7C(2)(f) does the Act refer specifically to the fiduciary duty of the board (the pension fund trustees).<sup>646</sup> Section 7C(1) states that the object of a pension fund board is to direct, control, and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund. To fulfil this object, section 7C(2) imposes a duty on pension fund trustees to take all reasonable steps to

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<sup>642</sup> For example, both ss 7C and 7D of the Pension Funds Act codify some of the common-law fiduciary duties of pension fund trustees. See below par 5.4.1 for a discussion of ss 7C and 7D.

<sup>643</sup> Before the insertion of s 37C into the Pension Funds Act, 1956 by s 24 of the Financial Institutions Amendment Act 101 of 1976, the duties of retirement fund trustees in distributing retirement fund death benefits were regulated primarily by the common law.

<sup>644</sup> See par 5.5 below in this regard.

<sup>645</sup> Section 7C of the Pension Funds Act was inserted in the Act by s 2 of the Pension Funds Amendment Act 22 of 1996.

<sup>646</sup> See n 576 above, where s 7C(2)(f) of the Pension Funds Act is discussed.

- ensure that the interests of members under the fund's rules and the Act are protected at all times;<sup>647</sup>
- act with due care, diligence, and good faith;<sup>648</sup>
- avoid any conflict of interest;<sup>649</sup>
- act with impartiality towards all members and beneficiaries;<sup>650</sup> and
- act independently.<sup>651</sup>

Section 7C(2)(f) adds that the board of trustees have

- a fiduciary duty to members and beneficiaries regarding accrued benefits or any amount accrued to provide a benefit,
- a fiduciary duty to the fund to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and the Pension Funds Act;<sup>652</sup> and, lastly,

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<sup>647</sup> In *Labuschagne v IF Umbrella Provident Fund and Others* 2016 2 BPLR 234 (PFA), the Adjudicator found that the pension fund trustees failure to complete a rebuilding exercise of the fund members' data or details in good time indicated that the trustees had failed to take reasonable steps to protect their members' interests in terms of s 7C(2) of the Pension Funds Act (at 234). The fund was ordered to complete the rebuilding exercise and provide a breakdown of benefits due to the complainant (at 234). See also *Emma and Others v Orion Money Purchase Provident Fund (SA) (1)* 2004 2 BPLR 5443 (PFA), where the Adjudicator referred to the provisions of s 7C(2) of the Pension Funds Act. He found that the fund had breached its duty by failing to collect the contributions, and that the failure of the underwriter to inform the Registrar in this regard amounted to maladministration of the fund. The protection of the best interests of the fund members and beneficiaries is in line with the objective of the establishment of pension funds.

<sup>648</sup> Section 7C(2)(b) of the Pension Funds Act. See also in this regard *Ledwaba v Imperial Group Pension and Provident Fund and Another* (PFA/GA/10594/2006/RM) in par 5.4; and *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 6 BCLR 750 (CC), where the Constitutional Court stated (in par 41) that the pension fund board owes a primary duty of good faith to the fund and its members.

<sup>649</sup> Section 7C(2)(c) of the Pension Funds Act.

<sup>650</sup> See s 7C(2)(d) of the Pension Funds Act.

<sup>651</sup> See s 7C(2)(e) of the Pension Funds Act. It was inserted into the Act by s 9 of the Financial Services Laws General Amendment Act 45 of 2013.

<sup>652</sup> See s 7C(2)(f) of the Pension Funds Act and *Mahlangu v Soweto City Council Pension Fund and Another* 2009 2 BPLR 190 (PFA), confirming that the board has fiduciary duties towards its members and beneficiaries (at 190).

- a duty to meet any other prescribed requirements.<sup>653</sup>

Clearly, these duties set by section 7C of the Act restate the common-law duties discussed in the preceding paragraphs.<sup>654</sup> If the trustees ignore these duties and pay the death benefit to the wrong beneficiaries, or consider irrelevant factors, or unfairly discriminate between beneficiaries, or pay the death benefits contrary to section 37C, they do not meet their duties under section 7C(2). Failure by funds and their trustees to meet the duties above may lead to trustees' being found to have breached their statutory duties in terms of section 7C of the Act and/or violated the constitutional right of dependants and nominees to equality and/or just administrative action.<sup>655</sup> This failure could deprive fund members, dependants, and nominated beneficiaries of their legitimate share of the death benefits.<sup>656</sup> This outcome causes these dependants and beneficiaries undue financial hardship when they depended on the fund member before his or her death while still in service.<sup>657</sup>

In *Bukhosini v Private Security Sector Provident Fund and Another*,<sup>658</sup> the Adjudicator stated that a dependant and/or a nominated beneficiary, on submission of the death benefit claim form to the fund, is entitled to expect that proper consideration will be given to the claim: that is, that the discretion which the trustees have will be exercised fairly.<sup>659</sup> The Adjudicator held that the trustees' failure to

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<sup>653</sup> Section 7C(2)(g) of the Pension Funds Act. Section 37C of the Pension Funds Act prescribes how trustees must distribute the death benefit. Failure by trustees to comply with the provisions of s 37C would contravene the Pension Funds Act.

<sup>654</sup> See par 5.3 above, where the duties of pension fund trustees under the common law are discussed. See also par 5.5 below, where the effect of the codification of duties (the duty of care, diligence and fiduciary duties) on the distribution of retirement fund death benefits is discussed.

<sup>655</sup> See par 6.5.1.2 and n 796 below for a discussion of the constitutional right to fair administrative action. Section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay.

<sup>656</sup> Dependants of retirement fund members and nominated beneficiaries are sometimes collectively referred to in this thesis, under the discussion dealing with remedies, as "aggrieved parties".

<sup>657</sup> In *Noordien v Metal Industries Provident Fund* 2002 3 BPLR 3236 (PFA) at 3241.

<sup>658</sup> *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA).

<sup>659</sup> At 256. In *Bukhosini* the Adjudicator dealt with the issue of non-payment of death benefits following the death of a former fund member. The question was whether the pension fund trustees had failed to comply with their duties in terms of the Pension Funds Act and their pension fund rules on the payment of a death benefit to the deceased's children. To decide on whether the trustees' conduct amounted to maladministration and to assess whether there had been a failure to adhere to the provisions of s 37C of the Pension Funds Act, the Adjudicator analysed the statutory duties imposed on trustees. She found that the trustees in *Bukhosini* had clearly breached their fiduciary duties (at 250). She ordered the fund to pay the death benefit to the complainant and other qualifying dependants.

properly exercise this discretion breaches their statutory duties to ensure that members' interests are protected at all material times and to act with due care, diligence, and good faith.<sup>660</sup>

Pension Fund Circular 130 also echoes provisions of the Pension Funds Act as follows:

Members of the board should be able to demonstrate their independence. Such independence is essential also for the credibility of the governance arrangements, and is demonstrated by any discretion of the board being exercised in a manner which is impartial, fully informed and not influenced by inappropriate considerations. In particular the board should always consider what is in the best interests of the members, and should appreciate that the duty of good faith owed by the fund to the employer and the sponsor is subordinate to this requirement.<sup>661</sup>

Besides the duties mentioned above under section 7C, section 7D of the Act imposes other duties on pension fund trustees as to the administration of their funds.

Section 7D provides that the basic duties of trustees are to:–

- ensure that proper registers, books, and records of the operations are kept,<sup>662</sup> inclusive of proper minutes of all resolutions passed by the board;<sup>663</sup>
- ensure that proper control systems are in place, and adequate and appropriate information is communicated to members;<sup>664</sup>

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<sup>660</sup> See, for example, *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA) at 256-257. See also par 5 above, which discusses the duties of pension fund boards.

<sup>661</sup> See PF 130 at 6 in par 20. PF 130 was issued by the FSB on 11 June 2007 to deal with good governance for retirement funds.

<sup>662</sup> See Njuguna *Strategies* at 198, stating: "It is imperative for pension funds to maintain proper records processing systems (OECD 2009a:4; Carmichael and [Palacios] 2003:16). The maintenance of [an] appropriate record processing system ensures that pension funds are able to track all the financial and non-financial details of the fund, facilitates timely preparation of financial statements and ensures faster computation of the retirement benefits due to retirees in addition to speedy identification of the beneficiaries in case of a member's death. Pension funds that reap the benefits of improved record processing systems are thus deemed to be efficient".

<sup>663</sup> Principle 9 of PF 130 deals with the communication and access to information. It states that no person other than board members and service providers should have access to the minutes of the board meeting and membership details unless such information is required for a lawful purpose.

<sup>664</sup> See in this regard *Baloyi v South African Transport and Allied Workers Union National Provident Fund and Others* 2016 2 BPLR 190 (PFA) at 191 and 194, confirming the duties of a board of a pension fund in terms of s 7D(1)(c) of the Pension Funds Act. That duty is in turn delegated to

- take all reasonable steps to ensure that contributions are paid in good time to the fund;
- obtain expert advice where sufficient expertise is lacking;<sup>665</sup> and
- ensure that the rules, operation, and administration of the fund comply with the Pension Funds Act, the Financial Institutions (Protection of Funds) Act, and all other applicable laws.

In *Mkhungo v Trentyre Provident Fund and Others*,<sup>666</sup> the fund had failed to pay the death benefit to beneficiaries since the fund member died in 2001. In 2016, fifteen years after the deceased's death, the fund, even though it had identified the beneficiaries, transferred the death benefit to the Unclaimed Benefit Fund. The issue to be determined was whether the fund had failed to carry out its duties in terms of section 37C of the Pension Funds Act by failing to pay the death benefit within a reasonable time.

The Adjudicator noted that in terms of section 37C of the Pension Funds Act, the fund had twelve months to identify the dependants of the deceased and to allocate and pay a death benefit.<sup>667</sup> She found that more than fifteen years had passed since the deceased's death in 2001, but despite identifying and allocating portions of the death benefit to the identified dependants in 2007, the fund had yet to pay the beneficiaries their benefit.<sup>668</sup> The fund also failed to investigate the matter within the prescribed period in terms of section 37C of the Pension Funds Act. The Adjudicator was concerned by the conduct of the fund in its handling of this death benefit claim,

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the administrator of the fund. The administrator's failure to perform the statutory duty constitutes maladministration of the fund.

<sup>665</sup> See the provisions of s 7D(e) of the Pension Funds Act in this regard. The Mouton Committee *Report* at 179 states that "a trustee has to consult experts when he does not have adequate knowledge or skills to deal personally with issues requiring his attention, e.g., legal and medical opinions. A trustee may enter into contracts to delegate his duties to others, specifically with regard to investment of fund monies and administration of the fund. However, the trustee could well be personally liable for the actions of the delegate in respect of any negligence or non-performance attributable to that third party. The trustee must make every effort to investigate and satisfy himself as to the adequacy, suitability and consequences to the fund of the actions of the delegate. ... Once the expert has offered comments and advice, a trustee may not simply adopt it as his own. He must give it due consideration and make a decision based on his own assessment of the various opinions received."

<sup>666</sup> *Mkhungo v Trentyre Provident Fund and Others* 2018 1 BPLR 155 (PFA).

<sup>667</sup> In par 5.7.

<sup>668</sup> In par 5.8.

as it had a duty to act in good faith towards its members and the members' beneficiaries in terms of section 7C(2)(f) of the Pension Funds Act.<sup>669</sup>

She found that the conduct of the fund was undesirable and unlawful. The fund had failed in its fiduciary duty to ensure that the complainant and other identified beneficiaries of the deceased were paid their benefit within a reasonable time. As a result of the fund's dilatory conduct, the deceased's beneficiaries had suffered prejudice in that they were potentially denied access to benefits which had become available to them.<sup>670</sup>

The Adjudicator held that the fund had failed to act in terms of section 37C of the Pension Funds Act.<sup>671</sup> The fund should have paid the death benefit to the identified beneficiaries in the proportions proposed in its resolution dated 2007, within twelve months from the death of the deceased. The fund did not even attempt to provide the Adjudicator with reasons why it had taken so long to pay the death benefit, despite a period of fifteen years having passed.<sup>672</sup> She held that the Tribunal, like any court of law, has the power to grant compensatory damages in order to mark its displeasure with the conduct of a board if circumstances fit.<sup>673</sup> She thus ordered the fund to pay the complainant and other identified beneficiaries compensation for its delay in paying the death benefit.<sup>674</sup>

In *Mthethwa v Soweto City Council Pension Fund and Others*,<sup>675</sup> the complaint concerned the delay in the fund's payment of a death benefit to the deceased's beneficiaries following the death of its member (the deceased). The complainant stated that she had submitted the death benefit claim to the fund's pension administrator in 2010, but two beneficiaries had still not been paid by 2016. The fund claimed that it was awaiting identity documents and affidavits from the deceased's two children. It stated that the complainant had advised it that she would find the

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<sup>669</sup> In pars 5.9 and 5.10.

<sup>670</sup> In par 5.10, referring to *Mohatla v Metal Industries Provident Fund* 2004 6 BPLR 5797 (PFA).

<sup>671</sup> *Mkhungo v Trentyre Provident Fund and Others* 2018 1 BPLR 155 (PFA) in par 5.11.

<sup>672</sup> In par 5.10.

<sup>673</sup> In par 5.11, referring to *Claase v Information Officer, SA Airways (Pty) Ltd* 2007 5 SA (SCA) 469 at 475; and *PM v Eskom Pension and Provident Fund* 2008 3 BPLR 240 (PFA).

<sup>674</sup> *Mkhungo v Trentyre Provident Fund and Others* 2018 1 BPLR 155 (PFA) in par 6.1.2.

<sup>675</sup> *Mthethwa v Soweto City Council Pension Fund and Others* 2018 1 BPLR 174 (PFA).

deceased's daughter and ask her to provide her documentation. The fund provided the Adjudicator with the board's resolution stating that the death benefit was distributed and paid to the deceased's beneficiaries except for two beneficiaries whose benefits remained in the fund. The issue for the Adjudicator to determine was whether the fund had breached its Pension Funds Act duties to pay the deceased's beneficiaries a death benefit. The fund could not provide the Adjudicator with the reasons that had prevented it from finalising the beneficiaries' death benefit claim in good time. The Adjudicator thus condemned the fund's taking such a long time to finalise the death benefit claim and noted the fund's reliance on the complainant to provide it with information on the deceased's beneficiaries.<sup>676</sup> The Adjudicator found that the delay in paying the beneficiaries a death benefit was unreasonable.<sup>677</sup> She was also concerned by the fund's failure to provide its members, former members, and beneficiaries with adequate information about their benefits.<sup>678</sup> She concluded that, following the high number of complaints that she had received in this regard, the fund was clearly not providing its members with information about their benefits, which conflicted with section 7D(c) of the Act and was not in the best interest of its members.<sup>679</sup> She ordered the fund to finalise its investigations, distribute the outstanding benefits to the identified beneficiaries, and then provide her and the complainant with the distribution report.

This study has shown that where too much discretion is afforded to pension fund trustees in distributing retirement death benefits, this makes it difficult for aggrieved dependants and nominated beneficiaries to hold errant trustees (the wrongdoers) accountable.<sup>680</sup> Worse still, although the Pension Funds Act, in particular section 7C, mandates pension fund trustees (the pension fund boards) to oversee the operation of a fund in accordance with the applicable laws, including section 37C of the Pension Funds Act, and the rules of the fund, the Act does not provide for the liability of non-compliant pension fund trustees. This legal position differs from the one under the Companies Act 71 of 2008, where that Act has partially codified the

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<sup>676</sup> In par 5.13.

<sup>677</sup> In par 5.14.

<sup>678</sup> In par 5.17.

<sup>679</sup> In par 5.19.

<sup>680</sup> See par 6 below, where the enforcement remedies are discussed.

duties of directors and section 77 also prescribes the liability of directors who do not comply with their duties.<sup>681</sup>

#### 5.4.2 Duties prescribed by the Financial Institutions (Protection of Funds) Act

The Pension Funds Act is not the only legislative instrument that applies to retirement funds. These funds are also governed by the Financial Institutions (Protection of Funds) Act,<sup>682</sup> which applies to defined financial institutions dealing with public money and imposes on them the common-law fiduciary obligation to act in good faith, as well as the duty of disclosure.<sup>683</sup> Section 2(a) of the Financial Institutions (Protection of Funds) Act imposes a duty on fund managers, including pension fund trustees, to observe the utmost good faith and to exercise proper care and diligence in the safe custody, control, or administration of the fund.<sup>684</sup> The duty

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<sup>681</sup> Section 77 of the Companies Act 71 of 2008 states that anyone who is a director, prescribed officer, or committee member may be held liable for loss, damages, or costs suffered by the company resulting from their direct or indirect conduct.

<sup>682</sup> The Financial Institutions (Protection of Funds) Act 28 of 2001.

<sup>683</sup> In terms of s 1 of the Financial Services Board Act 97 of 1990 (repealed), the definition of a “financial institution” included a pension fund registered in terms of the Pension Funds Act.

<sup>684</sup> Sections 7C(2)(b) of the Pension Funds Act, as well as s 2 of the Financial Institutions (Protection of Funds) Act, makes it clear that members of funds, dependants, and nominated beneficiaries have the right to be treated in good faith by pension fund trustees. See in this regard *Noordien v Metal Industries Provident Fund* 2002 3 BPLR 3236 (PFA) at 3241; and *Doyle v Board of Executors* 1999 2 SA 805 (C), where the court held that a trustee undoubtedly occupies a fiduciary office, which imposes upon a trustee the duty of utmost good faith towards all beneficiaries, whether actual or potential. The Pension Funds Act refers to the duty of “good faith”, and the Financial Institution (Protection of Funds) Act refers to the duty of “utmost good faith”. The phrase “utmost good faith” is also known in Latin as *uberrima fides* (see *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 1 All SA 324 (A) at 330). PF 130 also states that the fundamental principle is that the pension fund board must always act in the utmost good faith towards the fund and in the best interests of the members (at 1 in par 2). The question is whether there is a difference between the duty of “good faith” and the duty of “utmost good faith”. The term “utmost good faith” is not supported in South African court decisions and jurisprudence generally. Thus, board members owe a duty of good faith rather than a duty of utmost good faith to members and employers. The Mouton Committee *Report* at 179 states that “there are no degrees of good faith”, only good faith and *mala fides*, and it also says at 179 that “this is important as any judgment of trustees’ actions will be based on an unqualified standard of good faith.” Hanekom *Manual* at 104 in this regard explains that “a breach of good faith no matter how minor, means that the trustee’s action is *mala fides* or in bad faith”. In *Mutual and Federal Insurance Company Ltd v Oudtshoorn Municipality*, which was decided in the context of insurance, the court said the following about the use and the relevance of the phrase of “utmost good faith” in the South African legal system: it was “alien, vague, useless ... without any particular meaning in law” (at 332). The court also commented (at 332): “It is entirely inconceivable that there could be a little, more or most (utmost) good faith. The distinction is between good faith or bad faith. There is no room for *uberrima fides* as a third category of faith in our law”. See also in this regard Thyne “‘To be or not to be’ ... a Trustee” unpublished presentation at the Pension Lawyers Association (PLA) Conference 2014 at 6-10 available at [http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PLA\\_Session\\_6b\\_Thyne.pdf](http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/PLA_Session_6b_Thyne.pdf) (last accessed on 30 June 2021).



to act in good faith incorporates the duty to disclose adequate relevant information.<sup>685</sup> So pension fund trustees in distributing death benefits must disclose adequate relevant information to retirement fund members, dependants, and other nominated beneficiaries.<sup>686</sup> This is particularly the case when individuals, such as dependants and nominated beneficiaries, face an impending decision about the allocation of death benefits that may have adverse implications for their financial and social security.<sup>687</sup> The pension fund might, among other things, have to provide members and their potential beneficiaries with the information necessary to safeguard their interests in the death benefit.<sup>688</sup> In *Caffin v African Oxygen Limited Pension Fund*, it was held that

It would seem to be just and equitable, therefore, that boards of trustees be obliged in terms of their duty to act in good faith to disclose such information as would reasonably enable members of pension funds to consider the consequences that the information held for them in the realisation of their rights, interests and expectations. The failure to furnish such information, without appropriate justification, will constitute an improper exercise of the board's powers and will amount to maladministration of the fund as contemplated in the definition of a complaint in section 1 of the Pension Funds Act.<sup>689</sup>

The Organisation for Economic Co-operation and Development (OECD) echoes the sentiment above. It states that the accountability of the governing body also requires that the decisions reached in these meetings should be appropriately disclosed to affected plan members and beneficiaries.<sup>690</sup> In *Mphahlele v AECI Employees*

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<sup>685</sup> See in this regard *Tatiya v Liquor and Catering Trade (Cape) Pension Scheme and Others* 1999 11 BPLR 315 (PFA).

<sup>686</sup> See par 5.4.6 for a discussion of the pension fund boards' duty to disclose relevant information.

<sup>687</sup> See *Tatiya v Liquor and Catering Trade (Cape) Pension Scheme and Others* 1999 11 BPLR 315 (PFA) at 328; and *Hanekom Manual* at 309.

<sup>688</sup> See *Doyle v Board of Executors* 1999 2 SA 805 (C), where it was held that a trustee must show the utmost good faith in his or her dealings on behalf of beneficiaries of the trust. This includes the duty to account sufficiently to beneficiaries.

<sup>689</sup> See *Caffin and Another v African Oxygen Ltd Pension Fund* 1999 10 BPLR 113 (PFA) at 123. See also in this regard *Marumoagae* 2012 *PER* at 7 n 17.

<sup>690</sup> See the OECD *Guidelines for Pension Fund Governance* (5 June 2009) at 8 available at <https://www.oecd.org/finance/private-pensions/34799965.pdf> (last accessed on 30 June 2021). Refer to Chapter 5, n 22, where the OECD is briefly discussed in this thesis. Section 1(a)(v) of the definition of "governing body" in the Financial Sector Regulation Act (FSRA) defines a "governing body" as meaning

"in relation to a financial institution, a person or body of persons, whether elected or not, that manages, controls, formulates the policy and strategy of the financial institution, directs its affairs or has the authority to exercise powers and perform the functions of the financial institution, and includes— ... the board of a pension fund referred to in section 7A of the Pension Funds Act".

*Pension Fund*,<sup>691</sup> the complainant was a widow of the former member of the pension fund. Her complaint concerned the failure of the fund to keep proper records and to disclose information to the complainant about her benefit. The issue was whether the fund had complied with its duty to account properly to the complainant. The Adjudicator held that the fund had a duty to account to beneficiaries, and so its failure, without appropriate justification, to supply information requested by the complainant to provide a proper and regular accounting of benefit invested on behalf of beneficiary of death benefit amounted to breach of common law and statutory duty to provide adequate information. The Adjudicator concluded that the conduct of the pension fund trustees amounted to maladministration of the fund causing prejudice to the complainant.<sup>692</sup> The Adjudicator also stated that the inadequate information provided by the fund and its subsequent failure to respond to the complainant's letters revealed a measure of arrogance on the part of the fund, which the Adjudicator found totally unacceptable in the pensions industry. In terms of a rule *nisi* the Adjudicator ordered the fund to provide the complainant with relevant information.

#### 5.4.3 Principles of the Code of Conduct in terms of the Financial Advisory and Intermediary Services Act

Section 15 of the Financial Advisory and Intermediary Services Act 37 of 2002 empowers the Registrar (the FSCA) to draft a Code of Conduct for authorised financial services providers.<sup>693</sup> Section 16(1) of the Financial Advisory and Intermediary Services Act 37 of 2002 is headed "Principles of code of conduct" and provides:

(1) A code of conduct must be drafted in such a manner as to ensure that the clients being rendered financial services will be able to make informed

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<sup>691</sup> *Mphahlele v AECI Employees Pension Fund* 2001 1 BPLR 1493 (PFA).

<sup>692</sup> At 1493.

<sup>693</sup> The objective of the Financial Advisory and Intermediary Services Act 37 of 2002 is to regulate the rendering of certain financial advisory and intermediary services to clients. A pension fund benefit qualifies as a financial product, and thus the Financial Advisory and Intermediary Services Act also applies to pension funds and their boards. In the Financial Advisory and Intermediary Services Act, para (d) of the definition of "financial product" in s 1 as substituted by s 175(d) of the Financial Services Laws General Amendment Act 45 of 2013 includes a benefit that is provided to members by a pension fund organisation as defined in s 1(1) of the Pension Funds Act. See also s 2(1)(d)(i) of the Financial Sector Regulation Act, stating that a "financial product" means a benefit provided by a pension fund organisation, as defined in s 1(1) of the Pension Funds Act, to a member of the organisation by virtue of membership.

decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of such code to-

(a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial services industry;

(b) have and employ effectively the resources, procedures and appropriate technological systems for the proper performance of professional activities;

(c) seek from clients appropriate and available information regarding their financial situations, financial product experience and objectives in connection with the financial service required;

(d) act with circumspection and treat clients fairly in a situation of conflicting interests; and

(e) comply with all applicable statutory or common law requirements applicable to the conduct of business.

(2) A code of conduct must in particular contain provisions relating to-

(a) the making of adequate disclosures of relevant material information, including disclosures of actual or potential own interests, in relation to dealings with clients;

(b) adequate and appropriate record-keeping;

(c) avoidance of fraudulent and misleading advertising, canvassing and marketing;

(d) proper safe-keeping, separation and protection of funds and transaction documentation of clients;

(e) where appropriate, suitable guarantees or professional indemnity or fidelity insurance cover, and mechanisms for adjustments of such guarantees or cover by the registrar in any particular case;

(eA) the control or prohibition of incentives given or accepted by a provider; and

(f) any other matter which is necessary or expedient to be regulated in such code for the better achievement of the objects of this Act.

Pension Circular 130 of 2007 ("PF 130") states that every fund should have a Code of Conduct which outlines and confirms the duties and obligations of the board.<sup>694</sup> Each board member must complete an acceptance of duties form, and trustees

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<sup>694</sup> See PF 130 in par 22.

must declare their interests annually or more often as stated in the fund's code of good practice. The circular is discussed below.

#### 5.4.4 Guidelines for duties in accordance with PF 130

PF 130 states that the fundamental principle of good governance of funds is that the board must always act with the utmost good faith towards the fund and in the interest of all members. The board should always give full and proper effect to the rules of the fund, and it should deal with all matters relating to the fund and its members in accordance with their fiduciary duties, fairly, and with respect.<sup>695</sup>

Principle 1 of PF 130 deals with the role, responsibilities, and accountability of the board and the governance structure. It states that the duty owed by the board and the principal officer requires that they avoid conflicts of interest.<sup>696</sup>

Principle 1 of PF 130 states that members of the board should be able to demonstrate their independence.<sup>697</sup> This is demonstrated by

any discretion of the board being exercised in a manner which is impartial, fully informed and not influenced by inappropriate considerations. In particular the board should always consider what is in the best interests of the members, and should appreciate that the duty of good faith owed by the fund to the employer and the sponsor is subordinate to this requirement.<sup>698</sup>

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<sup>695</sup> In par 2.

<sup>696</sup> In par 19. PF 130 states that the board and the Principal Officer should appreciate the following in this regard:

“19.1. the proper resolution by the board of any conflict of interest is necessary for promoting the credibility of the governance of the fund; and enhances the trust of both members, beneficiaries, and stakeholders;

19.2. the board should distinguish between conflict of interests which may be structural, and, therefore, unavoidable, and those conflicts of interest which can be avoided or, if this does not compromise the credibility of the governance arrangements, managed appropriately;

...

19.5. potential or perceived conflicts of interest are as serious as actual conflicts of interest;

19.6. any conflict of interest situation should be fully recorded in the board minutes, which should include details as to how the board has resolved the matter.”

<sup>697</sup> The duty of trustees to act independently is now included as s 7C(2)(e) of the Pension Funds Act. It was added by s 9 of the Financial Services Laws General Amendment Act 45 of 2013. See par 5 above, where the duty of trustees to act independently is discussed.

<sup>698</sup> See in this regard PF 130 in par 20. Principle 4 of PF 130 deals with the board assessment and breach of the code of conduct. It states (in par 34): “Where a board member breaches the fund's code of conduct or acts in contravention of any of the responsibilities imposed upon him or her then the board should take such action as it considers appropriate, after consideration of any argument presented in defence of the board member concerned. This may, should the rules of the fund permit, be in a form of, *inter alia*, declaring that such trustee should vacate office; that

This discussion about PF 130 shows that this circular amplifies the fiduciary duties of trustees contained in sections 7C and 7D of the Pension Funds Act.<sup>699</sup>

#### 5.4.5 Duties recommended in King IV

The King IV Report states that the governing body should lead ethically and effectively, and recommends that members of the governing body should individually and collectively cultivate these characteristics and exhibit them in their conduct:

*a. Integrity:*

Members of the governing body must act in good faith and in the best interests of the organisation.

Members of the governing body should avoid conflicts of interest. In cases where a conflict cannot be avoided, it should be disclosed to the governing body in full at the earliest opportunity, and then proactively managed as determined by the governing body and subject to legal provisions.

- i. Members of the governing body should act ethically beyond mere legal compliance.
- ii. Members of the governing body should set the tone for an ethical organisational culture.<sup>700</sup>

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such trustee is suspended from office for such period or in respect of such function as the board may decide, and subject to any appropriate terms and conditions imposed by the board. The objective of action by the board against a trustee is to preserve the integrity of the board and its governance role. Action against a board member should not be driven solely by whether or not the breach gave rise to financial or other reputational prejudice being suffered by the fund or any other stakeholder. Each matter should be assessed on the facts and merits of the situation, and an appropriate form of discipline should be imposed.”

<sup>699</sup> See above in par 5.4.1 (duties prescribed by the Pension Funds Act), where ss 7C and 7D of the Pension Funds Act are discussed.

<sup>700</sup> King IV Report, part 5.1, (Principle 1, recommended practice 1). King IV Report, part 5.1, deals with leadership, ethics, and corporate citizenship. A total of four King Reports on Corporate Governance have been published to date in South Africa. The first one, King I, was introduced in 1994 by the King Committee under the leadership of former Judge Mervyn King. King II was introduced in 2002 and replaced by King III in 2009. The first three King Codes (King I, II, and III) applied to South African companies as well as retirement funds. However, these Codes did not have a section prepared specifically for the retirement fund industry. The most recent Code is the King IV Report, which came into effect on 1 April 2017 and replaced King III in its entirety. Unlike the first three Codes, King IV has special supplements that apply to different organisations. Supplement 6.4 contains the “Supplement for retirement funds”. King IV’s purpose is to ensure that organisations, including retirement funds, are managed in a way that promotes good performance, effective control, ethical culture, and legitimacy. It is the responsibility of the governing bodies to lead organisations ethically and effectively.

Members of governing bodies must act with due care, skill, and diligence, and take reasonable steps to become informed about matters for decision.<sup>701</sup>

The recommended practices, guidelines, and principles under the Financial Advisory and Intermediary Services Act; the Code of Conduct; PF 130; and the principles recommended by the King IV Report reiterate the duties to act in good faith and in the best interest of an organisation, the duty to avoid conflicts of interest, and the duty to act with care and skill. It is apparent from the provisions of the Financial Advisory and Intermediary Services Act that the principles which should be in the Code of Conduct are like the duties that pension fund trustees have under the common law and the statutory provisions. The Code of Conduct; PF 130; and King IV are not statutes:<sup>702</sup> so their provisions, principles, and recommendations are not prescriptive for pension funds.<sup>703</sup> The provisions are guidelines to give direction to the retirement funds and their trustees to ensure efficient services to their clients, in this case to the fund members, dependants, and nominated beneficiaries.<sup>704</sup> The Code of Conduct does not replace the common law, but complements both the common law and statutory law.<sup>705</sup> A pension fund trustee who fails to act honestly or who fails to comply with the duty of care will, besides breaching the code, also

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<sup>701</sup> King IV Report, part 5.1 (Principle 1, recommended practice 1(*b. Competence*)). See, for example, the discussion of the King IV Report recommendations in Chapter 2, par 6.4, dealing with the competency of pension fund boards and their board members (pension fund trustees); par 5.4.5, dealing with duties of pension fund trustees; par 5.4.6.2, dealing with the right of dependants and/or nominated beneficiaries to relevant information; and par 6.1, n 756 below, dealing with the need to have effective sanctions and remedies against erratic board members.

<sup>702</sup> Statutes are laws that are written and enacted by the legislative branch of the government.

<sup>703</sup> Some of the King IV Report recommended principles relating to the duties of pension fund trustees are like the statutory provisions that apply to pension fund trustees. This means that pension fund trustees who do not comply with certain recommendations of the King IV Report could also be contravening statutory provisions that apply to fiduciary obligations and the duty of care and skill. See in this regard *South African Broadcasting Corporation Ltd v Mpopu and Another* 2009 4 All SA 169 (GSJ), in which the court approved certain basic principles of corporate governance relying on the King Report on Corporate Governance for South Africa 2002 (King II). This case related to companies, but it is submitted that the principles apply equally to pension funds.

<sup>704</sup> Unlike legislation and regulations, codes of conduct are not enforceable in law. They are voluntary governance guidelines. Codes of conduct are guidelines and rules that members of a profession, trade, occupation, or organisation are expected to adhere to.

<sup>705</sup> See s 16(1)(e) of the Financial Advisory and Intermediary Services Act, stating that the Code must comply with all applicable statutory and common-law requirements applicable to the conduct of business. See also par 5.5 below for a discussion of the effect of the codification of pension fund trustees' duties.

breach the duty of good faith and the duty of acting with care in terms of both the statutory provisions and the common law.

5.4.6 The duty to disclose relevant information and reasons for distributions to dependants and nominated beneficiaries

*5.4.6.1 The right of access to relevant information*

One of the challenges that dependants and nominated beneficiaries face is the lack of, and difficulty obtaining, information that helps establish their entitlement to the benefits. One example of this challenge is *Mntseu v Mineworkers Provident Fund* where the Adjudicator stated the following

The above history paints a breathtaking picture of lack of interest, non-cooperation, and shocking administration on the part of the fund and its administrator. It is self-evident that no purpose will be served by further requests or demands for information. Unfortunately this is one of those cases, as is often the situation in pension fund complaints, where the fund is the party in possession of the information necessary to support a cause of action. In particular, the Complainant is not in possession of a copy of the rules of the fund as they obtained at the time the deceased passed away. The rules are indispensable for establishing the entitlement, if any, to a death benefit.<sup>706</sup>

In some cases, as illustrated in *Mntseu*, the attitude and the approach of boards or board members do not help the State realise the provisions of section 37C of the Pension Funds Act. This conduct thus leads to unfairness and injustice for dissatisfied fund members, dependants, and nominated beneficiaries who neither have confidence in the retirement fund industry nor trust pension fund boards and their board members.

The right of a dependant or nominated beneficiary to receive information that is reasonably needed to establish or to protect a right is entrenched in various statutes and other regulatory mechanisms:

- Section 7D(1)(c) of the Pension Funds Act requires pension fund trustees to ensure that adequate and appropriate information is communicated to members and beneficiaries of funds, informing them of their rights, benefits, and duties in terms of the rules of the fund, subject to such disclosure

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<sup>706</sup> *Mntseu v Mineworkers Provident Fund* 2005 4 BPLR 339 (PFA) at 341.

requirements as may be prescribed.<sup>707</sup> In *Clacher and Others v Mercedes-Benz South Africa Pension Fund and Others*<sup>708</sup> the Adjudicator held that the failure by a pension fund, without appropriate justification, to provide relevant information required by a member for the exercise of his or her rights breaches the duty to act in good faith and amounts to an improper exercise of powers and maladministration of the fund.<sup>709</sup>

- In terms of section 50(1) of the Promotion of Access to Information Act 2 of 2000 (PAIA) on the right of access to records of private bodies, a requester of information must be given access to any record of a private body if (a) that record is required for the exercise or protection of any rights; (b) that person complies with the procedural requirements of PAIA relating to a request for access to that record; and (c) access to that record is not refused in terms of any ground for refusal contemplated in Chapter 4 of Part 3 of PAIA.<sup>710</sup>
- King IV recommends that members of the governing body should individually and collectively cultivate transparency.<sup>711</sup> King IV states that members of the governing body should be transparent in the way they exercise their governance role and responsibilities.<sup>712</sup> It is submitted that this implies access to information and reasons for decisions.

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<sup>707</sup> See in this regard *Clacher and Others v Mercedes-Benz South Africa Pension Fund and Others* 2016 2 BPLR 200 (PFA) at 200; *Minnie v Motor Industry Provident Fund and Others* 2011 3 BPLR 387 (PFA); and *Lediga v Bosal Afrika Group Provident Fund and Another* 2001 7 BPLR 2211 (PFA).

<sup>708</sup> *Clacher and Others v Mercedes-Benz South Africa Pension Fund and Others* 2016 2 BPLR 200 (PFA).

<sup>709</sup> At 200.

<sup>710</sup> In *Noordien v Metal Industries Provident Fund* 2002 3 BPLR 3236 (PFA) at 3236, the Adjudicator held that the constitutional right of access to information was binding on tribunals such as the pension fund. The correct interpretation of the law was said to be that it would be fair and reasonable to oblige pension funds, in fulfilling their duty of good faith, to disclose to their members, pensioners, and beneficiaries such information as was reasonably required by those persons for the exercise or protection of any right, and that failure or refusal to do so without justification would amount to an improper exercise of the fund's powers. The Adjudicator also stated that in establishing whether the complainant was entitled to the relief sought, these questions were posed: whether the complainant had an antecedent right which she wished to exercise or protect; whether the information sought by the complainant was reasonably required by her to exercise or protect her right; and whether the fund provided any grounds to justify its refusal of the information sought (at 3237).

<sup>711</sup> King IV Report, part 5.1 (Principle 1, recommended practice 1(f)).

<sup>712</sup> According to Hunter, transparency minimises opportunities for corruption because if decisions are to be subject to scrutiny, they are likely to be taken more carefully and with less regard for



- The National Treasury and the FSB (now the FSCA) also recommend that to improve the quality of private pension provision in South Africa, among others, concerns about lack of transparency and inadequate disclosure in the pension fund industry would need to be addressed.<sup>713</sup> It is submitted that this also implies access to information and reasons for decisions.
- Circular PF No. 90 issued by the FSB deals with the provision of minimum information to pensioners, deferred pensioners, and dependants of deceased members. The circular states that pension fund trustees should provide dependants with a summary of all benefits that were payable on death, what has already been paid, and what will be allocated.<sup>714</sup>

#### 5.4.6.2 Reasons for distributions

Pension fund boards must be obliged by law to provide their reasons for the adopted distribution of death benefits, even where these reasons are not requested. This will add towards ensuring that trustees try their level best to distribute the death benefits equitably. The right of a dependant or nominated beneficiary to receive reasons for distributions is also entrenched in various statutes and other regulatory mechanisms.

- Section 33(2) of the Constitution states that everyone whose rights have been adversely affected by administrative action has the right to be given

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ulterior motives then might otherwise be the case: see Hunter R “The Governance of Pension Funds” (Paper to be presented to the annual convention of the Financial Planning Institute, Durban, April 2002) in par 3.5, available at Bowman’s website at <http://www.bowman.co.za/FileBrowser/ArticleDocuments/Governance-Of-Pension-Funds.pdf> (last accessed on 30 June 2021).

<sup>713</sup> See in this regard the National Treasury *Social Security and Retirement Reform 2007* at 23 in par 93; and the FSB *Treating Customers Fairly (TCF) Guide for Retirement Funds for Consultation* (13 October 2017), which outcomes were created to ensure that the fair treatment of consumers is embedded in the culture of companies operating in the financial services industry. The TCF Guide is available at the FSCA website, <https://www.fsca.co.za> (last accessed on 30 June 2021).

<sup>714</sup> See Financial Services Board Circular PF No. 90 (May 1997) at 4 in par C dealing with initial disclosures, available at <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%2090.pdf> (last accessed on 30 June 2021). In *Zwane v National Fund for Municipal Workers and Another* 2019 3 BPLR 905 (PFA), the Adjudicator highlighted that the provision of information to the dependants is crucial and in line with the provisions of FSB Circular PF No. 90.

written reasons for that action.<sup>715</sup> It was shown in Chapter 2 of this thesis that the provisions of the Constitution apply to retirement funds<sup>716</sup> and that the conduct of pension board members qualifies as administrative action.

- Section 5(1) of the Promotion of Administrative Justice Act (“the PAJA”) also caters for the right to reasons for administrative action.<sup>717</sup>

So it is crucial for pension fund trustees to engage fairly and in a transparent manner with dependants and beneficiaries and where possible and practical, make documents or information available that will help them to determine their entitlement to death benefits.<sup>718</sup> For these reasons, pension fund trustees should promptly supply information about the particular individual’s death benefit to all dependants

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<sup>715</sup> Cox 2003 *Pensions* 118 at 122 states that refusing to disclose documents is not the same as refusing to give reasons. He refers to the English trust-law case of *Re Londonderry’s Settlement* [1965] Ch 918 (CA), which dealt with the disclosure of documents containing confidential information relating to various potential beneficiaries. The Court of Appeal refused to order disclosure. Cox suggests that when trustees are asked for reasons by disappointed beneficiaries, it is unnecessary to give detailed reasons. However, the trustees can explain the “key criteria” on which their decisions are based. It would help all trustee boards to set down their “key criteria” in writing and, in difficult cases, to give a copy of the document to potential beneficiaries before taking their final decision.

<sup>716</sup> See Chapter 2, n 136 in this regard.

<sup>717</sup> Section 5(1) of the PAJA provides: “Any person whose rights have been materially and adversely affected by administrative action and who has not been given reasons for the action may, within 90 days after the date on which that person became aware of the action or might reasonably have been expected to have become aware of the action, request that the administrator concerned furnish written reasons for the action.” See the discussion of the PAJA below under par 6.5.1.2.

<sup>718</sup> In *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019), the High Court remarked (in par 39) that the fund had adopted a technical defence to the application that was concerned less with explaining how the fund reached its decision and more with seeking to persuade the court to decline permission to access the court. When making decisions in terms of s 37C of the Pension Funds Act, the fund is performing an important social function. When dealing with challenges to its decisions, it is appropriate that a fund assist a court and provide it with sufficient information in response to the challenges advanced about how its decisions were taken and what investigations were done, whether through provision of its record and reasons or through the filing of affidavits. A fund should also be diligent in its dealings with persons aggrieved by its decisions and in the usual course, in any subsequent litigation, not regard itself as an adversary of a person aggrieved by its decisions. This was not a case in which bad faith was alleged in the founding affidavit. The court highlighted the contested nature of Arries’s (the fourth respondent’s) factual dependency. The application for condonation for the late institution of proceedings was dismissed. It should be noted that the conduct of the fund in *Kim* goes against the recommendations of King IV, which regards corporate citizenship as “the recognition that the organisation is an integral part of the broader society in which it operates, affording the organisation standing as a juristic person in that society with rights but also responsibilities and obligations”. See in this regard King IV Report (“Glossary of Terms” at page 11). The conduct of the fund is also measured against the values of treating customers fairly, as prescribed by s 57 of the FSRA. See in this regard Chapter 2, n 64.

and beneficiaries who were considered for potential allocation.<sup>719</sup> This information should include the reasons for the way in which the trustees have distributed the death benefits.<sup>720</sup> The furnishing of reasons aims to ensure fairness and transparency in the way in which pension fund trustees distribute benefits.<sup>721</sup> It gives members, dependants, and other beneficiaries an opportunity to appreciate the facts and circumstances that the trustees considered in making the distribution of benefits.<sup>722</sup> Aggrieved parties could make an informed decision before challenging the decision of the fund in court or with the Adjudicator. This is even more pertinent because the fund members indirectly bear the costs of litigation.<sup>723</sup>

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<sup>719</sup> See *Magane v Engineering Industries Pension Fund* 2002 4 BPLR 3365 (PFA), where the complainant, the son of the deceased fund member, could not adduce proof of his allegations against the fund because the fund had not given him the information that he required to protect his rights. The Adjudicator held that the complainant was entitled to be given the requested information to protect his rights and/or establish his interest, especially because the fund had the information at its disposal or in its possession (in par 12). The fund was ordered to provide the Adjudicator and the complainant with the information and documents required by the complainant to protect his rights, including the fund rules and a detailed breakdown of the benefits.

<sup>720</sup> See OECD *Guidelines for the Protection of Rights of Members and Beneficiaries in Occupational Pension Plans* (2004) at 12, stating that rights may be meaningless unless they are adequately disclosed and understood. So it is important that sufficient, readily understood information about the pension plan is provided to plan members and beneficiaries in good time. Moreover, any major changes in rights, rules, and obligations should similarly be disclosed.

<sup>721</sup> See Bolton *Regulation* at 311, referring to the Australian case of *Ansett Transport Industries (Operations) Pty Ltd and Another v Wraith and Others* (1983) 48 ALR 500 (FC, GD) at 507, where Woodward J pointed out that the duty to give reasons requires the decision maker to explain his or her decision in a way which will enable an aggrieved person to say in effect: "Even though I may not agree with it, I now understand why the decision went against me. I am now in a position to decide whether that decision has involved an unwarranted finding of fact, or an error of law, which is worth challenging".

<sup>722</sup> Cox 2003 *Pensions* at 123, quoting the Ombudsman in the United Kingdom, succinctly states the following in this regard: "the problem with refusing to give reasons for a decision is that, if trustees have confidence in their reasons, there is no reason not to disclose them. It is easy to infer a lack of good reasons from a refusal to say what the good reasons were. If the reasons for a decision were flawed, then one would naturally prefer not to disclose them. However, concern that reasons may be flawed is hardly a good reason for refusing to disclose them." Although the author was referring to the position in the United Kingdom, it is arguable that the same applies in South Africa. See Chapter 4, par 5.4.3 for a discussion of the United Kingdom laws in this regard.

<sup>723</sup> If the retirement fund is paying for the litigation costs, surely the amounts used could have been available for the benefit of the fund and its members rather than paying lawyers. See par 6.5.5.2 below, where legal costs and other challenges are discussed.

The provision of reasons to affected parties<sup>724</sup> has been described as one of the fundamentals of good administration,<sup>725</sup> and so pension fund trustees' failure to provide reasons for their decisions may be considered maladministration.<sup>726</sup> Not knowing the basis on which an adverse decision is taken is itself an injustice to parties affected by the particular decision.<sup>727</sup> It is difficult to argue against the reasonableness of requiring pension fund trustees to give appropriate (not necessarily detailed) reasons for decisions that significantly affect the financial well-being of dependants and nominated beneficiaries.<sup>728</sup>

In *Tshabalala v Municipal Employees Pension Fund and Another*,<sup>729</sup> the complaint concerned the quantum of the death benefit paid by the fund to the complainant following the death of the fund member (the deceased). The complainant confirmed that she was receiving a monthly pension, and that an amount of R61 907, being 50 per cent of the total gratuity, was paid to her by the fund. The benefits allocated to the children were placed in a trust for their benefit. The focus of the discussion here is on the complainant's contention that the amount she received from the fund was not explained to her. The fund indicated that it had made payment to her for herself and the minor children, but the administrator (the second respondent) prepared the entire payroll for all beneficiaries, and it could not obtain proof of payment that would reflect payments to the complainant in isolation. It said that moneys were paid into the complainant's bank account, and that the Adjudicator should request the complainant to supply bank statements as proof that she did not receive payments for her minor children. The fund concluded that it had paid the

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<sup>724</sup> If the deceased fund member is not survived by any dependants but has nominated a beneficiary, the executor of the deceased's estate is considered an interested party and is entitled to be issued with the details of payments made to beneficiaries. See in this regard *Mabaso v Assmang Provident Fund and Another* 2019 2 BPLR 448 (PFA) in par 5.2. Section 37C(1)(b) of the Pension Funds Act deals with instances in which the deceased is not survived by any dependants but has nominated a beneficiary. See par 3 above, where this provision is discussed.

<sup>725</sup> See Bolton *Regulation* at 288, for a full analysis of the furnishing of reasons by an administrative body.

<sup>726</sup> See Chapter 4, par 5.4.3 for a discussion of the duty of pension scheme trustees in the United Kingdom to record and disclose to the beneficiaries the reasons for distributing death benefits in a particular manner.

<sup>727</sup> See also Cox 2003 *Pensions* at 119.

<sup>728</sup> Cox 2003 *Pensions* at 122.

<sup>729</sup> *Tshabalala v Municipal Employees Pension Fund and Another* 2019 2 BPLR 570 (PFA).

death benefit in terms of the fund's rules. The Adjudicator had to determine whether the fund had failed to explain the amount that was paid to the complainant.

The Adjudicator held that the complainant as a beneficiary of the deceased's death benefit was entitled to relevant information about the quantum of the amount paid to her.<sup>730</sup> Her entitlement to be provided with relevant information was based essentially on the duties of the board in terms of section 7D(c) of the Pension Funds Act.<sup>731</sup> The Adjudicator held that the duty to disclose adequate information to members and beneficiaries is important for accountability and the provision of access to information.<sup>732</sup> The fund had been requested many times to explain the computation of the total death benefit and the amount paid to the complainant, but had failed to do so. Thus it had breached its fiduciary obligation to provide the complainant with relevant information. The fund administrator had also failed to assist the complainant in this regard, which conflicted with its duty to administer the fund in a responsible manner.<sup>733</sup> The Adjudicator ordered the fund to provide her office and the complainant with a detailed computation which reflected how the total death benefit was calculated and the computation of the amount paid to the complainant.<sup>734</sup>

In the light of the advantages of providing reasons to dependants and beneficiaries, it is submitted that, in the interests of clarity and certainty, section 37C of the Pension Funds Act should expressly provide for the right of a dependant or beneficiary to be provided with written reasons by pension fund trustees.<sup>735</sup> This amendment would

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<sup>730</sup> In par 5.5.

<sup>731</sup> The provisions of s 7D are stated in par 5.4.6 above, where *Clacher and Others v Mercedes-Benz South Africa Pension Fund and Others* 2016 2 BPLR 200 (PFA) is discussed.

<sup>732</sup> *Tshabalala v Municipal Employees Pension Fund and Another* 2019 2 BPLR 570 (PFA) in par 5.6, referring to s 32(1)(b) of the Constitution of the Republic of South Africa, 1996 and *Wentworth v GG Umbrella Fund and Others* 2009 1 BPLR 87 (PFA).

<sup>733</sup> *Tshabalala v Municipal Employees Pension Fund and Another* 2019 2 BPLR 570 (PFA) in par 5.7, referring to s 13B(1)(5) of the Pension Funds Act.

<sup>734</sup> *Tshabalala v Municipal Employees Pension Fund and Another* 2019 2 BPLR 570 (PFA) in par 5.8.

<sup>735</sup> See Chapter 6, par 5.14 for the suggested formulation of the new s 37C(1)(d) of the Pension Funds Act. See also *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC) in par 47, where the High Court stated: "There is no general duty on a person holding a fiduciary position to give reasons for his actions to those to whom his duties are owed. The duty of a fiduciary to render an account is a duty to disclose what he has done in the course of his administration, not why he has done it."

remove any uncertainties.<sup>736</sup> It is suggested that, as far as possible, pension funds should have standard templates and processes that they follow in distributing death benefits. These standard templates and processes may be circulated to identified dependants and beneficiaries before the commencement and/or finalisation of the distribution process. In many matters before the Adjudicator, the determination required the board of trustees to provide the Adjudicator and the complainants with reasons for distributions.<sup>737</sup>

#### 5.4.6.3 Guarding against abuse of the right of access to information

Nevertheless, it is important to guard against the abuse of the right of access to information. Potential beneficiaries may have ulterior motives when using the mechanism to gain information relating to death benefits paid to other people, which could lead to extortion and other threats being made against the recipients of the benefits. As a result, despite the importance of providing reasons for the distribution of benefits to members and beneficiaries as highlighted above, there are limitations which may lead to certain information being justifiably refused, especially where there is a need to preserve the right to privacy of individual members.<sup>738</sup>

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<sup>736</sup> As an example of a statutory provision creating a similar right to certain information, see s 26(1) of the Companies Act 71 of 2008, stating that a person who holds beneficial interests in a profit company or is a member of a non-profit company has a right to inspect without charge the reports to annual meetings and annual financial statements. Section 26(9) further provides that it is an offence if a company tries to frustrate or unreasonably fails to grant access to the relevant information.

<sup>737</sup> See, for example, in *Zakwe and Others v Discovery Preservation Pension Fund and Another* 2019 2 BPLR 588 (PFA) in par 6.13. *Zakwe* is discussed under par 3.2 and n 499 above.

<sup>738</sup> Section 14 of the 1996 Constitution provides that everyone has the right to privacy. See also the preamble to the Protection of Personal Information Act 4 of 2013 ("POPI"), stating that the right to privacy includes a right to protection against the unlawful collection, retention, dissemination, and use of personal information. The State must respect, protect, promote, and fulfil the rights in the Bill of Rights. The right to privacy is also not absolute but can be limited where justified. In this regard the preamble to POPI states that consonant with the constitutional values of democracy and openness, the need for economic and social progress, within the framework of the information society, requires the removal of unnecessary impediments to the free flow of information, including personal information; and to regulate, in harmony with international standards, the processing of personal information by public and private bodies in a manner that gives effect to the right to privacy subject to justifiable limitations that seek to protect other rights and important interests. See in this regard *Shahim v Shahim Provident Fund* 2009 1 BPLR 75 (PFA), where the Adjudicator held that pension fund members have a right to information from the board, but they are not entitled to information about benefits and contributions relating to other members of the fund. She concluded that in so far as the information requested by the complainant related to the personal information of former and existing members of the fund, the fund was justified in refusing to supply such information to the complainant (at 78). See also in this regard Bolton *Regulation* at 301, quoting Lord Denning MR in *Breen v Amalgamated Engineering Union and Others* [1971] 2 QB 175 (CA) at 191B-C. Although the comments related

### 5.5 *The effect of the codification of duties on the distribution of retirement fund death benefits*

It is clear from the preceding discussion about statutory provisions that the duties of pension fund trustees are codified in certain respects. Section 7C(2) of the Pension Funds Act partly codifies both the duty of care and skill and the fiduciary duties of pension fund trustees. It was also shown in the paragraphs above that the Pension Funds Act is not the only legislation that prescribes duties for pension fund trustees. Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 also prescribes their duties. And in terms of section 16 of the Financial Advisory and Intermediary Services Act 37 of 2002, a pension fund must have a Code of Conduct. The principles often contained in the Code of Conduct are like the duties that pension fund trustees have under the common law and statutory provisions. It is argued that the codification of duties does not discard the common-law duties from South African law, as statutory provisions and the common law exist parallel to each other. Nor do the statutory provisions introduce new standards for fiduciary duty and duty of care, because the codification of the common-law principles has preserved the standard applicable to pension fund trustees. So the position in South Africa is a partial codification, and the duties under the common law still apply when not expressly excluded by the statutory provisions.

None of the statutes mentioned above — the Pension Funds Act, the Financial Institutions (Protection of Funds) Act, and the Financial Advisory and Intermediary Services Act — states that the statutory provisions replace or repeal the common law. In line with the provisions of the Constitution, courts should seek to apply the common law unless it is specifically prohibited by a statute.<sup>739</sup> Section 16(1)(e) of the Financial Advisory and Intermediary Services Act specifically states that the principles contained in the Code of Conduct must comply with all applicable statutory and common-law requirements applicable to the conduct of business.<sup>740</sup> Sections 7C(1)(e) and 7C(1)(f) of the Pension Funds Act were introduced into the

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to the procurement of services, in my view they are also informative in the field of retirement funds. It is the responsibility of pension funds and their trustees to ensure that personal information relating to their fund members and the beneficiaries (including children) is processed lawfully in compliance with the relevant provisions of POPI.

<sup>739</sup> See par 4.2 above, where the common law is discussed.

<sup>740</sup> See par 5.4.3 above, where the Code of Conduct is discussed.

Act by section 9 of the Financial Services Laws General Amendment Act 45 of 2013, while the rest of section 7C was introduced by section 2 of the Pension Funds Amendment Act 22 of 1996: and neither of these statutes specifically excludes the common law. It should be noted that already in 1996, the introduction of section 7C in the Pension Funds Act codified fiduciary duties and the duty of care.<sup>741</sup> Since 1996, the courts and the Pension Funds Adjudicator have applied both the common law and the statutory provisions in determining the fiduciary obligations and standard of care required from pension fund trustees.<sup>742</sup> In some cases and determinations, the court and/or the Adjudicator specifically states that the powers and duties of pension fund trustees, and the rights and obligations of fund members and the employer, are governed by the rules of the fund, the relevant legislation, and the common law.<sup>743</sup> The preamble to PF 130 specifically states that pension fund trustees must act in terms of pension law, common law, customary law, regulations, registered rules of the fund, the Code of Conduct, and policies that apply to the fund.<sup>744</sup>

The partial codification of pension fund trustees' common-law duties is a welcome development and was necessitated by the lack of clarity in some matters under the common law, such as whether pension fund trustees owe any fiduciary duties to fund members and their beneficiaries.<sup>745</sup> Even so, despite the partial codification of

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<sup>741</sup> See n 642 above, in this regard.

<sup>742</sup> See *PPWAWU National Provident Fund v Chemical, Energy, Paper, Printing, Wood and Allied Workers' Union (CEPPWAWU)* 2008 2 SA 351 (W) in par 21, stating that the introduction of sections 7A to 7E into the Pension Funds by Act 22 of 1996 "created statutory duties that overlap with the pre-existing common law fiduciary duties of pension fund trustees". In *Sasol Limited and Others v Chemical Industries National Provident Fund* 2015 JOL 33910 (SCA), the Supreme Court of Appeal held (in par 13): "The legal principles that apply to pension and provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents." It is apparent from the above determination of *Affirm Marketing* and the two cases of *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* and *Sasol Limited v Chemical Industries National Provident Fund* (per the Supreme Court of Appeal) that the courts and the Adjudicator still rely on the common law as one of the sources of duties of pension fund trustees, despite the codification of those duties in terms of s 7C of the Pension Funds Act.

<sup>743</sup> See, for example, in *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ) in par 9.

<sup>744</sup> It is submitted that if the FSB (now the FSCA) considered s 7C to be abolishing common law, it would not have found it necessary, in PF 130, to state that pension fund trustees must act in terms of the common law among other sources of powers mentioned there.

<sup>745</sup> See par 5.4.1 above, where s 7C(2)(f) of the Pension Funds Act is discussed.



the duties of pension fund trustees, it is clear from the discussion in this thesis that there are still some gaps in the legislation that may weaken its effectiveness. This study exposes the inconsistent way in which pension funds, and sometimes the Pension Funds Adjudicator, interpret the provisions of section 37C of the Pension Funds Act; and there are also instances in which pension fund trustees do not comply with their duties in terms of applicable laws and their pension fund rules.

The provisions of the Pension Funds Act do not specifically state that pension fund trustees should comply with their duties under the common law. This position contrasts with the one under section 77(2) of the Companies Act that refers directly to the common law. In company law, section 77(2) of the Companies Act 71 of 2008 provides that a director on the board of directors may be held liable under the principles of the common law relating to breach of a fiduciary duty, for any loss, damages, or costs sustained by the company because of the breach by the director of a duty contemplated in, among other provisions, sections 76(3)(a) (the duty to act in good faith and for a proper purpose) or 76(3)(b) (the duty to act in the best interests of the company). The Pension Funds Act, although it has partly codified the duties of pension fund trustees in terms of section 7C, does not contain a similar provision prescribing liability for pension fund trustees who breach their duties. It is suggested that a provision like section 77(2) of the Companies Act 71 of 2008 should be added to the Pension Funds Act.<sup>746</sup>

The discussion in this chapter highlighted the role that pension fund trustees play in the distribution of retirement fund death benefits. Pension fund trustees must

- exercise the duty of care and skill in ensuring that the correct amounts are paid to the rightful owners (the dependants and/or nominated beneficiaries);
- act in the best interests of the fund and dependants and/or nominated beneficiaries;

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<sup>746</sup> See Chapter 6, par 5.13 for the suggested formulation of this section in the Pension Funds Act. In 2013, sections 13A(8) and (9) were added to the Pension Funds Act to provide that, where there is or there was non-compliance with s 13A of the Pension Funds Act (payment of contributions by employers), the person at the employer responsible for not paying the contributions over to the fund is held personally liable for the non-compliance (see par 2.2.10.2 and n 473 above, where s 13A is also discussed); and it is suggested that the same statutory provisions should be added to s 37C of the Pension Funds Act.

- treat all members equally and fairly (impartially);
- ensure that there is no conflict of interest between pension fund trustees, pension funds, and pension fund members and/or beneficiaries;
- disclose any potential conflict of interest;
- act in good faith;
- ensure their discretion is independent and unfettered; and
- ensure that members and beneficiaries have access to information that is relevant in establishing and protecting their rights in respect of the pension or death benefit.

Even though the test for good faith may be subjective, there must be a reasonable ground for a pension fund trustee's belief that in exercising his or her power to distribute death benefits, he or she is acting in the best interests of the fund and affected beneficiaries. As a result, if a trustee distributes the death benefit under section 37C of the Pension Funds Act with ulterior motives, he or she will breach his or her fiduciary duty to the pension fund and beneficiaries to act in good faith and in the best interests of the fund and the beneficiaries.<sup>747</sup>

These duties also encourage accountability on the part of pension fund trustees in distributing the death benefits. Trustees' compliance with their duties is at the heart of the efficient distribution of death benefits. Trustees thus play a crucial role in ensuring that the objectives of the State in the establishment of retirement funds are realised and are guided by pension fund rules, statutory provisions, the Constitution, and the common law, as well as by the trustees' compliance with their fiduciary duties and the duty of care. The trustees' failure to comply with their duties, resulting in payments to dependants and nominated beneficiaries of death benefits which

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<sup>747</sup> See *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2017 6 BCLR 750 (CC), where the Constitutional Court stated (in par 42): "For one to succeed in an action for breach of a duty of good faith, the duty should be well pleaded. The breach should also be pleaded and the proof of such breach stated with precision. This is so because breach is a matter of evidence. It has to be established and proved." The Constitutional Court in this regard referred (in par 42, n 56) to *South African Local Authorities Pension Fund v Msunduzi Municipality* 2016 4 SA 403 (SCA) in pars 31-33.

they are not entitled to, may constitute “maladministration” for the purposes of the Pension Funds Act.<sup>748</sup>

The next paragraph examines the remedies which may be relied on under statutory provisions and the common law by dependants and/or nominated beneficiaries who are aggrieved by the way that pension fund trustees have distributed (or are distributing) the death benefit. Some challenges facing dependants and/or nominated beneficiaries in applying these remedies are pointed out, and improvements to the existing remedies are proposed where relevant.

## **6 THE LIABILITY OF PENSION FUNDS AND THEIR TRUSTEES FOR WRONGFUL DISTRIBUTION OF DEATH BENEFITS**

*Ubi jus, ibi remedium.*<sup>749</sup>

### *6.1 Introduction*

A person’s most valuable possession is often his or her retirement fund benefit.<sup>750</sup> Similarly, a retirement fund benefit payable to a dependant or nominated beneficiary on the death of a fund member may be the largest amount of money that this recipient has ever received. Furthermore, on the death of a fund member, the death benefit payable by the fund may be the only source of income available to sustain the dependants financially. So it is no surprise that the number of disputes relating to the distribution of death benefits is high, as can be seen from the many court cases, determinations by the Adjudicator,<sup>751</sup> and media reports.<sup>752</sup> In Chapter 1 of this thesis it was mentioned that one of the main objectives of the State in the establishment of retirement funds is that people should have some form of income when they retire or that their dependants should have some form of financial support when the fund member dies while still in service.<sup>753</sup> This objective ensures that fund members or their dependants do not have to rely solely on the State’s older person’s

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<sup>748</sup> See *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) at 730, also cited in Chapter 2, n 122, and Chapter 3 par 5.3.2.2.

<sup>749</sup> *Ubi jus, ibi remedium* is a Latin maxim which means that where there is a right, there is a remedy.

<sup>750</sup> See Ellison *Pensions* at 1.

<sup>751</sup> See the statistics in this regard in Chapter 1, par 1, n 11.

<sup>752</sup> See, for example, n 44 above referring to the news article by Bechard *Girlfriend Gets Too Big a Slice of Pie*.

<sup>753</sup> See Chapter 1 par 2.4, where the objectives of a retirement fund are discussed.

grants (formerly known as “old age pensions”) or any other social grants. For these objectives to be realised, members of retirement funds must have confidence in the management of their retirement funds and the availability of adequate protection of their benefits.<sup>754</sup> In other words, reassurance is needed that if fund members, dependants, and nominated beneficiaries are not satisfied with the nature and amounts of their pension benefits, the aggrieved parties should have access to an appropriate forum to decide the matter and to remedies to enforce their rights and hold any wrongdoers accountable.<sup>755</sup>

It is submitted that the value of ownership rights lies in their enforceability, and in criminal sanctions and other remedies available to protect the owner against wrongdoers.<sup>756</sup> Lack of effective remedies for dependants and nominated beneficiaries for the wrongful distribution of death benefits weakens the confidence of fund members and their dependants or nominated beneficiaries in the efficiency of the retirement fund industry. So it is important that aggrieved parties should have access to affordable means to enforce their rights<sup>757</sup> in terms of the pension fund

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<sup>754</sup> See the OECD *Guidelines for Pension Fund Governance* (5 June 2009) in par 3, stating that to guarantee the accountability of the governing body, it should be legally liable for any actions that fail to comply with the obligations imposed on it, including prudence. The OECD document is available at <https://www.oecd.org/finance/private-pensions/34799965.pdf> (last accessed on 30 June 2021).

<sup>755</sup> See also in this regard, PF 130 at 2 in par 6, stating that fund members and their beneficiaries must have legal recourse or remedies where their benefits are not provided to them as stipulated in the rules of the fund.

<sup>756</sup> King IV, part 5.1 deals with leadership, ethics, and corporate citizenship. King IV (Principle 2, recommended practice 9) states that the governing body should exercise ongoing oversight of the management of ethics and, in particular, oversee that it leads to (b) having sanctions and remedies in place for when the organisation’s ethical standards are breached. In *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC) in par 69, Ackermann J stated that “this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the Constitution cannot properly be upheld and enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to ‘forge new tools’ and shape innovative remedies if needs be, to achieve this goal.”

<sup>757</sup> See *Masemola v Special Pensions Appeal Board and Another* 2020 2 SA 1 (CC) in par 51, where the Constitutional Court referred to the maxim *ubi jus, ibi remedium* and (through a quotation from the judgment of Centlivres CJ in *Minister of the Interior and Another v Harris and Others* 1952 4 SA 769 (A) at 780H-781B) the English case of *Ashby v White* (1703) 92 ER 126 at 136, where Holt CJ stated the following: “If a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy, if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.” The Constitutional Court in *Masemola* (in par 51) also referred to the

rules as well as the basic rights protected by the Constitution.<sup>758</sup> The legal remedies that may be relied on by dissatisfied members, dependants, and nominated beneficiaries, and the liability of funds and their pension fund trustees (the board members), are discussed below. Attention is also given to forums that have the jurisdiction to adjudicate retirement fund disputes, particularly complaints about the wrongful distribution of death benefits; options available to aggrieved parties who seek redress for wrongful distribution; and the question of who is entitled to claim these remedies (*locus standi* (standing)).

## 6.2 *Locus standi* to initiate legal actions or claims against pension funds and/or their trustees

The obligation of boards to conduct correct and fair distribution of death benefits is owed to the funds, fund members, their dependants, and nominated beneficiaries.<sup>759</sup> Therefore, in the context of the wrongful distribution of death benefits, retirement funds or their boards, dependants, and nominated beneficiaries have the legal capacity to seek remedies against wrongdoers such as the fund, board members, and other accountable officers. The focus of the discussion here is on the *locus standi* (the standing) of fund members' dependants and the nominated beneficiaries.

The *locus standi* of an aggrieved person who wishes to approach the Adjudicator's office for relief is determined by section 1 of the Pension Funds Act. It defines a "complainant" as

- (a) any person who is, or who claims to be—
  - (i) a member or former member, of a fund;

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English case of *Dixon v Harrison* (1823) 124 ER 958 at 964, where it was stated that the greatest absurdity imaginable in law is "that a man hath a right to a thing for which the law gives him no remedy; which is in truth as great an absurdity, as to say, the having of right, in law, and having no right, are in effect the same".

<sup>758</sup> See par 4.3 above, where the rights protected by the Constitution related to retirement fund death benefits are discussed.

<sup>759</sup> See *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA), where the Supreme Court of Appeal dealt with the *locus standi* of a functionary, in this case the Registrar of Pension Funds. The *locus standi* of the Registrar (now the FSCA) to institute actions against funds and pension fund trustees is, however, not canvassed in this thesis.

- (ii) a beneficiary or former beneficiary of a fund;
- (iii) an employer who participates in a fund;
- (iv) a spouse or a former spouse of a member or former member, of a fund;
- (b) any group of persons referred to in paragraph (a) (i), (ii), (iii) or (iv);
- (c) a board of a fund or member thereof; or
- (d) any person who has an interest in a complaint.<sup>760</sup>

Thus, dependants and nominated beneficiaries who are dissatisfied with the distribution of death benefits qualify as “complainants” under sections 1(a)(ii) (*beneficiary or former beneficiary of a fund*), 1(a)(iv) (*spouse or former spouse*), and 1(b) (*any person who has interest in a complaint*) of the Pension Funds Act to pursue their actions against the funds or their trustees before the Pension Funds Adjudicator.

### 6.3 *The audi alteram partem rule and the distribution of death benefits*

Disputes or disagreements between funds, dependants, and nominated beneficiaries about the allocation or apportionment of death benefits are common. If these disputes are brought to the attention of the pension fund trustees by dependants and/or nominated beneficiaries, it is crucial that all the parties involved should be afforded the right to be heard (under the *audi alteram partem* rule).<sup>761</sup>

<sup>760</sup> See, for example, *Bogie (obo Board of Trustees of Chaka’s Rock Pension Fund) v Metropolitan Life Limited and Others* 2009 3 BPLR 237 (PFA), where the Adjudicator dealt with the issue of the employer’s not paying contributions to the fund. The Adjudicator confirmed that any complainant with a substantial interest in the outcome of the complaint has *locus standi* to lodge the claim before the Adjudicator (at 243). *D v M* 2016 JDR 0067 (GJ) involved the *locus standi* of a properly appointed executor or executrix of a deceased member’s estate to bring the application to compel the mother and her minor child to undergo paternity (DNA) tests when there was a dispute about the paternity of the child and the possibility that the estate might be a beneficiary of a death benefit (in pars 2 and 16). See above in par 2.2.7, where *D v M* is discussed.

<sup>761</sup> See n 804 below for an explanation of the *audi alteram partem* rule. In *Van der Merwe and Others v Southern Life Association and Another* 2000 3 BPLR 321 (PFA) in par 9, the Adjudicator states that given that the fund’s decision to distribute the death benefit may impact significantly upon the rights and property of the dependants, the fund ought properly to investigate the circumstances of the dependants and should give each one an opportunity to be heard. The nature, content, and extent of such a hearing will depend on the circumstances of each case. If there are disputes of fact and credibility, the resolution of which may lead to the payment of a great deal of money, the fund may very well be expected to hold an oral hearing to ventilate the issues properly before making a finding. See also in this regard, *Mlungisi v Anglo American Property Services Provident Fund (1)* [2001] 4 BPLR 1878 (PFA) in par 11, where the Adjudicator stated that it would be unwise for him to make a final order in the matter about a

Following this rule allows trustees to hear both sides of the matter before finalising the allocation of benefits.<sup>762</sup> Failure by pension fund boards to afford persons who have a substantial interest in the matter the opportunity to be heard provides the aggrieved parties with a valid ground to contest the distribution.<sup>763</sup> It would be unwise for the board to make a final order in the matter without having entertained or considered any valid concerns from potential beneficiaries. This conduct would also conflict with the principles of procedural fairness.<sup>764</sup>

Similarly, in disputes between dependants and nominees about the allocation or apportionment of death benefits before the Adjudicator or courts, it is advisable to afford all the parties involved a right to be heard.<sup>765</sup> They should therefore be joined in the proceedings unless they specifically choose not to be involved.<sup>766</sup>

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dispute concerning the distribution of a death benefit where parties that have a substantial interest in the matter were not cited as parties in the proceeding.

<sup>762</sup> See *Government Employees Pension Fund and Another v Buitendag and Others* 2007 4 SA 2 (SCA) in par 30, where in his dissenting judgment, Conradie JA said that the natural-justice principles underlying a fair hearing are very flexible. While the fund may not have to afford a hearing to every claimant, whatever the circumstances, it must do so when a hearing is requested. This step could avert unnecessary litigation. See also in this regard *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 22.

<sup>763</sup> See *Musgrave v Unisa Retirement Fund* 2000 4 BPLR 415 (PFA), where the Adjudicator set aside the decision of the fund because the fund had failed to engage with or hear the side of the complainant before making the decision, so it was found to have violated the *audi alteram partem* rule (at 416). The complainant was one of the nominated beneficiaries: after the death of the fund member, she heard nothing about the pension benefit until she made enquiries of the fund. She was shown the beneficiary nomination form but was advised that a decision had already been taken not to allocate her any lump sum benefit, as the friends and family of the deceased had informed the fund that the couple no longer lived together at the time of death and that the relationship had ceased. The complainant accused the trustees of having failed to apply their minds to the case, of having demonstrated bias against her, and of having exercised their discretion improperly in terms of s 37C of the Pension Funds Act. She requested the Adjudicator to set aside the trustees' decision and to pay her the amount due to her in accordance with the deceased's nomination form. The Adjudicator held that the complainant was shown to be a dependant on the facts of the case and that the trustees had failed to exercise their discretion properly in concluding that she was not a dependant. First, the trustees had failed to inform the complainant that she was nominated on the form as a beneficiary before they decided to exclude her from the death benefit distribution. In terms of the disclosure requirements, the trustees had to inform her of the reasons for her exclusion but did not do so. Nor did the trustees even try to obtain the complainant's version of the facts after obtaining the version of the deceased's family (at 416). The Pension Funds Adjudicator set aside the decision of the fund.

<sup>764</sup> See, for example, *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 22.

<sup>765</sup> See also n 794 below, discussing *Aherne v Hortors Group Pension Fund* 2002 1 BPLR 2920 (PFA), which also dealt with the right to be heard.

<sup>766</sup> See, for example, *Kipling v Unilever SA Pension Fund (1)* 2001 8 BPLR 2368 (PFA) in par 22. If the matter is before the Adjudicator, s 30G(d) of the Pension Funds Act allows the Adjudicator to join the parties. Section 30G states:

"The parties to a complaint shall be-

## 6.4 The forums

Various forums that can decide disputes relating to wrongful distribution of retirement fund death benefits.<sup>767</sup> These forums include the Equality Court,<sup>768</sup> the High Court, the Adjudicator, and the Financial Services Tribunal. The focus of this thesis is on a complainant's options to approach the Adjudicator and the courts. The Pension Funds Act<sup>769</sup> encourages referring the dispute to arbitration by agreement in order to resolve disputes amicably among the parties without involving the courts or the Adjudicator.<sup>770</sup> So it is important that a complaint should be discussed with

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- (a) the complainant;
  - (b) the fund or person against whom the complaint is directed;
  - (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;
  - (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party.”

<sup>767</sup> The choice of forum is important, as it affects the speed, cost, outcome, and use of the remedies. See also Khumalo *Jurisprudential Role*, discussing in detail the jurisprudential role played by the Adjudicator.

<sup>768</sup> It is submitted that, where the facts of a case deal with equality issues and they (the facts) are appropriate, aggrieved beneficiaries may approach the Equality Court. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) specifically lists unfair discrimination in the pension industry as one of the issues over which the courts will have jurisdiction. See the Schedule attached in terms of s 29 of the Promotion of Equality and Prevention of Unfair Discrimination Act. The Schedule provides an Illustrative List of Unfair Practices in certain sectors. Item 6 refers to pensions and states:

“(a) Unfairly excluding any person from membership of a retirement fund or from receiving any benefits from the fund on one or more of the prohibited grounds.

(b) Unfairly discriminating against members or beneficiaries of a retirement fund.”

However, in all the judgments published by the Equality Court on its website, there is none yet that deals with the distribution of death benefits as such. See Department of Justice & Constitutional Development “Justice/Equality Courts/Home” available at [https://www.justice.gov.za/eqcact/eqc\\_main.html](https://www.justice.gov.za/eqcact/eqc_main.html) (last accessed on 30 June 2021).

<sup>769</sup> Section 30E(1)(b) of the Pension Funds Act deals with the disposal of complaints. It states:

“In order to achieve his or her main object, the Adjudicator– ...

(b) may, if it expedient and prior to investigating the complaint, require any complainant first to approach an organisation established for the purpose of resolving disputes in the pension funds industry or part thereof, and approved by the registrar.”

The *King Report on Governance for South Africa 2009* (King III) described Alternative Dispute Resolution (ADR) at 14-15 in par 10 as an important part of corporate governance because it is part of the duty of care and skill of directors try to resolve disputes “expeditiously, efficiently and effectively” (at 15). King IV at 33 states that a dispute resolution process should be regarded as an opportunity not only to resolve the dispute at hand, but also to maintain and enhance the social and relationship capital of an organisation. King III is at [https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king\\_iii/King\\_Report\\_on\\_Governance\\_fo.pdf](https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/king_iii/King_Report_on_Governance_fo.pdf) (last accessed on 21 June 2021).

<sup>770</sup> See in this regard Ngilwana *Pension* at 40. See also the *OECD Guidelines for the Protection of Rights of Members and Beneficiaries in Occupational Pension Plans* (2003) at 14, stating that a claim process may include the establishment of an Internal Dispute Resolution (“IDR”) procedure. Good practice would also ensure that the fund's procedure in this regard uses an



an employer and the fund, perhaps through the fund administrator, to see whether a problem can be resolved before further recourse measures are considered.<sup>771</sup> In this regard, section 30A of the Pension Funds Act provides that a complainant may lodge a written complaint with a fund for consideration by the board of the fund.<sup>772</sup> The board should consider the complaint and respond in writing to the complainant within 30 days of its receipt.<sup>773</sup> If the complainant is still not satisfied with the reply or when there was no reply, then a complaint may be lodged with the Adjudicator.<sup>774</sup> If a party is not satisfied with the decision of the Adjudicator, this party may lodge a review application with the Financial Services Tribunal.<sup>775</sup> A party who is not satisfied with the decision of the Adjudicator or that of the Financial Services Tribunal may, within six weeks after the date of the determination of the Adjudicator or the Tribunal, apply for relief to the division of the High Court which has jurisdiction.<sup>776</sup>

#### 6.5 Remedies available to dependants and nominated beneficiaries

The discussion below examines a variety of remedies which may be relied on by parties: in this context, dependants and nominated beneficiaries aggrieved by the pension fund trustees' distribution of a death benefit. Aggrieved parties may apply

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independent arbitrator or a board or tribunal, which may include fund member representatives. See, for example, *Zwane v Wiseman and Others* 2005 1 BPLR 92 (PFA), where the trustees were deadlocked on distributing the death benefit, and the dispute was referred to an arbitrator (at 98).

<sup>771</sup> See s 30E(1)(b) of the Pension Funds Act, discussed above in n 769. In this regard, the Pension Funds Regulation 30(2)(n) states that the rules of a pension fund should provide for the manner in which any disputes between the pension fund and its members or between the pension fund and any other person whose claim derives from a member must be settled.

<sup>772</sup> Section 30A(1) of the Pension Funds Act.

<sup>773</sup> Section 30A(2) of the Pension Funds Act.

<sup>774</sup> Section 30A(3) of the Pension Funds Act. Members and beneficiaries in private pension funds that are regulated by the Pension Funds Act have the Pension Funds Adjudicator and the Financial Services Tribunal to resolve any complaints that they have against their funds and their trustees before they can approach formal courts. These options (the Pension Funds Adjudicator and the Financial Services Tribunal) are not available to members and beneficiaries of funds regulated by their own statutes (see Chapter 2, n 25 above for examples of funds regulated by other statutes).

In 2019 the Government Employees Pension Fund ("GEPF") introduced an inhouse ombudsman to provide members and beneficiaries in the GEPF with access to a dispute resolution forum similar to that of the Pension Funds Adjudicator's Office. See Government Employees Pension Ombud Office "Guidelines for Submitting a complaint to the Government Employees Pension Fund Ombud (GEPO)" available at <https://gepo.co.za/complaints-process-guideline> (last visited 18 June 2021); Mhango 2019 *AHRLJ* 337-360; and Marumoagae 2019 *De Jure* 115-137.

<sup>775</sup> See Chapter 2 par 6.6, where the Financial Services Tribunal is discussed.

<sup>776</sup> Section 30P(1) of the Pension Funds Act.

to court or the Adjudicator on the grounds of maladministration of the pension fund<sup>777</sup> to review the decision of the fund based on administrative rules and to afford an administrative law remedy under the PAJA.<sup>778</sup> Alternatively, aggrieved parties may sue the fund and/or its errant trustees for breach of fiduciary duties under the provisions *sui generis*;<sup>779</sup> or they may institute delictual claims under specific statutes and/or the common law for an award of damages against the fund and/or the trustees for breach of the duty of care and skill, as well as for breach of fiduciary duty where applicable.<sup>780</sup> A beneficiary or nominated dependant may also bring a direct action where pension fund trustees fail to pay what is due to him or her.<sup>781</sup> For their part, the pension fund trustees must prove that they exercised their discretion properly and reasonably when a death benefit was found to have been wrongly paid out. Trustees who fail to do so may be blamed for maladministration.<sup>782</sup>

These remedies are examined individually below.

6.5.1 An application to court or to the Pension Funds Adjudicator to review the board's decision

#### 6.5.1.1 *The position at common law*

When aggrieved parties approach the Adjudicator or the courts on the basis of administrative rules, seeking administrative law remedies at common law, the Adjudicator or the courts must review the fund's decision broadly on the grounds of reasonableness and fairness to determine whether the trustees' decision exceeded

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<sup>777</sup> See *Gross and Others v Pentz* 1996 4 SA 617 (A) at 21, where the court recognised that trust beneficiaries may bring a court action against the trustee in their own right. This action may be for maladministration of the trust estate, for failing to pay or transfer to the beneficiaries what is due to them under the trust, or for paying or transferring to one beneficiary what is not due to him.

<sup>778</sup> See pars 6.5.1.1 and 6.5.1.2 below, discussing the common-law remedies and the PAJA.

<sup>779</sup> Pension fund trustees who breach their fiduciary duties may be subject to equitable remedies such as accounting to the fund for profits made. The term *sui generis* is Latin meaning "the only one of its kind; peculiar" and is used to describe something unique or different. So it is a unique set of legal rules that apply to specific circumstances. See par 6.5.3 below discussing *sui generis*.

<sup>780</sup> See below, par 6.5.3, stating that delictual action can be instituted by an aggrieved party for breach of fiduciary duty provided all the requirements for delictual action are met.

<sup>781</sup> *Gross and Others v Pentz* 1996 4 SA 617 (A) at 21.

<sup>782</sup> See *Clarkson NO v Gelb and Others* 1981 1 SA 288 (W).

their powers or was an improper exercise of powers or maladministration.<sup>783</sup> In reviewing the exercise of the pension fund trustees' discretion, the Adjudicator or the courts must assess whether the trustees considered all relevant factors and whether they ignored relevant factors.<sup>784</sup> The discretion on the proportions in which to distribute the benefit among beneficiaries lies with the pension fund trustees.<sup>785</sup> They are free to pay one or some or all of the dependants in accordance with what they consider to be equitable in the light of everything they took into account.<sup>786</sup> It is important to note that the test on review is not whether the distribution of the death benefit was done on the fairest terms but whether the pension fund board acted reasonably in applying its collective mind to the matter.<sup>787</sup>

#### 6.5.1.2 *The Promotion of Administrative Justice Act*

The court in *Guarnieri*<sup>788</sup> held that the fact the provisions of the Promotion of Administrative Justice Act 3 of 2000 ("the PAJA") were not explicitly mentioned in the pleadings does not mean that the provisions of the PAJA do not come into play.

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<sup>783</sup> As with all board decisions, the inclusion or exclusion of dependants from the distribution is reviewable in the complaints process established under Chapter VA of the Pension Funds Act. See, for example, *Mongale v Metropolitan Retirement Annuity Fund* 2010 2 BPLR 192 (PFA) at 193, where the Adjudicator confirmed that a decision can be reviewed if the fund has exercised its powers unreasonably and improperly or unduly fettered their exercise.

<sup>784</sup> See, for example, *Swanepoel v Abrahams and Gross Provident Fund and Another* 1999 10 BPLR 216 (PFA), where the employer intended to set off money due to it for personal loans and losses that it had suffered as a result of the deceased's negligence. But the Adjudicator held that these losses were irrelevant for s 37C of the Pension Funds Act's distribution of death benefits and should not have been considered (at 225).

<sup>785</sup> Pension fund trustees' role in distributing death benefits is so important that even the courts and the Adjudicator are not prepared to tamper with the trustees' discretion unless the circumstances are exceptional. This approach emphasises the importance of trustees' exercising their discretionary powers properly. If the court or the Adjudicator differs from the trustees' view, the issue should be referred back to the trustees for reconsideration. However, see, for example, *Dollman v The Irvin and Johnson Retirement Fund and Others* 2008 2 BPLR 137 (PFA) at 148, where the Adjudicator held that remitting the matter to the board would not be justified because it would unreasonably delay the payment, to the prejudice of the complainant.

<sup>786</sup> In *Meyer v Iscor Pension Fund* 2003 (2) SA 715 (SCA) in pars 22 and 23, the court found that as a matter of principle, a court is entitled to scrutinise the decisions taken by the trustees in the exercise of their discretion in terms of the rules on a basis analogous to the review of administrative decisions: i.e., in accordance with the principles of natural justice. The court in this regard referred to *Turner v Jockey Club of South Africa* 1974 3 SA 633 (A) at 645-646; *Lunt v University of Cape Town and Another* 1989 2 SA 438 (C); and *Edge and Others v Pension Ombudsman and Another* [1999] 4 All ER 546 (CA) at 567-569.

<sup>787</sup> See in this regard *Graham v Mine Employees Pension Fund and Others* (PFA/EC/10/98/JM) in par 22. See <https://www.pfa.org.za/Determinations/PRE%202003/5F39EC8A-E019-458A-95B7-3E8BDD109FE1.pdf> (last accessed on 16 August 2021).

<sup>788</sup> *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA).

The court referred to the Constitutional Court decision in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs*,<sup>789</sup> which stated the following about the PAJA:

The provisions of section 6 divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past.<sup>790</sup>

Section 33(1) of the Constitution states that everyone has the right to administrative action that is lawful, reasonable, and procedurally fair. The PAJA was promulgated to give effect to the provisions of section 33 of the Constitution.<sup>791</sup> Both the Constitution and the PAJA codify the principles of natural justice that have their origin in the common law.<sup>792</sup> The decisions that pension fund trustees make when distributing death benefits qualify as “administrative actions” and are governed by the PAJA.<sup>793</sup> Section 239(b) of the Constitution defines an “organ of state” as meaning

any other functionary or institution—

- (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation,

but does not include a court or a judicial officer.

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<sup>789</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) in par 25.

<sup>790</sup> *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA) in par 41. See Currie and De Waal *Bill of Rights* at 651, stating that since its promulgation, the PAJA is “the legislation that gives effect to the constitutional rights in s 33. The result is that for the most part, administrative-law review now has a legislative basis. The common law continues to have direct application, but only where the Constitution and the PAJA do *not* — so the common law applies in a direct sense only to exercises of private power” (original italics). The authors at 652 further note that the common law also has an indirect role to play as a source of informing the interpretation of the provisions of both the PAJA and s 33 of the Constitution.

<sup>791</sup> See the preamble to the PAJA and s 33(3) of the Constitution.

<sup>792</sup> See Khumalo *Jurisprudential Role* at 51.

<sup>793</sup> See in this regard *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020); *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019); *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA); and *Swart NO (née Van der Merwe) and Others v Lukhaimane NO and Others* 2021 JOL 49952 (GP) in par 11. See also Dyani-Mhango 2021 *De Jure* 549-564, reiterating that when pension fund boards exercise their discretion in distributing death benefits pursuant to s 37C of the Pension Funds Act, they are performing public functions or exercising public power as contemplated under the PAJA.

Pension fund trustees, when distributing retirement fund death benefits, are exercising power or performing a function in terms of the Constitution;<sup>794</sup> and are also exercising public power or performing a public function in terms of the provisions of section 37C of the Pension Funds Act.<sup>795</sup> So fund members, dependants, and nominated beneficiaries are entitled to fair administrative actions.<sup>796</sup> In *Mbatha v Transport Sector Retirement Fund and Another*,<sup>797</sup> the High Court confirmed that the PAJA applies to the distribution of death benefits made by the pension fund trustees in terms of section 37C of the Pension Funds Act, and a decision of the board of a pension fund taken in terms of section 37C of the Pension Funds Act constitutes an administrative action as contemplated in the PAJA, which applies to a review of such decision.<sup>798</sup> The applicability of the PAJA depends on

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<sup>794</sup> See s 239(b)(i) of the Constitution.

<sup>795</sup> See s 239(b)(ii) of the Constitution. See also *Van Zelser v Sanlam Marketers Retirement Fund and Others* 2003 2 BPLR 4420 (PFA), where the Adjudicator stated that inasmuch as boards of pension funds are like administrative bodies, in exercising their discretionary powers they must act in accordance with the principles of just administrative action. Thus, in allocating a death benefit, they must exercise that power reasonably and for the purpose for which it was given to them. This requires them to consider relevant factors, to ignore irrelevant ones, and to guard against unduly fettering their discretion (at 4421).

<sup>796</sup> In *Aherne v Hortors Group Pension Fund* 2002 1 BPLR 2920 (PFA) the Adjudicator held that the boards of pension funds, as repositories of social power, are akin to administrative bodies. Any decision by a board which is unreasonable or procedurally unfair will constitute either an improper exercise of power or maladministration as contemplated in the Pension Funds Act (at 2920). The Adjudicator also held that the concept of legitimate expectation required that administrative bodies be bound to give a person who had a right, interest, or legitimate expectation the opportunity to make representations before that right, interest, or legitimate expectation was taken away. The complainant had a legitimate expectation that she would be asked to give reasons why the payment of the pensions should not cease. So there was no reason she should be deprived of that expectation without being allowed to be heard. Furthermore, the Bill of Rights upholds the right to fair administrative action, and retirement funds, like any other juristic person, are bound by the Bill of Rights (at 2921). The Adjudicator found that the complainant should have been given an opportunity to make representations, and that since she had not been given this opportunity, she should be put in the position she would have been in had the payments not been ended (at 2921).

<sup>797</sup> See par 2.2.9.2 above, where *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020) is discussed.

<sup>798</sup> *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020) in par 9, where the court referred to these cases to confirm that the PAJA applies to pension funds: *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM) in par 14; *Themba and Another v Retail Provident Fund (Shoprite) and Others* (unreported) WCHC case no 9647/13 (6 May 2014) in par 21; *Guarnieri v Fundsatwork Umbrella Pension Fund* 2018 JDR 0740 (GP) in par 39; *Moshoshoe v Sentinel Retirement Fund and Others* (unreported) GPJ case no 2506/19 (13 September 2019) in pars 11-13. The court in *Mbatha* also noted *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ), where (in pars 39 and 45) that court (per Du Plessis AJ) held that the PAJA did not apply to s 37C reviews. It is a generally accepted view that a decision of the pension fund board taken in terms of s 37C of the Pension Funds Act

the nature of the case.<sup>799</sup> For example, it requires the plaintiffs or applicants to have exhausted internal remedies.<sup>800</sup> This requirement was clearly illustrated in *Titi v Funds at Work Umbrella Provident Fund*,<sup>801</sup> where the High Court dealt with two issues: first, the validity of the pension fund's decision to allocate death benefits in terms of section 37C of the Pension Funds Act, contrary to the written wishes of the deceased member; and, secondly, the judicial review process in terms of the PAJA. The deceased member was a brother of the applicant. Before dying, the fund member had completed a beneficiary nomination form in which he nominated three beneficiaries — his two children and the applicant — to receive a death benefit on his death. He died on 13 September 2009. The trustees allocated the death benefit to the two children and resolved not to make any allocation to the applicant because there was no evidence that she was dependent on the deceased, and the benefit was too small to make a reasonable allocation.<sup>802</sup> The trustees allocated the death benefit without notifying the applicant about their decision. The applicant asked the court to set aside the decision of the trustees in terms of the review procedure provided by the PAJA.<sup>803</sup> She contended that the decision of the fund was subject to judicial scrutiny and reviewable in terms of the PAJA on two grounds: first, that the decision was taken unilaterally without giving her notice or affording her a hearing (under the *audi alteram partem* rule),<sup>804</sup> and, secondly, that the fund was

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constitutes administrative action for the purposes of the PAJA. See in this regard *Mbatha* in par 9 and the recent High Court decision of *Swart NO (née Van der Merwe) and Others v Lukhaimane NO and Others* 2021 JOL 49952 (GP) in par 11.

<sup>799</sup> See, for example, *Cape Town Municipality v South African Local Authorities Pension Fund and Another* 2014 2 SA 365 (SCA); *Ngewu and Another v Post Office Retirement Fund and Others* 2013 1 BPLR 1 (CC); and *Sekwane v Chemical Industries National Provident Fund and Others* 2015 2 BPLR 272 (PFA).

<sup>800</sup> Section 30A of the Pension Funds Act provides comprehensive internal remedies for an aggrieved person as follows:

“(1) Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.

(2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.”

See *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM) in pars 16 and 18, where the court found that if not satisfied with the reply of the fund or the employer, the complainant may refer the matter to the Adjudicator.

<sup>801</sup> *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM).

<sup>802</sup> In pars 5 and 6.

<sup>803</sup> In par 8.

<sup>804</sup> The *audi alteram partem* rule is part of the rules of natural justice which are deeply entrenched in our law, and it has always been applicable in certain circumstances where a public functionary contemplates taking a decision that could prejudicially affect the rights or interests or property of an individual (see *Modise and Others v Steve's Spar, Blackheath* 2001 2 SA 406 (LAC) in par

not entitled to depart from the written instructions that were stipulated in the nomination form (*stipulatio alteri*).<sup>805</sup> The court held that when a pension fund board acts on behalf of the fund and its members, the board exercises public power, and so the provisions of the PAJA apply to the fund and its trustees, and the applicant in *Titi* was entitled to fair administrative action by the trustees.<sup>806</sup> The court agreed with the argument of the fund that the PAJA required that the applicant should have exhausted all available internal remedies in terms of the Pension Funds Act, which the applicant had not done.<sup>807</sup> The court also noted that the applicant did not even apply for condonation for failing to comply with the provisions of the PAJA. The court directed the applicant to exhaust the internal remedies provided for by the Pension Funds Act first before she could institute the procedure in a court for judicial review.<sup>808</sup> The *Titi* judgment<sup>809</sup> reminds applicants and plaintiffs that to succeed in an action in the judicial review process provided by the PAJA, they should first exhaust internal remedies in terms of the Pension Funds Act or at least have been granted condonation for not having done so.<sup>810</sup>

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20). The rule calls for the hearing of the other party's side of the story before a decision can be taken which may prejudicially affect that party's rights or interests or property. See in this regard *Modise and Others Steve's Spar Blackheath* in par 10 and *Mkhize v Rector, University of Zululand and Another* 1986 1 SA 901 (D) at 904. In *Aherne v Hortors Group Pension Fund* 2002 1 BPLR 2920 (PFA), the Adjudicator held that the *audi alteram partem* principle is one of the prerequisites of procedural fairness protected by the Bill of Rights. *Aherne v Hortors Group Pension Fund* is also discussed in n 796 above. In *Southern Staff Pension Fund v Murphy NO and Another* 2000 9 BPLR 963 (W), the High Court held that where a complaint other than that lodged with the Adjudicator is considered, the failure to inform the respondent of the complaint being considered, and to invite and consider response to it, constitutes material breach of the *audi alteram partem* principle (at 963). The court in setting aside the determination of the Adjudicator held that the breach was sufficiently material to make the proceedings unlawful (at 963 and 971).

<sup>805</sup> *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM) in par 9. A *stipulatio alteri* is a contract for the benefit of a third person. See in this regard *F v F* (12469/2016) 2017 ZAGPJHC 129 (10 May 2017) in par 22, where the court referred to *McCullough v Fernwood Estate Ltd* 1920 AD 204 at 205-206, where Innes CJ stated that a *stipulatio alteri* "is merely a convenient expression to denote that the object of the agreement is to secure some advantage for the third person". See also Cameron *et al Honoré* at 34-35 (cited in Chapter 2, n 217) for the definition of a *stipulatio alteri*.

<sup>806</sup> *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM) in par 14.

<sup>807</sup> In par 20.

<sup>808</sup> In pars 21 and 27.

<sup>809</sup> *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM).

<sup>810</sup> In *Nichol v Registrar of Pension Funds* 2004 11 BPLR 6218 (T) at 6221, the court held that a party who seeks an exemption in terms of s 7(2)(c) of the PAJA must apply for this exemption; show that there are exceptional circumstances justifying direct access to the court without exhausting remedies provided in the Pension Funds Act read with s 7 of the PAJA; and show that the exceptional circumstances so existing justify finding that it is in the interests of justice that exemption be granted. *Nichol* dealt with internal remedies as provided by s 26 of the

The PAJA will also apply if pension fund trustees have committed a gross irregularity in distributing retirement fund death benefits. Examples of such irregularities would be where the trustees make a distribution order which is obviously unlawful under the applicable laws and the rules of the particular retirement fund;<sup>811</sup> or where the trustees disregard clear proof of dependence and financial need by the potential beneficiary of a death benefit; or where there is evidence of bias and favouritism by the trustees.<sup>812</sup> It is submitted that the pension fund trustees' erroneous interpretation of section 37C of the Pension Funds Act or the Constitution or a breach of duties could thus constitute a fundamental irregularity.<sup>813</sup> At the same time, it is also required that the alleged gross irregularity must be prejudicial to the applicant before review proceedings will succeed.<sup>814</sup>

Section 6(2)(e)(iii) of the PAJA provides that a court may review administrative action if it was taken because irrelevant considerations were taken into account or relevant considerations were not considered.<sup>815</sup> Similarly, relevant considerations should be taken into account by pension fund trustees when exercising an "equitable discretion" to distribute death benefits.<sup>816</sup>

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Financial Services Board Act (at 6218 and 6221). In *Nichol*, the court held that there were no exceptional circumstances in terms of s 7(2)(c) of the PAJA for exempting the applicant from his obligation to exhaust his internal remedy before instituting review proceedings. The applicant appealed the decision to the Supreme Court of Appeal which is reported as *Nichol and Another v Registrar of Pension Funds and Others* 2008 1 SA 383 (SCA). The Supreme Court of Appeal in par 34 confirmed the correctness of the decision of the court *a quo* and dismissed the appeal. Section 7(2)(a) of the PAJA states that subject to paragraph (c), no court or tribunal may review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted. Section 7(2)(b) of the PAJA adds:

"Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act."

<sup>811</sup> For example, in *Mothudi v Old Mutual Staff Retirement Fund* 2002 12 BPLR 4180 (PFA), the Adjudicator found that the board had acted unlawfully by including a lover of the deceased fund member in the distribution of a death benefit without adequate proof that this person was a dependant of the deceased at the time of his death (at 4180). The Adjudicator found that the board had acted unlawfully and contrary to the provisions of s 37C of the Pension Funds Act (at 4189). The board decision was set aside.

<sup>812</sup> See in this regard *Sentinel Retirement Fund v Mtambo* 2015 JDR 1401 (GP) at 15 in par 29.

<sup>813</sup> At 16 in par 30 on the issue of fundamental irregularity, although in the context of a judicial officer's failure to apply the Constitution of the Republic of South Africa 200 of 1993.

<sup>814</sup> At 15 in par 29.

<sup>815</sup> *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and Others* 2016 1 All SA 704 (SCA).

<sup>816</sup> See in this regard par 3 above.



The judgments in *Titi*<sup>817</sup> and *Kim*<sup>818</sup> show that an applicant must meet strict requirements to succeed with a claim based on the PAJA. In both cases, the applicants had not met the prescribed time limits. The courts refused to grant condonation orders in terms of section 9 of the PAJA.

#### 6.5.1.3 Setting aside the decisions of pension fund trustees

If there are potential dependants and/or nominated beneficiaries that are aggrieved by the board's distribution of the death benefits, these dependants and/or nominated beneficiaries (the complainant or applicant) may approach the Adjudicator or courts to set aside the trustees' allocation of the death benefits.<sup>819</sup> The Adjudicator or the courts will usually give the trustees an opportunity to reconsider their allocation.<sup>820</sup> It is not the role of the Adjudicator to determine what the fairest or most generous distribution is: the test in law is to determine whether the trustees have exercised their discretion properly and equitably in terms of the law.<sup>821</sup> In other words, it should

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<sup>817</sup> *Titi v Funds at Work Umbrella Provident Fund* 2011 JOL 28125 (ECM). *Titi* is discussed above in this paragraph after n 799.

<sup>818</sup> *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019). See Chapter 1, n 83 and par 2.2, n 122 and n 162 above, where this case is discussed.

<sup>819</sup> In *Hlatshwayo v Iscor Employees Umbrella Provident Fund and Another* 2016 1 BPLR 58 (PFA), the Adjudicator found that the fund did not conduct a proper investigation to find all the beneficiaries of the deceased (at 59 in par 5.16). The fund had paid the death benefit to an alleged wife of the deceased fund member. The deceased's family members disputed knowledge of the alleged wife. The deceased also had two minor sons from another relationship. The fund could not produce any evidence that the alleged wife was married to, or financially dependent on, the fund member when he was still alive. The fund also failed to provide reasons why the deceased two sons were excluded as beneficiaries of the death benefit, as they were still minors at the date of the fund member's death (in par 5.14). The decision to distribute the death benefit was set aside, and the fund was directed to re-investigate the allocation.

<sup>820</sup> See par 6.5.1.4 below in this regard as well as for instances in which the Adjudicator or courts would not refer the matter back to a fund for reconsideration. See also, as an example, *Cillie v Lifestyle Retirement Annuity Fund and Another* 2019 2 BPLR 393 (PFA), where the Adjudicator held that the fund had allocated a portion (33 per cent) of the death benefit to the life partner of the deceased fund member without investigating the extent of her financial dependency on the fund member. The Adjudicator set aside the decision of the fund and ordered the fund to investigate the life partner's financial affairs and the extent of her dependency on the deceased fund member before deciding (in par 6.1).

<sup>821</sup> See in this regard, *Taljaard v Corporate Selection Umbrella Retirement Fund and Another* 2016 2 BPLR 271 (PFA) at 272; *Ditshabe v Sanlam Marketers Retirement Fund and Another (2)* 2001 10 BPLR 2579 (PFA) at 2582; *Berge v Alexander Forbes Retirement Fund (Pension Section)* 2009 JDR 0123 (W) in par 10; *Jordaan v Protektor Pension Fund* 2001 2 BPLR 1593 (PFA) at 1596 and 1597; and *Makhubele v Rand Water Provident Fund and Another* 2018 1 BPLR 114 (PFA) in par 5.9.

be determined whether the trustees have acted rationally and arrived at a proper and lawful decision.<sup>822</sup>

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<sup>822</sup> See *Kitching v Central Retirement Annuity Fund and Sanlam Life Insurance Limited* (PFA/KZN/33168/2009/RM) in pars 5.5 and 5.10; and *Jordaan v Protektor Pension Fund* 2001 2 BPLR 1593 (PFA) at 1597-1598. If it is shown that pension fund trustees conducted a thorough investigation and acted reasonably in exercising their discretion by relying on the evidence collected during the investigation, they would have properly discharged their duties in terms of s 37C(1) of the Pension Funds Act. See in this regard *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* 2019 5 SA 68 (SCA) in par 33. In *Berge v Alexander Forbes Retirement Fund (Pension Section)* 2009 JDR 0123 (W), an application was brought in the High Court in terms of s 30P of the Pension Funds Act to set aside the pension fund trustees' final resolution on the distribution of the benefit. The trustees made a provisional determination which was circulated for comment to all the interested parties, and after extensive investigations, meetings, and consultations, made a final distribution of the death benefit. The applicant complained to the Adjudicator that the trustees were biased and had exercised their powers improperly in awarding 82 per cent of the benefit to the stepmother while allocating only 10 per cent to the applicant. The applicant was the only biological major child of the deceased fund member. The Adjudicator duly considered the complaint and held that the trustees had acted equitably in the distribution of the benefit and that there were no grounds for him to interfere in the decision. The basis of the applicant's complaint was that the trustees did not exercise their discretion properly, fairly, equitably, and judiciously in making the final distribution of the death benefit. The applicant alleged that the trustees were biased in favour of the stepmother from the outset; the true relationship between the deceased and the stepmother and the applicant was ignored; the trustees, who did not possess the expertise of a divorce lawyer, erred in basing their decision largely on the possible maintenance payable by the deceased to her stepmother in the event of divorce; the trustees totally disregarded the deceased's wishes of disinheriting the stepmother as contained in his last will; and many factors considered by the trustees were incorrect and/or not properly considered and/or weighed in the decision-making. The question before the court was whether grounds existed for the court to interfere with the decision of the trustees and that of the Adjudicator and set aside their respective decisions. The court concluded that the onus was on the applicant to prove, on a balance of probabilities, that these decisions were wrongly taken. The court acknowledged that trustees have a discretion in determining the distribution of death benefits as envisaged in s 37C of the Pension Funds Act. The court referred to *Britten and Others v Pope* 1916 AD 150 at 157, where the following was said: "Now it has been repeatedly laid down that where a matter has by law been left to the discretion and determination of a public officer or body, and where discretion has been duly exercised, and a decision arrived at, a Court of Law cannot interfere with the result on the merits." The court in *Berge* further commented that the discretion of trustees must be exercised fairly and reasonably. The court referred to *Estate Geekie v Union Government and Another* 1948 2 SA 494 (N) at 502, where the court said that "in considering whether proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted *ultra vires* or not". The court in *Berge* held that the test is a strict one. The court also commented that the applicant must show actual bias in the sense that the trustees had a closed mind in that they were not open to persuasion and had prejudged the issues. The applicant did not co-operate with the trustees in submitting the required documents. The court found that the trustees had a broad discretion under s 37C of the Pension Funds Act. It held that the trustees used their discretion fairly and reasonably, referring to *Union Government (Minister of Justice) v Schierhout* 1922 AD 179. The court held that the applicant failed to discharge the onus resting on her to convince the court to interfere. The application failed. The court quoted the following in the determination of the Adjudicator in this matter in par 13: "once the trustees have conducted a proper investigation to ascertain the cycle of dependants and beneficiaries and taken into consideration all relevant factors and ignored all irrelevant factors, when they allocated the benefit, the allocation will be just and equitable."

#### 6.5.1.4 Non-interference by courts and/or the Adjudicator in the decisions of pension fund trustees

As a general principle, courts and the Adjudicator are reluctant to interfere in the decisions of pension fund trustees about the distribution of retirement fund death benefits in terms of section 37C of the Pension Funds Act.<sup>823</sup> Even when the courts or the Adjudicator disagree with the distribution of death benefit by trustees, the usual approach is to remit the decision to the trustees so that they can re-exercise it in compliance with the provisions of section 37C of the Pension Funds Act.<sup>824</sup> It is

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<sup>823</sup> For example, in *Antanasova-Letsoalo NO and Others v Lukhaimane NO and Others* 2018 JOL 39887 (GP), the Adjudicator had dismissed a complaint against a decision made by the fund's board of trustees in terms of s 37C. The Adjudicator found that the fund had distributed the death benefit correctly in line with the provisions of s 37C and dismissed the complaint. The complainants then approached the High Court to set aside the Adjudicator's determination. The court recognised that the pension fund board is vested with discretionary powers when it disposes of death benefits, and the decision of the board can only be interfered with where it can be demonstrated that it had taken into account irrelevant, improper information, or that it reached a decision no reasonable trustees would have reached (in par 20). The court could not find a ground for interfering with the discretion as exercised by the board, nor could it fault the Adjudicator in dismissing the complaint. The court held that there was no indication that the fund had acted irrationally or had taken irrelevant facts into consideration; on the contrary, it had disregarded irrelevant facts. The court held that the fund had exercised its discretion properly and had arrived at a proper and lawful decision as the Adjudicator found. The court found that the applicants did not establish a right to the relief claimed in their application and dismissed it with costs (in par 22). The reluctance to interfere with trustees' decision is similar in the United Kingdom: see in this regard Chapter 4, pars 6.2 and 6.3. South African courts and the Adjudicator have in this regard referred to the leading judgments in the United Kingdom. See, for example, *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) and *Senekal and Others v Municipal Gratuity Fund* 2000 10 BPLR 1175 (PFA). See also *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 2 SA 674 (CC), where in par 44 the Constitutional Court referred to the legality principle applicable to the exercise of public power, stating: "The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

<sup>824</sup> In *Pepcor Retirement Fund and Another v Financial Services Board and Another* 2003 6 SA 38 (SCA) in par 32, the court summarised the position as follows: "Hitherto, where jurisdiction is not in issue and there is no obvious transgression of the boundaries within which the functionary has been empowered to make decisions, our Courts have not permitted a review solely on the basis of a material mistake of fact on the part of the person who made the decision. Judicial intervention has been limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter: *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A) at 152C - D; *Hira and Another v Booyesen and Another* 1992 (4) SA 69 (A) at 93B - C." See also *Martin v Beka Provident Fund* 2000 2 BPLR 196 (PFA) at 214, where the Adjudicator found that as regards the lump sum death

also not for the Adjudicator or the courts to substitute the decision of the fund with their own.<sup>825</sup> The exception to this general approach is when the courts are and/or the Adjudicator is of the view that remitting the decision to the trustees would be a waste of time and would prejudice the rights of the affected dependant and/or beneficiary.<sup>826</sup> In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*,<sup>827</sup> the Constitutional Court provided some guidance about when the Adjudicator or the courts should remit a disputed distribution order (decision) to the trustees or make a substitution order in terms of section 8(1)(c)(ii)(aa) of the PAJA. The Constitutional Court held:

If the administrator is found to have been biased or grossly incompetent, it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In

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benefit, the usual recourse where a fund is found to have exceeded its powers is to refer the matter back to the trustees for a fresh decision. In *Martin*, the Adjudicator concluded that from the ongoing correspondence it appeared that the trustees were likely to stand by their viewpoint. Moreover, further delay might cause unjustifiable prejudice to the complainant. The Adjudicator therefore substituted his decision for that of the trustees (at 214).

<sup>825</sup> See in this regard *Maji v Cape Joint Pension Fund* 2004 4 BPLR 5624 (PFA) and *Gerson v Mondri Pension Fund and Others* 2013 6 SA 162 (GSJ) at 168 in par 28. In *Maji*, the fund member had, before his death, completed a beneficiary nomination form in which he nominated the beneficiaries with the stated allocations of the benefit. After investigation, the trustees identified another dependant, the deceased's daughter. They then decided to allocate the lump sum death benefit to the deceased's daughter. The complainant challenged the equitability of the distribution of the death benefit. Her view was that the benefit should have been allocated in accordance with the beneficiary nomination form. The question for determination was whether the trustees' decision to allocate the benefit as they did was an improper exercise of their powers. The Adjudicator held that it was apparent that the trustees had conducted an investigation and considered a range of relevant factors in making the decision regarding the equitable distribution of the available benefit among the beneficiaries; and irrelevant factors were not considered. The Adjudicator therefore refused to interfere with the trustees' decision. He dismissed the matter on the ground that there was no sufficient cause for interfering with the trustees' decision. *Maji* is also cited in n 144 above.

<sup>826</sup> This would be the case where, for instance, a further delay would cause unjustifiable hardship, or the functionary has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again, or where the end result is a foregone conclusion and it would be a waste of time to order the functionary to reconsider the matter, or where the court is in a good position to make the decision itself. See in this regard *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC). In *Nsele v Human Rights Commission Staff Provident Fund* 2000 7 BPLR 756 (PFA), the pension fund trustees had to deal with a proposal by the complainant to distribute a death benefit in a particular way to dependants after the death of the fund member. The complainant also requested the Adjudicator to set aside the distribution if the trustees did not comply with her proposal. The Adjudicator held that he would not lightly interfere with the decision of pension fund trustees who have had the advantage of thoroughly investigating the particular matter (at 756 and 760). He held that the test for interfering is whether a manifest injustice would result if the fund's decision were not set aside (at 756 and 760). He found that the trustees had complied with their duties, and so he could not interfere with the trustees' decision. The complaint was dismissed (at 761).

<sup>827</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 5 SA 245 (CC); and *Tellumat (Pty) Ltd v Appeal Board of the Financial Services Board and Others* 2016 1 All SA 704 (SCA).

those instances bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.<sup>828</sup>

Pension fund trustees have the sole discretion of distributing retirement fund death benefits to dependants and nominated beneficiaries.<sup>829</sup> But the trustees' discretion should be unfettered, and should be fair and just.<sup>830</sup> When trustees have honestly applied their collective minds to the issue and have exercised their discretion in a proper manner, there would be no legal basis on which to set aside or otherwise interfere in their decisions on the basis of administrative-law remedies under the common law or the PAJA.<sup>831</sup>

If the Adjudicator refers a matter back to the board, a complainant who remains dissatisfied after the board has re-exercised its discretion cannot approach the Adjudicator for a second order in the same matter.<sup>832</sup> There is also no guarantee that the fund will re-exercise its decision properly in compliance with the provisions

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<sup>828</sup> *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* 2015 5 SA 245 (CC) in par 54.

<sup>829</sup> In *Gerson v Mondi Pension Fund and Others* 2013 6 SA 162 (GSJ), the court held that the pension fund trustees' discretion must be unfettered (in par 12).

<sup>830</sup> In par 12.

<sup>831</sup> In par 13.

<sup>832</sup> See in this regard *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019), cited in Chapter 1, n 83 and par 2.2, n 162 above, where this case is also discussed.

of section 37C of the Pension Funds Act.<sup>833</sup> As a result, the rights of the dependants and/or nominated beneficiaries are at the mercy of the pension fund trustees.<sup>834</sup>

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<sup>833</sup> See, for example, *Guarnieri v Fundsatwork Umbrella Pension Fund* 2018 JDR 0740 (GP), where the main complaint centred on the fact that the board of trustees had allocated a percentage of the death benefit to a beneficiary (the mother of the deceased) who had died four days before the allocation decision was made. The Adjudicator ordered the fund to reinvestigate the matter and re-exercise its discretion in terms of s 37C of the Pension Funds Act. About two months later, the fund made the same determination that it had made previously and that had caused the complainant to approach the Adjudicator in the first place. The court in *Guarnieri* (in par 46) concluded that it could not find any justification for the board's second decision to make the same distribution and take the same decision as it had done in the beginning. The court in par 46 stated the following: "It is difficult to understand why they [the board] elected, in April 2015, being fully aware of the true state of affairs, to perpetuate the error: they were clearly aware of the true state of affairs: they were clearly instructed by the [Pension Funds Adjudicator] "to reinvestigate the matter and re-exercise its discretion", yet, in presenting the identical distribution, they did not say a single word about the instruction of the [Adjudicator] to "reinvestigate and re-exercise" (the italics being the court's). The board was also silent on the instruction by the Adjudicator to take into account the factors pointed out by her which included the fact that the mother had passed away before the distribution was made. The court held that the first distribution (in ignorance) and the second distribution (on purpose) were flawed because, in the spirit of s 6 of the PAJA, irrelevant considerations were taken into account and relevant considerations were not considered. A distribution was made to a dead person. This was a relevant consideration. The dead person was no longer a dependant in the spirit of s 37C of the Pension Funds Act. The relevant consideration was not considered or, if it was, was overlooked. The court held that the action taken by the board was not rationally connected to the purpose for which it was taken or to the purpose of the empowering provision (i.e., to distribute death benefits to dependants) or to the information before the decision maker (the passing of the mother). The court concluded that the review application should succeed, and the second distribution should be set aside. The court also stated that it was not persuaded that it had the power to order a pension fund board in what percentages the distribution of the death benefit amount should be made to the three applicants. It said that this is clearly something that falls within the discretion of the board in the spirit of s 37C, and it referred the matter to the board to make a distribution. The court also noted that the pension fund might well have lost the amount of R541 215.49 erroneously distributed to the dead mother. It also noted that it could be difficult to recover this amount from the sister of the deceased fund member (Ms Swart), but these damages, if they were to be suffered, flowed from the error of the board. (The mother, before her death, had requested that the death benefit due to her be used to purchase an annuity. The beneficiary of that annuity after the death of the mother was Ms Swart.)

This judgment is welcome in that it shows that it is possible to succeed under the PAJA where the board has considered irrelevant factors when deciding. However, what is worrying is the conduct of the board leading to this case, including its clear disregard for the Pension Funds Act, as well as for the determination and recommendations of the Pension Funds Adjudicator; its refusal to remedy its mistakes despite being given a second chance by the Adjudicator; and the fact that for the complainants to succeed, they had to go all the way to the High Court. The determination of the Adjudicator, although it was in their favour, was inadequate to deliver the relief they sought. In addition, the High Court still sent the decision back to the same board that had shown its disregard for the law. Two questions follow: where should the money (R541 215.49) come from to pay the applicants? And if from the fund, what would happen to the board that had caused the loss?

<sup>834</sup> It is not suggested that the courts and the Pension Funds Adjudicator should assume the role of pension fund boards to distribute the death benefit to dependants and nominated beneficiaries; instead, it is suggested that the discretionary powers of the pension fund trustees should be clearly defined and the list of potential recipients of the death benefit should be restricted. These arguments (about the restriction of potential recipients of the death benefits and guidelines for trustees when exercising their discretionary powers) were made in pars 2.2.1 and 3 above.

There is no administrative body in South Africa that proactively monitors whether pension fund trustees are exercising their discretionary powers in accordance with applicable laws and their pension fund rules.<sup>835</sup> Only a court and the Pension Funds Adjudicator have powers to make orders about the correctness of the pension fund trustees' decision. Interference by the courts and the Adjudicator is reactive in that they can only assess the correctness of a trustee's decision when a breach of duties is alleged. As a result, they are not involved until the claimant or complainant or plaintiff (an aggrieved dependant and/or nominated beneficiaries) lodges a claim or a complaint against the decision.

#### 6.5.2 Claims in delict

A claim in delict is available where the pension fund trustees' breach results from an intentional breach or from negligence.<sup>836</sup> Dependants of deceased fund members and nominated beneficiaries, as applicants or plaintiffs, may institute an action for delictual liability against funds and/or their trustees in their personal capacity if the claimants can prove that they suffered a loss because of the pension fund trustees' conduct where the trustees should have foreseen the possibility of harm to such a person and guarded against it.<sup>837</sup> The benefit of a successful claim based in delict is that claimants can recover their losses.<sup>838</sup> If the fund has paid the death benefit to another person by mistake, the aggrieved dependants or nominated beneficiaries may have a delictual claim against the fund based on negligence; the fund, in turn, may then have a claim against the recipient of the payment based on

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<sup>835</sup> See Chapter 6, par 5.3, where suggestions are made for the establishment of such a body.

<sup>836</sup> Cheadle, Thompson & Haysom *Accountability* at 10 and 34, also cited in Chapter 2, n 242.

<sup>837</sup> In the case of negligence, a person is blamed for an attitude or conduct of carelessness, thoughtlessness, or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him. The criterion of the reasonable man thus takes the central place in the determination of negligence. The test to determine whether a person's conduct complies with that of a reasonable person is to enquire whether a reasonable person in the position of the defendant (a) would foresee the possibility of his conduct causing harm; (b) take reasonable steps to guard against such harm; and (c) the defendant failed to take such steps. See *Naude v Eskom Pension and Provident Fund and Another* 2002 8 BPLR 3782 (PFA) at 3787.

<sup>838</sup> See, for example, in *Louw v Grobler and Another* (3074/2016) 2017 ZAFSHC 146 (2 June 2017) in par 12, where the court stated: "The *actio legis Aquiliae* enables a Plaintiff to recover patrimonial loss (including purely economic loss) suffered through a wrongful and negligent act of a Defendant. A Plaintiff for purposes of an *actio legis Aquiliae* must allege and prove that the Defendant was negligent."

unjustified enrichment.<sup>839</sup> And where the death benefit has already been distributed, the aggrieved beneficiary may hold the fund and/or the trustees personally liable.<sup>840</sup>

#### 6.5.2.1 *The elements of a delict*

To succeed with a delictual claim, the plaintiff must prove the five elements of delict: conduct (an act or omission); wrongfulness; fault; loss (damage); and causation.<sup>841</sup> The mere fact that the trustees have caused a dependant or nominated beneficiary to suffer loss (damage) is insufficient to constitute a delict for which the fund and its trustees may be held liable.<sup>842</sup> The person claiming that a delict has been committed and who wishes to hold the wrongdoer liable must prove that all the elements of a

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<sup>839</sup> See, for example, *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA) at 259, where the Adjudicator referred to *Krueger v Navratil* 1952 4 SA 405 (SWA) at 408 and stated that unjustified enrichment arises when someone without legal title derives advantage from another person's property. The Adjudicator also referred (at 259) to *Kudu Granite Operations (Pty) Ltd v Caterena Ltd* 2003 5 SA 1 (SCA) in par 17, which outlined the following requirements that must be met before relief can be granted under unjustified enrichment: (a) the defendant must have been enriched; (b) the plaintiff must have been impoverished; (c) the enrichment of the defendant must be at the expense of the plaintiff; and (d) the enrichment must be unjustified. On unjustified enrichment generally, see *Sonnekus Unjustified Enrichment. In Yarona Healthcare Network (Pty) Ltd v Medshield Medical Scheme* 2017 4 All SA 705 (SCA) in par 23, Navsa ADP stated that "payments were said to have been made in the reasonable but mistaken belief that they were owing. It is not every mistake which entitles the mistaken party to recover payment. Our courts have approved statements in the old authorities to the effect that the mistake should have been 'neither heedless nor far-fetched'; that it should not have been based on 'gross ignorance'; that it should not have been 'neither slack nor studied'". Navsa ADP further stated that the onus rests on the plaintiff to prove the excusability of the error (in par 24). See also in this regard *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 1 All SA 303 (SCA) in par 29.

<sup>840</sup> See, for example, in *Coetzee v Toyota South African Pension Fund and Others (1)* 2001 5 BPLR 2007 (PFA), where the pension fund trustees when making a distribution of a death benefit had excluded the ex-spouse of the deceased fund member even though she was still financially dependent on the fund member at the time of his death (at 2007). The Adjudicator held that the pension fund trustees had ignored an important consideration resulting in the failure to exercise their discretion properly. Accordingly, the complainant was held to be *prima facie* entitled to a spouse's pension. In respect of the lump sum benefit, the Adjudicator found that as a dependant of the deceased, the complainant should have been considered by the trustees in their decision to distribute the lump sum benefit (at 2008). The difficulty the Adjudicator faced was that of providing an appropriate remedy to the complainant because the benefit had already been distributed. The Adjudicator granted an award for damages (akin to Aquilian liability) against the fund for maladministration that had caused prejudice to the complainant (at 2008 and 2013). The Adjudicator makes this kind of award for damages on his or her own accord by considering the facts of a complaint where the fund's maladministration has caused prejudice to a complainant.

<sup>841</sup> *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA) at 448; par 4.17. See also *Bolton Regulation* at 577.

<sup>842</sup> See in this regard Neethling and Potgieter *Delict* at 4. See also Damant G "Liability of Fund Advisors" (Paper presented at the Pension Lawyers Conference 2004) at 9 available at [http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/GRAHAM-DAMANT-PAPER-liability-of-fund-advisors\\_110204.pdf](http://www.pensionlawyers.co.za/wp-content/uploads/2018/10/GRAHAM-DAMANT-PAPER-liability-of-fund-advisors_110204.pdf) (last accessed on 30 June 2021).



delict are satisfied.<sup>843</sup> In other words, if one element cannot be proved, it cannot reasonably be concluded that a delict was committed.<sup>844</sup> It is beyond the scope of this thesis to analyse each of the requirements or elements in detail.<sup>845</sup> The discussion below focuses on how these elements apply in the context of the wrongful distribution of retirement fund death benefits.

#### 6.5.2.2 An act or omission

An act or omission by the pension fund trustees is one of the elements which an aggrieved dependant or nominated beneficiary needs to prove in order to sustain a claim for delictual liability against the fund and/or its trustees. Thus, it must be shown that the fund and/or its trustees acted or omitted to act in a manner which caused damage or loss to the plaintiff.<sup>846</sup>

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<sup>843</sup> See, for example, *Clacher and Others v Mercedes-Benz South Africa Pension Fund and Others* 2016 2 BPLR 200 (PFA) at 201. The Adjudicator further stated that there had to be misconduct or an omission; this act or omission had to be negligent and unlawful; the complainants had to show that they suffered a loss; and there had to be a causal nexus (connection) between the act or omission and the loss. In this case, the Adjudicator found that the complainants had failed at the first hurdle and so she dismissed the claim (at 201). See also Neethling and Potgieter *Delict* at 4.

<sup>844</sup> See in this regard *Moloko v Diepmeadow Pension Fund* (PFA/GA/3495/05/VIA) at 3 in par 11. This determination is available at <https://www.pfa.org.za/Determinations/20062008/208ADC54-B4D2-4609-80B4-9DB17E815DF4.pdf> (last accessed on 17 August 2021). See also *Dirkse v Lifecare Group Holdings Provident Fund* 2001 8 BPLR 2345 (PFA), where the Adjudicator held that for a complainant to succeed in claiming relief for misrepresentation, the complainant bears the onus of proving on a balance of probabilities that a misstatement was made, the person who made the misstatement had acted negligently and unlawfully, the complainant had suffered loss as a result, and the damages claimed by the complainant reflect proper compensation for the loss sustained (at 2345). The Adjudicator dismissed the complaint on the ground that the complainant had failed to prove on a balance of probabilities that the misstatement was made (at 2345).

<sup>845</sup> See Neethling and Potgieter *Delict* Chapters 2 to 6 for a detailed examination of the different elements of a delict.

<sup>846</sup> See in this regard *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA) in par 5.7 at 448. The court confirmed (in par 4.17) that if a beneficiary fails to prove that pension fund trustees had wrongfully and negligently exercised their duty in a manner that caused his or her harm, delictual liability does not arise. See also *Biagio v Old Mutual Life Assurance Company (SA) Ltd and Another* (PFA/GA/7847/06/FM) in pars 5.2 and 5.3, where the Adjudicator confirmed: "It is trite law that for a claim founded in delict to succeed, all the elements of delict must be proved"; <https://www.pfa.org.za/Determinations/20062008/FD96E09B-7A9B-4EF7-B534-C71CA8883F87.pdf> (last accessed on 17 August 2021); and also *BoE Bank Ltd v Ries* 2002 2 All SA 247 (A) in par 26, where the Supreme Court of Appeal found that wrongfulness was not established by the plaintiff and dismissed the plaintiff's claim.

### 6.5.2.3 Wrongfulness

The mere distribution of a death benefit by the trustees which causes harm to the dependant or nominated beneficiary cannot give rise to delictual liability against the fund or the trustees. Neethling and Potgieter state: “For liability to follow, the act must be *wrongful*.”<sup>847</sup> The court in *Cape Town Municipality v Bakkerud* held that an omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff.<sup>848</sup> A delictual claim cannot be sustained if there was no wrongful conduct by the board in distributing the death benefit.<sup>849</sup> Liability may arise when funds and their trustees intentionally or recklessly, or negligently acted in a wrongful manner in making death benefit allocations, for example, in making distributions based on incorrect or incomplete facts or factors which they ought not to have considered.<sup>850</sup> Pension fund trustees must thus apply their minds to the relevant issues and ensure compliance with the provisions of sections 7C(2) and 37C of the Pension Funds Act.<sup>851</sup> The consideration of irrelevant factors, the

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<sup>847</sup> See Neethling and Potgieter *Delict* at 35 (original emphasis) and *Louw v Grobler and Another* (3074/2016) 2017 ZAFSHC 146 (2 June 2017) in par 9, where the court held: “For liability to follow, prejudice must be caused in a wrongful, that is, a legally reprehensible or unreasonable manner”, and the court referred to the fifth edition of Neethling and Potgieter’s book.

<sup>848</sup> *Cape Town Municipality v Bakkerud* 2000 3 SA 1049 (SCA) pars 14-17. See also *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA) at 447, where the Adjudicator referred to *Bakkerud* with approval.

<sup>849</sup> In *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA), the complainant was a member of the respondent pension fund. In February 2003, members of the respondent fund were presented with various choices either to remain as members of the fund or to be transferred to the Edcon Provident Fund. The complainant elected to join the provident fund scheme with effect from 1 March 2003. Following the complainant’s election to be transferred to the provident fund scheme, the respondent fund lodged a s 14 transfer application with the Registrar of Pension Funds on 4 July 2003. The Registrar of Pension Funds rejected the s 14 transfer application and was of the view that the respondent fund should comply with the surplus legislation, the Pension Funds Second Amendment Act 39 of 2001. The trustees unsuccessfully appealed the decision of the Registrar to the FSB Appeal Court, the High Court, and the Supreme Court of Appeal. The respondent fund was ordered to comply with the requirements of the surplus legislation before an application in terms of s 14 could be entertained by the Registrar. The complainant argued that the trustees, by appealing the decision of the Registrar, had caused the delay by not effecting the s 14 transfer on time and that reduced her retirement fund value. She instituted a delictual claim against the respondent fund following the decision of the board of trustees to appeal against a decision of the Registrar of Pension Funds. She was of the view that the conduct of the trustees caused her losses. The trustees argued that they acted in the best interest of the fund. The crux of the complaint was whether the respondent fund should be held liable for the alleged loss suffered by the complainant because of its decision to challenge the decision of the Registrar causing a delay in the processing of the s 14 transfer. The Adjudicator found in favour of the trustees and dismissed the complaint.

<sup>850</sup> See par 3 above for examples of relevant and irrelevant factors regarding the distribution of death benefits that are discussed under equitable allocation.

<sup>851</sup> See pars 1 and 2 above for a detailed discussion of s 37C of the Pension Funds Act.

lack of proper investigations, and the failure to comply with the required duties may all lead to the incorrect application of section 37C of the Pension Funds Act as well as the incorrect distribution of a death benefit. So dependants and nominated beneficiaries who are wrongly left out of a distribution or who are allocated amounts that are less than is due to them may be prejudiced. The claimant must show that the trustees, while distributing a death benefit, have either intentionally or recklessly or negligently acted in a wrongful manner which caused him or her damage or loss.<sup>852</sup>

An applicant or plaintiff (the member's dependant or nominated beneficiary) who alleges wrongful distribution has to prove that the conduct of the particular fund and/or its trustees breached a duty.<sup>853</sup> The relief sought for a breach of duty depends on the nature of the duty alleged to have been breached by the trustees.<sup>854</sup>

#### 6.5.2.4 Intention or negligence

It is accepted that fault (*culpa* in a wide sense) is a general requirement for delictual liability. Two main forms of fault are recognised: intention (*dolus*) and negligence

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<sup>852</sup> See pars 6.5.2.2 to 6.5.2.6 below, where the elements of a delict are discussed.

<sup>853</sup> In *Amplats Group Provident Fund and Others v Implicated Board Members of the Complainants and Others* (PFA/GP/00019725/2015/YVT) (dated 24 July 2018), the Adjudicator confirmed that the onus rests on the plaintiffs or applicants to prove their entitlement to the relief which they seek on a balance of probabilities. The burden of proof rests initially on them to establish their case on a *prima facie* basis, after which the burden of proof shifts to the respondents (the fund and/or their trustees) to prove their defence. The Adjudicator also referred to *Pillay v Krishna and Another* 1946 AD 946 at 951-952, which is regarded as the *locus classicus* on the burden of proof, where Davis AJA said the following: "The first principle in regard to the burden of proof is thus stated in the *Corpus Juris* ...If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it. But there is a second principle which must always be read with it... Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded *quoad* that defence, as being the claimant: for his defence to be upheld he must satisfy the Court that he is entitled to succeed on it ... But there is a third rule, which Voet states in the next section as follows: 'He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.'" The *Amplats* determination is available at <https://www.pfa.org.za/Determinations/2018/Amplats%20Group%20Provident%20Fund%20%20Others%20v%20Implicated%20Board%20Members%20of%20the%20Complainants%20and%20%20Others.pdf> (last accessed on 30 June 2021). See also par 5 above for a discussion of the duties (fiduciary duties and the duty of care and skill) applicable to boards when distributing death benefits.

<sup>854</sup> See Havenga *Fiduciary Duties* at 1.

(*culpa*) in a narrow sense.<sup>855</sup> A failure by pension fund trustees to exercise their duty of care and skill properly in the distribution of death benefits could be considered by the courts to constitute negligence on the part of trustees and could possibly lead to the liability of funds and/or of their trustees in their personal capacity.<sup>856</sup> Further, the failure to perform the duty of care and skill precisely and completely may constitute maladministration of the fund.<sup>857</sup> Moreover, the duty to act with care and diligence requires pension fund trustees not to act carelessly and without diligence.

A person who stands to be potentially prejudiced by the failure of the trustees to act with care when distributing death benefits may allege that such failure constituted improper or negligent conduct.<sup>858</sup> The plaintiff has to show blameworthiness in the form of intention or negligence on the part of the trustees.<sup>859</sup> The plaintiff may be unable to prove this blameworthiness if the trustees have acted in a manner that they believed was in the best interests of their fund members and beneficiaries and

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<sup>855</sup> See in this regard Neethling and Potgieter *Delict* at 155; and *Louw v Grobler and Another* (3074/2016) 2017 ZAFSHC 146 (2 June 2017) in par 10, where the court referred to the learned authors.

<sup>856</sup> See Neethling and Potgieter *Delict* at 164, stating that in the South African context, in order to find a person at fault for negligence, which ultimately gives rise to delictual liability, it must be found that such “a person ... is blamed for an attitude or conduct of carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions, he failed to adhere to the standard of care legally required of him”. Neethling and Potgieter at 157 further confirm that this liability for fault is based on the principles of the *lex Aquilia* and requires *dolus* or *culpa* which results in loss to the plaintiff. For an application of delictual principles in company law, see *Du Plessis NO v Phelps* 1995 4 SA 165 (C) at 170 and *Symington and Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* 2005 5 SA 550 (SCA) at 564.

<sup>857</sup> In *Mahlangu obo Hlatshwayo v Mineworkers Provident Fund and Others* (PFA/GA/7082/2006/RM), the Adjudicator found that it is the fund’s responsibility to identify and trace dependants and thereafter determine an equitable distribution. The fund cannot abrogate this responsibility to the dependants or the Adjudicator (in par 5.7). She further found that the considerable lapse of time between the notification of the deceased’s death and thereafter the lack of a proper investigation by the fund to ascertain the correct facts, despite being aware of the need for it, together with the prejudice suffered by the complainant as well as the other beneficiaries, because they had been deprived of a potential benefit from the fund, amounted to maladministration on the part of the fund (in par 5.8). For this determination, see <https://www.pfa.org.za/Determinations/20062008/793BDC57-D379-45EA-91C5-8779D64E3628.pdf> (last accessed on 17 August 2021).

<sup>858</sup> See Havenga *Fiduciary Duties* at 325, stating that “the existence of either intent or negligence on the part of the defendant is sufficient to blame him. Intent will be established if the wrongdoer’s will is directed at the result which he causes while he is conscious of the wrongfulness of his conduct. However, in the field of delictual liability for patrimonial loss within the *actio legis Aquiliae* intention is seldom encountered as the relevant form of fault since negligence is considered to be sufficient”. It is submitted that although this summary by Havenga refers to the relationship between directors and their companies, the principles enunciated in it are also applicable in determining the conduct of pension fund trustees in relation to their funds, fund members, dependants, and nominated beneficiaries.

<sup>859</sup> See *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA) at 448 for this submission.

there is no indication that they wilfully and negligently distributed the death benefits without any regard for the consequences.<sup>860</sup>

As stated in Chapter 2 above, pension fund trustees act on behalf of funds because funds have no capacity to represent themselves.<sup>861</sup> So, when complainants and/or plaintiffs institute actions against retirement funds, the courts and the Adjudicator assess the conduct of the trustees to determine the liability of the funds.<sup>862</sup> The standard for judging the conduct of pension fund trustees is the standard to be expected of a person in the position of the trustee in question.<sup>863</sup> The legal standard which courts will apply in determining the liability of pension funds and their trustees is succinctly explained by Hanekom as follows:

The standard of care which the law demands is ordinarily that which a reasonable person in the position of the defendant [trustee] would exercise in the same situation (objective standard). If a person has knowledge and skill superior to that of ordinary individual the law requires more than the minimum standard of care (subjective standard). The legal standard of care in effect becomes that of a reasonable person endowed with those particular superior qualities. Conduct which deviate [sic] in even the slightest degree from the standard of a reasonably prudent person is adjudged negligent.<sup>864</sup>

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<sup>860</sup> See in this regard Neethling and Potgieter *Delict* at 155; and *Louw v Grobler and Another* (3074/2016) 2017 ZAFSHC 146 (2 June 2017) in par 10, where the court referred to the learned authors.

<sup>861</sup> See Chapter 2, par 6.4, where pension fund boards are discussed.

<sup>862</sup> In this regard see *Visser Sitrus (Pty) Ltd v Goede Hoop Sitrus (Pty) Ltd and Others* 2014 5 SA 179 (WCC) in par 53, where the High Court observed that in most cases the exercise by a director of a corporate power will also be an act of the company; *Civils 2000 Holdings (Pty) Ltd v Black Empowerment Partner Civils 2000 (Pty) Ltd and Others* 2011 3 All SA 215 (WCC) pars 17-21, where the High Court affirmed that a breach of fiduciary duty on the part of the directors amounted to conduct of the company. The court held that the acts or omissions of the directors of a company are acts or omissions of the company even when they injure the company and constitute a breach of any duty owed to that company (in par 17). Although the judgments in *Visser Sitrus* and *Civils 2000 Holdings (Pty) Ltd* referred to the duties of company directors, it is submitted that the principles alluded to are just as applicable to the position of pension fund trustees.

<sup>863</sup> See National Treasury *Retirement Fund Reform 2004* at 56 in par 5.2. In *Administrators Estate Richards v Nichol and Another* 1998 4 All SA 555 (A), one of the issues dealt by the Supreme Court of Appeal was the standard of care required of a trustee in relation to trust property. The court (at 560) referred with approval to *Sackville West v Nourse and Another* 1925 AD 516, where that court held that the standard was higher than that which an ordinary person might generally observe in the management of his or her own affairs. Such a person was free to do what he liked with his property but a “person in a fiduciary position such as a trustee, on the other hand, was obliged to adopt the standard of the prudent and careful person”.

<sup>864</sup> Hanekom K “What Standard Will Courts Use to Measure the Conduct of Professional Independent and Other Trustees” (Unpublished Pension Lawyers Association Conference presentation Somerset West, Cape Town 16-18 March 2008) at 2-5.

When courts determine the reasonableness of the conduct of pension fund trustees facing allegations of a breach of duties in the distribution of a death benefit, the enquiry will be whether the trustees have exercised their discretion properly in terms of section 37C of the Pension Funds Act. The test for determining whether the conduct (including a decision) of a trustee meets the required standard is whether the conduct amounts to that of a reasonable person.<sup>865</sup> In *Van Wyk v Lewis*<sup>866</sup> the court held that in deciding what is reasonable, the court will have regard to the general level of skill and diligence possessed and exercised at the time by the members of the branch of the profession to which the practitioner belongs, but that the decision of what is reasonable under the circumstances is for the court to decide. The court will pay high regard to the views of the profession, but it is not bound to adopt them.<sup>867</sup> In *Durr v Absa Bank Ltd and Another*, the court also said that:

The reasonable person has no special skills and lack of skill or knowledge is not *per se* negligence. It is, however, negligent to engage voluntarily in any potentially dangerous activity unless one has the skill and knowledge usually associated with the proper discharge of the duties connected with such an activity.<sup>868</sup>

The legal standard of judging pension fund trustees' conduct, including trustees' decisions, "is the standard of a person who is familiar with issues under consideration by the trustees".<sup>869</sup> The Pension Funds Act requires that pension fund

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<sup>865</sup> See *Havenga Fiduciary Duties* at 325. See also *Kruger v Coetzee* 1966 2 SA 428 (A) at 430 for the formulation of the test to determine negligence on the part of the defendant. The general test for negligence was authoritatively formulated in *Kruger* as follows: a reasonable person in the same circumstances as the defendant would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against that occurrence; and the defendant failed to take those steps. If each part is confirmed, then the defendant is said to have failed to measure up to the standard of a reasonable person and is consequently negligent. The criterion for the reasonable person embodies an objective standard of care, but the general approach does not exclude allowance being made for subjective and personal characteristics in certain cases (*Midgley and Van der Walt Delict* at 166-167). Conduct is accordingly negligent if a reasonable person in the same position as the defendant would have foreseen the possibility of harm and would have taken steps to avoid it, and the defendant failed to take those steps (see further *Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (SCA) and *Member of the Executive Council for Education, Mpumalanga v Skhosana (in her capacity as mother and guardian of minor child Solomon Skhosana)* 2013 JOL 29995 (SCA) in par 10).

<sup>866</sup> *Van Wyk v Lewis* 1924 AD 438.

<sup>867</sup> At 444 and 448, quoted with approval in *Durr v Absa Bank Ltd and Another* 1997 3 SA 448 (SCA) at 460.

<sup>868</sup> *Durr v Absa Bank Ltd and Another* 1997 3 SA 448 (SCA) at 468, quoting Joubert (ed) *The Law of South Africa* First Reissue vol 8 in par 94.

<sup>869</sup> National Treasury *Retirement Fund Reform 2004* at 58 in par 5.6.9.

trustees have the ability to carry out the obligations with which they are entrusted in order to realise the objective of the Pension Funds Act, particularly that of section 37C.<sup>870</sup> Pretorius succinctly states the following:

A trustee is required to exercise the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another. It is not the care, diligence or skill which an individual trustee thinks or believes he can render, but that which can reasonably be expected of him in the management of the affairs of another that is required.<sup>871</sup>

#### 6.5.2.5 Damage

The plaintiff in a delictual action against the pension fund trustees must prove that he or she has suffered loss or damage, and its extent.<sup>872</sup> The Supreme Court of Appeal in *Jowell v Bramwell-Jones*<sup>873</sup> confirmed that the elements of damage or loss are fundamental to the Aquilian action, and the right of action is incomplete until damage is caused to the plaintiff through the defendant's wrongful conduct.<sup>874</sup> The question whether the dependants and the nominated beneficiary have suffered damage is one of fact which, like any other element of delict, must be established on a balance of probabilities. Once the damage or loss is established, a court will do its best to quantify that loss even if this involves some guesswork.<sup>875</sup>

In *Woods v Glenrand MIB Benefit Services (Pty) Ltd and Another*,<sup>876</sup> the Adjudicator stated that the basic criterion for assessing damages under the Aquilian action is that of placing the plaintiff in the position she would have been in had the unlawful

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<sup>870</sup> See Chapter 2, par 5.2 for a discussion of the objective of s 37C of the Pension Funds Act. Section 7A(3)(a) of the Pension Funds Act requires appointed or elected board members to attain a particular level of skills and training as may be prescribed by the Registrar, and s 7A(3)(b) of the Pension Funds Act requires the board members to retain the prescribed levels of skills and training. Section 7D(e) of the Pension Funds Act states that the board has a duty to ensure that it obtains expert advice on matters where board members may lack sufficient experience.

<sup>871</sup> Pretorius *Removal* in par 69.2, referring to *Master of the High Court v Deedat and Others* 1999 11 BCLR 1285 (N), although in the context of a trustee of a "trust" as defined in the Trust Property Control Act 57 of 1988.

<sup>872</sup> *Woods v Glenrand MIB Benefit Services (Pty) Ltd and Another* 2010 3 BPLR 378 (PFA) at 383.

<sup>873</sup> *Jowell v Bramwell-Jones and Others* 2000 3 SA 274 (SCA).

<sup>874</sup> In par 22.

<sup>875</sup> In par 22.

<sup>876</sup> *Woods v Glenrand MIB Benefit Services (Pty) Ltd and Another* 2010 3 BPLR 378 (PFA).

act or omission not occurred.<sup>877</sup> As for the wrongful or non-distribution of a retirement fund death benefits, the dependants and/or nominated beneficiaries would usually have suffered damage in that the conduct of the trustees denies them access to a benefit which is due to them or their children.<sup>878</sup> So the aggrieved parties or their children are worse off because of these acts of maladministration.<sup>879</sup>

In *Lekhozi v Auto Worker's Pension Fund*,<sup>880</sup> the trustees had failed to trace or identify a wife of the deceased by civil marriage. The fund had paid the entire lump sum to the wife who was married to the fund member by customary rights. The complainant conceded that she had only lived with the deceased for four years and was only visited by him on isolated occasions during the year, nor was she financially dependent on the fund member before his death. She was also not nominated as a beneficiary by the fund member (the deceased). The Adjudicator held that the board's investigation had left something to be desired but after considering the view that the complainant did not suffer any loss despite the board's failure to locate her during its investigations, the Adjudicator was of the view that even had the trustees been aware of the complainant's existence, she would not have received a portion of the benefit; and he dismissed the complaint.<sup>881</sup> Although *Lekhozi's* determination was not based specifically on a delictual claim, it emphasises the point that for dependants and nominated beneficiaries to succeed in their claims against the funds and their trustees, they must be able to prove that they have suffered a loss because of the conduct of the pension fund board.

In *Naicker v Orion Money Purchase Pension Fund*,<sup>882</sup> the complaint related to the misrepresentation made by the respondent fund to the complainant about the amount of the withdrawal benefit, more particularly the diminution in her benefit on withdrawal from the fund by approximately R10 000 compared to the amount she had been advised was due to her in the month that she resigned from her

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<sup>877</sup> At 383.

<sup>878</sup> See in this regard, *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA) at 259; and *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM), which is also cited in n 281 above.

<sup>879</sup> *Bukhosini v Private Security Sector Provident Fund and Another* 2009 3 BPLR 249 (PFA) at 259.

<sup>880</sup> *Lekhozi v Auto Worker's Pension Fund* 2004 5 BPLR 5714 (PFA).

<sup>881</sup> At 5714 and 5717.

<sup>882</sup> *Naicker v Orion Money Purchase Pension Fund (SA)* 2002 3 BPLR 3218 (PFA).



employment. The fund argued that the issue was not whether the complainant obtained her correct benefit under the rules (which it claimed she did) but whether she was entitled to payment in the amount that the fund erroneously advised her was her due. The fund alleged that the complainant's resignation from employment was occasioned by personal reasons and occurred before she had enquired about the value of her benefit. The argument was then that there could have been no prejudice occasioned by the representation and that in the absence of any prejudice, the complainant had failed to lay a legal basis for her claim. The Adjudicator held that there were two possible causes of action on which the complainant could base her complaint.<sup>883</sup> The first was that of delictual misrepresentation, and the second was the maladministration referred to in the Pension Funds Act. To succeed with damages for maladministration, the complainant had to prove that an act or omission by the fund had caused her prejudice. The complainant had to show that she had sustained a loss that she would not have suffered had there been no misrepresentation. The Adjudicator found that there was no prejudice shown by the complainant and dismissed the complaint.<sup>884</sup>

The plaintiff must be able to prove a calculable pecuniary loss or diminution of his or her estate for the purpose of founding Aquilian liability.<sup>885</sup> In *Biermann v Absa Consultants & Actuaries (Pty) Ltd and Others*,<sup>886</sup> the Adjudicator dealt with a situation in which fund administrators had provided a fund member with an incorrect quotation of benefits issued. The Adjudicator found that both the administrator's erroneous quotation and the employer's letter were incorrect statements of fact. No fault was ascribed to the employer, though, as it had reasonably relied on information obtained from the fund's administrators. The Adjudicator established that the fund administrators were negligent in issuing the quotations as they did.<sup>887</sup> But in determining whether the complainant had suffered any loss as a result of the

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<sup>883</sup> In par 13.

<sup>884</sup> At 3218.

<sup>885</sup> See generally Neethling and Potgieter *Delict* in Chapter 6, where the authors discuss Aquilian liability for damage. See also in this regard Havenga *Fiduciary Duties* at 328, n 172 and Damant *Liability* at 11, stating that the plaintiffs must establish that they have suffered loss. A plaintiff must prove that he or she sustained a loss because of the board's or the board member's conduct.

<sup>886</sup> *Biermann v ABSA Consultants & Actuaries (Pty) Ltd and Others* 2002 4 BPLR 3347 (PFA).

<sup>887</sup> At 3348.

negligence, the Adjudicator found no causal link between any loss suffered and the actions of the fund and the employer, and so dismissed the complaint.

#### 6.5.2.6 Causation or a causal link

To succeed in a delictual claim against the fund or its trustees, the aggrieved party must be able to show or prove a causal link between the conduct and the loss incurred,<sup>888</sup> and that this act or conduct on the part of the trustees caused his or her damage. The fund and/or its trustees cannot be liable in delict if they have not caused any damage to the plaintiff.<sup>889</sup> If there was maladministration on the part of the pension fund trustees, the question arises whether the aggrieved parties (the dependants and nominated beneficiaries) have suffered prejudice as a result of this maladministration. An example of damage that may be caused to the dependants and nominated beneficiaries is the incorrect or non-distribution or non-payment of the death benefit that the claimant believes to be due in terms of the fund rules.

In *Junker v AON SA (Pty) Ltd*,<sup>890</sup> the complaint concerned the maladministration of a pension fund which led to the alleged inflation of members' fund value. The issue to be determined by the Adjudicator was whether the fund members suffered delictual loss because of the miscalculation of their fund values caused by the respondent. The Adjudicator confirmed that where a claim is founded in delict, the complainant should comply with and prove all the elements of delictual liability.<sup>891</sup> The Adjudicator found that a leg of the delictual elements which have to be proved was the causal nexus between the error caused by the respondent and the loss suffered by the fund, if any. She was not satisfied that in this matter there was a connection between the conduct of the administrator and the alleged loss. She found that the failure by the complainant to prove that there was a direct causal link

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<sup>888</sup> See *Smith v Edcon Pension Fund* 2014 3 BPLR 439 (PFA) at 448 in par 5.7, where the Adjudicator concluded that there was no legal and factual basis to conclude that the trustees were negligent and there was also no proven loss caused to the complainant and, therefore, the delictual claim could not be sustained.

<sup>889</sup> See *Havenga Fiduciary Duties* at 324. See also par 6.5.2.5 above.

<sup>890</sup> *Junker v AON SA (Pty) Ltd* 2015 2 BPLR 222 (PFA). The complainant was the chairperson of the fund's board. He appeared to be acting on behalf of the board even though there was no express authority granting him authority to do so (in par 2.1). The respondent was the administrator of the fund.

<sup>891</sup> *Junker* in par 5.2, referring to *Hooley v Haggie Pension Fund and Another* 2002 1 BPLR 2939 (BPA) in pars 20 and 21.

between the error and the purported costs left the Adjudicator with no other option but to conclude that the complainant's submission was baseless and should be rejected.<sup>892</sup> The Adjudicator found that although the administrator had committed an act which caused damage to the fund, the administrator had offered to pay the fund back the amount which was lost to one member through the payment of an incorrect benefit.<sup>893</sup> The effect was that the fund would be put in the position it would have been in had the miscalculation not occurred. The Adjudicator found that the complainant had not established the elements required to prove a claim in delict, and so she dismissed the complaint.<sup>894</sup>

In *Hooley v Haggie Pension Fund and Another*,<sup>895</sup> the question before the Adjudicator was whether the fund's omission had caused the complainant's loss: that is, whether the requirement of causation was met. The Adjudicator dismissed the complaint because the complainant had failed to prove a sufficiently close link between the fund's omission and his alleged loss.<sup>896</sup>

To succeed in a claim in delict, the dependants and nominated beneficiaries must prove all the elements stated above. The burden of proof rests on the plaintiff, and it is clear from the above discussion that the burden is heavy.

#### 6.5.2.7 Apportionment of damages

The preceding paragraphs have briefly discussed the elements of delict that dependants and nominated beneficiaries need to prove to establish the liability of pension funds and their trustees. It is not the intention to provide a comprehensive exposition on the apportionment of damages here. Yet it should be noted that if a dependant and/or a nominated beneficiary contributed to the damage, the pension fund and/or its trustees (the defendant(s)) can plead contributory negligence and request the apportionment of damages between themselves and the plaintiff.<sup>897</sup> The

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<sup>892</sup> *Junker v AON SA (Pty) Ltd* 2015 2 BPLR 222 (PFA) at 228.

<sup>893</sup> In par 5.6.

<sup>894</sup> At 222.

<sup>895</sup> *Hooley v Haggie Pension Fund and Another* 2002 1 BPLR 2939 (PFA).

<sup>896</sup> At 2940.

<sup>897</sup> In *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 4 All SA 161 (A) in par 10, Nienaber JA referred to (Watermeyer CJ) "Aquarius" 1941 SALJ 232 at 248, confirming that contributory negligence "is negligence in the sense of a failure to look after his own interests, and not necessarily negligence in the sense of a breach of a duty to take care

Apportionment of Damages Act 34 of 1956 deals with the apportionment of liability in the case of contributory negligence. Contributory negligence arises when a person suffers damage which is caused partly by his or her own fault and partly by the fault of a third party.

Section 1(1)(a) of the Apportionment of Damages Act gives the court a discretion to reduce a plaintiff's claim for damages to the extent that the court deems just and equitable having regard to the degree to which the plaintiff was at fault in relation to the damage suffered. In such a case the defendant would have to adduce evidence to establish fault on the part of the plaintiff (the aggrieved dependant and/or other beneficiaries) on a balance of probabilities.<sup>898</sup> The defendant has to show a causal connection between the damage and the conduct of the plaintiff, this being a deviation from the standard of the *diligens paterfamilias*.<sup>899</sup> The court is obliged to consider the evidence in its assessment of the degrees of negligence of the parties to determine the apportionment of damages.<sup>900</sup>

### 6.5.3 The *sui generis* claim for breach of fiduciary duties

Pension fund trustees owe fiduciary duties to their funds, fund members, and beneficiaries in respect of accrued benefits.<sup>901</sup> Dependents and nominated beneficiaries who have suffered a loss as a result of the trustees' failure to comply with their fiduciary duties are entitled to bring a claim to recover their losses against the funds and their trustees.<sup>902</sup> If pension fund trustees have failed to comply with

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which is owed to another". See also Conaglen 2001 *CLJ* 441 at 483, stating: "Contributory negligence does not require the plaintiff to be in breach of a duty of care owed to the defendant; rather, it is concerned with issues of causation: was the plaintiff's failure to take reasonable care of her own interests a legally contributing cause in bringing about the loss suffered?" See also in this regard Cameron *et al Honoré* at 377 (cited in Chapter 2, n 217), referring to *Lloyd-Gray Lithographers (Pty) Ltd v Nedcor Bank Ltd t/a Nedbank* 1998 2 SA 667 (W), stating that in the apportionment of damages, where the plaintiff's loss is caused by one defendant's intentional wrongful conduct and another defendant's negligent wrongful conduct, the defendants are joint wrongdoers so that the apportionment and a right of recovery apply. Cameron and others submit that an apportionment of damages would apply to trustees who are guilty of a breach of fiduciary duty (at 378).

<sup>898</sup> See *Fox v Road Accident Fund* 2018 JDR 0609 (GP) in par 13.

<sup>899</sup> In par 14.

<sup>900</sup> In par 14.

<sup>901</sup> See in this regard also 7C(f) of the Pension Funds Act; and par 5.3 above for a discussion of the duties of pension fund boards. See par 5.2 and n 576 above for a discussion of the beneficiaries of pension fund duties.

<sup>902</sup> In *Du Plessis NO v Phelps* 1995 4 SA 165 (C) at 170-171, the court held that a claim for damages based on a breach of a fiduciary duty is *sui generis* as liability attaches upon proof of a breach

their fiduciary duties, resulting in the wrongful distribution of death benefits, aggrieved dependants and nominated beneficiaries may base their claims against the fund and its trustees on a breach of fiduciary duties. It is generally accepted that the liability for breach of fiduciary duties is *sui generis* and that the latter forms the proper basis for claiming liability.<sup>903</sup> Havenga states that the fiduciary principle is clearly recognised by South African law and has traditionally not been based on contract or delict.<sup>904</sup> So, since “a director’s liability for a breach of his fiduciary obligation arises neither contractually nor delictually”, it is unnecessary to prove fault or damage.<sup>905</sup> These elements are not a prerequisite for the establishment of pension fund trustees’ liability when they breach their fiduciary duties.<sup>906</sup> As a result, dependants and nominated beneficiaries are required to demonstrate their losses in order to succeed in a claim for compensation.<sup>907</sup> A *sui generis* action can also be used by dependants and nominated beneficiaries to found a claim for the disgorgement of secret profits obtained by the pension fund trustees in breach of their fiduciary duties.<sup>908</sup> This action may also justify the granting of an interdict against pension fund trustees for engaging in or continuing the impugned conduct.<sup>909</sup>

It should be pointed out that where pension fund trustees have breached their fiduciary duties, the usual action is *sui generis* but the claimant retains the option to institute a delictual action in appropriate circumstances, and if he or she proceeds

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of the fiduciary duty without the need to prove fault on the part of the defendant. The court further said that it is necessary for the plaintiff to allege and prove the causal connection between the loss giving rise to the damages claimed and the breach of the fiduciary duty. See also *Watson NO and Another v Shaw NO and Others* 2008 1 SA 350 (C) at 370. See also Havenga 1996 SA Merc LJ 366-376 for a detailed discussion of damages claims based on breach of fiduciary duties.

<sup>903</sup> See Havenga *Fiduciary Duties* at 329. See also n 780 above, where it is indicated that a delictual claim for breaches of fiduciary duties is not completely excluded.

<sup>904</sup> Havenga *Fiduciary Duties* at 330.

<sup>905</sup> At 330-331.

<sup>906</sup> At 330. The plaintiff succeeds in a *sui generis* claim without needing to prove fault as he must when claiming in delict. It is thus submitted that this is one of the factors which distinguish the *sui generis* claim for breach of fiduciary duties from the *actio legis Aquiliae* in delict.

<sup>907</sup> Hunter *et al Pension Funds Act* at 73. In the company-law context, see also *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168.

<sup>908</sup> Hunter *et al Pension Funds Act* at 73.

<sup>909</sup> At 73.

then the normal principles of delict will apply.<sup>910</sup> This constitutes a fundamental difference between the bases of fiduciary duties and the duties of care and skill of a person appointed or acting in a particular position (who is often also a fiduciary).

As stated above, pension fund trustees owe their fiduciary duties to the fund members and beneficiaries,<sup>911</sup> and these beneficiaries may, where the trustees breach their fiduciary duty, bring an action against funds and their trustees to recover their losses. This means that members, dependants, and other beneficiaries may rely on a breach of fiduciary duties as a basis of their claims in their individual capacities. Members of funds, their dependants, and nominated beneficiaries may claim in their own names, and they are proper parties to enforce those duties and to seek compensation for their breach. So members, dependants, and other beneficiaries with accrued benefits have *locus standi* to bring an action against the fund and/or its trustees.<sup>912</sup>

To succeed in a *sui generis* claim, the dependants and nominated beneficiaries must prove that the pension fund trustees exercised their discretionary powers in distributing the death benefits in a way that breached their fiduciary duties. The claimants must lead evidence to establish or support the claim that the trustees have breached one, some, or all of the components of their fiduciary duty.<sup>913</sup> For example, the plaintiffs can prove that pension fund trustees were not impartial,<sup>914</sup> or were conflicted,<sup>915</sup> or were not acting in good faith,<sup>916</sup> or disregarded the best interests of the fund, dependants, and nominated beneficiaries<sup>917</sup> when making the distribution

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<sup>910</sup> See in this regard *Cohen NO v Segal* 1970 3 SA 702 (W); and *Havenga* 1996 SA *Merc LJ* 366 and authorities cited there. The plaintiff must satisfy all the elements of a delict.

<sup>911</sup> See par 5.2 and n 576 above for a discussion of the beneficiaries of pension fund duties.

<sup>912</sup> See par 6.2 above for a discussion of the *locus standi* of dependants and beneficiaries.

<sup>913</sup> See above, par 5.3.2 for a discussion of the fiduciary duties of pension fund boards.

<sup>914</sup> See above, par 5.3.2.5 for a discussion of the duty to act with impartiality.

<sup>915</sup> See above, par 5.3.2.4 for a discussion of the duty to avoid conflict of interest.

<sup>916</sup> See above, par 5.3.2.1 for a discussion of the duty of good faith.

<sup>917</sup> See above, par 5.3.2.2 for a discussion of the duty to act in the best interest of the fund.

order.<sup>918</sup> A *sui generis* claim for breach of fiduciary duty is not for damages but for disgorgement of profits.<sup>919</sup>

#### 6.5.4 Statutory remedies for breaches of duties of care and fiduciary duties

In paragraph 5 above, it was shown that in distributing death benefits, pension fund trustees owe a duty of care and skill and have fiduciary obligations to dependants and nominated beneficiaries. These duties are found both in the common law and in statutory provisions.<sup>920</sup> Most of the statutory provisions that apply to pension fund trustees codify the common law.<sup>921</sup> The liability of funds and their trustees under statutory provisions is similar to the liability under the common law. Dependants and nominated beneficiaries may found a claim against the fund and its trustees on any of the applicable statutory provisions such as the Financial Institutions (Protection of Funds) Act 28 of 2001 and the Pension Funds Act.<sup>922</sup> The dependants and nominated beneficiaries who are suing the fund and its board members for breach of statutory duty are required to show the following in order to succeed with their claims:

(a) the statute was intended to give a right of action; (b) ... the claimant was one of the persons for whose benefit the duty was imposed; (c) the damage was of the kind contemplated by the statute; (d) the defendant's conduct constituted a breach of the duty; and (e) the breach caused materially contributed to the damage.<sup>923</sup>

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<sup>918</sup> See in this regard *Du Plessis NO v Phelps* 1995 4 SA 165 (C) at 171. This case makes it clear that, based on fiduciary duties, the first action was for disgorgement of funds and the second action was for damages. The damages claim that was awarded in *Du Plessis NO v Phelps* was for damages suffered as a result of a breach of the duty of care and skill.

<sup>919</sup> Disgorgement is defined in the following way: "A remedy requiring a party who profits from illegal or wrongful acts to give up any profits he or she made as a result of his or her illegal or wrongful conduct. The purpose of this remedy is to prevent unjust enrichment" ("Disgorgement" (*LII / Legal Information Institute*) available at <https://www.law.cornell.edu/wex/d disgorgement> (last accessed on 18 August 2021). See also *Du Plessis and Visser Disgorgement* for a general discussion of disgorgement of profits in South African law.

<sup>920</sup> See par 5.5 above, discussing the effect of the codification of duties on the distribution of retirement fund death benefits. The difference between partial and complete codification was also briefly explained.

<sup>921</sup> See also par 5.5 above, where the effect of the codification of duties (the duty of care, diligence; and fiduciary duties) on the distribution of retirement fund death benefits is discussed.

<sup>922</sup> See s 10 of the Financial Institutions (Protection of Funds) Act.

<sup>923</sup> See the South African Law Commission Discussion Paper 67 (Project 96) "The Apportionment of Damages Act 34 of 1956" at 30-31 available at [https://www.justice.gov.za/salrc/dpapers/dp67\\_prj96\\_1996.pdf](https://www.justice.gov.za/salrc/dpapers/dp67_prj96_1996.pdf) (last accessed on 18 August 2021), referring to McKerron *Delict* at 276. See also Neethling and Potgieter *Delict* at 90-92, discussing the elements that a plaintiff needs to prove to succeed in a claim for breach of a

A dependant and/or nominated beneficiary has to establish and prove that the fund or its trustees have failed to act in accordance with their statutory and constitutional obligations.<sup>924</sup> Aggrieved parties will be able to base their claims on breach of fiduciary duties (*sui generis*) and breach of duty of care and skill (delict) against the fund and its trustees. Both these actions can be founded in either common law or statutory law or both. The onus is on the applicant or plaintiff, who is usually a dissatisfied dependant or a nominated beneficiary, to prove on a balance of probabilities that the decision and subsequent distribution of death benefits by the pension fund trustees were wrongly taken and made.<sup>925</sup>

#### 6.5.5 Liability of retirement funds and their trustees in their personal capacity

Pension fund trustees who fail to comply with their duties of care and skill when distributing death benefits may expose both their fund and themselves personally to liability.<sup>926</sup> Dependants and/or nominated beneficiaries may sue either the retirement fund or the offending trustees to recover their losses or may proceed against both jointly.<sup>927</sup> In most cases, if dependants or nominated beneficiaries suffer damages because of a breach of duty, including through wrongful distribution of benefits by the trustees, an action to recover damages is instituted against the

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statutory duty. In *Thoroughbred Breeders' Association of South Africa v Price Waterhouse* 2001 4 All SA 161 (A) in par 17, Nienaber JA held: "Although our law recognises an action for damages for breach of a statutory duty where the statute was intended to give a right of action (see McKerron *The Law of Delict* 7th ed at 276), where it does not the Courts may yet hold that the breach may be evidence of negligence". *Thoroughbred* (also cited in n 897 above) involved a client's suing its auditor for damages for breach of contract.

<sup>924</sup> Section 237 of the Constitution requires that all constitutional obligations must be performed diligently and without delay.

<sup>925</sup> See *Berge v Alexander Forbes Retirement Fund (Pension Section)* 2009 JDR 0123 (W) in par 9. See also Neethling and Potgieter *Delict* at 90, stating: "The causing of damage by means of conduct in breach of a statutory duty is *prima facie* wrongful. In other words, non-compliance with a statutory duty is an indication that the violation of the plaintiff's interests took place wrongfully". Neethling and Potgieter *Delict* at 190 state that the plaintiff has the onus to prove that the defendant was negligent. "Where there is a statutory presumption of negligence, the *onus* rests on the defendant to rebut the presumption of negligence in order to escape liability" (at 190).

<sup>926</sup> See par 6.5.2 above, where delictual liability is discussed.

<sup>927</sup> See, for example, *Hellawell and Another v Boart Longyear Pension Fund and Others* 1999 10 BPLR 150 (PFA), where members sued the fund and its administrators for losses suffered because of alleged maladministration by the fund or the administrator where the administrator had misquoted transfer values to members who were considering exiting the fund. The Adjudicator held that duties conferred on pension fund trustees apply to administrators by delegation. The administrator was found liable for maladministration and was ordered to pay compensation to the members.



fund.<sup>928</sup> If the dependants and/or nominated beneficiaries elect to sue the fund or if the fund suffers loss because of its trustees' breach of duty, the fund can institute an action to recover its losses from the offending trustees.<sup>929</sup>

Pension fund trustees are generally not liable for the debts or claims against the pension fund.<sup>930</sup> Yet if the circumstances so merit, a claim may also be instituted against the trustees in their personal capacity. When applicants or plaintiffs succeed in their claims against pension fund trustees, pension funds usually discharge the liabilities of these trustees by paying these applicants or plaintiffs.<sup>931</sup>

Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 may be relied on by a dependant or nominated beneficiary who has suffered losses because of the negligent conduct or dishonest conduct of a pension fund trustee or trustees to claim against the wrongdoers.<sup>932</sup> This section applies to pension fund trustees<sup>933</sup> and is a protective remedy in the public interest.<sup>934</sup> The Financial Institutions (Protection of Funds) Act provides that pension fund trustees may, in their personal

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<sup>928</sup> See, for example, *Warner v Old Mutual Staff Retirement Fund* 2000 BPLR 804 (PFA), where a former member sued the fund to recover the losses he suffered because of a breach of fiduciary duties by a principal officer of the fund, who did not disclose relevant information to the former member. The Adjudicator concluded that the principal officer owed members a duty of the "utmost good faith" in terms of s 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984. The Adjudicator held that the principal officer's failure to disclose relevant information to the former member was a breach of fiduciary duty and amounted to maladministration of the fund. The fund was ordered to pay the former member the amount that would have been due to him had there been no breach.

<sup>929</sup> Although board members may be held personally liable for any loss to the fund, members, or other beneficiaries arising from some act of negligence or wilful default, court actions are extremely rare in South Africa. See also *Zwane v Wiseman and Others* 2005 1 BPLR 92 (PFA), where the Adjudicator dealt with a dispute among trustees regarding the distribution of death benefits and the citation of the pension fund as co-complainant by trustees in dispute with fellow trustees (at 92). The Adjudicator held that "a pension fund is a separate legal entity but any action carried out on its behalf can only be done by the board of trustees acting as a whole, or by one or more trustees who have the authority to act on behalf of the board as a whole. As the Complainant was embroiled in a dispute with his fellow trustees, he lacked authority to cite the fund as Second Complainant" (at 92).

<sup>930</sup> See par 6.5.5 above, where the liability of retirement funds for wrongful distribution of death benefits is discussed.

<sup>931</sup> See par 7 below, where indemnity and insurance of pension funds and their trustees are discussed.

<sup>932</sup> See above, par 5.4.2 for a discussion of the duties that are prescribed by the Financial Institutions (Protection of Funds) Act.

<sup>933</sup> Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 deals with "duties of persons dealing with funds of, and with trust property controlled by, financial institutions". See par 5.4.2 above, where s 2 of the Financial Institutions (Protection of Funds) Act is discussed.

<sup>934</sup> Section 2 of the Financial Institutions (Protection of Funds) Act 28 of 2001 requires pension fund boards to safeguard funds' assets and not to use them for their personal interests.

capacity, be liable for damages suffered by the fund and/or its members as a result of their negligence, theft, or fraud.<sup>935</sup> In *Knight v Mitchell Cotts Pension Fund*,<sup>936</sup> the Adjudicator also confirmed that pension fund trustees may be held liable in their personal capacity for failing to comply with their duties in terms of section 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984.<sup>937</sup> This shows that where pension fund trustees fail to distribute the death benefit in the manner required, South African law has mechanisms that allow the fund or members, dependants, and nominated beneficiaries to take action against the offending trustees, either in their individual capacity or collectively.<sup>938</sup> If pension fund trustees are sued in their personal capacity, the consequence is that they are personally liable to pay compensation to the claimant.<sup>939</sup> This is an exception to the general rule and happens if the trustees lose their common law and statutory protection against personal liability.<sup>940</sup>

In *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others*,<sup>941</sup> the Adjudicator faced the question of whether pension fund trustees could be held personally liable for the loss suffered by the complainant (the beneficiary) because of the failure to act with due care and diligence and ensuring that members' interests are protected at all times. In terms of the fund rules, all benefits under the fund were secured by an insurance policy concluded with Liberty Life, which acted as both

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<sup>935</sup> Section 10 of the Financial Institutions (Protection of Funds) Act 28 of 2001.

<sup>936</sup> *Knight v Mitchell Cotts Pension Fund* 2002 8 BPLR 3765 (PFA) at 3770.

<sup>937</sup> The Financial Institutions (Protection of Funds) Act 28 of 2001 replaced the Financial Institutions (Investment of Funds) Act 39 of 1984. It is my view that cases decided under s 2 of the 1984 Act are equally applicable to s 2 of the 2001 Act because these two sections impose similar duties on pension fund trustees. See in this regard *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others* 2006 2 BPLR 140 (PFA), where the Adjudicator held that the Financial Institutions (Protection of Funds) Act imposes similar duties on a pension fund trustees as the Financial Institutions Investment of Funds Act used to (at 144). The Adjudicator found that a death benefit beneficiary has a direct or indirect interest in the fund and has a right to seek compensation against the pension fund trustees for losses suffered as a result of such trustees' negligence (at 143).

<sup>938</sup> See Chapter 2, n 242; Cheadle, Thompson & Haysom *Accountability* at 33.

<sup>939</sup> There are cases in which pension funds may refuse to cover the liabilities of their trustees to the applicants or plaintiffs, and pension fund trustees may have to pay from their own pockets. See, for example, *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others* 2006 2 BPLR 140 (PFA).

<sup>940</sup> See in this regard par 7 below, which deals with indemnity and insurance cover of pension fund trustees. See also Hanekom *Manual* at 108 for a discussion of the personal liability of the trustee.

<sup>941</sup> *Mes v Art Medical Equipment Pension Fund (now liquidated) and Others* 2006 2 BPLR 140 (PFA).

underwriter and administrator of the fund. Payment of the insured benefit to the deceased member was subject to Liberty Life's accepting liability. The pension fund trustee was responsible for paying the contributions of the fund member (the deceased) to Liberty Life but did not do so. Contributions were deducted from the member's salaries but not paid over for a period of six months. As a result, the life insurance policy belonging to the deceased member lapsed, and it was on this ground that Liberty Life repudiated the claim. The pension fund was also liquidated. The beneficiary claimed the insured benefit from the trustee concerned. The trustee argued that the beneficiary did not have grounds to sue him personally but should have sued the pension fund. The Adjudicator examined the provisions of relevant statutes and concluded that a member of a fund or any other beneficiary has a right to sue the trustee in his personal capacity to recover the losses suffered. The Adjudicator held that the trustee was personally liable for the loss suffered by the beneficiary because the trustee had failed to act with due care and diligence in ensuring that the members' interests were always protected. So the trustee was ordered to compensate the beneficiary from his personal funds, not the pension fund assets. The fact that members and beneficiaries are afforded statutory protection that allows them to hold pension fund trustees personally liable for breaches of duties (in this case, the duty of care and skill) is a welcome development. It is a wake-up call to pension fund trustees that they should make sure that they comply with their duties and always act in the best interests of the pension fund, its members, and nominated beneficiaries. The personal liability of pension fund trustees grants members' dependants and nominated beneficiaries the opportunity to recover losses and can be most effective in sanctioning the mismanagement and abuse of the distribution process in terms of section 37C of the Pension Funds Act.

Pension fund trustees are expected to act jointly and unanimously.<sup>942</sup> If two or more trustees are liable for a breach of duties, their liability is joint and several.<sup>943</sup> This

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<sup>942</sup> Under the law of trusts, trustees also act jointly unless the trust deed provides otherwise. See in this regard *Nieuwoudt and Another NNO v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) at 493; *Thorpe and Others v Trittenwein and Another* 2007 2 SA 172 (SCA) at 176; *Boyce v Bloem and Others* 1960 3 SA 855 (T) at 858, quoting *Adam and Others v Dada and Others* 1912 NPD 495 at 507, where Broome J held that the trustees must be regarded as having acted together as one body during their common periods of office. See also PF 130 in par 15, stating that board members should act jointly.

<sup>943</sup> See *Affirm Marketing (Pty) Limited and Others v IF Umbrella Pension Fund and Others* 2013 3 BPLR 300 (PFA) (also cited in Chapter 2, n 239) in par 5.28, where the Adjudicator held that in

means that the plaintiff can claim the whole loss from any of the trustees, or from all of them, and even where a judgment or determination is obtained against all of them, the plaintiffs may execute the whole judgment against any one of them.<sup>944</sup> However, “innocent pension fund trustees” are not necessarily liable for the actions of their board co-members,<sup>945</sup> and the Pension Funds Act protects them from joint and several liability if they act independently and honestly in exercising their fiduciary obligations.<sup>946</sup>

Section 7F of the Pension Funds Act provides pension fund trustees with statutory protection against liability in some cases.<sup>947</sup> Section 7F gives courts a discretion to

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terms of the common law, persons who jointly administer the affairs and property of others like trustees can be held jointly and severally liable for the loss caused by maladministration (see *Gross and Others v Pentz* 1996 4 SA 617 (A) at 629-630). Therefore, the former trustees who were responsible for managing the IF Funds in July 2010 when a decision was taken to rebuild the funds’ data should be held personally liable (jointly and severally) for the financial loss occasioned by the rebuilding process. In addition to the statutory provisions of the Pension Funds Act, PF 130 in par 71 states: “Boards are held *accountable* for any actions and decisions taken by their mandated sub-committees, agents, office bearers and duties outsourced to service providers. As such, the members of the board of the fund can be held jointly and severally liable for the actions of their mandated agents” (original italics). King IV (at 9) defines “accountability” as the obligation to answer for the execution of responsibilities. It further states that accountability cannot be delegated, whereas responsibility can be delegated without abdicating accountability for that delegated responsibility.

<sup>944</sup> See *Boyce v Bloem and Others* 1960 3 SA 855 (T) at 858, stating that trustees are liable severally and *in solidum* for loss arising from negligence or breach of trust.

<sup>945</sup> Innocent trustees are those who do not participate in the breach of duties. This does not include those trustees who stand by while a breach of duty, of which they are aware, is being committed. Cameron *et al Honoré* (cited in Chapter 2, n 217) state at 376-371 that “a trustee who is guilty of neither negligence nor deliberate wrongdoing should not be held liable for the breach of trust committed by his co-trustee. This does not mean that a trustee would escape liability by merely establishing inactivity in the administration of the trust: there must be a satisfactory explanation of the inactivity”. Hanekom *Standard* at 33 states that this explanation in Cameron *et al Honoré* appears to be the correct approach because it is difficult to grasp how there could be justification for the personal liability of a trustee who voted against the proposal or act that led to the breach of fiduciary duties or where a trustee was not present at the meeting or where the task was delegated to a committee and a particular trustee did not serve on that committee.

<sup>946</sup> Section 7F of the Pension Funds Act protects a board member against liability in certain circumstances.

<sup>947</sup> Section 7F of the Pension Funds Act deals with the liability of a board member. It states: “(1) In any proceedings against a board member in terms of this Act, other than for wilful misconduct or wilful breach of trust, the court may relieve the board member from any liability, either wholly or partly, on terms that the court considers just, if it appears to the court that—  
(a) the board member has acted independently, honestly and reasonably; or  
(b) having regard to all the circumstances of the case, including those connected with the appointment of the board member, it would be fair to excuse the board member.”

Section 7F of the Pension Funds Act is comparable to s 77(9) of the Companies Act 71 of 2008, stating:

relieve a board member (a pension fund trustee) from any liability, either wholly or partly, who has acted honestly and independently.<sup>948</sup> Thus pension fund trustees who make a mistake may be indemnified or exempted by the court against personal liability. The challenge with this statutory provision is that it does not apply automatically; it only applies if a court decides to apply it. It should be emphasised that the provision does not apply to exonerate pension fund trustees who acted in bad faith or recklessly. The shortcoming of this provision is that it can impoverish the assets of retirement funds because those funds then have to pay the aggrieved dependants and also to cover the increased insurance costs.<sup>949</sup>

#### 6.5.5.1 *The criminal liability of pension fund trustees*

The Pension Funds Act<sup>950</sup> and the Financial Institutions (Protection of Funds) Act provide for criminal-law penalties of imprisonment and fines for wrongdoers in respect of certain crimes.<sup>951</sup> The ultimate objective of criminal liability is not to repay the victims for losses they suffered because of wrongful distribution; hence the importance of the availability and effectiveness of other civil-law remedies. Aggrieved parties may prefer the return of the benefit in the form of money or other property as compensation for wrongful distribution,<sup>952</sup> and probably the outcome

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“In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that—

(a) the director is or may be liable, but has acted honestly and reasonably; or

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.”

<sup>948</sup> See n 947 above, where s 7F of the Pension Funds Act is quoted.

<sup>949</sup> See par 7.1.4 below in this regard on the issue of insurance costs.

<sup>950</sup> See s 37 of the Pension Funds Act dealing with penalties. These provisions do not apply directly to situations in which the board and its members fail to comply with the provisions of s 37C.

<sup>951</sup> Section 10 of the Financial Institutions (Protection of Funds) Act 28 of 2001 lists offences that apply to members of pension fund boards for breach of duties. It provides:

“(1) A person who contravenes or fails to comply with any provision of Chapter 1 is guilty of an offence and on conviction liable to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.

(2) A court may, in addition to any penalty it may impose in terms of subsection (1), order that such person—

(a) pay the institution or principal concerned any profit he or she made; and

(b) compensate the institution or principal concerned for any damage suffered, as a result of the contravention or failure.”

<sup>952</sup> See *Jowell v Bramwell-Jones* 1998 (1) SA 836 (W) at 894-895 describing what happens if trustees breach their fiduciary duties.

that criminal sanctions be applied to the wrongdoers in addition to civil-law remedies.

Section 10(1) of the Financial Institutions (Protection of Funds) Act provides that a person who contravenes or fails to comply with any provision contained in Chapter 1, which deals with funds and trust property held by financial institutions,<sup>953</sup> is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding ten years, or to both such fine and such imprisonment. Besides any penalty imposed, the court may order that this person may not serve as a director, member, partner, or manager of any financial institution for such period as the court may deem fit.<sup>954</sup> In addition, section 276 of the Financial Sector Regulation Act 9 of 2017 deals with liability in relation to juristic persons. It states that if a financial institution commits an offence in terms of a financial sector law and a member of the governing body of the financial institution failed to take all reasonably practicable steps to prevent the commission of the offence, the member of the governing body commits the like offence and is liable on conviction to a penalty not exceeding the penalty that may be imposed on the financial institution for the offence.<sup>955</sup>

It was discussed above that section 7C of the Pension Funds Act partly codifies the fiduciary duties and the duty of care and skill of pension fund trustees.<sup>956</sup> The common-law remedies are not excluded by the statutory provisions.<sup>957</sup> The discussion in the preceding paragraphs explained that both retirement funds and their trustees in their personal capacity may be held liable for a breach of such duties.<sup>958</sup> Yet it should be pointed out that a contravention of the duties provided for in section 7C of the Pension Funds Act is not an offence under section 37 of the Pension Funds Act, and no specific penalties are prescribed in respect of these

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<sup>953</sup> See n 951 above in this regard.

<sup>954</sup> See s 10(3) of the Financial Institutions (Protection of Funds) Act 28 of 2001.

<sup>955</sup> Section 276(1)(a) and (b) of FSRA.

<sup>956</sup> Section 37 of the Pension Funds Act prescribes penalties for contravening certain provisions.

<sup>957</sup> See in this regard par 5.5 above for a discussion of the effect of the codification of pension fund trustees' duties.

<sup>958</sup> See above par 5.3.2 for a discussion of fiduciary duties.

contraventions.<sup>959</sup> This means that pension fund trustees cannot be held criminally liable solely for failing to comply with their duties in terms of section 7C of the Pension Funds Act.<sup>960</sup> The question arises whether it should not be possible to hold pension fund trustees who wrongfully breach their duties criminally liable,<sup>961</sup> especially as claims for wrongful distribution of death benefits are mostly directed to the funds themselves and not to the errant trustees in their personal capacity.<sup>962</sup> In

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<sup>959</sup> See Hanekom *Manual* at 108. Section 37(1) of the Pension Funds Act provides penalties as follows:

“Any person who-

(a) contravenes or fails to comply with section 4, 10, 13A, 13B or 31;

(b) induces or attempts to induce any person to become a member of, or to contribute to, a fund not registered under this Act; or

(c) in any application in terms of this Act deliberately makes a misleading, false or deceptive statement or conceals any material fact,

is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.”

<sup>960</sup> Section 298 of FSRA provides for transitional arrangements that apply to the Enforcement Committee and Appeal Board.

<sup>961</sup> See ss 2 and 10 of the Financial Institutions (Protection of Funds) Act regarding sanctions that can be meted out to errant board members. Imposing criminal sanctions for breaches of fiduciary duties may not be universally supported, because it may be argued that the civil remedies available to aggrieved dependants and beneficiaries are adequate. The aggrieved beneficiaries (claimants) should rely instead on civil remedies and administrative procedures, together with theft and other common-law crimes in appropriate circumstances. See in this regard Cameron *et al Honoré* at 389-390 for a similar view in the context of a normal (ordinary) trust. See below in this par 6.5.5.1 for arguments in support of criminal sanctions. See par 6.5.5 above, where the liability of retirement funds and their trustees in their personal capacity is discussed.

<sup>962</sup> In the light of this suggestion to prescribe criminal sanctions for certain conduct on the part of pension fund trustees, it is necessary and important to differentiate between ordinary and gross negligence as well as to explain the meaning of wilful misconduct. Neethling and Potgieter *Delict* at 168 in par 4.3 state that although it makes no difference for Aquilian liability whether the defendant acted with slight or gross negligence, some statutory provisions limit liability to instances of “gross negligence”. Therefore, it is material to determine whether a wrongdoer has acted with gross negligence. In *Transnet Ltd t/a Portnet v Owners of The MV Stella Tingas and Another: MV Stella Tingas* 2003 2 SA 473 (SCA) at 481, the Supreme Court of Appeal described gross negligence as follows: “to qualify as gross negligence the conduct in question, although failing short of *dolus eventualis*, must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity.” In *S v Dhlamini* 1988 2 SA 302 (A) at 308, the court described “gross negligence” to mean the following: “Gross negligence in our common law, both criminal and civil, connotes a particular attitude or state of mind characterised by an entire failure to give consideration to the consequences of one’s actions, in other words, an attitude of reckless disregard or such consequences.” In the English case of *Rustenburgh Platinum Mines Ltd, Johnson Matthey (Pty) Ltd and Matthey Bishop Inc v South African Airways and Pan American World Airways Inc* [1977] 1 Lloyd’s Rep 564 (QBD) at 569, Ackner J held that “it is common ground that ‘wilful misconduct’ goes far beyond negligence, even gross or culpable negligence, and involves a person doing or omitting to do that which is not only negligence, and involves a person doing or omitting to do that which is not only negligent but which he knows and appreciate is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be”. See also Cassim *Critical*

addition, insurance policies and indemnity agreements can be concluded to protect or indemnify pension fund trustees found guilty of breaching their duties.<sup>963</sup>

It is submitted that for accountability to be effective, there should be criminal consequences for pension fund trustees' non-compliance with the applicable laws and pension fund rules. The consequences discussed in the preceding paragraphs may not, on their own, have the desired effect of ensuring accountability by pension fund boards and their trustees. Trustees, in some instances, have nothing to be afraid of in not complying with their duties, applicable laws, and pension fund rules. It is suggested that non-compliance with sections 37C and 7C of the Pension Funds Act should be an offence.<sup>964</sup>

The discussion above considered the civil liability of pension funds and their trustees as well as the penalties for non-compliance with the relevant statutes including the Pension Funds Act and the Financial Institutions Act. This paragraph discusses specific aspects that may deter beneficiaries from enforcing their right. It is imperative that pension fund trustees should be familiar with the consequences of any negligent or wrongful conduct on their part.<sup>965</sup> Any person who may perceive personal liability of pension fund trustees and criminal sanctions for their breach of duties as drastic measures must consider the following: first, retirement benefits are important, and it is necessary to protect the vulnerable part of the population that has lost jobs, or dependants who have lost breadwinners or employees who have reached retirement age and cannot fend for themselves.<sup>966</sup> Secondly, most plaintiffs or applicants in respect of death benefits are not the members of the funds and may therefore not have in their possession all the relevant documents, such as pension fund rules, and information needed to argue their case successfully.<sup>967</sup> If the

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*Analysis* at 376 to 381 and the authorities cited there for a discussion of gross negligence, wilful misconduct, and breach of trust, although in the context of company directors' breach of duties.

<sup>963</sup> See par 7 below on indemnity and insurance of pension funds and their board members.

<sup>964</sup> See Chapter 6, par 5.15, where the suggestion to amend s 37 of the Pension Funds Act which deals with penalties is discussed. In 2013, s 37 of the Pension Funds Act was amended to include non-compliance with s 13A of the Pension Funds Act as an offence (see, n 473 and n 746 above in this regard), and it is suggested that the same should be done to sections 7C and 37C of the Pension Funds Act.

<sup>965</sup> See Downie *Essentials* at 117.

<sup>966</sup> See in this regard Chapter 1, par 2.

<sup>967</sup> See in this regard par 5.4.6.1.



Adjudicator or the courts consider that a claim or an action has been frivolously instituted, a cost order may be ordered against the plaintiffs or applicants.<sup>968</sup>

It is submitted that making pension fund trustees criminally liable in addition to imposing the personal liability that already exists may deter unscrupulous people who assume trustee positions with no intention of serving the interests of the fund, members, and other beneficiaries.<sup>969</sup> The availability of effective enforcement measures for members, their dependants, and other beneficiaries could help in ensuring the accountability of pension fund trustees. There is a need to train trustees so that they can understand their duties for the position that they occupy as trustees and avoid conduct that can expose their pension funds and themselves to civil and criminal liabilities.<sup>970</sup>

#### 6.5.5.2 *Legal costs*

If the dependant and/or nominated beneficiary chooses to lodge a complaint against a pension fund and/or their trustees with the Pension Funds Adjudicator, it is a free service, and this complainant does not necessarily need to be represented by a lawyer.<sup>971</sup> One of the aims of Chapter VA of the Pension Funds Act is to provide for accessible, economic, and expeditious means of resolving pension fund disputes. It is intended to be a free service to pension fund members as well as for their dependants and nominated beneficiaries. Pension fund members' contributions contribute towards financing the office of the Adjudicator.<sup>972</sup>

Section 30K of the Pension Funds Act states: "No party shall be entitled to legal representation at proceedings before the Adjudicator." If a dependant and/or nominated beneficiary does not lodge a complaint with the Adjudicator but is required to bring an action in a civil court, legal representation is often needed. If the matter is to be heard before the High Court, the costs of legal representation are

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<sup>968</sup> See below, par 6.5.5.2 and n 973, where legal costs are discussed.

<sup>969</sup> See generally Marumoagae 2021 *PER* 1-35, where he discusses the challenge of the misappropriation of retirement fund assets by trustees, fund asset managers, and retirement funds' administrators.

<sup>970</sup> See below Chapter 6, par 5.1, where the need and recommendations to train pension fund trustees are discussed.

<sup>971</sup> See Chapter 2, par 6.5, where the office of the Pension Funds Adjudicator is discussed.

<sup>972</sup> See *Roach and Another v Tiger Oats Workers Provident Fund and Another (2)* 1999 10 BPLR 214 (PFA) at 215.

high and may well become prohibitive.<sup>973</sup> The complexity of section 37C of the Pension Funds Act makes it difficult for some dependants and beneficiaries to represent themselves in civil courts without the assistance of legal representation. The prohibitive legal costs of High Court litigation, and the possibility of a cost order against an unsuccessful claimant,<sup>974</sup> may also dissuade many potentially successful claims.<sup>975</sup> If the case is successful, the plaintiffs may be able to recover their costs, but may be unable to pay costs during litigation or it may take a long time before they can recover the costs. A pension fund and its trustees are in a more favourable

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<sup>973</sup> Rule 70 of the Uniform Rules of Court sets the tariff schedule for the High Court. Legal costs awarded by a High Court typically include advocates' fees. See in this regard "Understanding Legal Costs in South Africa: A Simple Guide" (*DSC Attorneys*) <https://www.dsclaw.co.za/articles/understanding-legal-costs-in-south-africa-a-simple-guide/> (last accessed on 30 June 2021). South Africans live in "a time when people around the globe, especially poor persons, are denied access to justice as they are unable to afford lawyers or if they can afford, their funds may dry out as such persons cannot sustain the costs associated with continued litigation" (Judge J Makume "Is Access Justice Dependent on One's Ability to Afford Legal Fees?" A paper presented at the South African Law Reform Commission International Conference on Access to Justice, Legal Costs and Other Interventions, Durban, South Africa, 31 October–2 November 2018), quoted in Klaaren 2019 *SAJHR* 1 at 1).

<sup>974</sup> See, for example, in *Kolb v University of Natal Retirement Fund and Others (2)* 2001 6 BPLR 2100 (PFA), where the Adjudicator found that the complaint was frivolous and trivial, and granted a cost order against the complainant (at 2100). Also, in *Roux v Cape Municipal Pension Fund* 2001 3 BPLR 1783 (PFA) the Adjudicator cautioned pension fund members that it was within his discretion in terms of s 30Q(g) of the Pension Funds Act to award costs against complainants who lodged trivial or unjustifiable complaints, as these are an unnecessary invasion upon the time and resources of his office (at 1784 and 1788). In *Grobler v Denel Retirement Fund* 2001 2 BPLR 1588 (PFA), the Adjudicator deemed the complaint frivolous and trivial, and ordered the complainant to pay the costs incurred by the fund in dealing with the complaint (at 1588). In *Roach and Another v Tiger Oats Workers Provident Fund and Another (2)* 1999 10 BPLR 214 (PFA), the Adjudicator stated that costs would generally be awarded against the complainant only where the complaint is vexatious, frivolous, or unreasonable. There was no evidence of that being the case in this dispute in *Roach*. The issues raised were complex and beneficial to other members of the fund concerning their death benefits (at 215). As a result, no cost order was made (at 214). The Adjudicator remarked that in time, when pension fund members are more educated on the purpose of the Adjudicator's office and pension funds themselves set up effective internal mechanisms for dispute resolution, this approach might very well change. However, at this stage, the imposition of punitive cost awards on pension fund members may well defeat the object of establishing the office in the first place (at 215).

<sup>975</sup> Like any other litigant, the plaintiff who is a fund member, his or her dependant, or any other nominated beneficiary who is claiming against the retirement fund and/or its board members must generally fund the litigation from his or her own funds. In other words, this litigant is responsible for personally raising funds to cover the legal costs involved, and where the claim fails, the court may award a cost order that this litigant be personally liable to cover the costs of both parties in the matter. See, for example, in *Oosthuizen obo Breed v Mercedes Benz of South Africa Pension Fund and Another (2)* 2000 11 BPLR 1284 (PFA), where the Adjudicator awarded a costs order against the fund because the complainant had been compelled to obtain legal assistance as a result of the respondents' raising the issue of paternity (in par 14).

position regarding the risk of costs in respect of litigation,<sup>976</sup> as they are invariably protected against legal costs and expenses through indemnification or insurance.<sup>977</sup>

The preceding portion of paragraph 6 examined the various remedies which a dependant and/or a nominated beneficiary could rely on should he or she be aggrieved by the way a pension fund death benefit was (or is being) distributed by pension fund trustees. It was shown that to rely successfully on these remedies, the affected dependant and/or a nominated beneficiary must meet the specific requirements of each remedy.<sup>978</sup> For example:

- To succeed in a claim of delict, the dependant and/or nominated beneficiary must prove that all the elements of delict were complied with, including conduct (an act or omission), wrongfulness, fault (intention or negligence), loss (damage), and causation. Moreover, no liability will ensue unless the trustee acted in an unreasonable manner and all the elements of delict are proved;<sup>979</sup>
- To succeed in a *sui generis* claim, the dependant and/or nominated beneficiary must prove that he or she was owed a duty by the fund and its trustees, that this duty was breached, and that he or she suffered damage or losses as a result.<sup>980</sup>
- To succeed in an action based on the breach of statutory provisions, the dependant and/or nominated beneficiary must prove that the relevant statute

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<sup>976</sup> See par 7 below on the indemnity of board members.

<sup>977</sup> See in this regard Cassim *Statutory Derivative Action* at 184-185. Although referring to the position of company directors versus minority shareholders, it is submitted that the challenges identified by Cassim are similar to those faced by dependants and nominated beneficiary to pursue an action against a fund or its trustees. See also par 7 below, where indemnity and insurance cover for pension funds and their trustees are discussed.

<sup>978</sup> These remedies are as follows: an application for review under the common law (the applicant must show prejudice and the unfairness of the process — see par 6.5.1.1 above); a PAJA claim (the applicant should have exhausted other internal remedies — see par 6.5.1.2 above); a claim in delict (the applicant or plaintiff must prove all the elements of a delict — see par 6.5.2.1 above); a *sui generis* claim (the applicant or plaintiff must prove that he or she was owed a duty by the trustee and that this duty has been breached — see par 6.5.3 above).

<sup>979</sup> See par 6.5.2.1 above, where all the elements of a delict are discussed.

<sup>980</sup> See par 6.5.3 above.

applies to him or her, that the statute provides for compensation for losses or damage, and that the fund or its trustees contravened the statute.<sup>981</sup>

- To succeed under the PAJA, the dependant and/or nominated beneficiary must comply with the provisions of the PAJA, including the requirement that he or she has exhausted the internal remedies available.<sup>982</sup>

The Pension Funds Act does not currently provide for civil liability for breach of duties in the way that the provisions of section 77 of the Companies Act 71 of 2008 do.<sup>983</sup>

The Pension Funds Act does not currently provide criminal sanctions for breach of duties by the pension board and its trustees that are similar to the penalties in section 37(1)(a) of the Pension Funds Act.<sup>984</sup> Section 37(1)(a) of the Pension Funds Act prescribes penalties for any person who contravenes or fails to comply with various sections including sections 13A and 13B of the Pension Funds Act.<sup>985</sup>

The challenges faced by the aggrieved dependants and/or nominated beneficiaries in enforcing their rights against the funds and their trustees were pointed out in the preceding paragraphs. The discussion now turns to the protection of retirement funds and their trustees if those dependants and nominated beneficiaries' rights are enforced.

## **7 INDEMNITY INSURANCE AS A FORM OF PROTECTION FOR RETIREMENT FUNDS AND THEIR TRUSTEES AGAINST LIABILITY FOR WRONGFUL DISTRIBUTION**

The huge number of matters relating to the distribution of retirement fund death benefits in terms of section 37C of the Pension Funds Act that are brought before the Adjudicator and the courts indicates that the section is not working as

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<sup>981</sup> See par 6.5.4 above.

<sup>982</sup> See par 6.5.1.2 above.

<sup>983</sup> See par 5.4.1 above.

<sup>984</sup> See par 6.5.5.1 above.

<sup>985</sup> See par 2.2.10.2 above and n 473, where the non-payment of contributions by employers and as well as the provisions of s 37(1)(a) of the Pension Funds Act are discussed.

intended.<sup>986</sup> This number also means that pension fund trustees, principal officers, and benefit administrators have to spend a lot of time attending to the resolution of disputes and court matters rather than managing and administering the fund. The discussion in this chapter highlighted some of the challenges faced by funds and their boards in distributing death benefits in terms of section 37C of the Pension Funds Act. The discussion that follows focuses on measures available to boards and board members that enhance the proper distribution of death benefits and protect their funds and themselves against liability. Indemnity clauses in the fund rules and other insurance covers such as fidelity insurance and professional liability insurance are discussed below.

### 7.1 *Indemnity insurance*

Insurance plays a significant role in making sure that the State's objectives of establishing retirement funds are achieved: insurance covers the losses that funds incur for misconduct by their trustees and provides money to pay fund members, dependants, and nominated beneficiaries. Indemnity insurance enables pension fund trustees to make themselves available to run retirement fund business without fear of personal liability save in exceptional circumstances where indemnity does not apply. The Pension Funds Act prohibits pension funds from indemnifying errant trustees in some cases,<sup>987</sup> as that step would hinder the ability of pension funds to realise the objectives of pension funds' establishment.<sup>988</sup>

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<sup>986</sup> See this chapter for a discussion of cases and determinations where the boards have misconstrued the provisions of s 37C of the Pension Funds Act, leading to disputes before the courts and the Adjudicator.

<sup>987</sup> Indemnity clauses are generally valid and enforceable unless the public interest would be violated — a typical example being attempts to exclude liability resulting from fraud. See in this regard also *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA). Furthermore, the board of trustees is not allowed to exclude or restrict any duty or liability which is imposed on it by any law, and the board should also not rely unreasonably on any provision seeking to exclude such duty or liability. See Clause 4.5.1 of Pension Fund Circular 98 on duties and objects of boards of management. See par 7.1.3 below on the circumstances that pension funds are allowed to indemnify their pension fund trustees against certain liabilities. See also in this regard n 993 below, where regulation 30(2)(u) of the Pension Funds Act is discussed. For PF 98, see <https://www.fsca.co.za/Regulatory%20Frameworks/Temp/PF%20Circular%2098.pdf> (accessed on 19 August 2021).

<sup>988</sup> See in this regard Chapter 1, par 2.4.

### 7.1.1 Indemnity for pension fund trustees

In their capacity as the management organ of the pension fund, pension fund trustees act on behalf of the fund,<sup>989</sup> and it is common for the fund rules to include provisions indemnifying the trustees against all proceedings, costs, and expenses incurred because of any claim against them in connection with the fund.<sup>990</sup> These provisions in the rules indemnifying the trustees are hence described as the “indemnity clause”.<sup>991</sup> In simple terms, the indemnity clause is for the benefit of pension fund trustees (pension fund board members) where they have reasonably incurred costs in opposing a claim against the fund or themselves in their capacity as board members which did not result from any negligence, recklessness, intentional unlawful acts, dishonesty, or fraud by a board member. The indemnity clause does not exempt pension fund trustees from liability for claims arising from their negligence, dishonesty, or fraud.<sup>992</sup> Should it be found that the claim against the trustees in their personal capacity was not justified — in other words, where these trustees were not negligent, dishonest, or fraudulent, then they are entitled to

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<sup>989</sup> Section 6 of the FSRA states: “Where a financial sector law imposes an obligation to be complied with by an entity that is a juristic person, the members of the governing body of that juristic person must ensure that the obligation is complied with.”

<sup>990</sup> It is important to note that the indemnification of legal costs incurred by board members is not guaranteed. See, for example, *Amplats Group Provident Fund v Anglo American Platinum Corporation Limited and Another* (A5011/2020) 2020 ZAGPJHC 66 (18 March 2020), where the High Court (per Weiner and Senyatsi JJ (Mdalana-Mayisela J concurring)) in par 47 was of the view that if the fund was to be burdened with a costs order in this case, this step would prejudice members of the fund. The court concluded that the principal officer, the chairperson of the board, and the member elected trustees had failed in their fiduciary duties and involved the fund in costly litigation. The court ordered these parties to file affidavits directly with the registrar of the court within ten days of the order, setting out why they should not be held personally liable for the costs, or a portion thereof (either individually, jointly, or jointly and severally) of the application and the appeal, including the costs consequent upon the employment of two counsel. This case is discussed here to emphasise and to make trustees aware that there are instances in which pension fund boards and their trustees may find themselves being ordered to pay legal costs from their personal assets. Although this is more of an exception to the general rule where pension fund trustees are indemnified for the legal costs that they incur while performing their duties, the possibility of being held personally liable for legal costs is still worth noting.

<sup>991</sup> A typical indemnification clause reads as follows: “The management board of all officers of the fund shall be indemnified by the fund against all proceedings, costs and expenses incurred by reason of any claim in connection with the fund, not arising from their negligence, dishonesty or fraud” (Hanekom *Manual* at 447). See also *Watson NO and Another v Shaw NO and Others* 2008 1 SA 350 (C) at 373-374 for a similar indemnity clause, although one dealing with the fiduciary relationship between a trustee and a medical scheme. It is submitted that the relationship between a trustee and a medical scheme is no different in principle from the relationship between a pension fund trustee and a pension fund: the trustee stands in a fiduciary relationship to the pension fund, members, and other beneficiaries.

<sup>992</sup> *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA).

be indemnified by the pension fund.<sup>993</sup> The fund's undertaking of indemnification is aimed at a claim by third parties against the fund, and does not apply when pension fund trustees are sued by their fund for damages caused by a breach of the duties that trustees owe to the fund, members, and beneficiaries.<sup>994</sup> It is submitted that in many cases in which pension fund trustees have caused damage to their funds and/or to the fund members and beneficiaries because of the breach of their duties, they will also have acted negligently, dishonestly, or fraudulently and will not be covered by the indemnification clause because these clauses usually exclude claims arising from the trustees' negligence, dishonesty, or fraud.<sup>995</sup> So there is a need for insurance to cover pension funds and their trustees for negligence and erroneous conduct.

### 7.1.2 Fidelity insurance

In simple terms, fidelity insurance protects a pension fund that has incurred any loss resulting from any error or omission, negligence, recklessness, intentional unlawful

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<sup>993</sup> When pension fund trustees are sued in their personal capacity for breach of duties and they are vindicated, the fact that they were sued (even if personally) would be regarded as a consequence or incidence of their having agreed to act as pension fund trustees. If their conduct gave rise to the claim and their defence of the proceedings was proper, they would be entitled to recoup any losses (costs incurred) by them from the pension fund. This sum would be the difference between their full reasonable expenditure in defending themselves, on the one hand, and any amounts recouped from the unsuccessful complainant, on the other. In *Stander and Others v Schwulst and Others* 2008 1 SA 81 (C) at 90, the court confirmed that where a trustee is sued for breach of trust, the claim is against him or her personally, and the trustee could be liable for the legal costs.

<sup>994</sup> See *Watson NO and Another v Shaw NO and Others* 2008 1 SA 350 (C) at 373-374, where the liquidator of a medical scheme (Publiserve) claimed for damages against the trustee of Publiserve (the defendant) on the basis of the trustee's alleged breach of his fiduciary duties as a trustee of Publiserve. It was common cause that in his capacity as a trustee, the defendant had to comply with the duties of a trustee, as set out in the Publiserve rules. The first rule of Publiserve provided that the board of trustees must be indemnified by Publiserve against all proceedings, costs, and expenses incurred by reason of any claim in connection with the scheme, not arising from negligence, dishonesty, or fraud. The court held that the provisions of this rule did not provide a defence for the trustee. The court explained that this rule "clearly envisages a claim by third parties against the board of trustees and does not apply in the instant case, where De Villiers the trustee is sued by the liquidator of Publiserve for damages caused by the breach of the fiduciary duties which he owed to Publiserve" (at 373-374). The second rule required the board of trustees to ensure that Publiserve was insured against loss resulting from the dishonesty or fraud of any of its officers. The court held that the provision of insurance, as envisaged in the second rule, did not provide the trustees with a defence to the damages claim (caused by the breach of the fiduciary duties which the trustee owed to Publiserve) by the medical scheme, as it merely gave rise to a right of recourse by Publiserve against the insurer.

<sup>995</sup> See Hanekom *Manual* at 447, stating that "because fund rules do not normally indemnify the trustees against negligence, errors and omissions, it is possible, therefore, that a person who agrees to act as a trustee of a retirement fund will be personally liable for any losses suffered as a result of any error or omission on his/her side".

acts, or dishonesty or fraud by the board, a board member, the principal officer, or any official of the fund. The difference between the indemnity clause discussed in the preceding paragraph and fidelity insurance discussed in this one is that the indemnity clause protects or indemnifies the pension fund trustees, while the fidelity insurance protects or indemnifies the fund against losses that it suffers as a result of the conduct of its officials, including the pension fund trustees. The Pension Funds Act requires retirement funds to take out the policy of insurance to indemnify themselves (the funds) against any losses that may arise from *dishonesty or fraud* on the part of its officers (including the pension fund trustees) or such other indemnification as the Registrar may allow.<sup>996</sup> PF 130 states the following:

In terms of pensions law a fund is required to take out fidelity cover. The purpose of this cover is to indemnify the fund against any loss suffered by the fund which cannot otherwise be recovered. The terms of this cover and the quantum should be carefully considered by the board to ensure that it is appropriate for the fund; where necessary, expert advice should be obtained in this regard. Such cover should include loss arising from negligence.<sup>997</sup>

The fidelity cover policy is necessary because any person who acts on behalf of the fund (including a pension fund trustee) can cause a loss to the fund because of his or her negligent act, error, or omission. The loss to a fund can become a loss to the retirement fund members and their beneficiaries when the assets of the fund are reduced significantly to the point where the fund cannot pay all or some of the benefits to the members or dependants and their beneficiaries. In *The Printing Industry Pension Fund for SATU Members and Another v John Sibanda NO and Another*,<sup>998</sup> the High Court dealt with the interpretation of a fidelity insurance policy and cover for “officers of the fund”. A claim must first be brought against the fund before the fund could claim from the insurer.<sup>999</sup> The insurer is obliged only to insure the insured against claims made against it by third parties.<sup>1000</sup>

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<sup>996</sup> See regulation 30(2)(u) of the Pension Funds Act; and Downie *Essentials* at 74 and Hanekom *Manual* at 442, commenting on fidelity insurance.

<sup>997</sup> See PF 130 in par 48. Regulation 30(2)(u) of the Pension Funds Act refers to indemnity against *dishonesty or fraud* of the fund’s officials, while PF 130 specifically states that this cover should include loss suffered by the fund because of the *negligence* of its fund officers.

<sup>998</sup> *The Printing Industry Pension Fund for SATU Members and Another v John Sibanda N.O and Another* case no. 17619/12 High Court of South Africa, Gauteng Division, Johannesburg, delivered on 11 November 2014.

<sup>999</sup> In par 23.

<sup>1000</sup> In par 22.



The benefit of fidelity insurance is that the fund is put in the same financial position that it was before the negligence, dishonesty, or fraud by the fund's officers.<sup>1001</sup> That step allows a fund to be able to pay the death benefits to qualifying dependants and nominated beneficiaries in accordance with the retirement fund rules. If it were not for the insurance cover, there could be times when, after the negligence, dishonesty, or fraud committed by the fund's officials, a particular fund would become unable to pay death benefits to beneficiaries. The disadvantage is that the insurance premiums for this cover are paid from the fund assets. If it were not for the insurance cover, these funds (the premiums) could have been used to enhance the benefits payable to fund members or their dependants and nominated beneficiaries. It is submitted that the payment of premiums for insurance cover by retirement funds is a necessary and justifiable cost. One must consider the effect on dependants and nominated beneficiaries who cannot receive payments after the death of a fund member because of fund officers' theft and fraud. Funds' failure to pay death benefits to dependants and nominated beneficiaries surely goes against the objectives of the establishment of retirement funds<sup>1002</sup> and that of section 37C of the Pension Funds Act.<sup>1003</sup>

It should also be noted that the availability of fidelity insurance in a fund does not provide the pension fund trustees with a defence against a damages claim in their personal capacity (caused by the breach of a duty which trustees owe to the fund, members, and other beneficiaries) by the fund, members, and other beneficiaries, as it merely gives rise to recourse by the fund against the insurer.<sup>1004</sup> The purpose of fidelity insurance is for the fund to cover itself against losses that it may suffer resulting from negligence, dishonesty, or fraud on the part of any of its officers.<sup>1005</sup>

### 7.1.3 Professional indemnity insurance or professional liability insurance

It is clear from the discussion above that there are instances in which pension funds, members, and beneficiaries may hold trustees liable in their personal capacity for

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<sup>1001</sup> See in this regard n 997 above.

<sup>1002</sup> See Chapter 1 par 2.4 in this regard.

<sup>1003</sup> See Chapter 2 par 5.2 in this regard.

<sup>1004</sup> See *Watson NO and Another v Shaw NO and Others* 2008 1 SA 350 (C) at 373-374.

<sup>1005</sup> See PF 130 in par 48.

breach of their duties.<sup>1006</sup> It is important that these trustees should make sure that adequate professional liability cover (professional indemnity insurance) to protect themselves against liability in their personal capacity is put in place by either the pension funds or the trustees themselves.<sup>1007</sup> Without this cover being in place, the personal estates of the trustees can be exposed to claims.<sup>1008</sup>

The question arises who should be responsible for the costs of this indemnity insurance. Hanekom recommends that although a trustee could arrange his or her own insurance policy, a preferred arrangement would be for the trustees to be protected by a policy arranged by the fund.<sup>1009</sup> In my view, it would not make practical sense to require trustees to arrange their own insurance, because trustees in South Africa are generally not remunerated at all and would not have any incentive to pay insurance premiums from their own pockets, choosing instead not to become trustees.<sup>1010</sup>

#### 7.1.4 Advantages and disadvantages of indemnity insurance for retirement funds and their board members

The scope of both fidelity and professional indemnity insurance cover should protect the fund against negligence, errors or omissions, theft, and fraud on the part of all its officers.<sup>1011</sup> Yet the insurance costs incurred by retirement funds to cover themselves and their trustees against liability erode the pension fund assets, which could have been used to enhance the benefits of members and beneficiaries.<sup>1012</sup> It

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<sup>1006</sup> See par 6.5.5 above.

<sup>1007</sup> See Goodall *Easiguide* in par 16.11.

<sup>1008</sup> In par 16.11. See also PF 130 in par 48, stating that in addition to fidelity cover for the fund, “members of the board themselves should have indemnity insurance provided by the fund, or an indemnity from the sponsor of the fund. The board should also ensure that each service provider has adequate malpractice cover in the form of professional indemnity and fidelity guarantee insurance so that the fund’s right of recourse against that service provider where required to be invoked, is safeguarded”.

<sup>1009</sup> See Hanekom *Manual* at 447-448.

<sup>1010</sup> See in this regard Chapter 2, n 207 for a brief discussion of the remuneration of pension fund trustees in South Africa. The question arises whether a distinction should be drawn between an “ordinary” and a “lay” trustee (an employee who voluntarily sits on pension fund boards as a trustee to represent employees or employer interests without receiving any remuneration for the services rendered) compared with professional persons who sit on pension fund boards as independent trustees and are remunerated for their services or expertise.

<sup>1011</sup> Hanekom *Manual* at 437 and 449, stating that there are no clear guidelines on the quantum of fidelity insurance to be arranged by retirement funds.

<sup>1012</sup> At 436, stating that professional indemnity insurance is not a statutory requirement because of problems of availability and cost. It is common practice within the retirement industry for the fund

is submitted that the protection of pension fund trustees against personal liability by way of an indemnity clause, professional liability insurance, fidelity insurance, or statutory provisions such as section 7C(f) of the Pension Funds Act is important to ensure the availability of persons who are willing to become pension fund trustees. However, the practical effect of these protections is that trustees who have caused damage or losses to their retirement funds by failing to comply with their duties in terms of applicable laws and the rules of their funds stand to lose nothing because they are free of any personal responsibility to their funds, members, dependants, and nominated beneficiaries, both for the payment of the award of the damages to claimants and for the payment of the legal costs of their defence.<sup>1013</sup> To permit a retirement fund to indemnify a negligent pension fund trustee who has harmed it amounts to exemption from liability.<sup>1014</sup> This outcome harms the financial position of the fund and ultimately the fund members, dependants, and nominated beneficiaries who may not be able to receive all of their promised benefits.

## 8 CONCLUSION

This chapter examined the provisions of section 37C of the Pension Funds Act and the challenges faced by pension fund trustees in its interpretation and application. It was argued that these challenges undermine the efficiency of pension fund trustees in distributing retirement fund death benefits. The objective of section 37C of the Pension Funds Act as an instrument to achieve a social purpose was analysed. The discussion highlighted the importance of pension fund trustees' understanding and correctly interpreting and applying the provisions of section 37C, as well as the definition of "dependant" in the context of the distribution of retirement fund death benefits. Also discussed were:

- the restrictions that have been put in place to protect and ringfence death benefits from being paid to beneficiaries solely because of the wishes of the

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to insure trustees' liability, through the fund's purchasing of trustees' indemnity insurance. This step limits the exposure of trustees in appropriate cases, such as where negligence is involved. This step does not deal with the exposure of trustees under other circumstances, such as where gross negligence is involved. In some instances, there is a fine line between negligence and gross negligence.

<sup>1013</sup> See par 6.5.5.2 above, where legal costs are discussed.

<sup>1014</sup> See Cassim *Statutory Derivative Action* at 184, referring to the position of company directors versus minority shareholders. See also in this regard the *OECD Guidelines for Pension Fund Governance* (5 June 2009) in par 3.

fund member and also from creditors that would have otherwise lodged claims against the benefit that is due to beneficiaries,<sup>1015</sup>

- the allocation of death benefits to beneficiaries,<sup>1016</sup>
- the discretionary powers<sup>1017</sup> and the sources of trustees' powers,<sup>1018</sup>
- the duties of pension fund trustees,<sup>1019</sup>
- the remedies available to dissatisfied dependants and nominated beneficiaries to enforce their rights against pension funds and also against pension fund trustees in their personal capacity,<sup>1020</sup> and
- measures available to pension funds and their trustees to reduce their exposure to any form of liability.<sup>1021</sup>

The analysis of the distribution of retirement fund death benefits has shown that pension fund trustees face challenges in distributing retirement fund death benefits in terms of section 37C of the Pension Funds Act efficiently. It is submitted that although the social objective of the State in the establishment of retirement funds and how retirement fund death benefits should be distributed appears clear, it has been blurred by various factors, including the following:

- the failure of some pension fund trustees to comply with their duties;
- the current use of beneficiary nomination forms by funds;<sup>1022</sup>
- the lack of legislative clarity about the discretionary powers of pension fund trustees;<sup>1023</sup>

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<sup>1015</sup> See above, par 2.1.

<sup>1016</sup> See above, par 2.2.

<sup>1017</sup> See above, par 3.

<sup>1018</sup> See above, par 4.

<sup>1019</sup> See above, par 5.

<sup>1020</sup> See par 6 above.

<sup>1021</sup> See par 7 above.

<sup>1022</sup> See par 2.1 above.

<sup>1023</sup> See par 3 above.

- the difficulties that pension fund trustees face in balancing the interests of dependants and nominated beneficiaries;<sup>1024</sup>
- the differentiation between factual dependants and legal dependants;<sup>1025</sup>
- the lack of clear legislative guidelines on the meaning of “equitable distribution” of death benefits;<sup>1026</sup>
- the incompetence or ignorance of pension fund trustees;<sup>1027</sup>
- the non-payment of death benefits, and unclaimed pension benefits;<sup>1028</sup>
- the lack of accountability on the part of pension fund boards and their trustees;<sup>1029</sup>
- the difficulties faced by dependants and/or beneficiaries in enforcing their rights or remedies following the wrongful distribution of death benefits;<sup>1030</sup>
- the need to make sure that pension fund trustees comply with the applicable laws and their pension fund rules;
- the liability of funds and of their trustees for wrongful distribution; and
- the risk of a lack of proper governance of pension funds.

The discussion in this chapter has shown that the law governing the distribution of retirement fund death benefits in South Africa and the extent of the discretionary powers of pension fund trustees lack clarity in some respects. The main shortcoming is the lack of guidelines when trustees exercise their discretionary powers to distribute death benefits.<sup>1031</sup> There are also concerns about the competency of

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<sup>1024</sup> See par 2.3 above.

<sup>1025</sup> See par 2.1 above.

<sup>1026</sup> See par 3 above.

<sup>1027</sup> See Chapter 2, par 6.4; and par 3 above, where courts and the Adjudicator, in some cases and determinations discussed, questioned the competency of trustees in certain instances.

<sup>1028</sup> See par 2.2.10 above.

<sup>1029</sup> See par 6 above.

<sup>1030</sup> See par 6 above.

<sup>1031</sup> See par 3 above.

some trustees to distribute the death benefits efficiently;<sup>1032</sup> as well as the payment of death benefits in the form of cash or a lump sum by pension funds to dependants and beneficiaries. This mode of payment of death benefits does not encourage the preservation or sustainability of these benefits.

It is submitted that a comparative approach will help address the challenges facing pension fund trustees in distributing retirement fund death benefits in South Africa. In the next chapter, the approach followed in the United Kingdom to the distribution of retirement fund death benefits is therefore discussed.

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<sup>1032</sup> See Chapter 2, par 3, where the competency of some pension fund trustees was questioned. It was clear that in certain instances, trustees do not follow their fund rules, and misunderstand or misapply the relevant laws.

**CHAPTER 4**  
**AN OVERVIEW OF THE DISTRIBUTION OF RETIREMENT FUND DEATH**  
**BENEFITS IN THE UNITED KINGDOM**

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- 1 INTRODUCTION**
  - 2 THE STRUCTURE OF RETIREMENT FUNDING**
  - 3 THE IMPORTANCE, OBJECTIVES, LEGAL STATUS, AND NATURE OF OCCUPATIONAL PENSION SCHEMES**
  - 4 KEY ROLE-PLAYERS IN THE DISTRIBUTION OF OCCUPATIONAL PENSION SCHEME DEATH BENEFITS**
  - 5 THE DISTRIBUTION OF OCCUPATIONAL PENSION SCHEME DEATH BENEFITS**
  - 6 THE LIABILITY OF PENSION SCHEMES AND THEIR TRUSTEES IF A DISTRIBUTION OF DEATH BENEFITS IS CHALLENGED**
  - 7 CONCLUSION**
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**1 INTRODUCTION**

The choice of the United Kingdom as a comparative jurisdiction in this thesis was justified in Chapter 1.<sup>1</sup> The comparison between the distribution of death benefits in

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<sup>1</sup> See in this regard Chapter 1, par 6.1. The judicial system in the United Kingdom is divided into three separate legal systems: those of England, Scotland, and Northern Ireland. The focus of this comparative chapter is mainly on the provisions of the Pensions Acts, Pension Schemes Acts, and the Finance Act 2004 (c. 12), which apply throughout the whole of the United Kingdom. Reference is also made to the determinations of the Pensions Ombudsman, who exercises jurisdictional powers in the United Kingdom. References to the general principles of trust law are based mainly on English law. Any deviations from the standard approach articulated above are clarified in the thesis.

the United Kingdom and South Africa is compelling. In both countries, pension scheme or fund trustees

- play a significant role in the distribution of death benefits;<sup>2</sup>
- are granted discretionary powers to distribute death benefits;<sup>3</sup>
- are bound by fiduciary duties and duties of care when distributing death benefits;<sup>4</sup> and
- are required to comply with their pension rules and trust documents when distributing death benefits.<sup>5</sup>

In both jurisdictions, the principles emanating from trust law apply and have shaped some statutory provisions.<sup>6</sup> The Ombudsman in the United Kingdom plays a significant role in resolving pension disputes over the distribution of death benefits.<sup>7</sup> In South Africa, the Pension Funds Adjudicator plays a similar role.<sup>8</sup> In various instances, the courts and the Pension Funds Adjudicator in South Africa in their

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<sup>2</sup> See par 4.2.4 below for the role that pension scheme trustees play in the United Kingdom, and Chapter 2, par 6.4 for a discussion of the role of pension fund trustees in South Africa.

<sup>3</sup> See par 5.3 below for a discussion of the discretionary powers that pension scheme trustees have in the United Kingdom, and Chapter 3, par 3 for a discussion of the position in South Africa. *Self Handbook* at 34 states that discretionary powers are those powers given to trustees by trust deed and rules which permit a choice to be made.

<sup>4</sup> See par 5.4 below for a discussion of trustees' duties in the United Kingdom, and Chapter 3, par 5 for trustees' duties in South Africa.

<sup>5</sup> See par 5.1 below for a discussion of pension scheme rules in the United Kingdom, and Chapter 3, par 4.4 for a discussion of pension rules in South Africa.

<sup>6</sup> Trust law consists of a number of statutory provisions dating back to the Trustee Act 1893 (c. 53) and principles of equity that have evolved over the centuries in cases decided in the courts. See The Pensions Management Institute *Pensions Terminology* at 28. See also Chapter 2, par 2.2 for a discussion of the establishment of occupational pension funds in South Africa.

<sup>7</sup> See par 4.2.3 below for a discussion of the Pensions Ombudsman in the United Kingdom.

<sup>8</sup> See Chapter 2, par 6.5 for a discussion of the Pension Funds Adjudicator in South Africa. South Africa considered the Pensions Ombudsman in the United Kingdom when introducing the Office of the Pension Funds Adjudicator.



decisions<sup>9</sup> or determinations about disputes or complaints regarding the distribution of death benefits refer to their counterparts in the United Kingdom.<sup>10</sup>

One of the issues apparent from the discussion of the South African law was the lack of a proper definition and understanding of the trustees' "discretionary powers" in making an equitable distribution of the death benefits.<sup>11</sup> This chapter examines occupational pension death benefits distribution in the United Kingdom, particularly the trustees' discretionary powers.<sup>12</sup> The aim is to determine whether the United Kingdom can provide any lessons or solutions to the challenges that South African pension funds law faces in the distribution of death benefits.<sup>13</sup>

There is no universal pension law that applies across all pension schemes in the United Kingdom: instead, the law is contained in various statutes, and the applicability of a particular law or statute or specific provisions of a statute<sup>14</sup> depends on the nature of the pension scheme concerned: for example, whether the

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<sup>9</sup> For example, see *Senekal and Others v Municipal Gratuity Fund* 2000 10 BPLR 1175 (PFA), also cited in Chapter 3 n 823, which referred to *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA). In *Edge* the Court of Appeal in England fully examined the extent and scope of the duty to act with impartiality to all members and beneficiaries and the basis on which a court may interfere with the board's decision upon the breach of this duty.

<sup>10</sup> For example, in *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) the South African Supreme Court of Appeal referred to *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA) at 567-569. The court in *Meyer* dealt with the scrutinisation of decisions taken by trustees in the exercise of their discretion and the review of administrative decisions in accordance with the principles of natural justice. *Meyer v Iscor Pension Fund* is also cited in Chapter 2 n 122 and Chapter 3 par 5.3.2.2 at n 624.

<sup>11</sup> See Chapter 3, par 3; and par 5.3 below discussing "discretionary powers" of pension scheme trustees. The Pensions Management Institute *Pensions Terminology* at 8 states that "discretionary powers are powers conferred on trustees or on the employer by a trust deed and rules of pension schemes whereby trustees (for example, the destination of death benefits) can be determined at their discretion".

<sup>12</sup> See Chapter 1, par 6.1 for the reasons why the United Kingdom has been selected as one of the comparative chapters.

<sup>13</sup> There are ideas from the distribution rules of death benefits in the United Kingdom that the South African legislature and regulatory bodies can emulate or avoid in their endeavours to improve the efficiency in the distribution of the death benefits. The lessons from the United Kingdom are considered with the consciousness that pension schemes' policies in different countries are shaped and influenced by the local cultures and challenges that a country faces in a particular period. See also Chapter 2, par 2.3 for a discussion of the local culture in influencing policies on the provision of retirement income in a country, as well as the warning against the wholesale transfer of one country's pension system to another. Yet it is acknowledged that there are lessons that a country can usefully learn by observing how other countries meet contemporary pension challenges. See in this regard the *Pickering Report* at 47 cited in Chapter 2, n 38.

<sup>14</sup> For example, Part 1 of the Pensions Act 2014 applies to the state pension while Part 6 applies to private pensions; and Part I of the Pensions Act 1995 (c. 26) applies to occupational pensions while Part II applies to state pensions.

scheme involved is a state pension,<sup>15</sup> occupational pension,<sup>16</sup> or personal pension.<sup>17</sup> Occupational pension schemes are governed by two distinct strands of law: statutory law and trust law.<sup>18</sup> The principal statutes governing occupational pension schemes originate from the Department for Work and Pensions, which frames social security law,<sup>19</sup> and from Her Majesty's Revenue and Customs ("HMRC"),<sup>20</sup> which is responsible for taxation law.<sup>21</sup>

These sources include the following:<sup>22</sup>

### 1.1 *The Old Age Pensions Act 1908*

The Old Age Pensions Act 1908 (c. 40) introduced the first statutory pension scheme in the United Kingdom.<sup>23</sup> It provided basic state pensions (then known as old age pensions) financed from central taxation.<sup>24</sup> To be eligible for a pension provided under this Act, a person needed to be at least 70 years old and have been a resident in the United Kingdom for at least twenty years.<sup>25</sup> The recipients of these state pensions had to comply with a means test but did not have to make any

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<sup>15</sup> See par 2.1 below, where the state pension is discussed.

<sup>16</sup> See par 2.2 below, where occupational pension schemes are discussed.

<sup>17</sup> See par 2.3 below, where personal pensions are discussed.

<sup>18</sup> *Self Handbook* at 6.

<sup>19</sup> See, for example, the Social Security Acts, Pensions Acts, and Pension Schemes Acts.

<sup>20</sup> The HMRC is the tax revenue collector in the United Kingdom. It oversees the supervision of taxation issues, including those that relate to pensions. For more details, see HM Revenue & Customs (*GOV.UK*) available at <https://www.gov.uk/government/organisations/hm-revenue-customs> (last accessed on 13 September 2021). See par 4.2.5 below for a brief discussion of the HMRC.

<sup>21</sup> The relevant statutes are the Finance Act 2004 and the Taxation of Pensions Act 2014 (c. 30). See also in this regard *Self Handbook* at 6.

<sup>22</sup> The discussion in this paragraph dealing with pension laws briefly outlines the provisions that apply to pay survivor pensions to dependants, widows or widowers, orphans, and other beneficiaries in the United Kingdom. It is not intended to give a detailed picture of the whole history of the statutes in the United Kingdom but rather to emphasise points or provisions in the statutes that may be of interest in reforming the processes of distributing retirement fund death benefits in South Africa.

<sup>23</sup> *Whiteford Adapting* at 33.

<sup>24</sup> Section 2 of the Old Age Pensions Act 1908 stated that the sums required for the payment of old age pensions under this Act must be paid out of moneys provided by Parliament. See *Foster Benefits* at 4, stating that the Old Age Pensions Act 1908 was an early movement towards state pensions as they exist today, although under the 1908 Act, pensions (to a maximum five shillings per week) were paid out of direct taxation.

<sup>25</sup> Section 2 of the Old Age Pensions Act 1908. See also in this regard Thurley D "Old Age Pensions Act 1908" (12 August 2008) at 7 available at <https://commonslibrary.parliament.uk/research-briefings/sn04817/> (last accessed on 30 June 2021).

contribution to be eligible.<sup>26</sup> The pension was payable until the death of the pensioner unless the latter became disqualified under section 3 of the Old Age Pensions Act.<sup>27</sup> This Act is now repealed.

### 1.2 *The Widows, Orphans' and Old Age Contributory Pensions Act 1925*

The Widows', Orphans' and Old Age Contributory Pensions Act 1925 (c. 70) established a compulsory, contributory system providing for old age pensions to be paid to wage earners between the ages of 65 and 70 and to the wives of insured men, and survivors' benefits to the widows and children of insured men who died.<sup>28</sup> The pensions were a flat sum paid through the post office. The wife of an insured person also received a weekly pension when she turned 65. The widow of an insured worker who had died after he qualified for an old age pension was entitled to a pension of 10 shillings a week until she remarried or turned 70. At 70, she qualified to receive a non-contributory old age pension without having to pass a means test.<sup>29</sup> A widow with children dependent on her also received an additional allowance. For children who had no mother, orphans' pensions were also paid weekly from the date of the father's death. Benefits to children were paid until they turned 14, or until 16 if they were attending day school full-time.<sup>30</sup>

### 1.3 *The Social Security Acts*

The Social Security Act 1973 (c. 38) introduced provisions to protect members who left the service or opted out of the scheme before retirement.<sup>31</sup> The Social Security Pensions Act 1975 (c. 60),<sup>32</sup> the Social Security Act 1975 (c. 14),<sup>33</sup> the Social

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<sup>26</sup> Section 3 of the Old Age Pensions Act 1908 stated that "the person must satisfy the pension authorities that his yearly means calculated under this Act do not exceed thirty-one pounds ten shillings".

<sup>27</sup> Section 1 of the Old Age Pensions Act 1908.

<sup>28</sup> See Fleisher and Kocher 1939 *Soc Sec Bull* 14 at 14.

<sup>29</sup> Fleisher and Kocher 1939 *Soc Sec Bull* at 14.

<sup>30</sup> At 14.

<sup>31</sup> Part II of the Social Security Act 1973 dealt with occupational pension schemes.

<sup>32</sup> Part IV of the Social Security Pensions Act 1975 dealt with occupational pensions.

<sup>33</sup> Sections 24 to 27 of the Social Security Act 1975. Part II Chapter 1 dealt with widowhood. It provided that a woman who had been widowed was entitled to a widow's allowance of a specified weekly rate if she was under pensionable age when her late husband died and the late husband had satisfied the prescribed contributions for a widow's allowance. Sections 31 and 32 dealt with the child's special allowance and death grant.

Security Act 1985 (c. 53),<sup>34</sup> and the Social Security Act 1986 (c. 50), respectively, extended protection offered to early leavers and gave them the right to transfer their benefits to another pension scheme.<sup>35</sup> The Social Security Act 1990 (c. 27) dealt with the registration of occupational and personal pension schemes.<sup>36</sup> The Social Security Contributions and Benefits Act 1992 (c. 4) and the Social Security Administration Act 1992 (c. 5) form the primary legislation regulating state retirement provision, accident insurance, statutory sick pay, and maternity pay in the United Kingdom.<sup>37</sup>

#### 1.4 *The Pensions Acts and Pension Schemes Acts*

The Pension Schemes Act 1993 (c. 48)<sup>38</sup> consolidated most of the Social Security Acts passed in the 1970s and 1980s.<sup>39</sup> The Pensions Act 1995 (c. 26) was introduced to provide greater protection for employees. Still partly in force, it deals with occupational pension plans regulated by the Pensions Regulator<sup>40</sup> as well as local government pension funds. The Welfare Reform and Pensions Act 1999 (c. 30) laid down the rules on stakeholders' pensions,<sup>41</sup> and the Child Support, Pensions and Social Security Act 2000 (c. 19)<sup>42</sup> dealt, among other things, with the selection of trustees and directors of corporate trustees.<sup>43</sup> The Pensions Act 2004 (c. 35) was

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<sup>34</sup> Part I of the Social Security Act 1985 dealt with occupational pensions.

<sup>35</sup> Part I of the Social Security Act 1986 dealt with pensions (personal pension schemes and occupational pension schemes). See also in this regard Manamela *System* at 110.

<sup>36</sup> Section 13 of the Social Security Act 1990 (c. 27). This section was later repealed by s 6 of the Pension Schemes Act 1993.

<sup>37</sup> See The Pensions Service "A Detailed Guide to State Pensions for Advisers and Others" (August 2008) available at <https://www.taxation.co.uk/docs/default-source/file/np46-guide-to-state-pensions.pdf> (last accessed on 13 September 2021) at 3 (hence "The Pensions Service *Detailed Guide*"). See par 2.1 below for a discussion of the state pension in the United Kingdom.

<sup>38</sup> See par 5.2 below, where s 24D of the Pension Schemes Act 1993 is discussed. Section 24D deals with the payment of survivors' benefits to a widow or widower or civil partner of the deceased scheme member.

<sup>39</sup> Frostick *Pensions Law* at 1. See also in this regard Manamela *System* at 110.

<sup>40</sup> See par 4.2.1 below, where the Pensions Regulator is discussed.

<sup>41</sup> Part I of the Welfare Reform and Pensions Act 1999 dealt with stakeholder pensions schemes and Part II dealt with pensions in general. Section 1 of this Act required stakeholder pensions schemes to be established under a trust or in such other way that might be prescribed. Section 87 of the Pensions Act 2008 amended a few sections that dealt with stakeholder pensions schemes in the Welfare Reform and Pensions Act 1999. See par 2.3 below, where stakeholder pensions schemes are briefly discussed.

<sup>42</sup> Part II, Chapter II of the Child Support, Pensions and Social Security Act 2000 dealt with occupational pensions.

<sup>43</sup> See ss 43 to 46 of the Child Support, Pensions and Social Security Act 2000. These sections were later repealed by the Pensions Act 2004.

introduced to strengthen the protection available to pension scheme members.<sup>44</sup> It abolished and amended many features that were introduced by the Pensions Act 1995. The Pensions Act 2004 (c. 35) was followed by the Pensions Act 2007 (c. 22).<sup>45</sup> The Pensions Act 2008 (c. 30) introduced automatic enrolment of workers to certain funds<sup>46</sup> and the National Employment Savings Trust (“NEST”).<sup>47</sup> The Pensions Act 2014 (c. 19) introduced changes to state pensions which came into effect on 6 April 2016.<sup>48</sup> Besides the Pensions Acts and the Social Security Acts stated above, there are also the Pension Schemes Acts: the Pension Schemes Act 1993 (c. 48), the Pension Schemes Act 2015 (c. 8),<sup>49</sup> the Pension Schemes Act 2017 (c. 17),<sup>50</sup> and recently the Pension Schemes Act 2021 (c. 1).<sup>51</sup>

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<sup>44</sup> Part 1 of the Pensions Act 2004 dealt with the powers of the Pensions Regulator in respect of occupational and personal pension schemes.

<sup>45</sup> Parts 1 and 2 of the Pensions Act 2007 dealt with state pension and occupational pensions, respectively. Sections 14 and 15 of this Act dealt with contracting out, and s 16 dealt with dispute resolution in occupational and personal pension schemes.

<sup>46</sup> The Pensions Act 2008 provides for “automatic enrolment” where every employer in the United Kingdom must put staff into a workplace pension scheme and contribute towards it: see, for example, s 3 of this Act. If an employer employs at least one person, that employer has certain legal duties. See The Pensions Regulator “Employers” available at <https://www.thepensionsregulator.gov.uk/en/employers> (last accessed on 13 September 2021). See also n 108 below in this regard.

<sup>47</sup> The National Employment Savings Trust (“NEST”) is a trust-based workplace pension scheme run by a Trustee (NEST Corporation). The Trustee comprises up to fifteen board members and the employees of NEST Corporation. NEST corporation is a public corporation accountable to Parliament through the Department for Work and Pensions. It is generally independent of government in its day-to-day decisions. It is a defined contribution workplace pension scheme that was set up to facilitate automatic enrolment as part of the government’s workplace pension reforms under the Pensions Act 2008. See in this regard <https://www.nestpensions.org.uk> (last accessed on 30 June 2021).

<sup>48</sup> See par 2.1 below for a brief discussion of the state pension.

<sup>49</sup> The Pension Schemes Act 2015 dealt with categories of pension schemes (Part 1), and general changes to legislation about pension schemes (Part 3). Section 37 of this Act dealt with the duty of managers of non-trust-based pension schemes to act in the best interests of members, and s 38 dealt with disclosing information about schemes. The duty of trustees to act in the best interest of members is discussed below in par 5.4.1.1.

<sup>50</sup> The Pension Schemes Act 2017 dealt with the Master Trust scheme, which is another kind of an occupational pension scheme.

<sup>51</sup> The Pension Schemes Act 2021 introduced important changes including the enhancement of the Pensions Regulator’s enforcement powers. This includes a new criminal offence for failure to comply with a contribution notice, which is punishable by an unlimited fine. There is a defence of “reasonable excuse” for new offences. See also Doraisamy J *et al* “The Pension Schemes Act 2021 – dawn of a new era?” (Perspectives & Events *Mayer Brown*, 17 February 2021) available at <https://www.mayerbrown.com/en/perspectives-events/publications/2021/02/the-pension-schemes-act-2021-dawn-of-a-new-era> (last accessed on 30 March 2021).

## 1.5 The Constitution

The United Kingdom, unlike South Africa, has no codified constitution.<sup>52</sup> The uncodified constitution of the United Kingdom consists of a body of documents such as Acts of Parliament, conventions, common law, royal prerogatives, court judgments, treaties, and works of authority.<sup>53</sup>

## 1.6 Trust law

The main duties and responsibilities of the trustees of an occupational pension scheme appear in the pension scheme's trust deed and rules.<sup>54</sup> They are supplemented or modified by trust law and pensions legislation.<sup>55</sup> When distributing pension scheme death benefits, the trustees of this scheme must take cognisance of and comply with the applicable law<sup>56</sup> and principles of general trust law.<sup>57</sup> The

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<sup>52</sup> See Chapter 2 and Chapter 3, par 4, where the South African Constitution and the sources of the trustees' powers are discussed.

<sup>53</sup> See in this regard "Constitution of the United Kingdom" available at <http://www.answers.com/topic/constitution-of-the-United-Kingdom> (last accessed on 30 June 2021). See also Alder *Character* at 23-43. There is therefore no Bill of Rights to protect the right to social security directly. However, this right to social security is protected by Acts of Parliament. See in this regard Dekker *Social Security* at 170 and authorities cited there.

<sup>54</sup> See Association of Chartered Certified Accountants (ACCA) "Technical Factsheet 179: Guidance on Pension Scheme Trustees Duties and Responsibilities" at 2, stating that a trust deed is a legal document that sets up and governs the scheme while the scheme rules set out more details on various issues including the benefits that will be provided, trustees' powers and procedures trustees must follow. Trustees must act in line with the terms of the trust deed and rules. Technical Factsheet 179 is available at <https://www.accaglobal.com/africa/en/technical-activities/technical-resources-search/2012/may/tech-tactsheet-179.html> (last accessed on 13 September 2021).

<sup>55</sup> Wright I and Doraisamy J "Mayer Brown: Trustee Guide" (*Mayer Brown*, April 2019) at 1. This guide is available at the website <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/04/pensiontrusteeguideapril2019.pdf> (last accessed on 30 June 2021) (hence "Wright and Doraisamy *Mayer Brown: Trustee Guide*").

<sup>56</sup> In other words, although trustees have the ultimate discretionary powers to distribute benefits, this distribution should not be *ultra vires*, or contrary to the pension scheme rules and applicable laws. Hayton *Extent* at 4, in par 3 states that trustees must not act beyond their authorised powers. See Chapter 3, par 4.4.2, where *ultra vires* principle is discussed.

<sup>57</sup> Ellison *Handbook* at 57 states that the general trust law is contained in statutes and in decisions of the judges made largely over the last 100 years. He also states (at 42) that trust law was invented to cope with the fact that the ordinary law led to some injustice; it had become obsolete and oppressive. Trust law was designed to be flexible, to change with the times, and to use general principles of fairness and justice (not just strict rules of law) that would apply to a range of situations. Ellison (at 42) recognises that trust law has its drawbacks: as it is based on the principles of fairness and equity, it is not always possible to say with certainty what the outcome of any question might be. He argues that the alternative of certainty through statutes can create as many, if not more, problems than it solves (at 42). He acknowledges (at 57) that attempts have been made by lawyers and others to apply the principles laid down in general trust law cases to the problems of pension funds; most are relevant more to family trusts, and much of this kind of law is dated and not applicable. Self *Handbook* at 8 recognises that some critics do

Trustee Act 1925 (c. 19) and the Trustee Act 2000 (c. 29) also govern occupational pension schemes and their trustees, though mainly as regards trustees' investments on behalf of their pension schemes.<sup>58</sup>

### 1.7 *The Finance Act*

Although the primary statutes regulating occupational pension schemes are the Pensions Acts and the Pension Schemes Acts, they are not the only statutes with specific provisions prescribing how death benefits should be distributed.<sup>59</sup> This topic is also dealt with in the Finance Act 2004 (c. 12)<sup>60</sup> and the Taxation of Pensions Act 2014 (c. 30).<sup>61</sup> The Finance Act 2004 focuses on taxation issues.<sup>62</sup> It prescribes relevant rules on the role of the HMRC in enforcing tax-related aspects for pension schemes.<sup>63</sup> Pension schemes are required to register with the HMRC for tax purposes and to qualify for tax benefits.<sup>64</sup> so their pension scheme rules must meet the provisions of the tax regime.<sup>65</sup> Pension schemes registered under the tax regime

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not see trust law as a suitable body to regulate occupational pension schemes. Nobles *Pensions* at 12 states that whether the flexibility of trusts is to be applauded depends on what one seeks from a trust. If you want the trust to provide strong protections for the beneficiaries, its flexibility may be something to be deplored. The Goode Report at 236 recognised the contrasting views regarding the use of trust law to set up pension schemes: those people who supported replacing trust law with simplified set of statutes and regulations; and the views of others, who "felt that Trust Law had worked well and simply needed tightening up". See in this regard *Pension Law Reform: The Report of the Pension Law Review Committee*, established on 8 June 1992 (Chairperson: Professor Roy Goode) Vol. II (1993 London: HMSO) at 280; see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272069/2342\\_ii.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/272069/2342_ii.pdf) on 30 June 2021 (hence the "Goode Report"). See par 2.2 below, where it is stated that most occupational pension schemes in the United Kingdom are set up as trusts.

<sup>58</sup> See in this regard Schedule 1 to the Trustee Act 2000 (c. 29) dealing with the application of duty of care of trustees under this Act.

<sup>59</sup> Section 24D of the Pension Schemes Act 1993 that deals with the payment of survivors' benefits to a widow or widower or civil partner of the deceased scheme member.

<sup>60</sup> Part 4 of the Finance Act 2004, especially s 58, deals with pension schemes. The Finance Act 2004 introduced a single integrated pension tax regime from 6 April 2006. See also in this regard Bell and Jones *Taxation* at 738.

<sup>61</sup> The objective of the Taxation of Pensions Act 2014 is to make provision in connection with the taxation of pensions. It amended certain provisions of the Finance Act 2004.

<sup>62</sup> The definition of a "pension scheme" in Chapter 2 of Part 4 of the Finance Act 2004, although for tax purposes, includes any scheme that provides benefits to their scheme members at retirement or death benefits to the surviving dependants of the deceased scheme member.

<sup>63</sup> See par 4.2.5 below, where the HMRC is discussed.

<sup>64</sup> This is like the position in South Africa where pension funds are required to register with the South African Revenue Service to qualify for income tax exemptions. See Chapter 2, par 7 in this regard.

<sup>65</sup> Sections 153 to 159 of the Finance Act 2004 deal with the registration and deregistration of pension schemes by the HMRC. The HMRC is the Inland Revenue. Section 153(1) states that an application may be made to the Inland Revenue for a pension scheme to be registered with

avoid an inheritance tax charge that beneficiaries would otherwise have to pay.<sup>66</sup> The registration of pension schemes under the Finance Act may be tax-driven, but it influences how pension schemes distribute death benefits. The discussion of the provisions (distribution rules) of the Finance Act 2004 and the Taxation of Pensions Act 2014 clarifies how pension schemes registered under the tax regime structure their rules to qualify for tax exemptions and how they distribute death benefits under these schemes.<sup>67</sup> It will be seen in the discussion below how these two tax statutes, the Finance Act 2004 and Taxation of Pensions Act 2014,<sup>68</sup> influence how pension funds are set up or structured and how pension fund rules are formulated. Of particular interest for this comparative chapter is the formulation of rules for distributing death benefits.

### 1.8 Case law and Pensions Ombudsman's determinations

An analysis of case law and determinations of the Pensions Ombudsman in the United Kingdom provides an overview of how pension scheme trustees distribute death benefits. The trustees' decision-making process is mostly internal. This means that without analysing case law and the Ombudsman's determinations, it is difficult for third parties (the public) to know how pension schemes make decisions. Third parties have no access to the trustees' information and/or factors in reaching their decisions unless they are provided with the reasons for these decisions or the minutes of relevant meetings. For this reason, the discussion below about established principles and relevant factors that trustees consider when exercising

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the HMRC. Section 59 of the Pensions Act 2004 regulates the registration of occupational and personal pension schemes by the Pensions Regulator.

<sup>66</sup> See in this regard Blake *Pension Schemes* at 189, stating that in a discretionary trust, there is no inheritance-tax liability provided that the death benefit is distributed within two years of the death of a scheme member. See par 5.5.5 below, where the two-year period is discussed.

<sup>67</sup> See par 5 below, where rules determining the distribution of pension scheme death benefits are discussed. It is not the intention of this comparative chapter to elaborate on the taxation of pension fund death benefits but to highlight instances where the provisions of the Finance Act directly influence the formulation of pension scheme rules, especially where pension scheme trustees are required to exercise their discretion in distributing the death benefits.

<sup>68</sup> Schedule 2, Part 1 of the Taxation of Pensions Act 2014 deals with the distribution of pension death benefits.



their discretion to distribute death benefits relies on the determinations of the Ombudsman and case law.<sup>69</sup>

It is clear from the list of statutes above that occupational pension schemes are regulated by various pieces of legislation. There is no single primary statute governing pension funds in the United Kingdom. Some of the various Pensions Acts, Pension Schemes Acts, and Social Security Acts mentioned above are still in force, and subsequent Acts specify where earlier ones were repealed or amended.

The discussion below deals with the relevant provisions in the statutes mentioned above that regulate the distribution of death benefits on the death of a pension earner in a state pension<sup>70</sup> and the death of an occupational pension scheme member.<sup>71</sup>

## **2 THE STRUCTURE OF RETIREMENT FUNDING**

A brief general overview of the retirement funding structure in the United Kingdom is provided here. The discussion describes the basic retirement funding structure and introduces categories and types of pension schemes.

The pension system in the United Kingdom comprises three pillars.<sup>72</sup> The first is the state pension: a public arrangement where the state provides pensions to qualifying people.<sup>73</sup> It is publicly provided and paid on a pay-as-you-go (PAYG) basis.<sup>74</sup> The

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<sup>69</sup> See par 5.5 below for a discussion of the established principles or relevant factors considered by trustees when exercising their discretionary powers to distribute death benefits in the United Kingdom.

<sup>70</sup> See in this regard the discussion in par 2.1 below.

<sup>71</sup> See in this regard the discussion in par 2.2 below.

<sup>72</sup> Blake *Pension Schemes* at 22 states that “*occupational pension schemes* are supplementary pension schemes that are related to a particular occupation or contract of employment. When an individual leaves that occupation, he will generally leave the pension scheme and have his accumulated pension rights transferred to the scheme of his new employer. Personal pension schemes, on the other hand, are not tied to a specific contract of employment. Rather, they are particular to the individual and the individual can keep his own personal pension scheme operating however many times he changes jobs”.

<sup>73</sup> See par 2.1 below.

<sup>74</sup> The pay-as-you-go basis means that pensions paid to current pensioners are financed from contributions paid by current workers. See Emmerson C “Pension Reform in the United Kingdom: Increasing the Role of Private Provision?” (Working Paper Number WP 402- Paper presented at the Oxford Institute of Ageing Conference “Pension Security in the 21st Century: Redrawing the public-private divide”, Rothmere American Institute, March 2002) available at [https://www.ageing.ox.ac.uk/files/workingpaper\\_402.pdf](https://www.ageing.ox.ac.uk/files/workingpaper_402.pdf) (last accessed on 30 June 2021).

second pillar is the occupational pension schemes. This comprises occupational funds organised at the company level or individual funds.<sup>75</sup> And the third pillar is personal pension schemes.<sup>76</sup> These are managed by private insurance companies and are also known as individual private accounts. These three pillars combine to cater for the financial needs of employees on retirement and those of their surviving beneficiaries if the employee dies while still in service.<sup>77</sup> These three categories of the retirement funding structure in the United Kingdom are briefly discussed below.

### 2.1 *The first pillar: the state pension*

State pensions were introduced in the United Kingdom in 1908.<sup>78</sup> Public sector schemes are based on statute, not a trust.<sup>79</sup> The Social Security Contributions and Benefits Act 1992 (c. 4) and the Social Security Administration Act 1992 (c. 5) are the primary legislation that deals with, among other benefits, the provision of a state pension to earners on retirement as well as the provision of benefits for widows and widowers in the United Kingdom.<sup>80</sup> These Acts provide the framework for the state pension scheme.<sup>81</sup> The most recent provisions that currently apply to the state pension are contained in the Pensions Act 2014. This Act introduced a single-tier state pension which came into effect on 6 April 2016.<sup>82</sup> The recipients of the state pension (employees) qualify to receive a state pension at the age of 66.<sup>83</sup> The right

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<sup>75</sup> See par 2.2 below. Occupational pensions are set up by employers to provide retirement income for their workers. See also in this regard *Manamela System* at 122 and cited authorities there.

<sup>76</sup> See par 2.3 below. A group personal pension (or stakeholder pension) is a scheme chosen by the employer with an individual contract in place between the pension provider and the member of staff.

<sup>77</sup> The United Kingdom retirement structure is like the pension structure in South Africa in that both countries combine public and private arrangements to cater for the financial needs of retirees. See Chapter 1, par 2.1 for a discussion of the three pillars of social security.

<sup>78</sup> See Foster *Benefits* at 6.

<sup>79</sup> Dawes and Samsworth *Guide* at 28.

<sup>80</sup> Sections 36 to 39 of the Social Security Contributions and Benefits Act 1992 (c. 4) contain provisions that deal with the widow's pension as well as the rate of the widowed mother's allowance and widow's pension.

<sup>81</sup> See The Pensions Service *Detailed Guide* at 3.

<sup>82</sup> Sections 2 to 24, par 523A of the Pensions Act 2014 contain provisions introducing the new state pensions.

<sup>83</sup> Until 5 April 2010, the state pension age was 60 for women and 65 for men. But after this date, women's qualifying age gradually rose until it reached 65 to be the same as that of men. The qualifying age then increased from 65 to 66 for both men and women between 2018 and 2020 and will be increased again to 67 by 2028. See s 26 of the Pensions Act 2014 in this regard.

to claim a retirement pension is based on the contribution record of the claimant<sup>84</sup> or that of the claimant's spouse or civil partner<sup>85</sup> to the national insurance.<sup>86</sup> The amounts paid to the recipient of a state pension depend on how long a person has worked and the number of qualifying years a person has.<sup>87</sup> The state pension in the United Kingdom, particularly Categories A and B, is contributory, and the rights of entitlement have to be earned through National Insurance Contributions ("NIC").<sup>88</sup>

The Pension Act 2014 contains provisions regulating the payment of a state pension to surviving dependants (spouses or civil partners) on the death of a person who contributed to the NIC.<sup>89</sup> A person is entitled to a state pension under section 7 of the Pensions Act 2014 if–

- the person has reached pensionable age,<sup>90</sup>
- the person's spouse died while they were married, or the person's civil partner died while they were civil partners of each other, and
- the person is entitled to an inherited amount under Schedule 3.<sup>91</sup>

On the death of a state pension holder, his or her surviving partner or spouse is entitled to receive a widow or widower pension.<sup>92</sup> The people who qualify to receive a state pension are assured of consistent financial support in retirement or old age.

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<sup>84</sup> Section 20(1)(f)(i) of the Social Security Contributions and Benefits Act 1992.

<sup>85</sup> Section 20(1)(f)(ii) of the Social Security Contributions and Benefits Act 1992. Section 2(2)(b) of the Pensions Act 2014 contains provisions dealing with a person's entitlement to state pension at full or reduced rate. Both sections 2 and 4 require that before a person can receive state pension, he or she should have reached pension age and fulfil the National Insurance Contribution ("NIC") qualifying conditions.

<sup>86</sup> Nesbitt *Policy Making* at 10.

<sup>87</sup> The state pension is paid at a full rate when contribution conditions are met in full or otherwise at a reduced rate (subject to the minimum conditions being satisfied). See in this regard sections 2 and 4 of the Pensions Act 2014, respectively.

<sup>88</sup> State pensions in the United Kingdom are contributory or earnings-related and provide a survivor's benefit on the death of a contributor. So they are like occupational pension funds in South Africa. Both pension systems serve the same objectives in their respective jurisdictions: to provide financial income to retirees and financial support to surviving dependants of the contributor or the pension fund member in the event of such person dying while still in service.

<sup>89</sup> Section 7 of the Pensions Act 2014.

<sup>90</sup> See n 83 above in this regard.

<sup>91</sup> Section 7(1) of the Pensions Act 2014. Section 7 of this Act deals with the survivor's pension based on inheritance of additional old state pension.

<sup>92</sup> See also Disney and Johnson *Pension Systems* at 300.

More importantly, when the state pension owner dies, his or her dependants' financial needs are catered for through survivors' pensions linked directly to the state pension.<sup>93</sup> A widow or widower may choose to receive a survivor's pension in the form of either a lump sum or a pension.<sup>94</sup> In South Africa, the older person's grants do not fill the vacuum left by the grant recipient's death.<sup>95</sup>

The Department for Work and Pensions in the United Kingdom is responsible for administering the state pension and paying pensions to members and death benefits to surviving dependants.<sup>96</sup> Pension holders and their dependants do not receive their state pension automatically but must contact the Pension Service at the Department for Work and Pensions to claim it.<sup>97</sup>

So the law is clear about who must receive survivors' death benefits from the state pension on the death of a contributor to the NIC. The persons qualified to receive survivor benefits (a widow or widower pension) when a member of the state pension dies are the surviving spouse or civil partner. The provisions and the distribution rules that apply to the death benefit payable on the death of a member of an occupational pension scheme do not provide equal certainty. This discrepancy will appear from the discussion of the relevant provisions below.<sup>98</sup>

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<sup>93</sup> The claimant or claimant's spouse or civil partner should have made contributions to build up entitlements for the claimant to receive the state pension under Categories A and B.

<sup>94</sup> Section 8 of the Pensions Act 2014. Section 8 deals with the choice of lump sum or survivor's pension under s 9 in some cases. Section 8(1)(b) of the Pensions Act 2014 states that a person is entitled to a choice under this section if the person's spouse died while they were married, or the person's civil partner died while they were civil partners. Section 8(2) of the Pensions Act 2014 states that the claimant may choose (a) to be paid a lump sum under this section, or (b) to be paid a state pension under s 9.

<sup>95</sup> See Chapter 1, par 2.1 discussing the older person's grants in South Africa.

<sup>96</sup> See in this regard the website of the Department of Work and Pensions at <https://www.gov.uk/government/organisation/department-for-work-pensions> (last accessed on 30 June 2021).

<sup>97</sup> See in this regard the website of the Department of Work and Pensions at <https://www.gov.uk/government/organisation/department-for-work-pensions> (last accessed on 30 June 2021). This process is different from the one prescribed by s 37C of the Pension Funds Act in South Africa, where the trustees have a duty to trace and pay qualifying beneficiaries. See in this regard Chapter 3, par 2.2.5.1.

<sup>98</sup> See par 5 below in this regard.

## 2.2 *The second pillar: occupational pension schemes in the private sector*

The second pillar consists of occupational pension schemes, also known as work or company pensions.<sup>99</sup> These schemes in the United Kingdom consist of state occupational pension schemes with civil servants, local government officers, and public-sector employees as scheme members; and private occupational pension schemes.<sup>100</sup> Other employers enrol their workers into group personal pensions and stakeholder schemes.<sup>101</sup>

The focus in this chapter is on private occupational pension schemes. Formal private pension arrangements were developed in the United Kingdom in the 18th

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<sup>99</sup> Section 1 of the Pension Schemes Act 1993 defines “occupational pension scheme” to mean “a pension scheme –  
(a) that –  
(i) for the purpose of providing benefits to, or in respect of, people with service in employments of a description, or  
(ii) for that purpose and also for the purpose of providing benefits to, or in respect of, other people,  
is established by, or by persons who include, a person to whom subsection (2) applies when the scheme is established or (as the case may be) to whom that subsection would have applied when the scheme was established had that subsection then been in force or a pension scheme that is prescribed or is of a prescribed description”.

Section 239 of the Pensions Act 2004 amended the definition of occupational pension scheme in the Pension Schemes Act 1993 by adding subparagraph in 239(3)(a) to state that an occupational pension scheme “that has its main administration in the United Kingdom or outside the member states”. This definition of “occupational pension scheme” under s 1 of the Pensions Scheme Act 1993 is repeated in s 18(a) of the Pensions Act 2008. A “pension scheme” is also defined for purposes of tax by s 150(1) of the Finance Act 2004 as “a scheme or other arrangements, comprised in one or more instruments or agreements, having or capable of having effect so as to provide benefits to or in respect of persons–  
(a) on retirement,  
(b) **on death**,  
(c) on having reached a particular age,  
(d) on the onset of serious ill-health or incapacity, or  
(e) in similar circumstances” (my emphasis).

For a general discussion of the definition of “occupational pension scheme”, see Langley and Mulcahy *Pension Schemes* at 11-12.

<sup>100</sup> Private occupational pension schemes tend to be established by a single employer or group of employers to provide pension and other benefits for their employees when they leave or retire. See in this regard Tapia W “Description of Private Pension Systems” 2008 *OECD Working Papers on Insurance and Private Pensions* (2008) No. 22 (OECD Publishing Paris) available at doi:10.1787/237831300433 (last accessed on 30 June 2021) at 79 (hence “Tapia Systems”). See also Manamela *System* at 111 and authorities cited there for a brief discussion of the retirement funding structure in the United Kingdom.

<sup>101</sup> See par 2.3 below, where personal pensions are discussed.

century.<sup>102</sup> Occupational pension schemes began as unilateral undertakings by employers to care for their long-serving but infirm employees.<sup>103</sup> Later, these schemes were seen by employers as a way to reward valuable employees and persuading them to remain in employment,<sup>104</sup> and employees who chose to leave forfeited their pension.<sup>105</sup> Employees did not have control over or rights as far as their pensions were concerned. When a pension scheme member died, the pension was stopped and was not transferred to the family.<sup>106</sup> The first company to assure pension funds in Britain was the Metropolitan Life Insurance Company of New York. In the 1920s, it began to organise the funds of British subsidiaries of American companies such as Woolworths and General Motors which had similar schemes for their employees in the United States of America.<sup>107</sup>

Occupational pension schemes are set up by employers voluntarily.<sup>108</sup> Although employers need not establish occupational pension schemes,<sup>109</sup> the legislature imposes significant obligations on employers operating occupational schemes. Failure to meet these obligations can lead to claims by aggrieved dependants and

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<sup>102</sup> Blake D “The United Kingdom Pension System: Key Issues”, a paper prepared for an international conference hosted by the Project on Intergenerational Equity at Hitotsubashi University, Tokyo, on 17 March 2001, available at <http://www.ier.hit-u.ac.jp/pie/Japanese/discussionpaper/dp2000/dp15/text.pdf> (last accessed on 30 March 2021) (hence “Blake 2003 *Pensions*”) at 330. This paper is also published as Blake D “The UK Pension System: Key Issues” 2003 *Pensions* 330-375.

<sup>103</sup> See Whiteford *Adapting* at 114-115.

<sup>104</sup> At 253. Nesbitt *Policy Making* at 8 states that the recommendations of the Phillips Committee Report (Great Britain Parliament *Report of the Committee on the Economic and Financial Problems of the Provision for Old Age* Command Paper Cmd. 9333 (HMSO London 1954)) advocated encouraging employers to set up occupational pension schemes. The Committee was of the view that occupational pension schemes “would enable employers: – (a) to meet obligations toward ageing employees, particularly those who had given long service; (b) to give the employer greater freedom in retiring those employees who were no longer regarded as efficient as a result of age or ill-health; (c) in conditions of full employment such schemes would help attract and retain labour”.

<sup>105</sup> Whiteford *Adapting* at 253.

<sup>106</sup> Raphael *Pensions* at 48.

<sup>107</sup> See Blake *Pension Schemes* at 30. See also Manamela *System* at 109 and authorities cited there. For a history of occupational pensions in Britain, see Hannah *Retirement*.

<sup>108</sup> Blake *Pension Schemes* at 248. See also Tapia *Systems* at 79. The Pensions Act 2008 introduced a requirement for employers to “auto-enrol” their workers who meet certain criteria in auto-enrolment schemes and to contribute to their workers’ pensions. Section 67 of the Pensions Act 2008 deals with the duty to establish a pension scheme.

<sup>109</sup> The Pensions Act 2008 sets out a series of measures aimed at encouraging wider participation in private pension saving.

beneficiaries.<sup>110</sup> Employers offer occupational schemes to employees as part of their contracts of employment.<sup>111</sup> They are contributory schemes: these employees must have contributed in one way or another to the pension scheme to qualify to receive pension benefits.<sup>112</sup> Occupational pension schemes are usually funded by the contributions paid by both the sponsoring employers and the employees themselves, although some schemes are financed exclusively by the employer.<sup>113</sup> Occupational pension schemes are divided into two main types: defined benefit schemes which are salary-related, or defined contribution pension schemes.<sup>114</sup> An occupational pension scheme can be funded or unfunded.<sup>115</sup>

Besides paying a pension scheme member a pension on retirement, pension schemes also provide death benefits to surviving dependants and non-dependants on the member's death while still in service.<sup>116</sup> The amounts of the pensions or death benefits paid by pension schemes to the members and their surviving beneficiaries are generally related to the members' earnings or salaries at or near retirement or death.<sup>117</sup> The distribution of death benefits payable on the death of a member of an occupational pension scheme while still in service is explored below.<sup>118</sup>

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<sup>110</sup> Whiteford *Adapting* at 75-78. See Disney and Johnson *Pension Systems* at 24, confirming that employers are not compelled to establish pension schemes and that the employees need not join pension schemes established by their employers. Blake 2003 *Pensions* 330 at 331. See par 5.4, below, for a discussion of duties of pension scheme trustees in the distribution of death benefits.

<sup>111</sup> See in this regard Blake *Pension Schemes* at 21.

<sup>112</sup> Tapia *Systems* at 80. See also in this regard Self *Handbook* at 5.

<sup>113</sup> See Tapia *Systems* at 80; and Colombo *Funding Strategies* at 1 (Abstract).

<sup>114</sup> Tapia *Systems* at 79. Sections 2 and 4 of the Pension Schemes Act 2015 define a "defined contributions scheme" and a "defined benefits scheme", respectively.

<sup>115</sup> Funded pension plans are pension plans that have accumulated dedicated assets to pay for the pension benefits. Unfunded pension plans are those in which no contributions are made to the plan in advance and are financed directly from contributions from the plan sponsor or provider and/or the plan participant. The unfunded pensions are also referred as PAYG. See in this regard Yermo J "Revised Taxonomy for Pension Plans, Pension Funds and Pension Entities" (OECD October 2002) in par 14, available at <https://www.oecd.org/finance/private-pensions/2488707.pdf> (last accessed on 30 June 2021); Self *Handbook* at 6; and Nesbitt *Policy Making* at 24-30, where both funded and unfunded occupational pension schemes are discussed.

<sup>116</sup> See par 5 below for a discussion of the distribution of death benefits in the United Kingdom.

<sup>117</sup> Blake *Pension Schemes* at 22 and 94.

<sup>118</sup> See par 5 below.

### 2.3 *The third pillar: personal pensions*

Besides the state pension and private sector occupational pension schemes, the United Kingdom also has personal pensions. These are associated mainly with self-employed people who contribute neither to the state pension nor to occupational pension schemes.<sup>119</sup> In addition to the self-employed, a small proportion of employees, especially higher-paid ones, make special private arrangements in the form of a personal pension to supplement both their state pension and occupational pensions.<sup>120</sup> Personal pension schemes are organised for individuals by financial institutions such as banks and insurance companies rather than by the companies for which these individuals work.<sup>121</sup> The pensions offered by these schemes are generally related to the contributions paid into them. As a result, they are known as defined-contribution pensions (also called money purchase schemes).<sup>122</sup> A personal pension scheme may be based on a contract or a trust. A personal pension scheme set up as a trust gives beneficiaries enforceable rights in the event of the pension holder's death. The benefits do not form part of the pension holder's estate.<sup>123</sup>

There are also stakeholder pensions that are insured personal pensions set up on terms that meet the standard set by the Government.<sup>124</sup> And there are group personal pensions linked to a particular employer.<sup>125</sup>

The preceding paragraphs have discussed the retirement funding structure in the United Kingdom. It is apparent from the discussion above that each of the three

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<sup>119</sup> Section 19 of the Pensions Act 2008 defines "personal pension scheme". Retirement annuity policies were introduced by the Finance Act 1956, and they were later succeeded by personal pension plans. See in this regard Ward *Tolley's Pensions Taxation 2013-2014* Chapter 1; and Nesbitt *Policy Making* at 30-31.

<sup>120</sup> See Foster *Benefits* at 533; and Nesbitt *Policy Making* at 30.

<sup>121</sup> See Nesbitt *Policy Making* at 30; and Blake *Pension Schemes* at 185.

<sup>122</sup> Nesbitt *Policy Making* at 30.

<sup>123</sup> Blake *Pension Schemes* at 188.

<sup>124</sup> See The Pension Service *Pensions* at 30; Department for Work and Pensions *Simplicity* at 18; and Tapia *Systems* at 79. Stakeholder pensions schemes are run by trustees or scheme managers who are authorised by the Financial Conduct Authority. See also n 41 above on stakeholder pensions.

<sup>125</sup> Some employers arrange for a pension provider to offer their employees a personal pension instead of an occupational pension. Although these personal pensions linked to an employer are sometimes called company pensions, they are not run by employers and should not be confused with occupational pensions. See in this regard The Pension Service *Pensions* at 40; and Spill *Practical Pensions* at 57-58.



categories of the pension structure — the state pension, occupational pension schemes, and personal pensions — provides financial support at retirement or to surviving beneficiaries. Pension schemes in the United Kingdom are also distinguishable from those in South Africa because there is greater membership of occupational pension schemes, covering both the public and private sector, in the United Kingdom than in South Africa.<sup>126</sup> This greater membership leads to a larger proportion of pensioners' income and support to surviving dependants derived from pension schemes rather than social security support.

Given the challenges that pension fund trustees in South Africa face in distributing retirement fund death benefits, especially with their discretion, the rest of this chapter focuses on death benefits payable to dependants and other beneficiaries on the death of a member of an occupational pension scheme.

### **3 THE IMPORTANCE, OBJECTIVES, LEGAL STATUS, AND NATURE OF OCCUPATIONAL PENSION SCHEMES**

The discussion below explains the role and objectives of occupational pension schemes in the United Kingdom.<sup>127</sup> It also discusses how occupational pension schemes are set up and their legal status and nature. It is necessary to determine whether occupational pension schemes in the United Kingdom play a social role like South Africa's ones.<sup>128</sup> To understand the role of occupational pension schemes in the United Kingdom, it is necessary to know how they complement the other two

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<sup>126</sup> See Chapter 2, par 2.3 for a discussion of the lack of participation in pension funds by unemployed people in South Africa. In the United Kingdom, the employment rate of people between the ages 16 to 64 was 75,6 per cent as of February–April 2018. The total membership of occupational pension schemes (covering both the public and private sector) in the United Kingdom was 39.2 million out of the population of about 65 million in 2016. By contrast, in South Africa the total membership of retirement funds at 31 December 2015 stood at about 16 million out of the population of about 55 million population in 2016. See Office for National Statistics “Occupational Pensions Schemes Survey, UK” which is available at <https://www.ons.gov.uk/peoplepopulationandcommunity/personalandhouseholdfinances/pensionsavingsandinvestments/bulletins/occupationalpensionschemesurvey/uk2016> (accessed on 14 September 2021) and the Financial Services Board *Annual Report 2017* at 36 <https://www.fsca.co.za/Annual%20Reports/FSB%20Annual%20Report%202017.pdf> (accessed on 14 September 2021). See also Chapter 1, n 35, in this regard, for 2018 and 2019 statistics in South Africa.

<sup>127</sup> See for example, in *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA), where rule 3 of the pension scheme stated that the main purpose of a pension scheme is to provide retirement and other benefits for employees of participating employers.

<sup>128</sup> See Chapter 1, par 2.4, where the objectives of establishing pension funds in South Africa are discussed.

categories of pension provision in that jurisdiction: the state pension and personal pensions.<sup>129</sup> One of the factors underlining the importance of occupational pension schemes in the social context of the United Kingdom is that the pension benefits payable by the State to persons who qualify to receive pensions and/or death benefits are inadequate for some if not for many beneficiaries.<sup>130</sup> The total basic state pension as of 2020 is £137 per week, although there are ways a pension holder can increase this amount.<sup>131</sup> Thus, occupational pension schemes supplement any perceived deficiencies in the level of state pension provision.<sup>132</sup> Employees who are members of occupational pension schemes and who have also paid into the NIC of the state pension may receive occupational pensions on top of any state pension to which they may be entitled.<sup>133</sup>

Occupational pension schemes form an essential part of the overall pension system in the United Kingdom. They provide income for pension scheme members on retirement and death benefits to the members' surviving dependants and to non-dependants<sup>134</sup> where the member dies while still in service.<sup>135</sup> The payment of death benefits responds primarily to the financial needs of families deprived of their breadwinner,<sup>136</sup> providing social protection for the recipients.<sup>137</sup>

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<sup>129</sup> See par 2.1 above for a discussion of the state pension, and par 2.3 for personal pensions.

<sup>130</sup> See Foster *Benefits* at 56, stating that because of the relatively low level of the United Kingdom social security pension, supplementation by private occupational schemes is both substantial and widespread.

<sup>131</sup> See in this regard the website of the Department of Work and Pensions at <https://www.gov.uk/government/organisation/department-for-work-pensions> (last accessed on 30 June 2021).

<sup>132</sup> Whiteford *Adapting* at 75. See, for example, Pensions Ombudsman Determinations (5 July 2010) *Morton* [77828/2] in par 10, where the deceased scheme member had specified that his widow should receive the income due from his private pension scheme or from any annuity that could be bought, plus the widow's entitlement from his state pension.

<sup>133</sup> Sections 2 to 24 and par 523A of the Pensions Act 2014 contain provisions that introduced the new state pension.

<sup>134</sup> Non-dependent beneficiaries are also referred to as "nominated beneficiaries" in this chapter. See par 4.1.3 below for a definition of "non-dependant beneficiaries".

<sup>135</sup> See above par 2.2 and n 99 for the definition of "occupational pension scheme". Besides retirement and death benefits, an occupational pension scheme may provide other benefits for pension scheme members such as serious illness benefits and incapacity benefits where applicable. See also Langley and Mulcahy *Pension Schemes* at 42.

<sup>136</sup> Spill *Practical Pensions* at 1.

<sup>137</sup> See Whiteford *Adapting* at 253 and Ellison *Pensions Disputes* at 2. See n 99 above for the definition of "occupational pension scheme" under s 1 of the Pensions Scheme Act 1993 and s 18 of the Pensions Act 2008. It includes the provision of death benefits as one of the objectives of an occupational pension scheme.

Section 59 of the Pension Act 2004 deals with the registration of occupational and personal pension schemes. The Regulator compiles and maintains a register of occupational pension schemes and personal pension schemes that are, or have been, registrable schemes.<sup>138</sup> This register contains comprehensive details of all occupational and personal pension schemes.<sup>139</sup>

In the United Kingdom, the legal nature of most occupational pension schemes is often that of a pension trust fund,<sup>140</sup> with the usual structure of trustees and fiduciary obligations.<sup>141</sup> Although trust law was not established initially to validate pension schemes, it became necessary to formalise the arrangements.<sup>142</sup> The employer establishes an occupational scheme based on a trust to provide benefits for the employees.<sup>143</sup> The scheme is managed by pension scheme trustees responsible for

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<sup>138</sup> Section 59(1) of the Pensions Act 2004. The regulations referred to under this section are the Register of Occupational and Personal Pension Schemes Regulations 2005 (SI 2005/597).

<sup>139</sup> See Frostick *Pension Law* at 6, referring to earlier version of the regulations published in 1997.

<sup>140</sup> Blake *Pension Schemes* at 94; and Blake 2003 *Pensions* 330 at 340. Most occupational pension schemes in the United Kingdom are set up as irrevocable trusts because the Inland Revenue imposes this as a condition for the granting of full tax relief. See in this regard Self *Handbook* at 7.

<sup>141</sup> Ellison *Pensions Disputes* at 7. See par 5.4.1 below, where fiduciary duties of pension scheme trustees are discussed.

<sup>142</sup> Blake *Pension Schemes* at 95; and Blake 2003 *Pensions* 330 at 341. Section 2 of the Superannuation and Other Trust Funds (Validation) Act 1927 (c. 41) dealt with the qualifications for registration of funds. It stated:

“Subject to the provisions of this Act, any fund established under trusts subject to the laws of Great Britain, in connection with an undertaking or combination of undertakings carried on wholly or partly in Great Britain, being a fund of which the main purpose is either—

- (a) the provision of superannuation allowances on retirement to persons employed in the undertaking or combination of undertakings in connection with which the fund is established; or
- (b) the provision of pensions during widowhood to the widows of persons who are or have been so employed and of periodical allowances to or in respect of children of such persons; or
- (c) the assurance of capital sums on the death of persons who have been so employed,

shall be qualified for registration under this Act if the rules of the fund comply with the requirements set out in the Schedule to this Act.”

The Act is available at <https://www.legislation.gov.uk/ukpga/Geo5/17-18/41/enacted/data.pdf> (accessed on 30 June 2021). Sections 1 to 8 were later repealed by the Social Security Act 1973. The establishment of an occupational pension scheme as a “trust” qualifies it to receive tax benefits, including that the recipients of the benefit do not pay inheritance tax if payment is made within two years from the death of the scheme member. There are other pension schemes that are not trust-based, and these do not comply with the HMRC requirements for inheritance tax exemptions. See par 4.2.5 below for a brief discussion of the HMRC.

<sup>143</sup> Blake explains that a “trust” is a legal relationship between individuals and assets, by which assets provided by one individual (the *settlor*) are held up by another group of individuals (the

paying pensions and lump sum benefits to beneficiaries.<sup>144</sup> Trust-based pension schemes are governed by a trust deed<sup>145</sup> and rules of the fund.<sup>146</sup> Trustees need to understand the English law of trusts to understand the law dealing with pension funds in the United Kingdom.<sup>147</sup> A pension scheme in the form of a trust does not have a separate legal personality and is therefore not a legal person in the United Kingdom.<sup>148</sup> This situation differs from that of companies, as registered companies have a separate legal personality in the United Kingdom.<sup>149</sup>

In addition to occupational pension schemes set up as trusts, some schemes are not trust-based.<sup>150</sup> Contract-based schemes are governed by individual contracts

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*trustees*) for the benefit of a third group of individuals (the *beneficiaries*). The interests of the beneficiaries are stated in the trust deed. If the trust is a discretionary trust, the trustees have the freedom of action to dispose the income and the capital of the trust as they see fit. See in this regard Blake *Pension Schemes* at 94.

<sup>144</sup> See par 4.2.4 below, where pension scheme trustees are discussed. See also Cocco JF and Volpin P “The Corporate Governance of Defined-Benefit Pension Plans: Evidence from the United Kingdom” (Centre for Economic Policy Research London 2005) at 4 available at <http://faculty.london.edu/pvolpin/pensions.pdf> (last accessed on 14 September 2021) (hence “Cocco and Volpin *Corporate Governance*”).

<sup>145</sup> A “trust deed” is a legal document, executed in the form of a deed, which establishes, regulates or amends a trust. See in this regard Blake *Pension Schemes* at 701 (Glossary).

<sup>146</sup> Blake 2003 *Pensions* at 330. Section 252 of the Pensions Act 2004 provides that United Kingdom-based schemes must be set up as trusts with effective rules. This requires that an occupational pension scheme that is administered mainly in the United Kingdom must be established as an irrevocable trust. See also in this regard Foster *Benefits* at 54; and The Pensions Regulator “Trustee Guidance” available at <https://www.thepensionsregulator.gov.uk/en/document-library/regulatory-guidance/trustee-guidance> (last accessed on 14 September 2021), under the part dealing with what is a trustee. See Chapter 2, par 4.2 for a discussion of the effect of registration of a pension fund in South Africa. The establishment of pension schemes in the United Kingdom differs from the legal position in South Africa. In South Africa, pension funds registered under the Pension Funds Act 24 of 1956 have a separate legal personality. Despite the differences in the legal form, the assets of a pension fund or pension scheme in both jurisdictions are separated from those of the sponsoring employer as well as those of the trustees. See par 5.1 below for the discussion of pension scheme rules and the trust deed.

<sup>147</sup> Blake 2003 *Pensions* at 330.

<sup>148</sup> Tilba and Reisberg 2019 *MLR* 456 at 484, n 116, also stating that Scots law is arguably different on this point. Section 37(1) of the Pension Schemes Act 2015 states that the Secretary of State may impose regulations on the managers of relevant non-trust-based schemes to act in the best interests of members when taking decisions of a specified description. See also Hayton *Extent* at 1 in par 1.

<sup>149</sup> Companies in the United Kingdom are registered in terms of the Companies Act 2006 (c. 46). Section 16 of the Companies Act 2006 deals with the effect of registration of a company. Sections 16(1) and 16(2) state that the effect of such registration as from the date of incorporation is that the subscribers to the memorandum, together with such other persons as may from time to time become members of the company, constitute a body corporate by the name stated in the certificate of incorporation.

<sup>150</sup> Section 37(5) of the Pension Schemes Act 2015 states that a non-trust-based scheme is a scheme that is not established as a trust.

between the scheme member and the pension provider, such as an insurance company. The trust deed and rules provide the appointed trustees or administrators of the pension scheme with discretion to distribute the death benefits so that these death benefits will be exempt from inheritance tax.<sup>151</sup>

Occupational pension scheme members' accrued benefits are considered deferred pay which the employees or scheme members have earned through their work.<sup>152</sup> When private pensions were first established, employees were not entitled to receive pension benefits, as they were granted at the employer's sole discretion.<sup>153</sup> Over the years, pensions have gradually come to be seen as a form of deferred pay received by employees under their employment contracts.<sup>154</sup> Occupational pension benefits are usually included in the employment contract as part of the remuneration payable to an employee.<sup>155</sup> It has now become established that pension rights are earned by an employee and are considered deferred pay.<sup>156</sup> This change was of great significance, because it implied a new conception of a pension as not being a charity but rather an allowance that was earned.<sup>157</sup> In *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf (Social policy)*,<sup>158</sup> the Court of Justice of the European Union confirmed that a

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<sup>151</sup> Section 5(1) of the Inheritance Tax Act 1984 (c. 51) regards discretionary death benefits as excluded property for the purpose of tax. Blake states that, in order to receive exempt approved status from the Inland Revenue, a pension scheme must be established under an irrevocable trust, with the employee being a beneficiary under the trust, and the employer being a contributor. The sole purpose of the scheme must be to provide "relevant benefits" in respect of service as an employee, where benefits are defined as pensions and lump sums payable on or in anticipation of retirement or on death. The benefits must be made available to the member or widow or widower, children, or dependants. See in this regard Blake *Pension Schemes* at 95.

<sup>152</sup> Dawes and Samsworth *Guide to the Pensions Act* at 3; *Sterling Insurance Trustees Ltd v Sterling Insurance Group Ltd* [2015] EWHC 2665 (Ch) (3 July 2015) at 26; *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) (19 May 2017) in par 376; Davies 2019 *Twentieth Century British History* 81 at 88. Section 100D(1) of the Pension Schemes Act 1993 states that "accrued rights" in relation to a member of a pension scheme means rights that have accrued to or in respect of the member to benefits under the scheme. This is also the position in South Africa: see Chapter 2, par 4.3 in this regard.

<sup>153</sup> Whiteford *Adapting* at 130; and Ellison *Pensions Disputes* at 2 and 4.

<sup>154</sup> Whiteford *Adapting* at 130.

<sup>155</sup> At 76; and *Self Handbook* at 6.

<sup>156</sup> See *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 589 (ChD) at 597 per Browne-Wilkinson VC, stating that it has become almost a commonplace to say that pension trust entitlements are different because the members have earned their trust entitlements by working for their employer. See also in this regard Fox 2010 *CLJ* 240 at 240-241.

<sup>157</sup> Raphael *Pensions* at 83.

<sup>158</sup> *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf (Social policy)* [1993] EUECJ C-109/91 Court of Justice of the European Communities Europe, 6 October 1993. This case was referred to the Court of Justice by the

survivor's pension complied with the concept of pay within the meaning of Article 119 of the Treaty of Rome (the EEC Treaty). As a result, this pension was subject to the prohibition of discrimination laid down by Article 119.<sup>159</sup> The court also confirmed that although a survivor's pension was not paid to the employee but to the employee's survivor, the latter is entitled to this benefit.<sup>160</sup> A survivor's pension is a consideration deriving from the survivor's spouse's membership of the scheme. The pension vests in and is paid to the survivor because of the employment relationship between the employer and the survivor's spouse.<sup>161</sup>

#### **4 KEY ROLE-PLAYERS IN THE DISTRIBUTION OF OCCUPATIONAL PENSION SCHEME DEATH BENEFITS**

The discussion below highlights certain key parties and role-players who are involved in the distribution of occupational pension scheme death benefits in the United Kingdom.<sup>162</sup> They include members of occupational pension schemes, surviving dependants, and surviving non-dependant beneficiaries. These parties are at the core of the distribution of the death benefits. There are also key role-players such as the Pensions Regulator, the Pensions Advisory Services ("TPAS")<sup>163</sup> —

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Kantongerecht Utrecht – Netherlands for a preliminary ruling in the proceedings pending before that court between Gerardus Cornelis Ten Oever and Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf. The judgment is available at <http://www.bailii.org/eu/cases/EUECJ/1993/C10991.html> (last accessed on 12 September 2021).

<sup>159</sup> In par 7. Article 119 of the Treaty states that each Member State shall during the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work between men and women workers. It also states that for the purposes of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment. The Treaty of Rome was signed on 25 March 1957 and established the European Economic Community (EEC). The EEC brought together six founding member countries (Belgium, West Germany, France, Italy, Luxembourg, and the Netherlands) to work towards integration and economic growth through trade. Denmark, Ireland, and the United Kingdom joined the Community on 1 January 1973. Greece on 1 January 1981 and later Portugal and Spain on 1 January 1986 became member states. In 1993, the European Union (EU) incorporated the EEC, and its name was changed to the European Community (EC). The EC formally ceased to exist in 2009 and its institutions were directly absorbed by the EU. See Chapter 5, n 21 for a brief discussion of the EU.

<sup>160</sup> *Gerardus Cornelis Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoonmaakbedrijf (Social policy)* [1993] EUECJ C-109/91 Court of Justice of the European Communities Europe, 6 October 1993 in par 13.

<sup>161</sup> In par 13.

<sup>162</sup> See pars 4.1 and 4.2 below, where these three key parties and role-players are discussed. The reasons for their inclusion under key parties and role-players are highlighted in the discussions.

<sup>163</sup> See "The Pensions Advisory Service (TPAS)" (GOV.UK) available at <https://www.gov.uk/pensions-advisory-service> (last accessed on 14 September 2021).

formerly, the Occupational Pensions Advisory Services (“OPAS”), the Pensions Ombudsman, pension scheme trustees, and the HMRC.<sup>164</sup> The function of the Pensions Regulator is to regulate the pension schemes and their trustees;<sup>165</sup> TPAS canvasses awareness of rights among pension scheme members and scheme beneficiaries; the Ombudsman resolves pension disputes; and the HMRC deals with the taxation of pensions.<sup>166</sup> Most importantly, these key role-players ensure that pension scheme beneficiaries<sup>167</sup> receive the death benefits that are due to them and can also use the mechanisms available to them to enforce their rights against pension schemes and errant trustees.<sup>168</sup>

#### 4.1 *Key rights holders in the distribution of occupational pension scheme death benefits*

The key rights holders in the distribution of occupational pension scheme death benefits in the United Kingdom are discussed below.

##### 4.1.1 Pension scheme members

A pension member is defined in section 124(1) of the Pensions Act 1995. An “active member” in relation to an occupational pension scheme means a person who is in pensionable service under the scheme.<sup>169</sup> A deferred member in relation to an occupational pension scheme means a person (other than an active or pensioner member) who has accrued rights under the scheme.<sup>170</sup> For the present discussion, a pension scheme member is someone who has been admitted to membership of a pension scheme and is entitled to a benefit under the scheme. The discussion focuses on a member of an occupational pension scheme who dies while still in

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<sup>164</sup> See n 20 above and par 4.2.5 below, where the HMRC is briefly discussed.

<sup>165</sup> See in this regard par 4.2.1 and n 193 below.

<sup>166</sup> See par 4.2 below for a discussion of the functions and purpose of these key role-players.

<sup>167</sup> See par 4.1.3 below for a description of a pension scheme beneficiary.

<sup>168</sup> See par 6 below, where the liability for wrongful distribution of occupational pension scheme death benefits is discussed.

<sup>169</sup> Section 124(1) of the Pensions Act 1995. See also in this regard Blake *Pension Schemes* at 631 (Glossary).

<sup>170</sup> Section 124(1) of the Pensions Act 1995. A *deferred member* is a pension scheme member that no longer contributes to the pension scheme or has accrued benefits from the scheme but is not yet receiving a pension. See in this regard the OECD Glossary of Statistical Terms “Deferred Member Definition” available at <https://stats.oecd.org/glossary/detail.asp?ID=5214> (last accessed on 14 September 2021).

service leaving pension scheme death benefits payable to surviving dependants and non-dependants (nominated beneficiaries). Pension scheme members are crucial to the distribution of occupational pension scheme death benefits: they pay the pension contributions to a pension scheme and nominate potential death benefit beneficiaries. So the death benefit recipients must somehow be linked to the scheme member, as the latter's dependants or nominees or both. Classifying someone as a "pension scheme member" at the time of death could determine whether pensions and/or pension death benefits are payable to the surviving dependants and nominated beneficiaries. The definitions of a "dependant" and a "pension scheme beneficiary" are discussed below.

#### 4.1.2 Dependants

In the context of this chapter, a "dependant" is a person who is financially dependent on a pension scheme member or who was so at the time of the member's death.<sup>171</sup> A major dependant may be required to prove that he or she was financially dependent on the deceased scheme member before the latter's death.<sup>172</sup>

Unlike the South African Pension Funds Act 24 of 1956,<sup>173</sup> the Pensions Acts<sup>174</sup> and the Pension Schemes Acts in the United Kingdom lack a specific definition of a

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<sup>171</sup> See Langley and Mulcahy *Pension Schemes* at 101 (Glossary); and Blake D *Pension Schemes* at 651 (Glossary) stating that "For Inland Revenue purposes, a spouse qualifies automatically as a dependant and a child of the member or pensioner may always be regarded as a dependant until attaining the age of 18 or ceasing to receive full time educational or vocational training, if later." In Pensions Ombudsman Determinations (5 January 2017) S [PO-10502] in par 16, the Pensions Ombudsman held that the relevant rules are very clear that dependency must be financial and defined as "anyone who shares living expenses with, or receives financial support from, the member or other person, and whose standard of living would be affected by the loss of that person's contribution or support".

<sup>172</sup> In Pensions Ombudsman Determinations (5 January 2017) S [PO-10502] in par 17, the Ombudsman refused to uphold the claim of the complainant (Miss S), who was a major, because she could not prove that she was financially dependent on her late father, the deceased scheme member, at the time of his death. The Ombudsman stated the following: "I do not doubt Miss S's claim that her standard of living has been affected following the death of her father. However, she has been unable to substantially support this – there is no evidence that she was sharing living expenses, such as bills, or that there is a 'paper trail' of regular money that was provided to her. It is unfortunate that her late father decided to provide cash, but there is not enough supporting evidence to show that she was the recipient of the cash or what it was used on. It is therefore not unreasonable for the Trustee to have reached the conclusion that it did – that Miss S had not provided sufficient evidence to show financial dependency under the rules of the Fund."

<sup>173</sup> See Chapter 3, par 2.2.1 and Chapter 1, par 8.3 for a definition of a "dependant" in the South African Pension Funds Act.

<sup>174</sup> Section 24D of the United Kingdom's Pension Schemes Act 1993 refers to a widow or widower of a pension scheme member.



“dependant” in relation to occupational pension schemes. The definition of a “dependant” for distributing death benefits is not clear-cut. The trustees or scheme administrators have the duty to decide whether a person meets the definition of a “dependant” in terms of the relevant statutory provisions.<sup>175</sup> So the trustees must exercise their discretion when determining “dependants” by considering the circumstances of cases on an individual basis. This position is like the one in South Africa.<sup>176</sup>

In the United Kingdom, the Finance Act 2004 defines a “dependant” for tax purposes as including a person who was married to, or a civil partner of, the *member at the date of the member’s death*.<sup>177</sup> If the rules of the pension scheme so provide, a person who was married to, or was a civil partner of, the member *when the member first became entitled to a pension* under the pension scheme, is a dependant of the member.<sup>178</sup> A child of a pension scheme member is considered a dependant until attaining the age of 23 or ceasing to receive full-time educational or vocational training.<sup>179</sup> Another person regarded as a dependant is a child who has turned 23 and who, in the scheme administrator’s opinion, was at the date of the member’s death dependent on the member as a result of physical or mental impairment.<sup>180</sup>

The definition of a “dependant” in terms of the Finance Act 2004<sup>181</sup> further includes a person who

- was not married to, or a civil partner of, the pension scheme member at the date of the member’s death and
- is not a child of the member but

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<sup>175</sup> See Self *Handbook* at 39; and Pensions Ombudsman Determinations (5 January 2017) S [PO-10502] in par 17.

<sup>176</sup> See Chapter 3, par 2.2.1 and Chapter 1, par 8.3 for a definition of a “dependant” in the South African Pension Funds Act.

<sup>177</sup> Schedule 28 (Part 2), s 15(1) of the Finance Act 2004 (Part 4).

<sup>178</sup> Schedule 28 (Part 2), s 15(1A) of the Finance Act 2004.

<sup>179</sup> See Chapter 1, par 8.3 and Chapter 3, par 2.2.1 for a definition of a “dependant” in the South African Pension Funds Act.

<sup>180</sup> Schedule 28 (Part 2), s 15(2)(a) and (b) of the Finance Act 2004.

<sup>181</sup> Schedule 28 (Part 2), s 15(3) of the Finance Act 2004.

- is a dependant of the member.

This dependant qualifies if, in the scheme administrator's opinion,<sup>182</sup> at the date of the member's death, any of the following apply:

- (a) the person was financially dependent on the member,
- (b) the person's financial relationship with the member was one of mutual dependence, or
- (c) the person was dependant on the member because of physical or mental impairment.<sup>183</sup>

A notable and significant difference is that the United Kingdom legislature also helps trustees determine whether a person qualifies as a factual dependant by providing the three categories of such a dependant mentioned above. This is not the case in South Africa.<sup>184</sup>

It is apparent from the above definitions under the Finance Act 2004 that a "dependant" refers to legal dependants of the deceased pension scheme member and includes people who were financially dependent (factual dependants) on the deceased pension scheme member before his or her death.<sup>185</sup>

This restriction on the persons who can qualify as factual dependants lacks in the definition of a "dependant" in section 1 of the Pension Funds Act in South Africa. So the scope of people who may qualify as dependants of the deceased fund member for the purpose of distributing the death benefits is extensive and overgenerous in South Africa.<sup>186</sup> It is suggested that in South Africa, there should be a qualification

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<sup>182</sup> Section 270(1) of the Finance Act 2004 defines a "Scheme Administrator" in relation to a pension scheme as a person or persons who are appointed in accordance with the rules of the pension scheme to be responsible for the discharge of the functions conferred or imposed on the scheme administrator of the pension scheme.

<sup>183</sup> See sections 15(1) and 167 of the Finance Act 2004 (Schedule 28 Part 2).

<sup>184</sup> See Chapter 3, pars 2 and 3 for a discussion of the definition of "dependant" and the discretion of pension fund trustees in South Africa.

<sup>185</sup> Section 15(1) of the Finance Act 2004 (Schedule 28 Part 2).

<sup>186</sup> See Chapter 1, par 8.3 and Chapter 3, par 2.2.1 for a definition of a "dependant" in the South African Pension Funds Act, as well as the challenges facing pension fund trustees in deciding whether a person qualifies as a dependant.

like that in the United Kingdom to help the trustees determine whether a person qualifies as a factual dependant.<sup>187</sup>

#### 4.1.3 Pension scheme beneficiaries

A pension scheme “beneficiary” in the context of this chapter refers to a person entitled to receive a benefit when a pension scheme member dies. Surviving non-dependant beneficiaries are also called “nominated beneficiaries”.<sup>188</sup> A nomination completed by a pension scheme member is not a testamentary disposition,<sup>189</sup> so it is valid even though not witnessed.<sup>190</sup> In this thesis, a “nominated beneficiary” refers to a person nominated by the pension scheme member to receive death benefits on a nomination or wishes form. The inclusion of surviving non-dependant beneficiaries (“nominated beneficiaries”) as potential recipients of the deceased pension scheme member’s death benefits suggests that the objective of these benefits in the United Kingdom is not limited to the provision of financial support for surviving dependants

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<sup>187</sup> See in this regard Chapter 6, par 5.12.

<sup>188</sup> A “surviving non-dependant beneficiary” is described in s 50A of the Pensions Act 1995. Section 50A(1)(c) states that for the purposes of s 50 a person is a person with an interest in an occupational pension scheme and includes a surviving non-dependant beneficiary of a deceased member of the scheme. Section 50A(2) states that in subsection (1)(c) a “non-dependant beneficiary”, in relation to a deceased member of an occupational pension scheme, means a person who, on the death of the member, is entitled to the payment of benefits under the scheme. Section 50 of the Pensions Act 1995 deals with pension dispute resolution arrangements.

<sup>189</sup> In *Baird v Baird* [1990] 2 AC 548 (PC) at 556, Lord Oliver, giving the judgment of the Panel, held: “A will is an instrument by which a person makes a disposition of his property to take effect after his decease, and which is in its own nature ambulatory and revocable during his life’ (*Jarman on Wills*, 8th ed. (1951), vol. 1, p. 26). It is not, however, the case that every revocable instrument which creates interests taking effect on the death of the person executing the instrument is necessarily a will.” See n 190 below for a brief summary of *Baird*.

<sup>190</sup> See par 5.5.1 below for a discussion of beneficiary nomination forms. Section 27A(1) of the Finance Act 2004 defines a “nominee” for tax purposes as an individual nominated by the scheme member or the scheme administrator to receive pension benefits although such person is not a dependant of the member. In *Baird v Baird* [1990] 2 AC 548 (PC), the employee joined the company’s pension scheme and nominated his brother as the beneficiary of the death benefit. The employee got married five years later, but he died two years later after the marriage while he was still employed by the company. He never changed the beneficiary in the nomination form. The widow challenged the brother’s right to the pension’s death benefit, arguing that the nomination was invalid. She submitted that the nomination was a testamentary disposition and, as such, had to be executed in accordance with s 2 of the Wills and Probate Ordinance (Laws of Trinidad and Tobago 1950 rev., c. 8 No. 2). The Ordinance required a will to be executed by two witnesses. Under the Rules of the Plan, if there was no beneficiary nominated, the benefits went to the widow. The brother claimed that the nomination was not a testamentary disposition, because the employee lacked full control of the pension interest. The Privy Council ruled that the nomination was not a testamentary disposition, and so the nomination was valid even though it was not witnessed.

of the scheme member. The benefits also provide support for other persons the pension scheme member nominates.<sup>191</sup>

#### 4.2 *Key role-players crucial to the awareness, protection, and efficient distribution of occupational pension scheme death benefits*

This section considers role-players crucial to the awareness, protection, and efficient distribution of occupational pension scheme death benefits — the Pensions Regulator (“TPR”); the Pensions Advisory Services (“TPAS”); the Pensions Ombudsman; pension scheme trustees; and the HMRC.

##### 4.2.1 The Pensions Regulator

The Pensions Regulator (“TPR”) was established by the Pensions Act 2004 as a regulatory body for occupational pension schemes in the United Kingdom.<sup>192</sup> The objectives of the Regulator are:<sup>193</sup>

- to protect the benefits under occupational pension schemes of, or in respect of, members of such schemes;
- to protect the benefits under personal pension schemes of, or in respect of, members of such schemes within subsection (2);
- to reduce the risk of situations arising that may lead to claims for compensation from the Pension Protection Fund;<sup>194</sup> and
- to promote, and to improve understanding of, the good administration of work-based pension schemes.<sup>195</sup>

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<sup>191</sup> See par 4.1.2 above, where the extended definition of a “dependant” is discussed.

<sup>192</sup> Section 4(1) of the Pensions Act 2004.

<sup>193</sup> Section 5(1) of the Pensions Act 2004.

<sup>194</sup> The Pension Protection Fund protects people with a defined benefit pension by paying benefits (compensation) to pension scheme members and beneficiaries when their sponsoring employer becomes insolvent. See in this regard Pension Protection Fund “Welcome to the PPF” available at <https://www.ppf.co.uk/> (last accessed on 15 September 2021).

<sup>195</sup> Section 5(3) of the Pensions Act 2004 states that a “work-based pension scheme” means “an occupation pension scheme, a personal pension scheme where direct payment arrangements exist in respect of one or more members of the scheme who are employees, or a stakeholder pension scheme”.

The Pensions Regulator in the United Kingdom plays a similar role to that of the Financial Sector Conduct Authority (FSCA) in South Africa.<sup>196</sup> The Pensions Regulator must keep a register of all persons prohibited from acting as trustees under section 3 of the Pensions Act 1995.<sup>197</sup> This provision helps in naming unscrupulous trustees who, if they were to be appointed to schemes, are likely not to serve the best interests of the scheme, the scheme members, and their surviving beneficiaries.<sup>198</sup>

Recently, the United Kingdom has further strengthened the enforcement powers of the Regulator. Criminal sanctions have been introduced for failing to comply with the Pension Schemes Act 2021. Section 107 of the Pension Schemes Act 2021 introduces in section 58B the *offence of conduct risking accrued scheme benefits*, and it applies to occupational pension schemes. It reads:

**58B Offence of conduct risking accrued scheme benefits**

....

(2) A person commits an offence only if—

(a) the person does an act or engages in a course of conduct that detrimentally affects in a material way the likelihood of accrued scheme benefits being received (whether the benefits are to be received as benefits under the scheme or otherwise),

(b) the person knew or ought to have known that the act or course of conduct would have that effect, and

(c) the person did not have a reasonable excuse for doing the act or engaging in the course of conduct.

(3) A reference in this section to an act or a course of conduct includes a failure to act.

(4) A reference in this section to accrued scheme benefits being received is a reference to benefits the rights to which have accrued by the relevant time being received by, or in respect of, the persons who were members of the scheme before that time.

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<sup>196</sup> See Chapter 2, par 7 for a discussion of the FSCA in South Africa.

<sup>197</sup> Section 66(1) of the Pensions Act 2004. Section 3 of the Pensions Act 1995 deals with prohibition orders by the Supervising Authority.

<sup>198</sup> See par 4.2.4 below, where the appointment and disqualification of pension scheme trustees are discussed.

- (9) A person guilty of an offence under subsection (2) is liable—
- (a) on summary conviction in England and Wales, to a fine;
  - (b) on summary conviction in Scotland, to a fine not exceeding the statutory maximum;
  - (c) on conviction on indictment, to imprisonment for a term not exceeding seven years or a fine, or both.
- (10) Proceedings for an offence under subsection (2) may be instituted in England and Wales only—
- (a) by the Regulator or the Secretary of State, or
  - (b) by or with the consent of the Director of Public Prosecutions.<sup>199</sup>

The stated aim of introducing these new offences is to strengthen the enforcement powers of the Pensions Regulator to “to tackle the more serious examples of intentional or reckless conduct that puts members’ savings at risk; and strengthen the deterrence and punishment for that behaviour”.<sup>200</sup>

#### 4.2.2 The Pensions Advisory Service

The Pensions Advisory Services (“TPAS”) is an independent and voluntary organisation giving free help and advice to members of the public who have problems with either a private sector occupational pension (a company pension) or a personal pension.<sup>201</sup> The service is available to any person who believes that he or she has pension rights in a company or personal pension scheme,<sup>202</sup> including dependants of pension scheme members.<sup>203</sup> TPAS is designed as a grievance filter, allowing aggrieved individuals to have their complaints reviewed without cost by an

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<sup>199</sup> Section 107 of Chapter 1 of Part 3 of the Pension Schemes Act 2021.

<sup>200</sup> Eytte J *et al* “Pension Schemes Act 2021: The New Criminal Offences and Their Potential Impact on Restructuring Transactions” (Insights *DLA Piper*, 24 May 2021) available at <https://www.dlapiper.com/en/us/insights/publications/2021/05/restructuring-global-insight/pension-schemes-act-2021/> (last accessed on 15 September 2021), referring to David Fairs, TPR Executive Director of Regulatory Policy, as quoted in the TPR’s consultation announcement, 11 March 2021.

<sup>201</sup> TPAS is an executive non-departmental public body, sponsored by the Department for Work and Pensions. For more information, see *The Pensions Advisory Service (GOV.UK)* available at [www.gov.uk](http://www.gov.uk) (last accessed on 30 June 2021). See pars 2.2 and 2.3 above, where the private sector occupational schemes, and personal pensions are discussed.

<sup>202</sup> Ellison *Pensions Disputes* at 22.

<sup>203</sup> At 22.

independent body.<sup>204</sup> The role of TPAS is to ensure that pension schemes, the Ombudsman, and the courts are not overburdened by matters that can quickly be resolved in another forum such as TPAS.<sup>205</sup> It is submitted that the South African pension fund industry might benefit from having an organisation providing similar services.<sup>206</sup>

#### 4.2.3 The Pensions Ombudsman

The Pensions Ombudsman was created by the Pension Schemes Act 1993.<sup>207</sup> The objective of the Ombudsman is to enable a speedy and expert resolution of pension disputes.<sup>208</sup> The Ombudsman conducts investigations and adjudicates disputes

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<sup>204</sup> At 22, referring to the Occupational Pensions Advisory Service (“OPAS”), which has now been replaced by TPAS. See also n 163 above in this regard. The roles and objectives of OPAS and TPAS remain the same.

<sup>205</sup> In South Africa, there are bodies and/or organisations that are involved in pension fund matters, such as the Pension Lawyers Association of South Africa (see PLA “Home” available at <https://www.pensionlawyers.co.za/home> (last accessed on 14 September 2021)), the Institute of Retirement Funds Africa (see IRFA “Home” available at <https://www.irf.org.za> (last accessed on 14 September 2021)), and the Council of Retirement Funds for South Africa (Batseta, the word “Batseta” being a Sepedi word meaning “advisory council” (see Batseta “About Us” available at <https://www.batseta.org.za/aboutus> (last accessed on 14 September 2021))). But the focus of these bodies is the protection of the interests of pension lawyers (Pension Lawyers Association of South Africa) and the interests of pension fund trustees and principal officers (Institute of Retirement Funds Africa, and the Council of Retirement Funds for South Africa (Batseta)). There is currently no recognised body (besides the Financial Sector Conduct Authority (FSCA)) to protect the interests of pension fund members, their dependants, and nominated beneficiaries who are facing problems regarding their funds.

<sup>206</sup> See Chapter 1, n 11, and Chapter 2, par 6, where it is stated that the Pension Funds Adjudicator’s Office and the courts in South Africa are overburdened with matters relating to pension disputes about death benefits. See also Chapter 2, where the social factors that hinder aggrieved dependants and beneficiaries from approaching formal courts to resolve their disputes are discussed.

<sup>207</sup> Section 145 of the Pension Schemes Act 1993 and s 274 of the Pensions Act 2004. The Pensions Ombudsman is a non-departmental public body funded by the Department for Work and Pensions. See in this regard *The Pensions Ombudsman Annual Report and Accounts 2020/21* at 6, available at [https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Annual Report and Accounts 2020-21.pdf](https://www.pensions-ombudsman.org.uk/sites/default/files/publication/files/Annual%20Report%20and%20Accounts%2020-21.pdf) (last accessed on 30 June 2021) (hence “*The Pensions Ombudsman’s Annual Report and Accounts 2020/21*”). *The Pensions Ombudsman’s Annual Report and Accounts 2020/21* at 21 and 28, respectively, states that the Pensions Ombudsman received 5 567 new pension complaint applications in 2020/21, and that 288 pension complaints were determined by the Ombudsman in the same period of 2020/21. *The Pensions Ombudsman’s Annual Report and Accounts 2020/21* at 28 adds that the number of complaints requiring an Ombudsman’s involvement has been decreasing compared to the past years. In 2020/21, complaints about the “payment of benefits on death” constituted only 1.7 per cent of pension complaints concluded by the Ombudsman and in 2019/20 it was 5.1 per cent (at 29). See Chapter 1, n 11 for the statistics relating to the Pension Funds Adjudicator’s Office in South Africa.

<sup>208</sup> The Pensions Ombudsman consists of the Pensions Ombudsman and the Deputy Pensions Ombudsman. Both the Ombudsman and the Deputy Ombudsman have powers to investigate and decide matters. References to the Pensions Ombudsman in relation to the performance of his or her functions are accordingly to be construed as including references to a Deputy

between pension schemes and their members, dependants, and beneficiaries more quickly and cheaply than conventional litigation in courts would be.<sup>209</sup> The Ombudsman plays a crucial role in protecting the interests of beneficiaries against trustees and employers.<sup>210</sup> This protection takes the form of making a platform and a mechanism available for disgruntled or concerned scheme members and their beneficiaries to seek remedies to protect their pension interests.<sup>211</sup> The Ombudsman may direct the trustees to take or refrain from taking such steps as he may specify.<sup>212</sup> The Ombudsman's determination is enforceable in a court as if it were a judgment or order of that court.<sup>213</sup>

In *Arjo Wiggins Ltd v Ralph*, Lewison J explained that it is now well settled that the Ombudsman must decide disputes according to established legal principles rather than by reference to what he considers to be fair and reasonable.<sup>214</sup> This sentiment resounded in the determination of *R*.<sup>215</sup> Though sympathetic to the complainant, the Ombudsman held that his role did not extend to considering whether the

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Pensions Ombudsman in relation to the performance of those functions (see s 145(5) of the Pension Schemes Act 1993). For ease of reference, any reference to the Ombudsman in this chapter includes both the Ombudsman and the Deputy Ombudsman. For a general discussion of the Pensions Ombudsman in the United Kingdom, see Ellison *Pensions Disputes* at 42-50; Dawes and Samworth *Guide to the Pensions Act* at 136-143; and Frostick *Pension Law* at 271-288.

<sup>209</sup> See also Hayton *Extent* at 3; and for information see The Pensions Ombudsman "Homepage" available at <https://www.pensions-ombudsman.org.uk> (last accessed on 15 September 2021).

<sup>210</sup> Langley and Mulcahy *Pension Schemes* at 46.

<sup>211</sup> If pension scheme trustees do not satisfactorily resolve matters with a complainant, the latter may approach the Ombudsman with a complaint that owing to maladministration on the part of the pension scheme, he or she has sustained injustice. The complainant may also approach the Ombudsman if he or she has a dispute of fact or law with the trustees or pension scheme administrators. See in this regard Hayton *Extent* at 3, in par 3; and sections 146(1) and (2) of the Pension Schemes Act 1993.

<sup>212</sup> Section 152 of the Pension Schemes Act 1993; and Hayton *Extent* at 3-4, in par 3.

<sup>213</sup> Section 151(5) of the Pension Schemes Act 1993 deals with enforcement of the Pensions Ombudsman's determinations.

<sup>214</sup> *Arjo Wiggins Ltd v Ralph* [2009] EWHC 3198 (Ch), [2010] Pen LR 11 in par 13; and *Catchpole v Trustees of the Alitalia Airlines Pension Scheme and Another* [2010] EWHC 1809 (Ch), [2010] ICR 1405 in par 35. Warren J in *Catchpole* found that "for the trustees to provide a benefit for Mr Catchpole [the complainant] to which, under the rules of the scheme, he is not entitled will have an adverse effect, I expect small but none the less adverse, on other beneficiaries. The trustees cannot, it might be said, estop themselves from denying a benefit to a person to the detriment of their beneficiaries when the rules of the scheme do not authorise the payment of such a benefit" (par 48).

<sup>215</sup> Pensions Ombudsman Determinations (25 May 2016) *R* [PO-7345].



complainant had been treated fairly in the general sense. His only consideration was whether there had been maladministration or a breach of law.<sup>216</sup>

Authorised complainants include members of a scheme; widows, widowers, or any surviving dependant of a deceased scheme member; and their personal representatives.<sup>217</sup> In *Andrews*,<sup>218</sup> the Ombudsman ruled that he could investigate a complaint made by an “actual or potential beneficiary” of a personal pension scheme.<sup>219</sup> The Ombudsman pointed out that the legislative intent was clear that people who suffer injustice in the administration of scheme benefits, as potential recipients of such benefits, should be able to complain to the Ombudsman’s office.<sup>220</sup> In *Brown*,<sup>221</sup> the Ombudsman stated that his determinations are not binding as precedents like decisions of the higher courts. Still, they do show how the office will probably reach further determinations.<sup>222</sup> The Ombudsman seldom interferes with the trustees’ discretionary powers.<sup>223</sup>

#### 4.2.4 Pension scheme trustees

Pension scheme trustees are appointed to administer and manage occupational pension schemes.<sup>224</sup> Trustees play a crucial and central role in properly managing occupational pension schemes and distributing death benefits.<sup>225</sup> In a 1993 Report

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<sup>216</sup> In par 29. This is like the position in South Africa in that the Pension Funds Adjudicator in various determinations has also explained that his or her role is not to determine what the fairest or most generous distribution is, but rather to determine whether the trustees have exercised their discretion properly and equitably in terms of the law. See Chapter 3, pars 6.5.1.1, and 6.5.1.3.

<sup>217</sup> Section 146(7)(a) and (b) of the Pension Schemes Act 1993. The provisions of s 146 of this Act, among other complaints, include a complaint made to the Pensions Ombudsman by or on behalf of an actual or potential beneficiary of an occupational or personal pension scheme who alleges that he has sustained injustice as a result of maladministration in connection with any act or omission of a person responsible for the management of the scheme. See also Ellison *Pensions Disputes* at 46.

<sup>218</sup> Pensions Ombudsman Determinations (19 March 2010) *Andrews* [76528/1, 76732/1, 76758/1].

<sup>219</sup> In par 19.

<sup>220</sup> In par 24.

<sup>221</sup> Pensions Ombudsman Determinations (28 October 2011) *Brown* [83842/1].

<sup>222</sup> Pensions Ombudsman Determinations (28 October 2011) *Brown* [83842/1].

<sup>223</sup> See par 6.3 below.

<sup>224</sup> Pension scheme trustees are called pension fund trustees in South Africa. See Chapter 1, par 8, where terms and definitions used in the thesis are explained. For a discussion of pension scheme trustees, see generally Ellison *Handbook*.

<sup>225</sup> A “trustee” is an individual or company appointed to carry out the purposes of a trust in accordance with the provisions of the trust instrument and general principles of trust law. See in this regard Blake *Pension Schemes* at 701 (Glossary).

on Pensions Law Reform, Goode recognised the growth, in both number and complexity, of trustees' responsibilities.<sup>226</sup> The Report raised several issues, primarily the need for clarifying trustees' duties and powers; the problem of trustees' not understanding their duties; and the corresponding need for expertise or training.<sup>227</sup> Trustees' duties and discretionary powers include deciding who should receive the death benefit when a pension scheme member dies.<sup>228</sup> The trustees have to distribute death benefits to surviving beneficiaries under the pension scheme trust deed and rules.<sup>229</sup> The trustees are appointed to carry out the purposes of a pension scheme<sup>230</sup> and may be individuals, companies, or sole corporate trustees.<sup>231</sup> Occupational pension scheme trustees must have an appropriate level of knowledge and understanding of pensions and trust law.<sup>232</sup> The degree of knowledge and understanding required is that appropriate for enabling a trustee to exercise his or her functions properly as the trustee of any relevant scheme.<sup>233</sup> Despite these provisions of sections 247 and 248 of the Pensions Act 2004, case law and determinations of the Ombudsman discussed in this chapter show that pension schemes in the United Kingdom are not immune from the

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<sup>226</sup> The Goode Report at 280.

<sup>227</sup> The Goode Report at 280. The issues referred to in the Report are like the issues facing pension fund trustees in South Africa. See Chapters 2 and 3 in this regard.

<sup>228</sup> The problems affecting occupational pensions, including the lack of clarity in defining trustees' duties and powers, were detailed in the Goode Report at 280-281. See also in this regard Nesbitt *Policy Making* in the preface.

<sup>229</sup> See par 5.1 below for a discussion of the significance of pension scheme rules.

<sup>230</sup> Section 7 of the Pensions Act 1995 regulates the appointment of trustees. A sponsoring employer may appoint half the trustees who sit on pension scheme boards. See also s 131 of the Pensions Act 2008 which amended ss 7(3) of the Pensions Act 1995. See in this regard Cocco and Volpin *Corporate Governance* at 4.

<sup>231</sup> A corporate trustee is a company that acts as a trustee of a pension scheme. The Pensions Act 1995 Part I provides for the appointment, removal, duties, and role of pension schemes trustees. If a scheme has individual trustees, decisions about the scheme are taken by those individuals. If the scheme has a corporate trustee, decisions about the scheme are taken by the board of directors of the trustee company. See in this regard Wright and Doraisamy *Mayer Brown: Trustee Guide* at 9. For a brief discussion of individual trustees and corporate trustees, see *Self Handbook* at 11-25. South Africa does not provide for the appointment of a corporate entity as a pension fund trustee.

<sup>232</sup> Sections 247 to 248 of the Pensions Act 2004. Section 247 deals with the requirements for knowledge and understanding of individuals acting as trustees, and s 248 with individuals exercising trustee functions on behalf of a corporate trustee. See also in this regard Robin Ellison *Handbook* at 1 (foreword).

<sup>233</sup> Sections 247(5) and 248 of the Pensions Act 1995.

challenges that their South African counterparts face in distributing retirement death benefits.<sup>234</sup>

#### 4.2.5 Her Majesty's Revenue and Customs (HMRC)

The HMRC plays a significant role in that pension schemes that need to qualify for tax exemptions must register with HMRC. The funds' rules must comply with certain conditions, such as being registered as an irrevocable trust.<sup>235</sup> The HMRC also has rules prescribing how pension schemes registered under it must pay pensions to scheme members and death benefits to qualifying beneficiaries if the scheme member dies while still in service.<sup>236</sup> The HMRC's distribution rules relevant to this chapter apply to the distribution of death benefits and are discussed below.

### **5 THE DISTRIBUTION OF OCCUPATIONAL PENSION SCHEME DEATH BENEFITS**

Pension scheme trustees are responsible for the distribution of occupational pension scheme death benefits. They are required to comply with applicable laws and their pension scheme's trust deed and rules. The applicable laws include the Pension Acts and the Pension Schemes Acts. Since most occupational pension schemes are created as trusts,<sup>237</sup> trust law applies when pension scheme trustees distribute death benefits to dependants and beneficiaries on the scheme member's death while still in service. Pension schemes rules, relevant provisions of the primary statutes governing the distribution of occupational pension schemes death benefits, and the distribution rules in the Finance Act 2004 and Taxation of Pensions 2014 are discussed individually below.

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<sup>234</sup> See n 207 above for a number of complaints that were lodged before the Ombudsman in the United Kingdom and those that were lodged before the Pension Funds Adjudicator in South Africa.

<sup>235</sup> See in this regard n 140 above; Self *Handbook* at 7; and Gaines *Individual Pension* at 2.

<sup>236</sup> See in this regard Ellison *Handbook* at 56, stating that HMRC registration is crucial to the operation of most schemes, and their rules may limit actions of pension scheme trustees. Many of these rules are stated in the Finance Act.

<sup>237</sup> See in this regard pars 1.7 and 2.2 above.

## 5.1 The pension scheme rules and the trust deed

Pension schemes are required to comply with the provisions of the scheme's governing documents: the scheme's trust deed<sup>238</sup> and rules.<sup>239</sup> The trust deed and rules, supplemented by pension legislation, prescribe what pension scheme trustees can and cannot do.<sup>240</sup> The scheme rules must also be registered with the HMRC<sup>241</sup> and the Regulator.<sup>242</sup> Registering pension schemes with the HMRC qualifies them for tax benefits.

The trust deed and scheme rules must also satisfy the relevant statutes that govern pension schemes.<sup>243</sup> The Pension Schemes Act 1993 provides for the definition of scheme rules of occupational pension schemes.<sup>244</sup> It states that references to the scheme rules, in relation to a pension scheme, refer to –

- (a) the rules of the scheme, except so far as overridden by a relevant legislative provision,
- (b) the relevant legislative provisions, to the extent that they have effect in relation to the scheme and are not reflected in the rules of the scheme, and
- (c) any provision which the rules of the scheme do not contain but which the scheme must contain if it is to conform with the requirements of Chapter 1 of Part 4 of this Act.

Pension scheme rules should accord with the applicable law: the general principles of trust law<sup>245</sup> and case law, and the relevant statutory provisions.<sup>246</sup> In other words, the rules should not contravene any common-law or statutory provisions. Trustees

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<sup>238</sup> The trust deed is the constitution of the trust. See in this regard Ellison *Handbook* at 43.

<sup>239</sup> Wright and Doraisamy *Mayer Brown: Trustee Guide* at 27. Pension scheme rules set out the benefits, the contributions, and the HMRC requirements. See in this regard Ellison *Handbook* at 43; and Self *Handbook* at 34.

<sup>240</sup> Wright and Doraisamy *Mayer Brown: Trustee Guide* at 27. The Pensions Ombudsman Determinations (30 November 2016) *The Estate of the late Mrs E* [PO-12824] in par 24 held that “all trustees have a fiduciary duty to ensure that benefits are paid correctly and in accordance with the Trust Deed and Rules of the Fund”. See also Blake 2003 *Pensions* 330 at 343.

<sup>241</sup> Sections 153 to 159 of the Finance Act 2004 deal with the registration and deregistration of pension schemes by the HMRC (Inland Revenue). Section 153(1) states that an application may be made to the Inland Revenue for a pension scheme to be registered with the HMRC. See par 4.2.5 above, where the HMRC is discussed.

<sup>242</sup> Section 6 of the Pension Schemes Act 1993.

<sup>243</sup> Self *Handbook* at 45; and Marshall *et al Pension Disputes* at 17.

<sup>244</sup> Section 100B(1) of the Pension Schemes Act 1993.

<sup>245</sup> Section 217 of the Pensions Act 2008 provides that subject to certain statutory modifications, the trustees of an occupational pension scheme are subject to the traditional law of trusts.

<sup>246</sup> Section 100B of the Pension Schemes Act 1993. See also Blake 2003 *Pensions* at 343.

derive their powers from the pension scheme rules and, in the absence of express provision in the rules, from statutes<sup>247</sup> and the common law.<sup>248</sup> The scheme rules set out when a dependant's pension is payable and the amount payable.<sup>249</sup>

In *Parizad*,<sup>250</sup> the Ombudsman found that where the trustees had a poor grasp of the scheme's rules or where they wilfully ignored the rules, this amounted to maladministration on their part.<sup>251</sup> The trustees' paramount responsibility is to pay death benefits to the beneficiaries in the correct manner. When exercising their discretionary powers to distribute death benefits, they must ensure that their decisions accord with their fiduciary duties,<sup>252</sup> the pension scheme rules, and applicable laws.<sup>253</sup>

Pension scheme rules in the United Kingdom, as in South Africa,<sup>254</sup> play a significant role in prescribing to the trustees the persons who will be the potential recipients of the death benefits. The challenge that pension scheme trustees face in the United Kingdom and South Africa is that the rules do not provide for the extent and the limit of trustees' discretionary powers. Yet any attempt by trustees to exercise their powers in a manner contrary to the rules is *ultra vires* and their decisions are void.<sup>255</sup>

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<sup>247</sup> See par 5.2 below for a discussion of statutory provisions.

<sup>248</sup> Blake *Pension Schemes* at 95.

<sup>249</sup> Section 17(2)(a) of the Pension Schemes Act 1993. The widow's guaranteed minimum must be half that of the earner (s 17(3) of the Pension Schemes Act 1993).

<sup>250</sup> Pensions Ombudsman Determinations (7 February 2012) *Parizad* [82720/2].

<sup>251</sup> In par 32. In this matter, a complaint was that the Trustees had failed to inform those acting for the complainant that there would be tax penalties if the lump sum death benefit payable on the death of the scheme member was not paid within the prescribed two-year time limit. The scheme member was the complainant's sister. Payment was not made within the two years, and as a result the complainant's benefit was reduced after payment of tax. The Ombudsman upheld the complaint against the Trustees because they had failed to take appropriate action to pay the complainant's benefit before it was classified as an unauthorised payment which made it subject to tax. If the Trustees had paid the lump sum death benefit within the HMRC prescribed time limit of two years, the payment would have been considered an authorised payment and the complainant would not have been required to pay the tax on such payment. See also par 5.1 below, where *Parizad* is explored.

<sup>252</sup> See par 5.4.1 below, where the fiduciary duties of pension scheme trustees are discussed.

<sup>253</sup> See par 5.3 below, where the discretionary powers of pension scheme trustees are discussed.

<sup>254</sup> See Chapter 3, par 4.4, where the significance of pension fund rules in South Africa is discussed.

<sup>255</sup> See Chapter 3, par 4.4.2, where *ultra vires* in South Africa is discussed.

## 5.2 *Distributing the death benefit under applicable statutory provisions*

If an occupational pension scheme member dies before reaching retirement age, various benefits may be payable to the surviving dependants. Pension scheme rules often provide that on the death of a pension scheme member who is still in service, two kinds of benefits are payable to surviving dependants and other beneficiaries:<sup>256</sup>

- a pension to a surviving widow, widower, and civil partner;<sup>257</sup> and
- a lump sum death benefit to surviving dependants and other beneficiaries.

The Pension Schemes Act 1993 is the primary statute regulating the distribution of death benefits paid to the widow, widower, or civil partner of an occupational pension scheme member who dies while still in service. Section 24D of the Pension Schemes Act 1993 deals with the payment of survivors' benefits to a widow, widower, or civil partner of the deceased scheme member. Those three people left behind are entitled to a pension if the member dies even before attaining normal pension age. The amount is at least half the value of the pension to which the pension scheme member would have been entitled by reference to his or her employment during the specified period.<sup>258</sup> The surviving spouse or civil partner

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<sup>256</sup> See, for example, the pension scheme rules in Pensions Ombudsman Determinations (18 June 2010) *Blundell* [78553/1] quoted in n 385 below.

<sup>257</sup> See Foster *Benefits* at 576, stating that the spouse's pension on death before retirement is typically 50 per cent of the employee's pension if employment had continued to normal retirement age or a percentage (ranging from 10 per cent to 30 per cent) of the employee's annual earnings at the date of death. In *Walker v Innospec Ltd* [2017] 4 All ER 1004 (UKSC), the Supreme Court confirmed that if a pension scheme member dies, the pension scheme has to pay the same death benefits to a surviving partner or same sex spouse as would be payable to an opposite sex spouse.

<sup>258</sup> Sections 24D(2) and 24D(3) of the Pension Schemes Act 1993 state:

"(2) The first benefit is that if the earner [is a man married to a woman or a woman married to a woman in a relevant gender change case, and the earner] dies (whether before or after attaining normal retirement age) leaving a widow, she is entitled to a pension of at least half the value of the pension to which the earner would have been entitled by reference to employment during the period—

- (a) beginning with 6<sup>th</sup> April 1978, and
- (b) ending with 5<sup>th</sup> April 1997.

(3) The second benefit is that if the earner [is a married woman (other than in relevant gender change case), a man married to a man, or a civil partner, and the earner] dies (whether before or after attaining normal pension age) leaving a widower [widow] or surviving civil partner, he or she is entitled to a pension of at least half the value of the pension to which the earner would have been entitled by reference to employment during the period—

- (a) beginning with 6<sup>th</sup> April 1988, and
- (b) ending with 5<sup>th</sup> April 1997."

qualifies to receive this payment as of right.<sup>259</sup> So, under this Act, the Pensions Act 1993, the potential recipients of a pension payable on the death of a member of an occupational pension scheme are the latter's widow, widower, or civil partner.<sup>260</sup> A pension may also be payable for a child either under 16 or 18, or under 21 or 23 if in full-time education.<sup>261</sup> The pensions are usually doubled if both parents are dead.<sup>262</sup>

The trust deed and rules may give the trustees some discretionary powers regarding pensions to widows, widowers, and dependants.<sup>263</sup> Some scheme rules stipulate that only widow's and widower's pensions are provided, but others will give the trustees discretion to pay pensions to other dependants.<sup>264</sup>

In addition to the above-stated pension payable to a surviving spouse or civil partner, most pension scheme rules also provide for the payment of lump sum death benefits on the death of a member before retirement.<sup>265</sup> These lump sums are invariably paid under a discretionary trust administered by the trustees as part of the

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<sup>259</sup> See *Catchpole v Trustees of the Alitalia Airlines Pension Scheme and Another* [2010] ICR 1405 in par 55; and Pensions Ombudsman Determinations (28 October 2011) *Brown* [83842/1] in par 22. *Self Handbook* at 39 states that it is unnecessary for widows or widowers to show financial dependency on the deceased scheme member. They qualify automatically for survivors' benefits because partners in a legal marriage may always be assumed to be financially dependent on one another. But an unmarried partner, whether of the same or opposite sex, can qualify for a survivors' pension only if he or she were financially dependent on the scheme member. Financial interdependence of the scheme member and his or her partner would be an acceptable criterion where, for example, the partner relied on a second income to maintain a standard of living which had depended on a joint income before the scheme member's death.

<sup>260</sup> A spouse or civil partner pension may continue for life, but a pension for a child must cease when the child turns 18 or, if later, the cessation of full-time education or vocational training. See in this regard Gaines *Individual Pension* at 17; and *Self Handbook* at 38.

<sup>261</sup> Foster *Benefits* at 576. Foster refers to the ages of 16 and 21. Gaines *Individual Pension* at 16 refers to the age of 18. See n 415 where pension scheme rules in Pensions Ombudsman Determinations (18 June 2010) *Blundell* [78553/1] referred to the age of 23.

<sup>262</sup> Foster *Benefits* at 576.

<sup>263</sup> *Self Handbook* at 38.

<sup>264</sup> At 38.

<sup>265</sup> Foster *Benefits* at 575 states that lump sum benefits are commonly provided on death before retirement. The benefit is typically from once times annual earnings to four-times earnings. The maximum lump sum under a tax-approved plan is four times annual earnings plus an amount equal to the employee's own contributions with interest. See in this regard Blake *UK Pension Schemes* at 118-119; and *Self Handbook* at 36, stating that "the recipient pays no income tax on lump sum and, provided the lump sum is not paid into the deceased employee's estate, it is free of inheritance tax". Lump sum benefits are commonly provided under discretionary trusts where employees can nominate a beneficiary, but this is not binding on the trustees. See also in this regard Gaines *Individual Pension* at 30.

pension scheme,<sup>266</sup> and payments are at the trustees' discretion.<sup>267</sup> Potential recipients are not restricted to widows and widowers but include other persons whom trustees may consider deserving. The Pension Schemes Acts and the Pensions Acts include no provisions that specifically prescribe how these lump sum death benefits must be distributed.

Unlike the position on the payment of pensions, trustees have no restrictions on the list of possible beneficiaries who may receive the lump sum death benefit.<sup>268</sup> Indeed, pension scheme members may nominate anyone as a beneficiary, and that person need not be a dependant of or related to the member.<sup>269</sup> When making a distribution, the trustees must consider all the dependants and the beneficiaries nominated by the scheme member.<sup>270</sup> Being a surviving dependant or a nominated beneficiary does not entitle this person to receive all or a share of the lump sum death benefit automatically.<sup>271</sup> This person's only entitlement is to be considered as one of the potential recipients of the lump sum death benefit when the trustees exercise their discretion to distribute it. In the determination of V,<sup>272</sup> the Ombudsman dealt with Ms V's complaint about the trustees' decision not to award her any death benefits under their discretionary powers.<sup>273</sup> The Ombudsman upheld the complaint because the trustees' decision not to exercise their discretion in favour of her was flawed.<sup>274</sup> The Ombudsman confirmed that just because a person was a dependant, it did not mean that he or she should automatically be awarded a death benefit. If a person is identified as an eligible recipient, though, the trustees should give such a person equal consideration with any other potential recipients.<sup>275</sup> The fact that a

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<sup>266</sup> Marshall *et al Pension Disputes* at 7.

<sup>267</sup> Foster *Benefits* at 575. Self *Handbook* at 36 states that the amount that the trustees can pay is not discretionary but will be laid down in the trust deed and rules. Rather, the discretion power lies in deciding who receives the money. See also Gaines *Individual Pension* at 30; and Marshall *et al Pension Disputes* at 7.

<sup>268</sup> Blake *Pension Schemes* at 97; and Blake 2003 *Pensions* 330 at 344.

<sup>269</sup> Self *Handbook* at 36.

<sup>270</sup> See in this regard Pensions Ombudsman Determinations (13 August 2013) *Young* [PO-1758] in par 22.

<sup>271</sup> See in this regard Pensions Ombudsman Determinations (25 May 2016) *V* [PO-7864].

<sup>272</sup> Pensions Ombudsman Determinations (25 May 2016) *V* [PO-7864].

<sup>273</sup> In par 1. This determination was in respect of a personal pension, but the principles apply equally.

<sup>274</sup> In par 2.

<sup>275</sup> In par 36.



person is a dependant is sufficient to entitle him or her to consideration without the need to determine whether the deceased pension scheme member would have nominated him or her for the lump sum death benefit.<sup>276</sup>

The trustees must find all the surviving dependants and nominated beneficiaries that they could be reasonably expected to trace. A potential beneficiary need not depend on the deceased pension scheme member to be considered for a lump sum death benefit allocation.<sup>277</sup> And it is the trustees who have the ultimate discretion to decide whether a particular dependant or nominated beneficiary should be allocated this benefit.<sup>278</sup> In *Crossan*,<sup>279</sup> the Ombudsman determined that the complaint should not be upheld against the trustees, because it had been reasonable for them to decide that the complainant did not meet the definition of a beneficiary and so could not qualify for the payment of a lump sum.<sup>280</sup> It follows that trustees are obliged to ascertain the identity of beneficiaries and take the necessary steps to ensure that a death benefit is distributed according to the pension scheme rules.<sup>281</sup>

The Finance Act 2004 and the Taxation of Pensions Act 2014 contain distribution rules for death benefits payable to dependants and other beneficiaries on the death of a scheme member while in service.<sup>282</sup> These rules are for taxation purposes. Yet they frame how rules of pension schemes registered with the HMRC are structured and thus how the resultant death benefits are paid to qualifying beneficiaries.<sup>283</sup> If, after the death of a scheme member, the death benefits are paid to qualified beneficiaries in accordance with the Finance Act 2004 and the Taxation of Pensions Act 2014, rather than to the member's estate as of right, the beneficiary avoids any liability for inheritance tax on the payment.<sup>284</sup> For example, under section 164 of the Finance Act 2004, a registered pension scheme is authorised to make only two

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<sup>276</sup> In pars 36 and 37.

<sup>277</sup> See par 4.1.3 below, where potential recipients of death benefits are discussed.

<sup>278</sup> See par 5.3 below, where the discretion of pension scheme trustees is discussed.

<sup>279</sup> Pensions Ombudsman Determinations (5 September 2014) *Crossan* [PO-2503].

<sup>280</sup> In par 37. The complainant was not financially dependent on the deceased and lived at a separate address from him. The Ombudsman in par 41 agreed with the trustees' conclusion that the complainant did not fall within the class of "beneficiary" as described by the rules.

<sup>281</sup> Stewart and McNally 2014 *Journal of Financial Regulation and Compliance* 2 at 5-6.

<sup>282</sup> See par 5 below for a discussion of distribution rules in the Finance Act 2004 and Taxation of Pensions Act 2014.

<sup>283</sup> See above par 1.1 (pension laws) and par 4.2.5 (HMRC).

<sup>284</sup> See in this regard Manamela *System* at 114.

kinds of payments to, or in respect of the death of, a member of the pension scheme. These payments are (a) pensions permitted by the pension rules or the pension death benefit rules<sup>285</sup> and/or (b) lump sums permitted by the lump sum rule or the lump sum death benefit rule.<sup>286</sup> In terms of sections 167 (pension death benefit rules) and 168 (lump sum death benefit rule), and Schedule 28 to the Finance Act 2004, when a pension scheme member dies, the trustees of that member's scheme are only authorised to pay out benefits in two forms (or in both forms). One form is a pension to the widow or widower or spouse or dependant.<sup>287</sup> And the other is a lump sum death benefit to the surviving dependants and non-dependants (the nominated beneficiaries).<sup>288</sup>

The provisions and the distribution rules of the Finance Act are of particular relevance to the interpretation of pension scheme rules because all or almost all occupational pension schemes are intended to be tax-efficient and to meet HMRC requirements.<sup>289</sup> So HMRC requirements are relevant to the interpretation of pension scheme rules.<sup>290</sup>

### 5.3 *The discretionary powers of pension scheme trustees*

A scheme's trust deed and rules generally give trustees a wide range of discretionary powers to administer the scheme. These include powers on how to distribute death benefits and whether to pay a dependant's pension.<sup>291</sup> The statutes

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<sup>285</sup> Section 164(1)(a) of the Finance Act 2004.

<sup>286</sup> Subsection 164(1)(b) of the Finance Act 2004.

<sup>287</sup> Generally, the widow or widower who benefits is defined as the late employee's legal wife or husband. This benefit is nearly always a multiple of annual salary, commonly two and sometimes the Inland Revenue maximum of four. See in this regard Spill *Practical Pensions* at 21. See also in this par 5.2 above, where it is stated that pension scheme rules may make provision to pay a pension to the member's spouse, civil partner, or any other dependant. The level of the death benefit received is generally linked to the pension and therefore salary previously received by the deceased. See in this regard Whiteford *Adapting* 184-185.

<sup>288</sup> In South Africa, a benefit that is payable as a pension (not a lump sum death benefit) is restricted to a spouse or a child (or children) of the deceased fund member. See Chapter 3, par 1, where the legal position in South Africa is discussed in this regard.

<sup>289</sup> See in this regard *Barnardo's v Buckinghamshire* [2016] EWCA Civ 1064 at 8-10.

<sup>290</sup> See in this regard *Barnardo's v Buckinghamshire* [2016] EWCA Civ 1064 at 8-10.

<sup>291</sup> Wright and Doraisamy *Mayer Brown: Trustee Guide* at 4 and 7. A discretion is a power to make a choice. One example is to decide whether to pay a death benefit to a particular dependant. See in this regard Ellison *Handbook* at 46. Self *Handbook* at 37 states that the trust deed and rules will typically allow the trustees to split any lump sum between different beneficiaries, and this gives more scope for dealing with difficult decisions.

(the Pensions Acts and Pension Schemes Acts) in the United Kingdom do not list categories of potential death benefit recipients as section 37C of the South African Pension Funds Act does.<sup>292</sup> Nor are there restrictions in the United Kingdom on the potential beneficiaries who may qualify to receive death benefits as dependants or be nominated by the pension scheme member.<sup>293</sup> The trustees have a substantial discretion to pay the whole or any part for the lump sum death benefit to one or more of the member's dependants and in such proportions as they may decide.<sup>294</sup> The payment of death benefits and the amount payable should accord with the pension scheme rules.<sup>295</sup> The payment of death benefits at the discretion of trustees is similar to the position in South Africa, where trustees are given powers by section 37C of the Pension Funds Act 1956 to use their discretion in distributing death benefits.<sup>296</sup> The discussion in Chapter 3 highlighted various challenges that pension fund trustees in South Africa encounter when they exercise their discretion in distributing retirement fund death benefits in terms of section 37C of the Pension Funds Act.<sup>297</sup> The discussion below examines the "discretion" that trustees are required to exercise when distributing death benefits in the United Kingdom.<sup>298</sup> Reference is made to certain established principles and/or key factors considered

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<sup>292</sup> See Chapter 3, par 2.2.

<sup>293</sup> A nominee can be any person that the pension scheme member wishes to include, and the member's wishes are not limited to a particular group of people. See par 4.1.3 above in this regard, and par 4.1.2 for the restriction on the definition of a "dependant".

<sup>294</sup> Blake *Pension Schemes* at 96 - 97. See also Wright and Doraisamy *Mayer Brown: Trustee Guide* at 7, stating that "trustees exercising a discretion may do so only within the terms of the power they are given. For example, a typical scheme rule about making lump sum payments after a member dies includes a list of relatives, dependants and so on, and gives the trustees a discretion about which of the people on the list they will actually make the payment to. But the trustees cannot decide to pay the lump sum to someone who is not on the list, however strongly they feel that that person ought to get the payment — the trustees would be acting outside the terms of the discretion, and beyond their powers, if they did so. It is therefore important to look at precisely what the rules say".

<sup>295</sup> See par 5.1 above for a discussion of the significance of pension scheme rules. See Pensions Ombudsman Determinations (5 July 2010) *Morton* [77828/2] in par 4. In Pensions Ombudsman Determinations (7 February 2012) *Parizad* [82720/2] in par 25, the Ombudsman confirmed that under the scheme rules, the trustees have the power and the responsibility to pay the lump sum death benefit to one or more of the listed potential beneficiaries in such shares as they, in their absolute discretion, shall decide. See pars 1 and 4.2.5 above for a brief explanation of the pensions tax rules (HMRC restrictions) on the payment of death benefits.

<sup>296</sup> See in this regard Chapter 3, par 1; and Manamela *System* at 114.

<sup>297</sup> See Chapter 3, par 3 in this regard.

<sup>298</sup> Ellison *Handbook* at 55 states that "the point of a discretion is simply to allow more flexible management of the trust. There are many decisions that have to be taken that cannot be fully catered for in any document that need personal knowledge, careful judgment and simple common sense to take. And there are some problems that simply cannot be seen".

by trustees when exercising their discretionary powers. In addition, the Ombudsman's determinations are analysed, and instances where the trustees' discretion was considered adequate or inadequate are pointed out.

It is helpful here to compare the United Kingdom pension scheme trustees' role in the payment of death benefits with the equivalent role of their South African counterparts. When a pension scheme member dies, trustees in both countries must identify relevant dependants and nominated beneficiaries (nominees) who may qualify to receive the death benefits under the pension scheme rules.<sup>299</sup> In both countries, the trustees must consider factors relevant to the particular situation before exercising their discretion.<sup>300</sup> The following paragraph highlights the challenges that trustees in the United Kingdom face when exercising their discretionary powers to pay death benefits because the extent of their discretion is not clearly defined.

The payment of a death benefit to the surviving dependants and non-dependant nominated beneficiaries of the deceased scheme member requires the trustees to exercise discretionary powers. So they must exercise their discretion in determining the beneficiaries who should receive the death benefit and the amounts payable if a pension scheme member dies while still in service. The trustees must consider paying the death benefit to surviving dependants and whomever the pension scheme member nominates. If no one is nominated and there are no surviving dependants, the death benefit is paid into the deceased member's estate and taxed.<sup>301</sup>

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<sup>299</sup> See Chapter 3, par 3.

<sup>300</sup> See par 5.5.3 below for the position in the United Kingdom and Chapter 3, par 2.2, for a discussion of the pension fund trustees' duty to consider relevant factors in South Africa.

<sup>301</sup> Blake *UK Pension Schemes* at 97; and Blake *2003 Pensions* at 344. The payment of a lump sum death benefit to the deceased member's estate where the trustees could trace neither dependants nor nominated beneficiaries is similar to the position in South Africa. See Chapter 3, par 2.2.4 for a discussion of the allocation of death benefits in the absence of dependants and nominees in South Africa.

#### 5.4 *The duties of pension scheme trustees*

Chapter 3 explained that the sources of fiduciary duties derive from trust law and that South African trust law is modelled on the relevant English law.<sup>302</sup> The duties of pension scheme trustees in the United Kingdom when distributing pension scheme death benefits are discussed below. The powers conferred on these trustees to distribute death benefits must be exercised equitably in respect of various potential beneficiaries who often have competing interests in the same death benefit.<sup>303</sup> Flannigan succinctly captures the challenge that pension scheme trustees face when distributing death benefits to beneficiaries:

Trustees may be required to distribute income and capital to a potentially large number of present and future beneficiaries with widely different beneficial interests. It is not always possible for the settlor to perceive and provide for the various difficulties that may arise in the course of making this distribution amongst beneficiaries with competing interests. Consequently, where no provision is made, the law has provided direction to the trustee in the form of specific fiduciary rules or duties. Thus, trustees are to treat beneficiaries of the same class equally and beneficiaries of different classes fairly. Trustees must not prefer or be partial to individual beneficiaries or classes of beneficiaries for any purpose unless so instructed.<sup>304</sup>

##### 5.4.1 Fiduciary duties

The fiduciary principle has been developed in equity: a prescriptive framework was developed to regulate the fiduciary's behaviour, particularly the discretionary use of the powers.<sup>305</sup> Trustees exercising their powers to distribute death benefits have a fiduciary duty<sup>306</sup> to pay them correctly according to the particular pension scheme

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<sup>302</sup> See Chapter 3, par 4 dealing with the sources of pension fund trustees' powers in South Africa; and Chapter 1, par 6.1, n 110.

<sup>303</sup> See par 5.3 above in this regard.

<sup>304</sup> See Flannigan 1989 *Oxf J Leg Stud* at 311-312. Although this statement was made in the context of the distribution of trust property, it is submitted that the observations made apply equally to pension scheme trustees.

<sup>305</sup> See in this regard Van Setten *Management* at 101 in par 3.64.

<sup>306</sup> See *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 52. The Court of Appeal in *Pitt* in par 231 confirmed that pension scheme trustees owe their members and dependants a fiduciary duty in exercising the power conferred on them to distribute death benefits. See also Chapter 3, par 5 (especially pars 5.3 and 5.4) where the fiduciary duties of trustees in South Africa were discussed.

rules.<sup>307</sup> Before exercising their discretionary power, the trustees have to consider and balance the interests of all potential beneficiaries whom they can trace.<sup>308</sup> They also have to inform themselves and properly consider matters relevant to their decision.<sup>309</sup> They are required to take into account all relevant considerations and refrain from taking into account any irrelevant ones.<sup>310</sup> The trustees' fiduciary obligations are directed at ensuring that the beneficiaries' interests under the trust are protected and that any breach of such duty does not prejudice them.<sup>311</sup> It is worth noting that trustees in both the United Kingdom and South Africa have the following in common concerning the distribution of death benefits:

- They are given discretionary powers to distribute the death benefits to potential beneficiaries.
- They must comply with their fiduciary obligations and other duties when exercising their discretionary powers.
- They owe fiduciary duties both to their schemes and to the members of the schemes and their beneficiaries.<sup>312</sup>

Trustees have a fiduciary relationship with their beneficiaries and, as such, are subject to the fiduciary obligation of loyalty.<sup>313</sup> The fiduciary duty of pension scheme trustees requires that they

- act in the best interest of their scheme and its beneficiaries,
- act with impartiality,
- avoid conflicts of interests, and

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<sup>307</sup> See Pensions Ombudsman Determinations (30 November 2016) *The Estate of the late Mrs E* [PO-12824] in par 24.

<sup>308</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 52.

<sup>309</sup> In pars 83 and 106.

<sup>310</sup> In par 83.

<sup>311</sup> In par 83.

<sup>312</sup> See Chapter 3, par 5 (especially pars 5.3 and 5.4) where the fiduciary duties of trustees in South Africa were discussed.

<sup>313</sup> Tilba and Reisberg 2019 *MLR* 456 at 467.

- act in good faith and not derive personal profit from the exercise of fiduciary responsibilities.<sup>314</sup>

These categories of fiduciary obligations of pension scheme trustees are discussed below.

#### 5.4.1.1 *The duty to act in the best interests of the scheme and its beneficiaries*

Under the common law, trustees must act in the best interests of the trust beneficiaries.<sup>315</sup> The highest standard required from trustees is that they must act in the beneficiaries' best interests.<sup>316</sup> It is not enough for a trustee to have acted in good faith and to benefit the beneficiaries if it is clear to the court that the actions taken were not in the beneficiaries' best interests.<sup>317</sup> The trustees' general duty to act in the best interests of the beneficiaries requires that particular powers be used for specified purposes.<sup>318</sup> The duty to act in the trust beneficiaries' best interests is also known as the duty of loyalty. This principle governs fiduciary obligations.<sup>319</sup> So pension scheme trustees owe fiduciary duties to the scheme and pension scheme members and beneficiaries. Some of these duties are entrenched in statutes.<sup>320</sup>

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<sup>314</sup> At 467.

<sup>315</sup> In *Cowan v Scargill* [1984] 2 All ER 750 (Ch) at 766, where Megarry V-C said that the duty of trustees is to exercise their powers in the best interests of the present and future beneficiaries of the trust and not differentiating between classes of beneficiaries, should be the starting point. See also in this regard Foster *Benefits* at 54; Langbein 1997 *Yale LJ* 165; Self *Handbook* at 34 and 57; and Tilba and Reisberg 2019 *MLR* 456 at 459.

<sup>316</sup> Nobles *Pensions* at 65. Hayton *Extent* at 3, in par 4 and authorities cited therein, states that "for trustees to be acting in the best interests of the beneficiaries when exercising their discretionary powers, they need to be sufficiently informed (by taking account of key factors and ignoring irrelevant factors) to be able to give effect to the purposes for which those powers were conferred upon them".

<sup>317</sup> At 65.

<sup>318</sup> At 66, referring to Finn *Fiduciary Obligations* at 39, stating that best interests and purposes are cumulative, not alternative, standards. Nobles *Pensions* at 66 also states that the purposes are simply spelled out from the duty to act in the beneficiaries' best interests; they are also constructed out of the rules of the particular instrument. On this basis, a power must not be used other than for the purpose which is expressly, or implicitly, authorised under the trust deed or rules. This allows a court to decide that powers were included to enable trustees to exercise discretions other than for the best interests of beneficiaries.

<sup>319</sup> See in this regard Van Setten *Management* at 100 in pars 3.61 and 3.62. Van Setten refers to Finn *Fiduciary Law* at 9. Finn states the consequences for those who owe a fiduciary duty of loyalty to another person: "a fiduciary (a) cannot misuse his position, or knowledge or opportunity resulting from it to his own or to a third party's possible advantage; or (b) cannot in any matter falling within the scope of his service, have a personal interest or an inconsistent engagement with a third party — unless this is freely and informedly consented to by the beneficiary or is authorised by law."

<sup>320</sup> See in this regard reg 4(2) of the Occupational Pension Schemes (Investment) Regulations (SI 2005/3378), which states that the trustee's foremost duty to beneficiaries is to act in their "best

This duty extends to potential beneficiaries of the death benefit, such as dependants and nominated beneficiaries, where the pension scheme member dies while still in service.<sup>321</sup> A pension scheme trustee's role is to distribute the death benefit in the best interests of pension scheme members and their scheme beneficiaries according to the trust deed<sup>322</sup> and pension scheme rules.<sup>323</sup> The duty of loyalty consists of the duty to act in good faith, the duty to avoid conflicts of interest, and the duty to act impartially towards beneficiaries. The central focus of the duty of loyalty is to ensure that pension scheme trustees do not misuse their powers for gain at the beneficiaries' expense. The duty of loyalty that applies to pension scheme trustees in the United Kingdom resembles that of pension fund trustees in South Africa. The duties of pension scheme trustees to act with impartiality, avoid conflict of interests, and act in good faith are briefly discussed below.

#### 5.4.1.2 *The duty to act with impartiality*

Trustees should act impartially, using the same care and vigilance as if for their own financial affairs, especially when paying the right money to the right people.<sup>324</sup> Trustees must distribute death benefits to all potential beneficiaries meeting the pension scheme rules. They must reach a final decision after considering the circumstances objectively, taking into account all the relevant facts and ignoring irrelevant ones.<sup>325</sup>

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interests", except where there is a potential conflict of interest, when they must act in the sole interest of members and beneficiaries.

<sup>321</sup> Ellison *Pensions Disputes* at 7.

<sup>322</sup> It was shown in par 3 above that most occupational pension schemes in the United Kingdom are set up as trusts. See in this regard Langley and Mulcahy *Pension Schemes* at 58-59, stating that "the trust deed will normally provide that, when a member dies, his benefits are held on broad discretionary trusts, so that payments can be made to or for the benefit of his family or dependants, or as specified in any letter of wishes he may have given to the trustees. The employee must not be given any power to direct the trustees as to how to apply these benefits since this may cause him to be deemed to be 'beneficially entitled' to the benefits for IHT purposes. Furthermore, the employee's estate should not be included as a potential beneficiary as (in the view of the Inland Revenue) this may give rise to an IHT liability for the trustees". The initials IHT stand for inheritance tax.

<sup>323</sup> See Pensions Ombudsman Determinations (13 August 2013) *Young* [PO-1758] in par 12.

<sup>324</sup> Spill *Practical Pensions* at 80. See also Wright and Doraisamy *Mayer Brown: Trustee Guide* at 4.

<sup>325</sup> Trustees have a duty to maintain equality between beneficiaries in accordance with scheme rules, and this includes acting fairly in making decisions for the distribution of benefits. See in this regard Stewart and McNally 2014 *Journal of Financial Regulation and Compliance* 2 at 5-6.



*Edge and Others v Pensions Ombudsman and Another*<sup>326</sup> is a crucial decision of the Court of Appeal in England that helps clarify the considerations that trustees should take into account when exercising their discretionary powers. The court held that the duty to act impartially requires a discretionary power to be exercised for the purpose for which it was given. Proper consideration must be given to the relevant matters, and irrelevant ones must be excluded. So a preference for one set of beneficiaries may result from a proper exercise of that power. The court's following comments have become authoritative regarding trustees' exercises of discretionary powers:

The essential requirement is that the trustees address themselves to the question what is fair and equitable in all the circumstances. The weight to be given to one factor as against another is for them.

Properly understood, the so-called duty to act impartially—on which the ombudsman placed such reliance—is no more than the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power: that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant. If pension fund trustees do that, they cannot be criticised if they reach a decision which appears to prefer the claims of one interest—whether that of employers, current employees or pensioners—over others. The preference will be the result of a proper exercise of the discretionary power.<sup>327</sup>

The principles expounded above by the Court of Appeal in *Edge* concern the duty of trustees to act impartially in the context of amending or changing the rules of a pension scheme. Yet it is submitted that these principles are just as applicable when the trustees have to exercise their discretionary powers, including the distribution of death benefits. It is noteworthy that the principles stated above have been applied in a few court cases and Adjudicator's determinations in South Africa.<sup>328</sup>

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<sup>326</sup> *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA).

<sup>327</sup> At 587. See also Pensions Ombudsman Determinations (31 July 2018) *Mrs S* [PO-17636] in par 29, referring with approval to the Court of Appeal's ruling.

<sup>328</sup> *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA) has been referred to by the courts and the Pension Funds Adjudicator in South Africa. See, for example, *Meyer v Iscor Pension Fund* 2003 2 SA 715 (SCA) in par 22, cited in Chapter 2, n 122 and Chapter 3 par 5.3.2.2; *Senekal and Others v Municipal Gratuity Fund* 2000 10 BPLR 1175 (PFA) at 1183-1184 in pars 27 and 29, cited in Chapter 3, n 823; and *Sentinel Retirement Fund v C V Bold and Others* (80105/2015) 2017 ZAGPPHC 83 (7 March 2017) in pars 31 and 32. See also *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 76, where Lloyd LJ quoted *Edge*.

#### 5.4.1.3 The duty to avoid conflicts of interest

The trustees are required to avoid conflicts of interest, and decisions that they take should not promote their interests at the expense of the interests of potential recipients of death benefits.<sup>329</sup> In other words, trustees must not place themselves in a position where their interests may conflict with their duties to the pension scheme and beneficiaries.<sup>330</sup> The trustees must appropriately identify, monitor, and manage conflicts between their interests and those of potential death benefit beneficiaries.<sup>331</sup> In the Pension Ombudsman's determination of *Dominator 2012 Pension Scheme (Dominator Scheme)*, *Donington MC Pension Scheme (Donington MC Scheme)* and *Commando 2012 Pension Scheme (Commando Scheme)* (collectively, *the Schemes*),<sup>332</sup> the Ombudsman found, among other issues, that the trustee had conducted himself in this way that led to the members' benefits and rights in the Schemes being lost: the trustee invested the Schemes' funds in a manner that did not agree with the Schemes' purpose,<sup>333</sup> acted under a conflict of interests, breached his investment duties, and committed multiple breaches of

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<sup>329</sup> Section 39 of the Pensions Act 1995 deals with the exercise of powers by member trustees. It states that "no rule of law that a trustee may not exercise the powers vested in him so as to give rise to a conflict between his personal interest and his duties to the beneficiaries shall apply to a trustee of a trust scheme, who is also a member of the scheme, exercising the powers vested in him in any manner, merely because their exercise in that manner benefits, or may benefit, him as a member of the scheme". See also *Keech v Sandford* (1726) 2 Eq Cas Abr 741, (1726) 25 ER 223, where the trustee of a trust for the benefit of a minor child acquired a lease property for his own benefit instead of that of the minor beneficiary. The Lord Chancellor (Lord King) found that there was a breach even though the trustee had acted honestly and had not known that he was committing a breach.

<sup>330</sup> The basic principles about conflict of interest and conflict of duty were summarised in *Re Thompson's Settlement, Thompson v Thompson* [1986] Ch 99 at 115, where Vinelott J explained that "a man must not put himself in a position where the duty and [personal] interest conflict or where his duty to one conflicts with his duty to another". See also in this regard Wright and Doraisamy *Mayer Brown: Trustee Guide* at 7, and Lord Herschell's explanation in *Bray v Ford* [1896] AC 44 (HL) at 52.

<sup>331</sup> Ellison *Handbook* at 59 states that there is nothing wrong in itself in having a conflict. The main concern is to be able to judge when a conflict has become so great that independent advice is needed. Just because there is a conflict of interest is no reason (provided it is declared) to leave the board or even to leave the room (at 59).

<sup>332</sup> Pensions Ombudsman's Determinations (23 June 2020) *Dominator 2012 Pension Scheme (Dominator Scheme)*, *Donington MC Pension Scheme (Donington MC Scheme)* and *Commando 2012 Pension Scheme (Commando Scheme)* (collectively, *the Schemes*) (CAS-30918-M4P3).

<sup>333</sup> In the *Dominator* matter, the trustee invested members' entire funds under the schemes in preference share capital in a company of which he was the sole director and a shareholder. He took no written advice in relation to the investment.

trust.<sup>334</sup> The Ombudsman directed the trustee to repay the Schemes the amount lost in the investment he made to his company and pay the applicants for their distress and inconvenience he caused through his maladministration of the Schemes.<sup>335</sup>

#### 5.4.1.4 *The duty to act in good faith*

Under the common law, trustees must act in good faith.<sup>336</sup> A fiduciary, in this analysis a pension scheme trustee, owes a general duty of “loyalty” to the beneficiary of the fiduciary duty. This duty is an over-arching characterisation of the fiduciary obligation owed by the fiduciary.<sup>337</sup> As stated in Chapter 3 of this thesis, the duty of good faith is a specific duty that evolved from the general duty of loyalty.<sup>338</sup> To comply with the duty of loyalty while exercising the discretion to distribute death benefits to dependants and beneficiaries, trustees must conduct themselves honestly and in good faith.<sup>339</sup> In *Pitt and Another v Holt and Another; Futter and Another v Futter and Others*,<sup>340</sup> the court confirmed that pension scheme rules usually contain a trustee exoneration clause. This clause renders the trustees immune from liability for any breach of trust arising from a mistake or omission made in good faith.<sup>341</sup> Trustees’ duties to act in good faith in the United Kingdom and South Africa are comparable.<sup>342</sup>

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<sup>334</sup> In the *Dominator* matter, the Ombudsman found the trustee had acted dishonestly and in breach of his duty of no conflict, his duty not to profit, and his duty to act with prudence. The Ombudsman also found that the trustee had breached his statutory duty to have acquired knowledge and understanding of the law relating to pension and trusts.

<sup>335</sup> See also The Pensions Ombudsman “Trustee Dishonesty and Wrongdoing” available at <https://www.pensions-ombudsman.org.uk/case-study/trustee-dishonesty-and-wrongdoing> (last accessed on 16 September 2021).

<sup>336</sup> Blake 2003 *Pensions* at 343. See also in this regard Self *Handbook* at 34. The duty of trustees in making decisions in the exercise of their fiduciary functions is to act in good faith, responsibly and reasonably. They must inform themselves, before making decision, of matters relevant to the decision. See in this regard *Scott v National Trust for Places of Historic Interest and Natural Beauty* [1998] 2 All ER 705 (Ch) at 717-718. See also Hayton *Extent* for a full analysis of pension trustees’ obligations in the United Kingdom.

<sup>337</sup> See in this regard Flannigan 1989 *Oxf J Leg Stud* 285 at 310. In this article the author calls a fiduciary a “trusted party” and the beneficiary of the fiduciary obligation a “trusting party”.

<sup>338</sup> See in this regard, Chapter 3, par 5.3.2.1, where the duty of good faith is discussed.

<sup>339</sup> See Blake 2003 *Pensions* at 343.

<sup>340</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA).

<sup>341</sup> In par 141.

<sup>342</sup> See in this regard, Chapter 3, par 5.3.2.1, where the duty of good faith is discussed.

#### 5.4.2 The duty of care

A trustee's duty of care exists together with his or her fiduciary obligation.<sup>343</sup> The trustee must manage the trust business in the way that an ordinary prudent man of business would conduct his own affairs.<sup>344</sup> Trustees must also exercise the duty of care when distributing death benefits, as they owe this duty to pension scheme members and their dependants.<sup>345</sup> Stewart and McNally succinctly summarise the trustees' duty of care:

[Trustees must] exercise, in relation to all matters affecting the fund, the same degree of care and diligence as an ordinary prudent person would exercise in dealing with property of another for whom the person felt morally bound to provide and to use such additional knowledge and skill as the trustee possesses or ought to possess by reason of the trustee's profession, business or calling.<sup>346</sup>

If the trustee does not act in compliance with the duty of care and a beneficiary suffers a loss, the pension fund and/or its trustees may be ordered to compensate the beneficiary for the loss suffered.

The trustee's duty of care to a scheme member extends (and thus is also owed) to the member's beneficiaries.<sup>347</sup> One example of this principle is *Wheeldon*.<sup>348</sup> The complainant was the widow of a former member of the pension scheme. She complained that the scheme administrator had provided her late husband, the

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<sup>343</sup> See also in this regard Flannigan 1989 *Oxf J Leg Stud* at 312, n 139.

<sup>344</sup> See *Learoyd v Whiteley* (1887) LR 12 App Cas 727 (HL) at 733 (Lord Halsbury LC), which was an appeal from *Re Whiteley, Whiteley v Learoyd* (1886) 33 ChD 347 (CA) at 355 (Lindley LJ).

<sup>345</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 75.

<sup>346</sup> Stewart and McNally 2014 *Journal of Financial Regulation and Compliance* 2 at 5-6, referring to the Goode Report (1993) in par 4.9.7.

<sup>347</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 107. In Pensions Ombudsman Determinations (4 January 2012) *Wheeldon* [81348/2] in par 34, the Ombudsman held that the complainant, who was also beneficiary, was a contingent member of the scheme, and that the information that was given to the scheme member before his death concerned her directly. Although the scheme member acted on the information, the complainant suffered the loss. The Ombudsman concluded that it would be a highly unattractive interpretation of the position if, after the death of the scheme member, it no longer mattered whether the information that was given to the deceased scheme member while alive about matters following his death was reliable or not.

<sup>348</sup> Pensions Ombudsman Determinations (4 January 2012) *Wheeldon* [81348/2]. The Ombudsman concluded that there was neither a dispute that the deceased scheme member, while still alive, was given incorrect information nor was there any dispute that the pension the complainant received from the NHS Pension Scheme was correctly calculated in accordance with the Scheme's Regulations (in par 26). The complainant contended that had her late husband been given correct information, the provisions he made in his will would have been different (in par 26).

scheme member, with an incorrect estimate of the widow's pension benefits.<sup>349</sup> Relying on the administrator's statements, the scheme member had left specific amounts to his wife and children in his will. After his death, the administrator informed the complainant that the statements of benefits supplied to the scheme member had been inaccurate, and her pension was lower than set out in the statement. The complainant claimed for the losses she had suffered because of the inadequate provision made by her husband in his will based on the incorrect statements. The Ombudsman confirmed that the scheme administrators owed both the pension scheme member and the potential beneficiary a duty of care.<sup>350</sup> The scheme member had taken the spouse's pension into account in planning his finances and relied on the incorrect statement to determine how much money he should leave to his wife. Had he known that the spouse's pension would be less, he would have planned his financial affairs differently.<sup>351</sup> The Ombudsman found that the complainant suffered a loss in the region of £35 000. He ordered the scheme administrator to pay her this sum within 28 days from the determination date.<sup>352</sup>

#### 5.4.3 The duty to disclose reasons for distributions

In performing their duty to disclose reasons for their distributions, the pension scheme trustees must minute full reasons for their decision to allocate or not to allocate a death benefit to a potential beneficiary.<sup>353</sup> Failure to formally record precise reasons why a potential beneficiary's claim for a death benefit is rejected may itself amount to maladministration. Ellison states that a trustee is not bound to give reasons (unless required in the trust deed) for any reasons.<sup>354</sup> Court cases such as *Re Londonderry's Settlement*<sup>355</sup> and *Wilson and Another v Law Debenture*

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<sup>349</sup> In par 32.

<sup>350</sup> In par 34.

<sup>351</sup> In par 36.

<sup>352</sup> In par 38.

<sup>353</sup> Self *Handbook* at 37-38 states that when trustees have taken a decision, the decision itself should be clearly minuted, but that the reasoning that led to the decision should not be recorded in the minutes.

<sup>354</sup> Ellison *Pensions Disputes* at 64.

<sup>355</sup> *Re Londonderry's Settlement* [1965] Ch 918 (CA). Nobles *Pensions* at 106 is of the view that *Re Londonderry's Settlement* should not be interpreted as a general statement of the right of all trustees, on all occasions, to refuse to give reasons. Instead, it should be read as a statement that trustees who have to exercise discretions which involve judgments on the worthiness of particular individuals, and other, similar "delicate" decisions, should not have to give reasons.

*Trust Corp plc* also suggest that scheme trustees are not bound to give reasons to beneficiaries for their exercise of discretion.<sup>356</sup> When the Ombudsman considers the core issue of maladministration, however, even the correctness of a decision would not save trustees from maladministration assertions if they were to fail to record their reasons.

Thus in *Stone*,<sup>357</sup> the complainant's husband was a member of a scheme. He and the complainant had been married for just over a year and had no children together. Before marrying the complainant, though, the scheme member had fathered a minor son and split up with the son's mother soon afterwards. Following the scheme member's death, the trustees arranged for the complainant to receive a widow's pension and for the mother of the minor son to receive a child's pension on behalf of the son. The death-in-service benefit was also to be paid, and trustees had to decide who should receive it. They later decided to pay the complainant and the minor son equal shares of the death benefit. When complaining to the Ombudsman, the complainant requested that the trustees provide her with reasons for their decision. She was also aggrieved that the trustees had not communicated with her when deciding to pay the death benefit in equal shares. The Ombudsman found that the minutes of the trustees' meeting contained no record of the reasons that informed their decision to pay the benefits in the way they did, and so they could not provide the complainant with any reasons.<sup>358</sup> It is a matter of good pension scheme administration that decision makers provide reasons for their decisions.<sup>359</sup> It is difficult, if not impossible, for those affected by a decision to understand or query it if they are not told how it was reached. The Ombudsman confirmed that the

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<sup>356</sup> See *Wilson and Another v Law Debenture Trust Corp plc* [1995] 2 All ER 337 (Ch), which dealt with the right of beneficiaries to challenge trustees' decisions. See also Ellison *Pensions Disputes* at 64. Wright and Doraisamy *Mayer Brown: Trustee Guide* at 15 states that trustees are given a confidential role, and the courts recognise that carrying out trust business — in particular, making the discretionary decisions that trustees are required to make under the trust deed and rules — would become almost impossible if trustees were automatically bound to disclose everything to beneficiaries.

<sup>357</sup> Pensions Ombudsman Determinations (11 October 2007) *Stone* [R00465]. See par 5.5.2 below, where *Stone* is also discussed.

<sup>358</sup> In par 12.1.

<sup>359</sup> In par 16.

complainant was entitled to the trustees' explanation about how they had reached their decision.<sup>360</sup>

In *Gooch*,<sup>361</sup> the scheme member had nominated her husband, the complainant, to receive the lump sum death benefit. She also left a will bequeathing all her possessions to be shared equally between the complainant and her brother. After her death, the trustee decided not to pay the lump sum benefit to the complainant, based on information received from the deceased's family members. The husband complained to the Ombudsman that the trustee had not disclosed the information it had relied on and the reasons for deciding not to award him death benefits.<sup>362</sup> He was the first person to notify the trustee of the scheme member's death; he had provided relevant information to the trustee and was the person named on the nomination form and her closest family member. The Ombudsman ruled that the complainant reasonably expected to receive the benefit and should, at the very least, have been given the courtesy of being told that he was not going to.<sup>363</sup> Instead, the trustee had made a decision based on partial evidence, much of it hearsay, and some of it in the form of unsubstantiated news reports that should have been set aside immediately. The trustee maintained that it had followed the trust deed and rules and did not have to disclose its reasoning. It also had no reason to provide copies of all correspondence that it considered when exercising its discretion. The Ombudsman upheld the complaint.<sup>364</sup> He confirmed that the trustee had a discretion regarding the recipient of the death benefits.<sup>365</sup> Still, his role as Ombudsman was to decide whether there had been maladministration in the exercise of the trustee's discretionary power in not awarding the complainant a portion of the death benefits. So it was not for the Ombudsman to decide whether the complainant should have received any of the death benefits. The Ombudsman later directed the trustee to allow the complainant to respond to any material allegations about his relationship with the scheme member.<sup>366</sup> The trustee was

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<sup>360</sup> In par 16.

<sup>361</sup> Pensions Ombudsman Determinations (4 November 2014) *Gooch* [PO-627].

<sup>362</sup> In par 19.

<sup>363</sup> In par 19.

<sup>364</sup> In par 16.

<sup>365</sup> In par 13.

<sup>366</sup> In par 21.

ordered to make further inquiries as it considered relevant and consider the complainant's responses. After that, the trustee was to make a fresh decision in distributing the death benefits under the plan and disregard the fact that an equivalent sum had already been paid.<sup>367</sup>

In *P*,<sup>368</sup> the complainant was the wife of the deceased scheme member but was separated from him. She complained that the trustee had failed to exercise its discretion correctly under the trust deed and scheme rules in distributing the death benefit that arose after the complainant's husband died. The trustee had awarded the lump sum equally to two adult daughters born of the scheme member and the complainant, aged 30 and 26, respectively, and had later failed to provide the complainant with an adequate reason or explanation for its decision to exercise its discretion in this way. The scheme member had, 15 years before the separation, completed an expression of wish form naming the complainant a beneficiary of 100 per cent of the benefits payable should he die. The complainant had moved out of the house she shared with the fund member, and he died few months afterwards. The trustee decided to split the lump sum death benefit equally between the two adult daughters.

The complainant received no further communication from the scheme until 24 September 2002. The scheme administrator confirmed the trustee's exercise of its discretion and the payment of all benefits from the scheme. The complainant complained to the Pension Ombudsman that the trustee had failed to provide details of the evidence it had considered in reaching its decision. The Ombudsman ruled that the trustee's choice not to follow the member's wishes recorded in the form did not automatically make the decision perverse. Though dependency was a relevant factor, the scheme rules did not require dependency for the payment of the discretionary benefit.<sup>369</sup> Yet the Ombudsman found that the trustee had failed to take proper account of the fund member's wishes in the expression of wish (nomination) form, or else had improperly disregarded it.<sup>370</sup> The trustee had also failed to provide the complainant with the reasons it had considered when it exercised the discretion.

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<sup>367</sup> In par 22.

<sup>368</sup> Pensions Ombudsman Determinations (17 July 2007) *P* [Q00486].

<sup>369</sup> In par 19.

<sup>370</sup> In par 20.6.



The Ombudsman determined that the failure to provide the complainant with reasons amounted to maladministration.<sup>371</sup> At no point did the trustee put her on notice that it was not going to follow the scheme member's expression of wish form or allow the complainant to respond to points made by the sister of the scheme member and the HR manager. The HR manager had confirmed that the scheme member was married at the time of his death but that he and the complainant were separated. The scheme member's sister had advised the trustee that the scheme member had told her before his death that he wanted his assets to be split between his two daughters.

The Ombudsman in *P*<sup>372</sup> also confirmed that, when exercising their discretion, trustees should rely on correct reports and information. Failure to do so could lead to the trustees' being deemed to have failed to consider all relevant factors.<sup>373</sup> The Ombudsman concluded that it was not for him to replace the trustee's decision with his own; but, given the amount of conflicting information provided, he referred the matter back to the trustee for reconsideration in the light of his findings.<sup>374</sup> He noted that trustees had a difficult line to draw between protecting people's confidentiality and ensuring that they had accurate information on which to make their decision.<sup>375</sup> Potential beneficiaries have a legitimate interest in being assured that decisions that might divert money that might otherwise come to them have been properly and fairly made. He also commented that he knew that such evidence was given to the trustee in confidence. Still, the latter ought to have given more thought to the ramifications of accepting evidence on that basis. The Ombudsman concluded that the trustee's reluctance to produce evidence on the basis of which it took its decision was unsatisfactory and had caused the complainant considerable distress and inconvenience.

If members cannot obtain trustees' reasons, then standards of care are less effective than they might appear.<sup>376</sup> A duty to act in the beneficiaries' best interests

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<sup>371</sup> In par 20.7.

<sup>372</sup> Pensions Ombudsman Determinations (17 July 2007) *P* [Q00486].

<sup>373</sup> In par 26. The Ombudsman found that the trustee had failed to resolve or test the inconsistency of the information before considering the beneficiaries' level of dependency.

<sup>374</sup> In pars 27 and 33.1. See also West and Teo 2010 *Pensions World* 22.

<sup>375</sup> Pensions Ombudsman Determinations (17 July 2007) *P* [Q00486] in par 31.

<sup>376</sup> Nobles *Pensions* at 104.

becomes, in practice, a duty not to act in a manner that is self-evidently contrary to those best interests.<sup>377</sup> A duty to match the purpose of a power, or a duty of good faith, is similarly by the need for a breach seen to be self-evident.<sup>378</sup> Nobles adds that if the courts wish pension trustees to be under strict duties to act in their members' best interests, then there is a case to be made for requiring trustees to give reasons for their decisions and allow beneficiaries access to documents recording those reasons.<sup>379</sup>

#### 5.4.4 Other duties

Trustees must adhere to the law generally; some of the specific statutory duties are mentioned in section 70(1) of the Pensions Act 2004. This section imposes a duty to report breaches of the law on various persons or institutions, including a trustee of a pension scheme. Section 70(2) states that where the person has reasonable cause to believe that (a) a duty which is relevant to the administration of the scheme in question, and is imposed by or by virtue of an enactment or rule of law, has not been or is not being complied with, and (b) the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions, he must give a written report of the matter to the Regulator in the exercise of any of its functions, as soon as reasonably practicable.<sup>380</sup> Trustees aware of a death benefit distribution contrary to the law and/or pension scheme rules are thus compelled to report these breaches to the Regulator. This precaution works as an early notification to the Regulator about breaches of the law that the Regulator could not yet have known of and provides the Regulator with an added tool, besides complaints by aggrieved pension scheme members, dependants and/or beneficiaries, to monitor and protect their interests. Section 70(1) of the Pensions Act 2004 imposes duties that are similar to those prescribed to principal officers in South Africa by section 8(6)(b) of the Pension Funds Act of 24 of 1956.<sup>381</sup> It is

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<sup>377</sup> At 104.

<sup>378</sup> At 104.

<sup>379</sup> At 105.

<sup>380</sup> Section 10 of the Pensions Act 2004, which deals with civil penalties, applies to any person who, without reasonable excuse, fails to comply with an obligation imposed on him by s 70(4) of the Pensions Act 2004. See also par 6.4 below for a brief discussion of pension scheme trustees' liability for breach of duties.

<sup>381</sup> See in this regard Chapter 2, pars 6.3 and 6.4, where principal officers and trustees in South Africa are discussed.

suggested that a monitoring instrument like the one in section 70(1) of the Pensions Act 2004 should form part of the South African Pension Funds Act.<sup>382</sup>

#### 5.5 *Key factors and guidelines considered by pension scheme trustees when distributing death benefits*

As mentioned above, trustees must distribute death benefits according to the trust deed and the rules of the particular pension scheme.<sup>383</sup> Trustees must consider who the legitimate potential beneficiaries of a specific death benefit are and how it should be distributed.<sup>384</sup> Despite the lack of statutory provisions defining trustees' discretionary powers, established principles guide trustees when exercising their discretion to allocate death benefits to beneficiaries.<sup>385</sup> When distributing death benefits, trustees are required to

- act fairly,<sup>386</sup>
- ask the right questions,
- construe the legal position and the rules correctly,
- take into account all relevant matters and no irrelevant ones, and
- reach a decision that is not perverse:<sup>387</sup> one that any other reasonable decision maker faced with the same evidence would reach.<sup>388</sup>

The various factors that must be considered by pension scheme trustees when distributing death benefits to various beneficiaries are discussed below.

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<sup>382</sup> See in this regard Chapter 6, par 5.13.

<sup>383</sup> Pensions Ombudsman Determinations (5 July 2010) *Morton* [77828/2] in par 25.

<sup>384</sup> In Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1] in par 17, the complainant challenged the decision through the Local Government Pension Scheme's internal dispute resolution procedure. The complaint was upheld at stage one because, among other things, the employer had not given sufficiently clear reasons for its decision.

<sup>385</sup> See for example, the judgment of Chadwick LJ for the English Court of Appeal in *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA) dealing with the proper exercise of a discretionary power and the principles the trustees must satisfy.

<sup>386</sup> Pensions Ombudsman Determinations (5 July 2010) *Morton* [77828/2] in par 25.

<sup>387</sup> Pensions Ombudsman Determinations (28 May 2009) *Curran* [74746/1] in par 19.

<sup>388</sup> Pensions Ombudsman Determinations (4 January 2012) *Earle* [76674/4] in par 31. See also Pensions Ombudsman Determinations (11 October 2007) *Stone* [R00465] in par 14; and *Self Handbook* at 35.

### 5.5.1 Considering the pension scheme member's wishes

Trustees must consider the deceased scheme member's wishes stated in the expression of wishes or nomination or benefit form in distributing death benefits. Trustees need not follow those wishes,<sup>389</sup> though, especially if they have grounds for believing that the nomination forms are out of date and that the member's circumstances have changed.<sup>390</sup> In other words, the expression of wishes or nomination of benefit form does not bind the trustees but serves merely as a guide.<sup>391</sup>

In *McNee*,<sup>392</sup> the complainants, the fund member's parents, alleged that the scheme administrators had not followed her expression of wishes that they should be paid the lump sum benefit (death grant) payable after her death.<sup>393</sup> The Ombudsman upheld the complaint because the employer had not properly considered the complainants as potential recipients of the death grant in their capacity as parents of the deceased scheme member.<sup>394</sup> The Ombudsman held that the decision maker (the scheme administrator) had been wrong to assume that the member's wishes

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<sup>389</sup> *Spill Practical Pensions* at 21 and *Marshall et al Pension Disputes* at 8.

<sup>390</sup> Most employees receive a scheme booklet which usually encourages them to fill out and sign a form ("expression of wish") when they join pension schemes as members. This form requires the employee to write down a name or names of a person or persons to whom the trustees should consider paying the lump sum death benefit. See in this regard *Spill Practical Pensions* at 21 and *Self Handbook* at 36. In *Pensions Ombudsman Determinations* (10 November 2009) *Winterstein* [76288/1] in par 8, the Ombudsman listed the following circumstances in which he would consider overturning the provisions of a nomination form: the nomination form had not been completed recently and there was a longer gap between the completion of the form and any change in circumstances; there had been a sudden death and no opportunity for the deceased member to review their arrangements; there was other information showing that the deceased member had come to a different view; and evidence produced by the claimants showing that it would be reasonable and fair to distribute the lump sum death benefit in a different way.

<sup>391</sup> *Pensions Ombudsman Determinations* (31 March 2014) *Hawkins* [PO-2753, PO-3081 & PO-3082]; *Pensions Ombudsman Determinations* (13 August 2013) *Young* [PO-1758] in par 14; and *Self Handbook* at 36.

<sup>392</sup> *Pensions Ombudsman Determinations* (5 September 2014) *McNee* [PO-2780 & PO-4183].

<sup>393</sup> *Pensions Ombudsman Determinations* (5 September 2014) *McNee* [PO-2780 & PO-4183]. The scheme member was employed by The Royal Borough of Kensington and Chelsea (RBKC) until November 2010 and was a member of the Local Government Pension Scheme. In March 2005, she had signed a Death Grant Nomination Form stating that, in the event of her death, she wished her employer to pay the death grant to her parents at 50 per cent each. She died on 4 September 2011.

<sup>394</sup> In par 27.

had changed after completing the nomination form.<sup>395</sup> He remitted the decision to the employer for reconsideration.<sup>396</sup>

In *Winterstein*, the complainant and her husband (the deceased scheme member) were married in April 2007.<sup>397</sup> He was diagnosed with cancer in November 2007 and died in January 2008. The complainant and her daughter (born in April 2008, after the member died) received a widow's pension and child's pension, respectively. The member had completed a nomination form in 2006 nominating his wife (who was then his partner and living with him) and his sister to receive equal shares of the death benefit. The pension scheme trustee decided to pay both the complainant and the sister equal shares of the death benefit according to the nomination form. The trustee distributed the death benefit under the nomination form because they believed that there were insufficient grounds for deviating from the nomination.<sup>398</sup> The dissatisfied complainant challenged the decision through the scheme's internal dispute resolution procedures. Still dissatisfied, she approached the Ombudsman for relief. He agreed that the trustee was not bound by the nomination form, which was only one factor in the decision-making. He concluded that the decision about distributing the lump sum death benefit was an absolute discretion to be exercised by the trustee as the administering authority.<sup>399</sup> The

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<sup>395</sup> In par 27. The scheme member had nominated her parents to receive the death benefit. She had completed the nomination form in 2007 and had since had a son. The pension administrator said that the scheme member's last will had been revised since the nomination form and implied that everything should have gone to her son instead of her parents. The employer decided that the death grant should be paid to the scheme member's deceased estate because the nomination form was advisory only. The scheme member's parents complained that the decision-making process by the administrator or the employer was unclear and lacking in visibility and accountability. They explained that they were not contacted or given an opportunity to state their case or appeal the decision. The employer submitted that the decision to pay the death grant to the deceased estate was based on the fact that there had been a major change in the scheme member's circumstances since she completed the nomination form in favour of her parents. These were the birth of her son and her expression of wish in her will where she bequeathed her assets to her son, not the parents.

<sup>396</sup> In par 28.

<sup>397</sup> Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1].

<sup>398</sup> In par 22. The employer believed that there were no sufficient grounds to overturn the clearly expressed wish of the scheme member as stated in the nomination form that the death grant should be divided equally between the two beneficiaries. The employer was also of the view that the scheme member had time to change the nomination had he so wished (in par 8). The personal circumstances of the scheme member that changed between the period of signing the nomination form and his death were the new responsibilities he acquired following his marriage: buying a house with the complainant (Ms Winterstein) and starting a family (in par 8).

<sup>399</sup> In par 15. The relevant rule in the Local Government Pension Scheme Regulations (the rules) provided that "38. – (1) if a member dies before his 75th birthday, the administering authority at their absolute discretion may make payments to or for the benefit of the member's nominee or

Ombudsman found that the nomination form was a relevant factor in determining the potential beneficiaries because a nominee was one of the categories of beneficiaries in the scheme rules.<sup>400</sup> And the mere nomination (whether or not the nominated person would otherwise be eligible) was itself material: it showed the pension scheme member's wishes at the point when he signed the form. Even so, the trustee had not found out about other beneficiaries. The Ombudsman recognised that the question was not whether he would have reached the same conclusion but whether the trustee's discretion had been exercised reasonably. The Ombudsman concluded that the trustee had not exercised its discretion correctly. Specifically, it had disregarded finding out about other beneficiaries.<sup>401</sup> He also found it strange that the trustee had relied on the complainant to provide details of "competitor" beneficiaries.<sup>402</sup> The Ombudsman thus upheld the complaint against the trustee because it had failed to exercise its discretion properly when distributing the lump sum death benefit.<sup>403</sup> The decision was referred back to the trustee for further consideration.<sup>404</sup>

In *Crossan*,<sup>405</sup> the Ombudsman found that there was nothing contractual about the nomination of a preferred beneficiary.<sup>406</sup> Although the rules might provide that any persons nominated in writing by the member automatically fall within a named class of beneficiary, that does not suggest that the member's wishes should be given any particular weight over other relevant factors.<sup>407</sup>

The discussion above clarifies that the pension scheme trustees must consider the pension scheme member's wishes as shown in the expression of wishes form and/or in a testamentary will. Yet those wishes are not binding but provide guidelines to the trustees. Some people argue that not following the member's wishes because

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personal representatives or any person appearing to the authority to have been his relative or dependant at any time" (*Winterstein* in par 3).

<sup>400</sup> In par 19.

<sup>401</sup> In par 25.

<sup>402</sup> In par 22.

<sup>403</sup> In par 5.

<sup>404</sup> In par 25.

<sup>405</sup> Pensions Ombudsman Determinations (5 September 2014) *Crossan* [PO-2503].

<sup>406</sup> In par 35.

<sup>407</sup> Pensions Ombudsman Determinations (4 January 2012) *Earle* [76674/4] in par 34.

the trustees consider them unreasonable smacks of paternalism.<sup>408</sup> As a change in practice, they urge that the sum should be paid to the pension scheme member's estate for disposal under the member's testament if there is one.<sup>409</sup>

#### 5.5.2 Considering all the potential beneficiaries

Trustees are required to consider the full range of potential beneficiaries. In *Blundell*, the complaint was that the complainant did not receive any share of the lump sum that was distributed following the death of her father, who was a scheme member.<sup>410</sup> She sought half the sum paid. The Ombudsman was of the view that the scheme's administrator had not given proper consideration to its decision in the matter and upheld the complaint.<sup>411</sup> Although the scheme administrators did not have to include all potential beneficiaries in any payment, they must consider all potential beneficiaries properly before making any selection or payment.<sup>412</sup> So they have to take reasonable steps to ascertain that any proposed payee is entitled to payment under the rules.<sup>413</sup> In this matter, the scheme administrator had carried out insufficient research to decide reasonably that the deceased pension scheme member and his girlfriend were financially co-dependent or in a financial relationship.<sup>414</sup> The complainant was the deceased's daughter. The Ombudsman ruled that the complainant, although 42 years old, was still entitled to be appropriately considered a potential beneficiary — the trustees had ignored her.<sup>415</sup>

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<sup>408</sup> See in this regard *Self Handbook* at 37.

<sup>409</sup> See in this regard *Self Handbook* at 37.

<sup>410</sup> Pensions Ombudsman Determinations (18 June 2010) *Blundell* [78553/1]. This determination is also reported as *Alun Griffiths (Contractors) Limited GPP (78553/1)* available at <https://www.pensions-ombudsman.org.uk/decision/2010/785531/alun-griffiths-contractors-limited-gpp-785531> (last accessed on 30 June 2021).

<sup>411</sup> In par 2. In terms of the rules of the Alun Griffiths (Contractors) Limited GPP (the Scheme), the scheme administrator had discretion to decide from a list of potential beneficiaries prescribed by the rules to whom and in what proportions a lump sum death benefit was to be paid.

<sup>412</sup> In par 27. The scheme member did not complete an expression of wish form to nominate a beneficiary in the event of his death (in par 2). He was divorced and living with his partner at the time of his death.

<sup>413</sup> In par 27.

<sup>414</sup> In par 29.

<sup>415</sup> In par 31. Section 2 of the Scheme's Rules defined a "dependant" to include "...a person who was married to, or a *civil partner* of, the *member* at the date of the *member's* death"; "...a child of the *member* if such child has not reached 23, or has reached that age but, in the opinion of the *scheme administrator*, was at the date of the *member's* death dependent on the *member* because of physical or mental impairment...the provisions...shall be extended to include a child of the *member* who has reached 23 but is in full time education or undertaking vocational training"; and "...a person who was not married to, or a *civil partner* of, the *member* at the date

The scheme administrator had submitted that there was no financial dependency that could have justified paying the complainant. The Ombudsman determined that the complainant did not need to be financially dependent to be eligible to receive some or all of the lump sum payable.<sup>416</sup> The maladministration in not properly considering a potential beneficiary constituted a procedural defect in the trustees' decision-making.<sup>417</sup> Moreover, the scheme administrator could not show that it had considered all relevant matters and disregarded irrelevant ones. Nor could it prove that it had followed a reasonable process to obtain relevant information. The Ombudsman directed the scheme administrator to consider its decision afresh.<sup>418</sup>

In *Stone*,<sup>419</sup> the complaint was that the trustees did not properly consider all relevant circumstances before paying the death-in-service benefit.<sup>420</sup> The trustees had paid this benefit in equal shares to the complainant and a former girlfriend of the scheme member who was also the mother of the member's minor son. The Ombudsman confirmed that if the trustees could award a lump sum to more than one person, the trustees must identify the potential beneficiaries, weigh the information available, and decide who should benefit.<sup>421</sup> The Ombudsman acknowledged that the obligation to maintain a child stopped on his father's death. Yet it was reasonable for the trustees to consider the child's future financial needs.<sup>422</sup> The fact that the scheme member and the complainant had only been married for a short time did not lessen the burden of financial commitments between them. The Ombudsman was concerned that no proper enquiries had been made about the potential beneficiaries'

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of the *member's* death and is not a child of the *member*, but who, in the opinion of the *scheme administrator*, at the date of the *member's* death was financially dependent on the *member* or had a financial relationship with the *member* which was one of mutual dependence or was dependant on the *member* because of physical or mental impairment" (*Blundell* in par 1 (original italics)).

<sup>416</sup> In par 33.

<sup>417</sup> In par 35.

<sup>418</sup> In par 36.

<sup>419</sup> Pensions Ombudsman Determinations (11 October 2007) *Stone* [R00465]. See par 5.4.3 above, where *Stone* is also discussed under the duty to disclose reasons for distributions.

<sup>420</sup> In par 4 referring to Scheme Rule 30.1. The rule stated that in exercising their discretion the trustees might have regard to any nomination made by a member, whether or not the person or persons so nominated was a dependant legal personal representative or other beneficiary, and that the trustee should have full discretionary powers to decide the recipients of the death benefits payable.

<sup>421</sup> In par 15.

<sup>422</sup> In par 17.



financial situation. The limited evidence available to him did not satisfy him that the trustees had obtained and weighed enough information to enable them to reach a proper decision. He directed the trustees first to gather relevant information about the financial needs of people they considered possible beneficiaries at the time of the pension scheme member's death. Then the trustees must decide afresh who should receive the lump sum payment under the scheme rules. And the trustees must give full reasons for their new decision.<sup>423</sup>

In *Young*,<sup>424</sup> the complainant was the scheme member's ex-husband and the joint administrator of her estate. The complainant and the member had two children below the age of 13 from their dissolved relationship. The ex-husband complained that the two children had not been paid the lump sum due after the member died. The marriage between the complainant and the member was dissolved in September 2010. The next month, the member took out a plan nominating Mr W, her new companion, as the plan's sole beneficiary. The scheme member died intestate on 5 June 2012. The two minor children (the dependants) from the dissolved marriage lived with the scheme member and Mr W. Following her death, Mr W had contacted the trust administrator and claimed to be the deceased scheme member's next of kin without disclosing that she had two dependent children.

The trust administrator paid the accumulated pension fund plan of £18,876.12 to Mr W without finding out about the scheme member's will or whether she had any dependent children or other beneficiaries. The complainant was informed only after the payment had taken place that the plan benefits had been paid out. The complainant argued that the trust administrator's processes at the time were flawed in that it had not exercised any due diligence when paying out the death benefit, whilst Mr W had not disclosed the existence of the scheme member's two minor children. The trust administrator argued that it had exercised its duty of care and skill reasonably in the circumstances of the submitted evidence and the scheme member's nomination. The trust administrator maintained that the plan rules did not stipulate that it should make enquiries about a member's personal situation after his or her death. It submitted that even if the rules were interpreted as obliging the trust

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<sup>423</sup> In par 20.

<sup>424</sup> Pensions Ombudsman Determinations (13 August 2013) *Young* [PO-1758].

administrator to make enquiries about potential beneficiaries after a member's death, the adequacy of enquiries that it could have made would have been influenced by the information that was provided by the plan member when the plan was established.

The Ombudsman found that although the rules were silent on when the trust administrator should have made "reasonable enquiries" to establish "eligible recipients", the trust administrator was still expected to identify potential beneficiaries at the point of death and not when the plan began.<sup>425</sup> The common-sense approach must be to make these enquiries at the point of death, especially if there was a significant period between the plan beginning and the member dying. In *Young*,<sup>426</sup> although more than two years had elapsed since the nomination of wishes was completed, earlier information received when the plan began might also be relevant.<sup>427</sup> The trust administrator did not make any enquiries about eligible recipients. It did not even ask whether the scheme member had dependent children before paying the benefit to Mr W. The Ombudsman found that although the trust administrator did not have to include all potential beneficiaries in any payment, it had to consider properly such potential beneficiaries as reasonable enquiries might have revealed before making its decision.<sup>428</sup> The trust administrator was directed to make a new decision after making reasonable enquiries of potential recipients.<sup>429</sup>

In *Siegfried*,<sup>430</sup> the complainant contested the refusal by trustees of the scheme to award her a spouse's pension following the death of her former partner, who had been a scheme member. The Ombudsman upheld the complaint, because the trustees had failed to ask the right questions, misinterpreted the rules, considered irrelevant factors, and had not undertaken reasonable enquiries before reaching

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<sup>425</sup> In par 16. The relevant scheme rules (Rule 7.2 Lump sum death benefit) in relation to the duty of the scheme administrator to make enquiries before paying lump sum death benefit to beneficiaries stated the following in par 1:

"7.21 On the death of a Member a lump sum death benefit may be paid, equal to his Member Fund ...

7.2.2 The Scheme Administrator may pay or apply such lump sum ... to or for the benefit of one or more Eligible Recipients in such proportions as they think fit."

<sup>426</sup> Pensions Ombudsman Determinations (13 August 2013) *Young* [PO-1758].

<sup>427</sup> In par 16.

<sup>428</sup> In par 22.

<sup>429</sup> In par 23.

<sup>430</sup> Pensions Ombudsman Determinations (18 June 2014) *Siegfried* [PO-1427].

their decision.<sup>431</sup> The Ombudsman ruled that the trustees should have properly considered all the benefits that might have been payable under the circumstances before deciding which one was the most appropriate.<sup>432</sup> The trustees' failure to take this action amounted to maladministration. The Ombudsman directed the trustees to make reasonable enquiries and decide the matter afresh.<sup>433</sup>

One challenge that pensions scheme trustees face in the United Kingdom is how trustees should distribute a death benefit if there are various potential recipients. In this situation, trustees have to decide among the interests of various competing potential beneficiaries before deciding who should receive the death benefits and what amount. In *Morton*,<sup>434</sup> the pension scheme member had at the time of divorce from his first wife (his ex-wife) undertaken to direct the trustees of his pension fund to nominate his first wife as the beneficiary of the lump sum payable on his death, despite any subsequent remarriage of either himself or the first wife.<sup>435</sup> This undertaking was made an order of court. The pension scheme member later married someone he nominated as his beneficiary for any available pension benefits on his death. So the trustee in *Morton* faced a situation in which the court order directed that the death benefits should be paid to the first wife, but the member's last will nominated the second wife as the beneficiary. The trustee therefore approached the Ombudsman for guidance in deciding the matter. The Ombudsman had to decide whether the provisions in a court order amounted to a nomination and not a directive. He later determined that the trustee was entitled to pay regard to both the court order and the will as containing nominations by the deceased scheme member about who should receive the benefit on his death.<sup>436</sup> The court order was found not to be binding on the trustee.<sup>437</sup> The Ombudsman confirmed that the trustees' decision on any problem of interpretation of either the trust deed or the rules was final and binding.<sup>438</sup> He ruled that it was not for him to instruct a trustee how to

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<sup>431</sup> In pars 37 and 43.

<sup>432</sup> In par 39.

<sup>433</sup> In par 45.

<sup>434</sup> Pensions Ombudsman Determinations (5 July 2010) *Morton* [77828/2].

<sup>435</sup> In par 6.

<sup>436</sup> In par 31.

<sup>437</sup> In par 29.

<sup>438</sup> In pars 2 and 20.

exercise his discretion under the rules.<sup>439</sup> He also confirmed that a trustee had considerable latitude in deciding how and to whom a deceased scheme member's uncrystallised or unsecured fund should be paid out. A trustee thus had to decide the weight to attach to competing nominations.<sup>440</sup> Trustees must weigh the interests of competing nominations, but it is not clear which factors must be considered. It appears that these factors are left to the trustees' absolute discretion, though there are a few general guidelines open to different interpretations by trustees, as shown by the complaints to the Ombudsman.<sup>441</sup>

Trustees must gather sufficient information and evidence by making enquiries to enable them to decide on the distribution of a death benefit. In the determination of C,<sup>442</sup> the Ombudsman upheld a complaint against both the employer and the trustees because the employer had failed to make sufficient enquiries before deciding who the deceased pension scheme member's relatives and dependants were and whether the complainant should receive a share of the death benefit.<sup>443</sup>

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<sup>439</sup> In par 30.

<sup>440</sup> In par 32.

<sup>441</sup> Pensions Ombudsman Determinations (28 May 2009) *Curran* [74746/1] in pars 18 and 19 stated that under the rules of the IBC Vehicles Pension Plan (the Plan), the trustee had discretion over the distribution of the lump death benefits. The Ombudsman stated that "there are well established principles that the Trustee is expected to follow. It has to take into account only relevant information, construe the Plan's Rules and the law correctly and reach a decision which any decision-maker could reasonably reach when presented with the same circumstances (that is, a decision which is not perverse)" (in par 19).

<sup>442</sup> Pensions Ombudsman Determinations (20 July 2016) C [PO-6823].

<sup>443</sup> In pars 2 and 43. The complaint against the employer and the trustees was about their decision on the death in service benefits under the scheme following the death of the scheme member. The scheme member was the complainant's partner. The relevant rule 11(J) of the pension scheme defined "dependants" as "all persons to whose advancement or support the Member shall have contributed in his lifetime or with whom the Member shall have resided and any person ... whom the Member shall by notice in writing have requested the Principal Company or any of the Employers or the trustees of this Scheme or another scheme of any of the Employers to consider as a recipient of any sum payable under the trusts thereof" in par 7. Before his death, the scheme member had completed a nomination form in which he nominated the complainant as a recipient of any lump sum death benefit payable under the scheme. On an employee emergency contact form, the complainant was shown as the person to contact in case of an emergency. The employer decided that the moneys due in connection with the death of the scheme member were to be paid to the scheme member's father. The view was that the scheme member when alive had never lived with the complainant at the same address, and that his closest family were his father and brother, and in the absence of a will, the moneys should be paid to his father.

In a different determination of *Crossan*,<sup>444</sup> the complaint was that the death benefit had been paid to the wrong person and that the trustees had handled the complaint inadequately.<sup>445</sup> The Ombudsman upheld the complaint against the trustees because they had paid without making proper enquiries.<sup>446</sup> He concluded that the trustees' actions in paying another person, and not the complainant, on the basis of the limited information available constituted maladministration.<sup>447</sup> The Ombudsman confirmed that trustees needed to make timely enquiries — before they decide and not afterwards.<sup>448</sup> Here the trustees should have made further enquiries before paying the lump sum. The Ombudsman directed them to make the decision afresh<sup>449</sup> and pay the complainant £100 compensation for maladministration.<sup>450</sup>

In *Curran*,<sup>451</sup> the complainant alleged that the trustee should have allocated her a share of her late husband's lump sum death-in-service benefit. The Ombudsman

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<sup>444</sup> Pensions Ombudsman Determinations (16 September 2011) *Crossan* [82784/1]. It should be noted that there is also another determination of *Crossan* discussed in this chapter which is cited in n 279 as Pensions Ombudsman Determinations (5 September 2014) *Crossan* [PO-2503].

<sup>445</sup> Pensions Ombudsman Determinations (16 September 2011) *Crossan* [82784/1] in par 63.

<sup>446</sup> In par 67.

<sup>447</sup> In pars 59 and 66. This other person that the trustees paid the lump sum had lived with the scheme member before his death. She appeared to be his partner, and the extent of her financial dependence was unclear.

<sup>448</sup> In par 66. The complainant submitted that the trustees had shown bias, prejudice, and conflict of interest. There was a clear conflict of interest from the trustees' perspective stemming from the fact that they had already paid out the full lump sum payable. This step created an obvious financial motivation to self-justify the payment rather to someone other than the rightful beneficiaries. The trustees had been using irrelevant points and ignoring all contrary evidence to back up their original wrong decision and had continued this practice going into the second decision.

<sup>449</sup> In par 69.

<sup>450</sup> In par 70.

<sup>451</sup> In Pensions Ombudsman Determinations (28 May 2009) *Curran* [74746/1], the scheme member and the complainant had five children from their marriage. At the time of the scheme member's death, three of the children (then aged 9, 12, and 14) were in foster care, and two (then aged 4 and 5) had been adopted by other parties as babies. No maintenance had been paid to the three children in foster care, and no contact had been maintained with the two adopted children nor was either of them financially dependent on the scheme member or the complainant. The trustee distributed the lump sum in equal portions to the member's five children. But there were no documents relating to the decision. The complainant argued that the trustee's decision was unfair and that the lump sum should have been divided between her and her five children. The Ombudsman ruled that it was not for him (the Ombudsman) to decide who was entitled to a share of the deceased's lump sum death in service benefits (in par 18). Under the plan rules, the trustee had a discretion over the distribution of lump sum death in service benefits (in par 1). The issue for the Ombudsman to decide was whether the trustee had satisfactorily adhered to the applicable principles. He concluded that the trustee had reached and recorded a conclusion without identifying the reasons (in par 21). The Ombudsman concluded that the fact that the trustee had exercised its discretion in such an informal way amounted to maladministration (in par 23). He noted that the decision to pay the lump sum to the five children in equal shares was one that the trustee could reach — it was not an impossible or automatically perverse conclusion.

upheld the complaint against the trustee because there was inadequate evidence that it had gathered and considered enough information before making its decision.<sup>452</sup> And the trustee had failed to document or explain to the complainant the reasons for its decision.<sup>453</sup>

### 5.5.3 Considering all the relevant facts

In *Hercberg*,<sup>454</sup> the complainants were the parents of the scheme member, who had died while still in service. The complaint was against Wolverhampton City Council (“the Council”) as the administering authority of the Local Government Pension Scheme (West Midlands Pension Scheme) (“the Scheme”). Following the death of their son, who was a member of the Scheme, the Council had decided that the death benefits should be divided between the complainants and their son’s widow. The complainants argued that the payment should reflect their son’s wishes that they should be the sole recipients.<sup>455</sup> The Ombudsman had to determine whether the Council had distributed the death grant fairly. He found that there had been maladministration by the Council in two respects.<sup>456</sup> First, the Council had considered the wrong total sum when reaching a decision.<sup>457</sup> Secondly, it had written to the complainants to confirm or notify them of a premature decision that they would receive 50 per cent of the death grant.<sup>458</sup> He dismissed the argument

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But it was an unusual decision and, in the circumstances, could not be considered a safe one. The evidence on which it was based (as far as there was any record of it) was inadequate. The outcome, which included a payment to two children adopted as babies and with whom there had been no contact since, was unusual and unexplained. So the informal way in which the trustee had reached its decision and its reasons constituted maladministration (in par 24). The Ombudsman could not find that the trustee had gathered and considered sufficient information before making its decision, and therefore he directed the trustee to ask the complainant for such further information as it could reasonably require (or if no further information was required to inform her of that fact), as well as to gather any other information it could find necessary to reach its decision (in par 26). He ordered the trustee to make a fresh decision about who should receive the lump sum payment due under the plan, and to communicate the decision to the complainant and other interested parties with reasons and an explanation of what had been considered (in par 28).

<sup>452</sup> In par 6.

<sup>453</sup> In par 6.

<sup>454</sup> Pensions Ombudsman Determinations (10 November 2011) *Hercberg* [82431/2 & 82835/1].

<sup>455</sup> In par 2. The scheme member had completed a nomination form for the payment of benefits under the scheme, nominating his parents as beneficiaries of the full lump sum benefit.

<sup>456</sup> In par 25.

<sup>457</sup> The Wolverhampton City Council treated the lump sum retirement allowance as part of the death grant and so subject to the same discretionary power (in par 12).

<sup>458</sup> In par 16.

that the Council's policy was "normally" to pay in line with nominations, but not when doing so was "inappropriate".<sup>459</sup> He also questioned the appropriateness of paying the lump sum death benefit automatically: some enquiry was needed before a decision was reached.<sup>460</sup> The Council suggested that paying the death benefit to the deceased estate might be a standard approach to dealing with disputed nomination forms. Yet the Ombudsman reminded the Council of its obligation to exercise its discretion actively in each case. If the Council had a policy on dealing with disputed nomination forms, it should not regard itself as bound to follow it so as, in effect, to be fettered by it.<sup>461</sup> The Ombudsman determined that the complaint against the Council should be upheld and ordered the Council to reconsider the distribution of the death grant and advise the potential recipient of its decision.<sup>462</sup>

In *Earle*,<sup>463</sup> the scheme member had completed and signed a nomination form in January 2000. He nominated his two daughters from a previous marriage as beneficiaries of the death benefits if he died before reaching retirement.<sup>464</sup> In 2001, he married his second wife, the complainant.<sup>465</sup> The scheme member died in April 2006 while an active member of the scheme and left no will. A widow's pension was paid to the complainant from June 2006. The scheme's trustee recognised that the scheme member had nominated his two adult daughters for the death benefit and that his surviving spouse (the complainant) was not their mother. The scheme resolved to pay the death benefit according to the nomination form and excluded the complainant. The complainant complained to the Ombudsman, who upheld the complaint against the trustee because it had not considered its decision properly. The Ombudsman was not satisfied that the trustee had asked the right questions or considered all relevant matters properly. An important feature was the financial position and degree of dependency of the identified beneficiaries, the complainant and the daughters, on the scheme member when he died. So the Ombudsman

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<sup>459</sup> In par 22.

<sup>460</sup> In par 22.

<sup>461</sup> In par 29.

<sup>462</sup> In par 30.

<sup>463</sup> Pensions Ombudsman Determinations (4 January 2012) *Earle* [76674/4]. This determination is also reported as *Michelin Pension and Life Assurance Plan (76674/4)*, available at <https://www.pensions-ombudsman.org.uk/decision/2012/766744/michelin-pension-and-life-assurance-plan-766744> (last accessed on 30 June 2021).

<sup>464</sup> In par 30.

<sup>465</sup> In par 3.

concluded that the trustee had reached an improperly made decision and remitted the matter for further consideration. He directed the trustee to reconsider, as though for the first time, the distribution of the lump sum death benefit payable in respect of the deceased scheme member.<sup>466</sup> The trustee was directed to do so after taking the appropriate steps to obtain sufficient material information about the financial positions of the three potential beneficiaries at the time of the scheme member's death.<sup>467</sup> The trustee was also directed, in exercising its discretion, to disregard the fact that payments of the death benefit had already been made.<sup>468</sup>

#### 5.5.4 Communicating decisions to the potential recipients of death benefits

During the distribution process, trustees must maintain adequate communication with the nominated beneficiaries.<sup>469</sup> This requirement ensures that the beneficiaries understand the distribution process and are informed of the trustees' ultimate decisions about who receives the death benefits. In *C*,<sup>470</sup> the pension scheme member had nominated the complainant as the sole recipient of a lump sum death-in-service benefit under the scheme.<sup>471</sup> After the member died, the employer and the scheme's trustees did not contact the complainant about her nomination status but distributed the benefit to the member's deceased estate. The employer also refused the complainant a copy of the deceased member's completed nomination form.<sup>472</sup> The Ombudsman concluded that the employer should have contacted the

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<sup>466</sup> In par 40.

<sup>467</sup> In par 40.

<sup>468</sup> In par 40.

<sup>469</sup> The Occupational and Personal Pension Schemes (Disclosure of Information) Regulations 2013 (SI 2013/2734) require trustees and employers of occupational schemes to disclose certain information to scheme members, prospective scheme members, beneficiaries, spouses and civil partners, and recognised trade unions. So where a member or a beneficiary of a scheme has died and rights or options are available to a person as a result, the information on any survivor's rights or options must be provided to any personal representative of the deceased person or anyone authorised to act on behalf of the survivor. See also *Self Handbook* at 37 in this regard.

<sup>470</sup> Pensions Ombudsman Determinations (20 July 2016) *C* [PO-6823]. See also n 433 above.

<sup>471</sup> In par 9. The scheme member (the deceased) had no wife or children. His family included his father, brother, and sisters. The complainant was in a relationship with the deceased when he was still alive, but they were not living together. She was also unable to prove any financial dependency on the deceased except to mention that they were intending to buy a house together after he had retired.

<sup>472</sup> In par 18. The Ombudsman concluded that it was clear from the scheme rules that the employer had a discretion to decide, after making the appropriate enquiries, who the member's relatives and dependants were and, from the individuals identified, who should receive the lump sum and in which proportions (in par 39).



complainant soon after being notified of the member's death and before paying the lump sum death benefit.<sup>473</sup> The Ombudsman agreed that the employer needed to make enquiries of the complainant to decide how to distribute the death benefit among multiple potential beneficiaries.<sup>474</sup> Even so, those enquiries should have been made before the trustees decided who should be paid the benefit.<sup>475</sup> The employer should have known that the complainant had been nominated by the scheme member before his death and was thus a dependant under the scheme rules. The employer was thus wrong to ask for proof of residency and financial support as a condition for establishing dependency.<sup>476</sup> The Ombudsman found that the trustees and the employer had misinterpreted the scheme rules about what was required to prove dependency in the limited sense of being potentially entitled to the benefit.<sup>477</sup> The employer and trustees had behaved incorrectly, and the complaint against them was upheld.<sup>478</sup> The Ombudsman directed the employer to reconsider the distribution of the lump sum death benefit and decide afresh how it should be distributed between the deceased relatives and dependants, including the complainant.<sup>479</sup> He also directed the employer to pay the complainant £500 as redress for the non-financial loss she had suffered through its conduct.<sup>480</sup>

In *Ellaway*,<sup>481</sup> the complaint was that the trustee had failed to ask all relevant questions when deciding how to pay out the lump sum death benefits on the scheme member's death. The complainants<sup>482</sup> argued that the extent of their dependency was not fully considered and that the decision about the actual recipient was unusual and needed to be reconsidered. They alleged that the trustee had failed to record the information it had collected, did not report this information or its decision, and did not provide reasons for its decision. The Ombudsman upheld the complaint against the trustee because it had not properly decided who was in the class of

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<sup>473</sup> In par 39.

<sup>474</sup> In par 41.

<sup>475</sup> In par 41.

<sup>476</sup> In par 41.

<sup>477</sup> In par 43.

<sup>478</sup> In par 44.

<sup>479</sup> In par 49.

<sup>480</sup> In par 49.

<sup>481</sup> Pensions Ombudsman Determinations (15 February 2011) *Ellaway* [80200/1, 80201/1, 80202/1, 79406/1].

<sup>482</sup> The complainants were the scheme member's sister, brother, mother, and niece.

potential lump sum recipients.<sup>483</sup> It had also failed to communicate to the potential recipients that they would not be receiving any part of the sum. The Ombudsman stated that among the advantages of recording reasons at the time of a decision would be the value “as an internal control on the quality of the decision, as support for accountability and as evidence in the event of later dispute, such as this”.<sup>484</sup> The balancing disadvantages might be the potential hampering of an otherwise scrutiny-free decision-making process and the peril to the confidentiality of beneficiaries.<sup>485</sup>

The Ombudsman considered whether the trustee’s discretion had been exercised properly at the time.<sup>486</sup> He noted that much of the case put forward by the trustee was to show that a decision to pay the whole of the benefit to a woman who was engaged to the scheme member<sup>487</sup> at the time of death was supportable — that it was a decision that could have been reached. The Ombudsman concluded that the trustee’s decision lacked a reasonable basis.<sup>488</sup> The trustee had also failed to communicate its decision properly to potential recipients. Each of them had been interviewed by the trustee in connection with the exercise of the discretion: each would have reasonably thought there was a prospect of being paid.<sup>489</sup>

The Ombudsman found that the trustee should have treated the complainants, who had recently lost a family member and been interviewed about the benefit, with more sensitivity.<sup>490</sup> The trustee ought to have ensured that the decision whether or not to make a payment to each was communicated clearly and sympathetically. The Ombudsman found that the failure to do so amounted to maladministration.<sup>491</sup> He noted that the scheme member’s mother was told that she could expect to hear the outcome. At that point, only she and her husband, who was not a party to the complaint, were expecting to be considered. The Ombudsman ordered the trustee

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<sup>483</sup> Pensions Ombudsman Determinations (15 February 2011) *Ellaway* [80200/1, 80201/1, 80202/1, 79406/1] in par 86.

<sup>484</sup> In par 66.

<sup>485</sup> In par 66.

<sup>486</sup> In par 67.

<sup>487</sup> The scheme member was engaged to a woman with whom he had had a relationship for two years and who moved into his home eight weeks before he died, together with her daughter from a previous relationship.

<sup>488</sup> In par 67.

<sup>489</sup> In par 89.

<sup>490</sup> In par 91.

<sup>491</sup> In par 91.

to pay one of the complainants (the scheme member's mother) £100 as compensation for the distress of not being sympathetically and readily told the outcome.<sup>492</sup> He then directed the trustees to obtain the necessary information to establish who in the named class of beneficiaries should receive the funds and in what proportions.<sup>493</sup>

#### 5.5.5 Exercising the discretion within a reasonable period

The tax rules provide that lump sum death benefits must be distributed within 24 months, and tax penalties are payable for distribution made outside this period.<sup>494</sup> In determining whether a delay amounts to maladministration, trustees must carefully consider the factors relevant to each case.<sup>495</sup> Trustees have the discretion to pay all or any part of the death benefit to the beneficiaries within 24 months of the member's death.<sup>496</sup> In *Browne*,<sup>497</sup> the complaint was that the trustees' payment of the lump sum benefit on the death of the pension plan member had been unduly delayed, thus incurring penal charges. The Ombudsman upheld the complaint

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<sup>492</sup> In par 92.

<sup>493</sup> In par 99.

<sup>494</sup> Section 206(1B)(c) of the Finance Act 2004 (on special lump sum death benefits) states that the special lump sum death benefit charge arises where "(c) the lump sum death benefit is not paid before the end of the period of two years beginning with the earlier of the day on which the scheme administrator of the scheme first knew of the member's death and the day on which the scheme administrator could first reasonably have been expected to have known of it".

<sup>495</sup> In Pensions Ombudsman Determinations (28 April 2017) *K* [PO-15939], the Ombudsman held that the failure of the pension scheme to pay the lump sum death benefit to the complainant within a period of two years, even though the necessary papers had been submitted, contradicted the rules and that the delay constituted maladministration on the part of the pension scheme (par 19). The trustee was ordered to pay the complainant a certain amount as compensation for the significant distress and inconvenience caused by the pension scheme's maladministration (par 27).

<sup>496</sup> Pensions Ombudsman Determinations (7 February 2012) *Parizad* [82720/2] in par 24.

<sup>497</sup> Pensions Ombudsman Determinations (18 September 2013) *Browne* [PO-220]. The complaint was that the payment of a lump sum benefit on the death of the scheme member was unduly delayed, thus incurring penal charges. These penal charges are payable to HMRC if a lump sum death benefit is not paid within two years of the death of a member of a registered scheme, to which the Finance Act 2004 applies. The Scheme member was unmarried and had no children at the time of his death in December 2005. The Trustee alleged that a Scheme's standard information form was sent to the mother of the deceased scheme member. The mother of the deceased scheme member was the complainant. The purpose of the information form was to obtain the death certificate and other information and to identify potential recipients of the lump sum death benefit available under the Scheme Rule. The Trustees submitted that the complainant never returned the form to them, but they could not provide any proof that the standard form was sent to the complainant. The Trustees only obtained a copy of the death certificate and sufficient information to proceed in April 2008, almost three years later. By then the two-year period prescribed by the Finance Act 2004 had expired, and the payment was classified unauthorised. Penal charges were levelled against the payment.

against the trustees “because they had an obligation, arising from the Rules, to take reasonably effective steps to make payment within a two year period”.<sup>498</sup> He stated that the lack of a copy of the death certificate was not an absolute bar to payment being made, especially where there was no doubt of the pension scheme member’s death.<sup>499</sup> The certificate was a formality, though one usually viewed as having high importance. He found that the trustees had a discretion about who should receive the lump sum death benefit within 24 months, but not about whether the benefit should be paid at all.<sup>500</sup>

In *Parizad*,<sup>501</sup> the Ombudsman found on the facts that rather than properly exploring the available options to pay the death benefit, the trustees had taken minimal action.<sup>502</sup> The Ombudsman found maladministration by the trustees in their failure to take appropriate steps to pay the complainant either directly or in a trust. The complaint against the trustees was upheld.<sup>503</sup> Under the scheme rules, trustees had the power and responsibility to pay the lump sum death benefit to one or more of the listed potential beneficiaries in such shares as they should decide in their absolute discretion.<sup>504</sup> What the trustees could not do was either deliberately fail to exercise or decline to exercise their discretion within the 24 months specified in the rules; to do so would be a breach of trust.<sup>505</sup>

The discussion in the paragraphs above has explained key factors and guidelines considered by pension scheme trustees when distributing death benefits. The

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<sup>498</sup> In par 1 under “The Pensions Ombudsman’s determination and short reasons”.

<sup>499</sup> In par 51. The failure of the trustees to obtain a copy of the death certificate and relevant information to proceed with the payment caused the delay that led to HMRC’s charging tax penalties.

<sup>500</sup> In par 38.

<sup>501</sup> Pensions Ombudsman Determinations (7 February 2012) *Parizad* [82720/2].

<sup>502</sup> In par 33.

<sup>503</sup> In par 33.

<sup>504</sup> In par 25.

<sup>505</sup> In par 26. Chambers states that liability for breach of trust in the abstract depends on three main questions: “(1) what duties were the trustees required to perform, (2) did the trustees fail to perform any of those duties properly, and (3) do the trustees have a defence to the liability ordinarily arising from that failure? If these inquiries (into duty, breach, and defence) lead to the conclusion that trustees are guilty of an unexcused breach of trust, it is then necessary to examine the consequence of that breach. There are two additional questions that must be answered: (4) what effect did the failure have on the trust assets, beneficiaries, and trustees and (5) what can be done to correct the situation?” (*Liability* at 1). See par 6 below, where the liability of pension schemes and their trustees is discussed.

discussion now turns to consider what happens if the distribution of the death benefits is challenged.

## **6 THE LIABILITY OF PENSION SCHEMES AND THEIR TRUSTEES IF A DISTRIBUTION OF DEATH BENEFITS IS CHALLENGED**

### *6.1 The reversal of a discretionary decision and the later recovery of death benefits*

If potential beneficiaries contest the distribution of death benefits, the question arises whether trustees can set aside their original decision unilaterally. A decision by a pension scheme trustee or an administrator of benefits, taken under their discretionary power to distribute death benefits, cannot be retaken unless a court or the Ombudsman sets aside the original decision.<sup>506</sup> In *Hawkins*,<sup>507</sup> the complaint was that after the plan member's death, the plan administrators and trustees made payments to beneficiaries which they later sought to recover. The Ombudsman confirmed that where there had been a distribution of death benefits, the trustees or the administrators could not recover any sums of money unless their original decision had been correctly set aside and that the administrators could not unilaterally set aside a discretionary decision.<sup>508</sup> In *Winterstein*,<sup>509</sup> the trustees asserted that any change to the lump sum death benefit distribution would first require recovery of some of the payments already made.<sup>510</sup> The Ombudsman disagreed with the trustees' submission. He held that if the trustees have made a distribution to recipients but after properly reconsidering their decision, they conclude that they need to change the recipients, that step would mean that the previous payments were made in error.<sup>511</sup> Thus, the distributions, as payments made in error, may or may not be recoverable. Still, the trustees had to pay the

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<sup>506</sup> Pensions Ombudsman Determinations (20 July 2016) C [PO-6823] in par 29.

<sup>507</sup> Pensions Ombudsman Determinations (31 March 2014) *Hawkins* [PO-2753, PO-3081 & PO-3082].

<sup>508</sup> In par 26.

<sup>509</sup> Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1]. See pars 5.5 and 5.5.1 above, where the *Winterstein* determination is also discussed.

<sup>510</sup> In par 28.

<sup>511</sup> In par 28.

correct sums to the relevant beneficiaries even if they could not recover any incorrect payment.

## 6.2 *The effect of a death benefit distribution made in breach of fiduciary duties*

The effect of a death benefit distribution made by trustees who have not complied with their duties is sometimes uncertain. It depends on whether the trustees acted within their powers (*intra vires* and thus not *ultra vires*)<sup>512</sup> and followed the correct process in exercising their discretion.<sup>513</sup> If the trustees acted *ultra vires*, the payment is void, as where, for example, a death benefit was paid to someone who is not a beneficiary in terms of the pension scheme rules.<sup>514</sup> However, if the trustees acted within their powers but breached their duties while exercising the powers, the distribution is voidable. Examples would be where the trustees did not consider a relevant factor, considered irrelevant ones,<sup>515</sup> or did not follow the correct process in exercising their discretion.<sup>516</sup> Their distribution remains valid until successfully challenged by an aggrieved potential beneficiary. Even so, this challenge would be subject to equitable defences<sup>517</sup> and the court's discretion.<sup>518</sup>

Trustees open their decisions to challenges by aggrieved dependants and beneficiaries if they fail to comply with their duties when exercising their

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<sup>512</sup> See in this regard *Hillsdown Holdings plc v Pensions Ombudsman and Others* [1997] 1 All ER 862 (QBD), which dealt with the powers of trustees, although in the context of a scheme merger; and Wright and Doraisamy *Mayer Brown: Trustee Guide* at 4, stating that trustees must be fully aware of the extent of their powers under the scheme when exercising their discretions. See Chapter 3, par 4.4.2, where the *ultra vires* doctrine is discussed.

<sup>513</sup> Wright and Doraisamy *Mayer Brown: Trustee Guide* at 4, stating that trustees must ensure that they follow the right procedures when exercising discretions.

<sup>514</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 66.

<sup>515</sup> In par 78.

<sup>516</sup> See in this regard *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) (19 May 2017) in par 376; *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 73; and Pensions Ombudsman Determinations (31 March 2014) *Hawkins* [PO-2753, PO-3081 & PO-3082].

<sup>517</sup> Equitable defences are usually affirmative defences asking the court to excuse an act because the party bringing the cause of action has acted in some inequitable way. Equitable defences were formerly available in a court of equity but are now used in a court of law. See in this regard the definition of "equitable defence" at <https://www.translegal.com/dictionary/en/equitable-defence/noun/> (last accessed on 17 September 2021).

<sup>518</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 99.

discretionary powers.<sup>519</sup> The fiduciary duty imposed on trustees extends only to applying their minds to what they know or could reasonably be expected to know.<sup>520</sup> In general, the courts do not undertake a retrospective examination of the trustees' state of mind in exercising a discretion.<sup>521</sup> In *Pitt and Another v Holt and Another; Futter and Another v Futter and Others*, the court held:

To sum up the preceding observations, in our judgment, where by the terms of a trust a trustee is given a discretion as to some matter under which he acts in good faith, the court should not interfere with his action notwithstanding that it does not have the full effect which he intended, unless (1) what he has achieved is unauthorised by the power conferred upon him, or (2) it is clear that he would not have acted as he did (a) had he not taken into account considerations which he should not have taken into account, or (b) had he not failed to take into account considerations which he ought to have taken into account.<sup>522</sup>

A plaintiff or applicant who alleges breach of duties by a trustee must show that the trustee in making its decision had ignored something that it was under a duty to consider. The court in *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* confirmed:

If the trustee has in accordance with his duty identified the relevant considerations and used all proper care and diligence in obtaining the relevant information and advice relating to those considerations, the trustee can be in no breach of duty and its decision cannot be impugned merely because in fact that information turns out to be partial or incorrect.<sup>523</sup>

The court also held that if the trustee was required to perform its duty in exercising its discretion, the beneficiary has a remedy if the trustee fails in that duty. Yet if there was no breach of duty, neither the trustee nor the beneficiary could have the decision declared invalid.<sup>524</sup> The court was of the view that if the trustees had exercised the discretion conferred upon them, but in doing so, had failed to take into

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<sup>519</sup> See Pensions Ombudsman Determinations (17 July 2007) P [Q00486] in par 22. The exercise of a discretionary power may be challenged if the evidence shows that the trustees asked themselves the wrong questions, failed to direct themselves correctly in law, or reached a perverse decision.

<sup>520</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 51.

<sup>521</sup> In par 51.

<sup>522</sup> In par 59 per Lloyd LJ, Mummery and Longmore LJJ concurring.

<sup>523</sup> In par 85, per Lloyd LJ, quoting Lightman J in *Abacus Trust Co (Isle of Man) and Another v Barr and Others* [2003] Ch 409 in par 23; this passage was quoted as being "a correct statement of the law" by Lord Walker in *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2013] 2 AC 108 (UKSC) in par 40.

<sup>524</sup> In par 86.

account a relevant consideration or had taken into account an irrelevant one, then it could not fairly or sensibly be held that they had made no decision.<sup>525</sup> Indeed, it could be held that they had made a flawed decision that was open to challenge, but the fact that they had made a decision was beyond question.<sup>526</sup> A successful challenge made to a decision under the rule should, in principle, result in the decision's being held voidable and not void. This outcome accords with the ordinary principles of equity that a decision challenged on the grounds of the breach of fiduciary duty is voidable, not void.<sup>527</sup>

Trustees may exercise their discretion without any check or control from the court unless there is some bad faith on their part concerning the exercise of discretion.<sup>528</sup> The court in *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* said the following in this regard:

[I]t is to the discretion of the trustees that the execution of the trust is confided, that discretion being exercised with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject. The duty of supervision on the part of this court will thus be confined to the question of the honesty, integrity, and fairness with which the deliberation has been conducted, and will not be extended to the accuracy of the conclusion arrived at, except in particular cases.<sup>529</sup>

Although the court made it clear that it would respect the trustees' exercise of a discretion vested in them, this does not exclude the possibility of a challenge if it were to appear that the trustees had acted in breach of their duties in respect of the exercise, for example by failing to give fair consideration to the question.<sup>530</sup> In *Board of Management for Dundee General Hospitals v Bell's Trustees*,<sup>531</sup> Lord Reid stated that even where trustees are expressed as having an absolute discretion:

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<sup>525</sup> In par 88.

<sup>526</sup> In par 88.

<sup>527</sup> In par 88.

<sup>528</sup> In par 110.

<sup>529</sup> In par 88, referring to a well-known saying of Lord Truro LC in *In re Beloved Wilkes's Charity* (1851) 3 Mac & G 440 at 448, (1851) 42 ER 330 at 333. See also *British Airways v Pension Scheme Trustee Ltd* 2017 EWHC 1191 (Ch) in par 484, referring to the same ruling by Lord Truro LC.

<sup>530</sup> In par 110.

<sup>531</sup> *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78. This case is referred to as *Dundee General Hospitals Board of Management v Walker* 1952 SC (HL) 78 in *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132



If it can be shown that the trustees considered the wrong question, or that, although they purported to consider the right question, they did not really apply their minds to it or perversely shut their eyes to the facts, or that they did not act honestly or in good faith, then there was no true decision and the Court will intervene....<sup>532</sup>

In similar vein, Viscount Radcliffe said in *Pilkington and Another v Inland Revenue Commissioners and Others*:

... there does remain at all times a residual power in the court to restrain or correct any purported exercise that can be shown to be merely wanton or capricious and not to be attributable to a genuine discretion.<sup>533</sup>

It is difficult for courts and the Ombudsman to intervene where trustees have exercised a discretion in a way that is within the terms of the relevant power.<sup>534</sup> In proceedings to challenge a trustee's exercise of a discretionary power because the trustee has left a relevant consideration out of account or has taken an irrelevant one into account, a breach of fiduciary duty by the trustee has to be established.<sup>535</sup> The question to ask is whether trustees have ignored something which it was their duty to take into account and, if so, whether they acted in breach of their fiduciary duty.<sup>536</sup> If there is a flaw in how the discretion has been exercised, the distribution will be valid unless and until set aside as between the parties by order of the court.<sup>537</sup> The discretion must be exercised honestly, fairly, and responsibly.<sup>538</sup>

### 6.3 *Setting aside decisions of pension scheme trustees*

It is a well-established principle that where trustees have been given an absolute discretion and have exercised it within the letter of their powers, the court will not interfere with this exercise, as long as it was done in good faith and was not

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(CA) in par 111 but appears under the name *Board of Management for Dundee General Hospitals v Bell's Trustees* in the Session Cases law report.

<sup>532</sup> *Board of Management for Dundee General Hospitals v Bell's Trustees* 1952 SC (HL) 78 at 92. See also in this regard *Self Handbook* at 35.

<sup>533</sup> *Pilkington and Another v Inland Revenue Commissioners and Others* [1964] AC 612 (HL) at 641.

<sup>534</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 113.

<sup>535</sup> In par 130.

<sup>536</sup> In par 136.

<sup>537</sup> In par 233.

<sup>538</sup> In par 234.

demonstrably unreasonable.<sup>539</sup> Their decisions are not easily set aside by the courts, which take the view that if the deed and scheme rules confer powers on trustees to make decisions, it is not for the courts to exercise this discretion for them.<sup>540</sup> For many years, the courts have shied away from examining the exercise of trustees' discretion, regarding it as a Pandora's box of difficulties.<sup>541</sup> Yet trustees should observe the limits applicable to any discretion given to them and should take decisions in good faith. In the absence of fraud or bad faith, the court may express the view that if the matter had come before it, it would have taken a different view but will still be extremely reluctant to overturn what, in effect, is a question of fact.<sup>542</sup> The decision of the Court of Appeal in *Associated Provincial Picture Corporation Houses Ltd v Wednesbury Corporation* sets the standard of the unreasonableness of public-body decisions that would make them liable to be quashed on judicial review. This is known as the Wednesbury test for unreasonableness.<sup>543</sup> The court

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<sup>539</sup> In par 48; and Ellison *Pensions Disputes* at 64.

<sup>540</sup> Thompson Solicitors "Pensions: The Law" (23 August 2012) available at <https://www.thompsons.law/news/news-archive/pensions-the-law> (last accessed on 31 June 2021). In Pensions Ombudsman Determinations (11 October 2007) *Stone* [R00465] in par 14, the Ombudsman confirmed that where the decision-making process was flawed, he does not substitute his own decision but directs that the decision be taken again. This established principle was reiterated by the Ombudsman in Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1] in par 16. The Ombudsman can only interfere with the exercise of a discretion if the decision maker has acted improperly in reaching the decision in that he (the decision maker) failed to take into account all relevant factors or took into account irrelevant factors; he asked himself the wrong question; he misdirected himself on a point of law, for example he adopted an incorrect interpretation of the relevant regulation; or he arrived at a perverse decision, i.e. a decision no reasonable decision maker, properly advising himself of all the relevant circumstances, could reach. In Pensions Ombudsman Determinations (17 July 2007) *P* [Q00486] in par 27, the Ombudsman confirmed that it was not for him to replace a trustee decision with his own, given the amount of conflicting information provided, and he must refer the matter back to the Trustees for reconsideration in the light of his findings. See above n 357 and n 397, where *Stone* and *Winterstein*, respectively, are discussed.

<sup>541</sup> Ellison *Pensions Disputes* at 20. Generally, a trustee is not bound to give reasons (unless required in the trust deed) for any decisions. Nor are trustees bound to disclose documents to a beneficiary which record the trustee's reasons. But the Ombudsman has made it clear that in so far as the distribution of death benefits is concerned, failure by trustees to record their reasons for distributing the benefits could be considered maladministration by pension schemes. See in this regard par 5.4.3 above.

<sup>542</sup> Ellison *Pensions Disputes* at 64, where he also stated that in general "the court will not step into the shoes of the trustee and make decisions in its place. The only exceptions are where: the trustee has not acted in good faith; the trustee has not considered the exercise of the discretion vested in the trustee; the trustee has exercised the discretion for an improper purpose in terms of the trust deed. The court will only examine the process by which a trustee has reached a decision to determine whether or not there was an absence of good faith, considerations or proper purpose; it will not inquire into the decision-making process to determine whether the decision was 'wise or unwise'".

<sup>543</sup> *Associated Provincial Picture Corporation Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA) especially at 233-234.

held that it could not intervene to overturn the defendant's decision simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that

- in making the decision, the defendant considered factors that ought not to have been taken into account, or
- in making the decision, the defendant did not consider factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The Wednesbury test is cited in United Kingdom courts as a reason for courts to be hesitant to interfere with decisions of administrative law bodies.<sup>544</sup> In *Pitt*, the court applied the Wednesbury test and confirmed that there was no doubt that the trustees' decision could be set aside if it could be shown that they had failed to consider relevant matters or had considered irrelevant ones.<sup>545</sup>

The principles for setting aside the trustees' decision were also outlined by the Court of Appeal in *Edge v The Pensions Ombudsman*.<sup>546</sup> The court noted that it could only overturn a decision where it could be shown that a power was not exercised for the purpose for which it had been given, or proper consideration was not given to relevant matters. The court confirmed that it could interfere in the exercise of such a power if the wrong question had been asked, or the trustee exercising the power had misdirected itself in law (for example, had made an incorrect construction of the rules), or it had come to a perverse decision (for example, a decision which no reasonable trustee would make).<sup>547</sup> The principles for setting aside trustees' decisions to distribute a death benefit in the United Kingdom, as explained above,

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<sup>544</sup> See *Wild v Smith* [1996] OPLR 129 (QBD) at 135; and also David *Legal Obligations* at 84-85 briefly explaining the Wednesbury Principles.

<sup>545</sup> *Pitt and Another v Holt and Another; Futter and Another v Futter and Others* [2012] Ch 132 (CA) in par 77.

<sup>546</sup> *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA).

<sup>547</sup> See *Lee v Showmen's Guild of Great Britain* [1952] 1 All ER 1175 (CA), where these principles canvassed in *Edge and Others v Pensions Ombudsman and Another* [1999] 4 All ER 546 (CA) at 567 were laid down; and Pensions Ombudsman Determinations (12 January 2000) *Mitchell* [J00212] in par 8.

are like those that apply in South Africa.<sup>548</sup> The fact that trustees' decisions in South Africa and the United Kingdom are rarely set aside makes it crucial that the death benefits be distributed correctly when the trustees exercise their discretionary powers. Potential beneficiaries of the death benefits have few ways of scrutinising the trustees' discretion in making decisions.

#### 6.4 *Liability for wrongful distribution of death benefits*

In Chapter 3, it was explained that aggrieved dependants and nominated beneficiaries in South Africa could sue pension funds and their trustees for wrongful distribution of death benefits where a breach of duties or maladministration had occurred.<sup>549</sup> The discussion below briefly explores the liability of pension schemes and their trustees in the United Kingdom for the wrongful distribution of death benefits.<sup>550</sup> All the same, it is not within the scope of this comparative chapter to analyse the various remedies available to aggrieved dependants and nominated beneficiaries in detail. The discussion above has shown that trustees have to ensure that the death benefits provided under the scheme rules are duly paid to qualifying beneficiaries.<sup>551</sup> It is enough to point out that trustees' failure to act according to their duties leads to the breach of a duty.<sup>552</sup> The dependants and nominated beneficiaries who have suffered a loss because the trustees failed to comply with their duties to scheme beneficiaries may bring damages claims against the schemes and/or the trustees personally for breach of duty.<sup>553</sup> A plaintiff or applicant alleging

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<sup>548</sup> See Chapter 3, par 6.5.1.2 for a discussion of the setting aside of the death benefit distributions under the PAJA.

<sup>549</sup> See Chapter 3, par 6.5.5, dealing with the liability of funds and their trustees in South Africa.

<sup>550</sup> See Spill *Practical Pensions* at 21, stating that trustees can be sued personally for a perverse or careless decision over the beneficiary. He explained that sometimes the job of trustees can "put large demands on their Solomon-like powers of judgment. Everybody knows someone whose domestic or marital arrangements are complex, sometimes sensationally so".

<sup>551</sup> Blake 2003 *Pensions* at 343.

<sup>552</sup> See Wright and Doraisamy *Mayer Brown: Trustee Guide* at 11, stating that a trustee's primary duty is to the beneficiaries of the trust, and any pension scheme trustee who fails to carry out his or her duties as a trustee to the scheme's beneficiaries could be judged as having committed a breach of trust. See also in this regard Self *Handbook* at 9, as well as at 145-147, where he discusses "breaches of trust". Millet LJ (as he then was) in *Armitage v Nurse and Others* [1998] Ch 241 (CA) at 253 held that "there is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts".

<sup>553</sup> In the determination of *Henry Davison Limited Pension Scheme* (PO-7292, PO-7951, PO-8118, PO-6703, PO-12813, PO-7616, PO-8801, PO-11753, PO-11759, PO-10259, PO-12802, PO-12801, PO-10848 & PO-10229) (29 March 2019) available at <https://www.pensions-ombudsman.org.uk/sites/default/files/decisions/PO-7292-and-13-additional-applicants.pdf> (last

maladministration against a pension scheme trustee must prove that the maladministration caused him or her loss.<sup>554</sup> If the claimant suffered no loss from the alleged maladministration, the claim against the pension scheme and its trustees fails.<sup>555</sup> The determination of *Andrews*<sup>556</sup> shows that maladministration by trustees or employers does not automatically mean that the complainant (the aggrieved beneficiary) is entitled to succeed in his or her claim.<sup>557</sup> The Ombudsman confirmed that the complainants must prove that the maladministration caused a loss on their part.<sup>558</sup>

### 6.5 *Indemnity for pension scheme trustees*

In the United Kingdom, it is common for trust deeds and/or pension scheme rules to contain provisions indemnifying trustees against claims and exempting them from all liability for breach of duty other than breaches committed knowingly or in bad

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accessed on 17 September 2021), the Ombudsman held (in par 231) that the trustees had committed multiple breaches of trust. Their actions also amounted to pure maladministration. For example, there was failure to produce statements (in par 55) and a lack of attention in respect of the fees, charges and commission structure (in par 158), and the trustees acted incompetently in assessing and addressing a conflict of interests. The Ombudsman found the trustees personally liable for the loss incurred by members and the Scheme because of the trustees' various breaches of trust. In Pensions Ombudsman Determinations (5 September 2014) *Crossan* [PO-2503] the Ombudsman confirmed that he could not consider an award where the complainant had suffered no harm. See n 279 above, where *Crossan* is also discussed. In Pensions Ombudsman Determinations (31 January 2013) *Wainwright* [89298/1], the complaint was that a member was told by her pension scheme that she could take early retirement at age 55 with no reduction in her benefits. She relied on this information in deciding to retire. The Ombudsman determined that the complaint should be upheld against the pension scheme because the latter had provided inaccurate information. But the Ombudsman concluded that the complainant had suffered distress and disappointment rather than clear financial harm (in par 41).

<sup>554</sup> Pensions Ombudsman Determinations (19 March 2010) *Andrews* [76528/1, 76732/1, 76758/1]. The complaint was that an accountant of a pension scheme member was led by the pension scheme to believe that a retirement annuity contract that the scheme member had with it (the scheme) was held in trust with the scheme member's sons as beneficiaries. When the scheme member died, it was realised that the sons were not beneficiaries under a trust. The sons sought a payment by the pension scheme of an amount as compensation for inheritance tax paid by the scheme member's estate. The sons' case was that a wrong form was provided, and that step led to an additional inheritance tax liability. The Ombudsman found that the failure of the pension scheme to provide the correct documentation had caused the contract proceeds to be subjected to inheritance tax (in par 29). The Ombudsman held that the error was caused entirely by the use of the wrong form, both generated and treated as if valid by the pension scheme (in par 35). He upheld the complaint against the pension scheme and found that its maladministration did indeed cause a loss ultimately equal to the tax paid to HMRC (in par 35). See n 218 above, where *Andrews* is also discussed.

<sup>555</sup> Pensions Ombudsman Determinations (23 July 2010) *Oliver* [77373/1] in par 32.

<sup>556</sup> Pensions Ombudsman Determinations (19 March 2010) *Andrews* [76528/1, 76732/1, 76758/1].

<sup>557</sup> In par 27.

<sup>558</sup> In par 27.

faith.<sup>559</sup> When exercising their discretion in distributing benefits, trustees can be vulnerable, as they are not permitted to obtain an exemption from liability for dishonesty, wilful default, or gross negligence.<sup>560</sup> So they cannot exclude liability for failure to exercise the standard of care that they possess or ought to possess.<sup>561</sup> The Pensions Act 2004 prohibits indemnifying pension scheme trustees for fines or civil penalties that they incur because of failing to comply with applicable laws.<sup>562</sup> However, a full analysis of the exoneration clauses, indemnities, and various insurances available in the United Kingdom to protect pension schemes and their trustees in their personal capacity is beyond the scope of this chapter.

## 7 CONCLUSION

The aim of conducting the comparative analysis of the relevant law of the United Kingdom has been to establish whether that jurisdiction provides solutions for problems in South Africa around the distribution of occupational pension fund death benefits. The fact that South African pension funds often face legal claims by aggrieved dependants and nominated beneficiaries would appear to show that the legal system in South Africa is not entirely adequate to ensure the efficient distribution of death benefits. This tendency requires that certain aspects of the laws that apply to the distribution of death benefits need to be improved. The law must devise legal solutions for these problems to help the State achieve its objectives in establishing occupational pension schemes. This chapter has discussed the approaches adopted in the United Kingdom regarding trustees' exercising their discretionary powers to distribute death benefits.

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<sup>559</sup> See in this regard Blake *Pension Schemes* at 101; Ellison *Pensions Disputes* at 58; Dawes and Samsworth *Guide to the Pensions Act* at 36; Ellison *Handbook* at 44; Self *Handbook* at 149; and *Armitage v Nurse and Others* [1998] Ch 241 (CA), which is the leading English decision on the efficacy of trustees' exemption clauses.

<sup>560</sup> See in this regard Blake *Pension Schemes* at 101; and Ellison *Pensions Disputes* at 19-29. Self *Handbook* at 149 states that insurance companies provide negligence insurance to pension scheme trustees, but this insurance excludes claims arising out of wilful negligence or wilful misconduct. See *McDonald and Others v Horn and Others* [1995] 1 All ER 961 (Ch) for a general discussion of indemnity of costs to pension scheme members who wish to sue the trustees to account to the scheme.

<sup>561</sup> See Blake 2003 *Pensions* at 344; and Dawes and Samsworth *Guide to the Pensions Act* at 36.

<sup>562</sup> See in this regard s 31 of the Pensions Act 1995; s 256 of the Pensions Act 2004; and s 67 of the Pensions Act 2008. Section 67(12)(d) of the Pensions Act 2008 provides: "No provision may be made by rules about— ... any exclusion of liability on the part of trustees, or the provision of any indemnity or insurance out of the funds of the scheme". See also Blake 2003 *Pensions* 330 at 344.

The discussion in this chapter has shown the following:

Pension scheme trustees in the United Kingdom have a discretion about which potential recipients should receive the death benefit.<sup>563</sup> These trustees' discretion is like the pension fund trustees' discretion in South Africa.<sup>564</sup>

The beneficiary nomination forms and wishes forms completed by a scheme member indicating persons that should receive the death benefits should the member die while still in service are not binding but are used merely as guidelines.<sup>565</sup> If trustees were to follow the wishes of the deceased fund member to the letter, without considering the needs of other potential dependents, they would be deemed to have fettered their discretion and breached their fiduciary duties, just as they would if they were to allocate the death benefit solely to dependants without considering nominated beneficiaries. Like pension scheme trustees in the United Kingdom, those in South Africa also use the beneficiary nomination forms and the consideration of the wishes of a pension scheme member as a guideline in distributing death benefits.<sup>566</sup>

Like their South African counterparts,<sup>567</sup> pension scheme trustees in the United Kingdom have to consider the financial dependency of both dependants and nominated beneficiaries when distributing the death benefit. Major dependants may have to prove that they were financially dependent on the deceased fund member at the time of death.<sup>568</sup>

Again, like their South African counterparts,<sup>569</sup> pension scheme trustees in the United Kingdom must minute and keep on record their reasons for a distribution.<sup>570</sup> The reasons must be made available to affected potential beneficiaries.<sup>571</sup> It is also

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<sup>563</sup> See par 5.3 above, where the discretionary powers of pension scheme trustees are discussed.

<sup>564</sup> See Chapter 3, par 3 in this regard.

<sup>565</sup> See par 5.5.1 above in this regard.

<sup>566</sup> See Chapter 3, par 2.1.1 in this regard.

<sup>567</sup> See Chapter 3, par 2.2.1.4 in this regard.

<sup>568</sup> See above par 4.1.2, and n 171, where the determination of S [PO-10502] is discussed.

<sup>569</sup> See Chapter 3, par 5.4.6.2 in this regard.

<sup>570</sup> Ellison *Handbook* at 60 states that it is crucial for pension scheme trustees to keep proper minutes (not necessarily full ones), and to make sure that the formalities are observed.

<sup>571</sup> See par 5.4.3 above, where the legal duty of trustees to give reasons to dependants and nominated beneficiary is discussed.

important that the trustees inform all nominated beneficiaries about their nomination and possible allocation or non-allocation of payment.<sup>572</sup> Trustees are also required not to delay the distribution and payment of the benefit unreasonably.<sup>573</sup> In the United Kingdom, the income tax regime sets a period of two years for pay-out. This period, absent from the Pensions Acts and Pension Schemes Acts, is included in the tax regime.<sup>574</sup> The trustees' failure to distribute within two years after the death of the fund member leads to the payment of tax penalties on the lump sum payment.<sup>575</sup> This fiscal provision differs from the position in South Africa, where the period within which the trustees must conduct investigations and make payments is stated in the Pension Funds Act.<sup>576</sup> Pension scheme trustees in the United Kingdom also have to consider relevant factors and disregard irrelevant ones when allocating death benefits,<sup>577</sup> a legal position like the South African one.<sup>578</sup>

It is clear from the comparative investigation that pension scheme trustees in the United Kingdom have the daunting task of ensuring that the death benefits are correctly paid to the beneficiaries. The list of potential beneficiaries can be complex, as there may be many potential recipients of the death benefit competing for a share in the distribution. What is even more problematic is that the lump sum death distribution rules do not limit the categories of potential beneficiaries. The trustees have the ultimate discretion to decide who should receive the death benefits and the amounts payable. To alleviate the difficulties that the trustees face in tracing and identifying potential recipients of the death benefit, pension scheme members must

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<sup>572</sup> See par 5.5.4 above, where the communication of decisions by trustees to potential recipients of death benefits is discussed.

<sup>573</sup> See par 5.5.5 above, where the period within which trustees should exercise their discretion is discussed.

<sup>574</sup> See par 5.5.5 above.

<sup>575</sup> See par 5.5.5 above. In the United Kingdom, it is clearly stated that on expiry of the two-year period, tax penalties are payable on the death benefit. In South Africa, the death benefit may become an unclaimed benefit after the expiry of a 24-month period. It should be noted that the 12-month period in South Africa does not apply automatically; the trustees have a discretion to prolong the distribution in the event of special circumstances. See Chapter 3, par 2.2.5 where the 12-month period that pension fund trustees have for payment of the death benefits is discussed; and Chapter 3, par 2.2.10.1 for a discussion of unclaimed benefits.

<sup>576</sup> See Chapter 3, par 2.2.5, where the legal position in South Africa in this regard is discussed.

<sup>577</sup> See par 5.5.3 above, where the requirement for trustees to consider all relevant factors is discussed.

<sup>578</sup> If the death benefit is payable to a dependant, the period is within 12 months and if payable where there are nominees, the payment period should be after 12 months. See in this regard Chapter 3, par 2.2.



make a non-binding nomination of potential recipients of the lump sum death benefit.<sup>579</sup> It is clear from the case law and determinations discussed that the nomination forms also contribute to disputes between potential beneficiaries. Usually, these disputes are lodged either by surviving dependants asking the trustees to deviate from the nomination form or by surviving non-dependants (nominated beneficiaries) requesting that the nomination form be followed.<sup>580</sup>

The key factors and guidelines that the trustees consider in exercising their discretionary powers are similar to those that pension fund trustees in South Africa have to consider when making an equitable distribution of death benefits.<sup>581</sup> Trustees' compliance with their duties serves to protect the interests of the pension schemes, pension scheme members, dependants, and nominated beneficiaries.<sup>582</sup> This compliance also serves to protect the trustees' interests in the event of claims against them from aggrieved dependants and nominated beneficiaries.<sup>583</sup>

The problems arising from the distribution of pension scheme death benefits have become clear in the overview of case law and the Pensions Ombudsman's determinations in this comparative chapter. In the United Kingdom, applying general principles or established guidelines is not always sufficient to resolve problems that arise because of the discretionary powers that trustees exercise in distributing death benefits. There are still no clear or conclusive guidelines for trustees when exercising their discretionary powers.<sup>584</sup> This position does not provide legal clarity and opens the door for disputes and legal claims by aggrieved dependants and nominated beneficiaries who believe that the trustees did not exercise their

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<sup>579</sup> See par 5.5.1 above for a discussion of the nomination of beneficiary form.

<sup>580</sup> In Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1] in pars 8 and 10.

<sup>581</sup> See par 5.5 above, where the established principles or key factors that pension scheme trustees in the United Kingdom consider when exercising their discretionary powers are discussed.

<sup>582</sup> See par 5.4 above, where pension scheme trustees' duties when distributing death benefits in the United Kingdom are discussed.

<sup>583</sup> See par 6.2 above, discussing the breach of fiduciary duties and the effect of a death benefit distribution made without compliance with the duties by pension scheme trustees. See also par 6.4 above, where the liability for wrongful distribution of death benefits is discussed.

<sup>584</sup> See par 5.3 above, discussing the lack of statutory provisions defining the "discretionary powers" of pension scheme trustees in the United Kingdom.

discretionary powers according to the pension scheme rules, duties, and applicable laws.<sup>585</sup>

Although there are guidelines on how trustees can exercise their discretionary powers, these lack the force of law that statutory provisions have. Nor do guidelines provide aggrieved dependants and beneficiaries with the complete protection of their interests as the statutory provisions do.<sup>586</sup>

It has been shown that in the United Kingdom, as in South Africa, pension scheme trustees play a crucial role in the distribution of death benefits and that they must exercise duties of care and fiduciary duties.<sup>587</sup> Trustees' duties include

- acting with care and skill;<sup>588</sup>
- operating their pension scheme in the best interests of the scheme and its beneficiaries;<sup>589</sup>
- acting impartially when exercising their discretionary powers of distributing the death benefits and protecting the interests of different classes of beneficiaries;<sup>590</sup>
- avoiding conflicts of interest;<sup>591</sup> and

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<sup>585</sup> See par 5 above, discussing the significance of pension scheme rules in the distribution of occupational pension schemes.

<sup>586</sup> In simple terms, legislation refers to written laws that are often referred to as Acts or statutes. Parliament, the legislative arm of government, is often responsible for the enactment of legislation (Acts or statutes). See in this regard South African Government "How Are Laws Made?" available at <https://www.gov.za/faq/guide-government/how-are-laws-made> (last accessed on 17 September 2021). Guidelines are used to interpret legislation and regulations. These may stem from legislation or be issued by the relevant departments or authorities, or they may be based on previous decisions of the relevant bodies, including the Ombudsman in the United Kingdom and the Adjudicator in South Africa. Although these guidelines are often used to advise how one might comply with the law or regulation, as guidelines they do not have the force of law. This explanation of the status of guidelines compared to legislation applies equally to both the United Kingdom and South Africa.

<sup>587</sup> See par 5.4 above.

<sup>588</sup> See par 5.4.2 above.

<sup>589</sup> See par 5.4.1.1 above.

<sup>590</sup> See par 5.4.1.2 above.

<sup>591</sup> See par 5.4.1.3 above.

- acting prudently, conscientiously, honestly and in good faith.<sup>592</sup>

Trustees must also act according to the trust deed and scheme rules and within the framework of the law.<sup>593</sup>

This study has shown that pension scheme trustees in the United Kingdom also grapple with the distribution of death benefits, particularly regarding the discretion that they are required to exercise in deciding who should receive the benefits and the amounts payable.<sup>594</sup> As in South Africa, the discretionary concept is not defined by statute, and the common law provides limited guidance. It is suggested that the discretionary powers that pension fund trustees have when distributing death benefits should be clarified in the relevant statutes.

It has also been found that the definitions of a “dependant” and a “pension scheme beneficiary”, and the extent of trustees’ discretion to determine “dependants” and “beneficiaries” in the United Kingdom, are akin to the position in South Africa. The difference is that a “dependant” is defined in the United Kingdom’s Finance Act, and this definition has been used as a basis of suggesting the formulation of its counterpart in the South African Pension Funds Act.<sup>595</sup>

In South Africa and the United Kingdom, pension funds are created with one primary objective: to provide income for their members and beneficiaries. Pension fund trustees in both jurisdictions have to act in the pension fund beneficiaries’ best interests and comply with their duties.<sup>596</sup>

From this comparative-law analysis of the relevant law of the United Kingdom, the discussion now moves to the comparative-law analysis of the law of Germany.

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<sup>592</sup> See par 5.4.1.4 above. See also in this regard Blake 2003 *Pensions* 330 at 343.

<sup>593</sup> See par 5 above, discussing the significance of pension scheme rules in the distribution of occupational pension schemes.

<sup>594</sup> The court cases and the Ombudsman’s determinations discussed in this chapter, in particular the determinations discussed in par 5.5 above, bear testimony to this observation.

<sup>595</sup> See Chapter 6, par 5.12 for the suggested new definition of a “dependant” in the Pension Funds Act .

<sup>596</sup> Chapter 3, par 5 discusses the duties of pension fund trustees in South Africa.

**CHAPTER 5**  
**AN OVERVIEW OF THE DISTRIBUTION OF RETIREMENT FUND DEATH**  
**BENEFITS IN GERMANY**

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- 1 INTRODUCTION**
  - 2 RETIREMENT FUNDING STRUCTURE**
  - 3 THE ROLE OF OCCUPATIONAL PENSIONS IN THE SOCIAL CONTEXT OF GERMANY**
  - 4 THE LEGAL STATUS OF OCCUPATIONAL PENSIONS**
  - 5 KEY ROLE-PLAYERS IN THE DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS**
  - 6 THE REGULATION AND SUPERVISION OF OCCUPATIONAL PENSION FUNDS**
  - 7 THE DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS**
  - 8 LIABILITY FOR WRONGFUL DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS**
  - 9 CONCLUSION**
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**1 INTRODUCTION**

The choice of German law as comparative material may be justified on several grounds.<sup>1</sup> Pensions were introduced to the world in Germany by Bismarck during

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<sup>1</sup> See Chapter 1, par 6.2, where the choice of Germany as a comparative jurisdiction is discussed. The discussions in Chapters 3 and 4 of this thesis comprise the legal regimes of South Africa and the United Kingdom, respectively, within which the distribution of retirement death benefits is discussed. These two legal regimes, South Africa and the United Kingdom, bear a number of striking similarities, including reliance on trust law and fiduciary obligations. So the inclusion of Germany, a legal regime that does not rely on trust laws, and in which a different approach to the distribution of retirement death benefits is followed, adds to the range of comparisons which can be made in the context of this research.

the 1880s.<sup>2</sup> Germany is credited with being the country where the first formal pension system emerged.<sup>3</sup> In 1889, a social (insurance) security system was developed,<sup>4</sup> providing insurance to many workers.<sup>5</sup> Both contributions and benefits were income-related.<sup>6</sup> However, this provision was mainly restricted to civil servants and war veterans, and many workers did not live to enjoy their retirement benefits because the life expectancy at the time was 60 years.<sup>7</sup> Moreover, this system did not provide survivors' benefits to spouses and dependants when the insured person died. Occupational pension funds in the form of company pensions were established much more recently in Germany, in 1974.<sup>8</sup>

The study in this comparative chapter discusses the distribution of retirement death benefits in both the mandatory first-pillar pensions (*gesetzliche Rentenversicherung*, hence "GRV") and the second-pillar pensions (occupational pensions (company pensions)).<sup>9</sup> The reason for discussing the distribution of death benefits in both the first-pillar and second-pillar pensions will become clear later.<sup>10</sup> Germany provides an example of a country that has for many years relied on the mandatory first-pillar pensions as the main provider of income at retirement but now recognises the need to develop and encourage the use of private occupational pensions.<sup>11</sup> These developments in Germany could guide policymakers in South Africa. The distribution of death benefits under the GRV provides South African policymakers with a possible alternative distribution process worthy of consideration

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<sup>2</sup> Foster *Benefits* at 180. The German pension system was designed by Otto von Bismarck (1815–1898) almost 140 years ago, becoming a model for many social security systems in other parts of the world. It was also designed to ensure a standard of living after retirement similar to that achieved during active life.

<sup>3</sup> See Wilke *Pension Reform* at 1.

<sup>4</sup> See Lomax *Pension Policy* at 32; and Johnson *Essays* at 3.

<sup>5</sup> Kohli 1987 *Journal of Aging Studies* 125 at 132.

<sup>6</sup> See Johnson *Essays* at 18.

<sup>7</sup> The retirement age was initially set at 70 years and later lowered to 65 years. See Börsch-Supan and Wilke *Pension System* at 4.

<sup>8</sup> See par 2.2 below, where occupational pensions in Germany are discussed.

<sup>9</sup> In this chapter, the terms "occupational pensions" and "company pensions" are used interchangeably, and both refer to the private occupational pensions provided by companies or employers for employees. They should be thus distinguished from the GRV, which is a mandatory state pension or insurance in Germany. See par 2.1 below for a discussion of the GRV.

<sup>10</sup> See n 14 below in this regard.

<sup>11</sup> See Chapter 1, par 2.1, where it is stated that the South African Government encourages the use of occupational pensions to reduce reliance on the older person's grants.

when section 37C of the Pension Funds Act is amended. The question that this comparative chapter seeks to answer is whether the management boards of company pensions or that of the *GRV* in Germany face the same challenges as their counterparts in South Africa do in distributing death benefits;<sup>12</sup> and whether they have any discretionary powers in distributing retirement fund death benefits.<sup>13</sup> A further aim is to establish and compare the method or methods used by pension funds, the *GRV*, and company pensions,<sup>14</sup> in Germany. The challenges that pension fund trustees in South Africa face concerning the distribution of retirement fund death benefits lie in, among other things:

- the lack of codification or clear guidelines concerning what is “equitable distribution”, and
- the unlimited number of persons who have to be considered as potential beneficiaries of the death benefit because the definition of a “dependant” in terms of the Pension Funds Act is unclear<sup>15</sup> — the source of many disputes between the funds, dependants, and nominated beneficiaries in South Africa.<sup>16</sup>

The process of distributing retirement fund benefits in Germany provides an example of a system where trust law and the requirement of “equitable distribution of benefits” do not apply.<sup>17</sup> Germany exemplifies a country with a different approach from South Africa to providing pensions. The main income provider at retirement is the mandatory state pension or public retirement insurance (*GRV*). The *GRV* is contributory, unlike South African first-pillar pensions, which are not contributory and have a meagre income replacement rate.<sup>18</sup> In fact, South Africa has no compulsory

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<sup>12</sup> See below, par 5.2.3 for a discussion of management boards in Germany.

<sup>13</sup> Paragraph 4 below states that in Germany some occupational pensions (i.e., *Pensionskassen* and *Pensionsfonds*) can be established as stock companies or associations; where this is done, company-law principles and statutory provisions are applicable.

<sup>14</sup> The reason for including both the *GRV* and company pensions in Germany for comparative purposes is that both pensions have the same functions as occupational pension funds in South Africa. See par 1.1 below for a discussion of the similarities between these three pensions.

<sup>15</sup> See Chapter 3, par 2.2.1.1 in this regard.

<sup>16</sup> See Chapter 3, par 2.2.1.1 in this regard.

<sup>17</sup> See n 1 above in this regard.

<sup>18</sup> See Chapter 1, par 2.1 for a discussion of first-pillar pensions (the older person’s grant) in South Africa. It is submitted that a comparison of the first-pillar pension in Germany (the *GRV*) and the first-pillar pension in South Africa (the older person’s grant) serves no purpose, as the *GRV* in

or national pension fund scheme similar to the *GRV*.<sup>19</sup> Although it is recognised that South Africa is a developing country with its own challenges in terms of demographics, a high unemployment rate, history and so on,<sup>20</sup> it is also crucial that in developing the systems in South Africa, including the pension law, notice should be taken of developments in other jurisdictions, particularly in developed countries whose retirement funding structures are considered efficient. Germany is an example of a developed country with a well-developed retirement funding system. So it is selected for its longstanding, well-established social security system ensuring access to social security for its population. Germany is a member of the European Union and is selected for this comparative study as representative of countries that are members of the European Union.<sup>21</sup> Germany is also a member of

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Germany is earnings-related while the older person's grant in South Africa is not. In addition, the *GRV* in Germany provides survivors' benefits for dependants on the death of the insured persons, while South Africa's older person's grant does not. Thus, the *GRV* is more comparable to occupational pensions in South Africa because they share the same objective: providing income to retirees and death benefits to dependants of the insured person (pension fund member). The *Grundsicherung im Alter* (social welfare benefits) in Germany is more comparable to the older person's grant in South Africa. See par 2.4 below, where the *Grundsicherung im Alter* in Germany is briefly discussed.

<sup>19</sup> See National Treasury *Retirement Fund Reform 2004* at 20-23 in par 2 cited in Chapter 1, n 2. This paper published in 2004 proposes the establishment of a National Savings Fund as a retirement funding vehicle for people with low income and those in the informal sector. It is not the intention in this chapter to delve into the merits and demerits of the National Savings Fund. However, as of June 2021, this proposal to introduce such a fund had not yet been implemented. More recently, in August 2021, the Department of Social Development published the "Green Paper on Comprehensive Social Security and Retirement Reform (2021)" in GN 741 *Government Gazette* 45006 of 18 August 2021: [https://static.pmg.org.za/210818Green\\_Paper\\_on\\_Comprehensive\\_social\\_security\\_and\\_Retirement\\_Reform\\_2021.pdf](https://static.pmg.org.za/210818Green_Paper_on_Comprehensive_social_security_and_Retirement_Reform_2021.pdf) (last accessed on 7 October 2021), inviting comments or representation by 10 December 2021. Its publication was controversial (see Grootes S "ANALYSIS: Lindiwe Zulu's Contrarian Move Could Be a Sign of New ANC Factional Fights to Come" (*Daily Maverick*, 23 August 2021) available at <https://www.dailymaverick.co.za/article/2021-08-24-lindiwe-zulus-contrarian-move-could-be-a-sign-of-new-anc-factional-fights-to-come/> (last accessed on 7 October 2021). It proposed a new state pension fund, the National Social Security Fund. The Green Paper was withdrawn later in the same month. See in this regard Buthelezi L "Proposed New State Pension Fund Would Wreak Havoc - but Treasury Says It's Not Govt Policy" (*Fin24*, 20 August 2021) available at <https://www.news24.com/fin24/economy/proposed-new-state-pension-fund-could-mean-tax-hikes-and-will-hit-investment-industry-hard-20210820-2> (last accessed on 4 October 2021); and "Lindiwe Zulu Withdraws Green Paper on Controversial State Pension Plan" (*Fin24*, 31 August 2021) <https://www.news24.com/fin24/economy/south-africa/breaking-lindiwe-zulu-withdraws-green-paper-on-controversial-state-pension-plan-20210831> (last accessed on 4 October 2021).

<sup>20</sup> See Chapter 2, par 2.3 in this regard.

<sup>21</sup> The following countries make up the European Union (EU): Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden. The United Kingdom ceased to be a member of the EU on 31 January 2020. The EU is a political and economic union, consisting of 27 member countries that are subject to the obligations and the privileges of membership. See in this regard

the Organisation for Economic Co-operation and Development (OECD), of which South Africa is one of the Key Partner countries.<sup>22</sup> And both Germany and South Africa are member countries of the International Organisation of Pension Supervisors (IOPS).<sup>23</sup>

This chapter briefly describes Germany's retirement funding structure<sup>24</sup> and the applicable pension law, occupational pensions' role in the German social context, the different kinds of pension schemes available, and the key role-players in distributing retirement fund death benefits. The chapter illustrates the different ways in which Germany provides financial support for dependants, including a surviving

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"Countries" (*European Union*) available at [https://europa.eu/european-union/about-eu/countries\\_en](https://europa.eu/european-union/about-eu/countries_en) (last accessed on 22 September 2021).

<sup>22</sup> The following 38 countries make up the Organisation for Economic Co-operation and Development (OECD): Australia, Austria, Belgium, Canada, Chile, Colombia, Costa Rica, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Mexico, Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States. South Africa as well as Brazil, China, India, and Indonesia are Key Partner countries. Key Partner countries take part in the OECD's daily work and policy debates. The OECD is a forum where governments of member countries work together to address the economic, social and environmental challenges of globalisation. See in this regard OECD "OECD Member Countries and Partners" available at <https://www.oecd.org/about/members-and-partners/> (last accessed on 22 September 2021).

<sup>23</sup> The International Organisation of Pension Supervisors (IOPS) is an independent international body representing institutions involved in the supervision of private pension arrangements. Its major goal is to improve the quality and effectiveness of the supervision of private pension systems throughout the world, thus enhancing their development efficiency, and allowing for the provision of a secure source of retirement income in as many countries as possible. The IOPS currently has 87 members and observers, representing supervisory bodies from 77 jurisdictions and territories worldwide. Germany (via the *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, hence the "*BaFin*"), South Africa (via the Financial Sector Conduct Authority (FSCA)), and the United Kingdom (via The Pensions Regulator) are all members of the IOPS. See in this regard IOPS "IOPS Members and Observers" available at <http://www.iopsweb.org/membership/iops-members-observers.htm> (last accessed on 22 September 2021).

<sup>24</sup> Germany is a federal state made up of sixteen constituent states or *Länder*. The federation (*Bund*) provides the framework for the legislation of the regional states. In 2020, Germany had a population of about 83 million. See in this regard "Germany Population" available at <https://www.worldometers.info/world-population/germany-population/> (last accessed on 30 June 2020). The unemployment rate (as of June 2020) in Germany is about 4.5 per cent. See "Germany Unemployment Rate" available at <https://tradingeconomics.com/germany/unemployment-rate> (last visited on 30 June 2020). The unemployment rate in South Africa (as of June 2020) is about 30 per cent. See in this regard "South Africa Unemployment Rate" available at <https://tradingeconomics.com/south-africa/unemployment-rate> (last accessed on 30 June 2020). There is a stark difference between the levels of unemployment in Germany compared to those of South Africa. In a country such as South Africa, where the unemployment level is remarkably high, the level of pension fund membership coverage is low. Naturally, where the level of pension coverage is low, this outcome reduces the number of dependants and other nominated beneficiaries who are eligible to receive death benefits on the death of an insured person before retirement. See Chapter 2, par 2.3 in this regard.



spouse or a civil partner of the deceased employee or fund member.<sup>25</sup> This comparative investigation aims to determine whether Germany's pension law provides a better alternative method for distributing the death benefits payable on the death of a member of a retirement fund, with the intention of deriving lessons for South Africa.<sup>26</sup> Given the challenges identified in South Africa regarding the distribution of retirement fund death benefits, including the discretionary powers of pension fund trustees,<sup>27</sup> the questions that this chapter attempts to answer are these:

- How does Germany provide financial support to pensioners and their dependants?<sup>28</sup>
- Which process does Germany follow to pay death benefits to surviving dependants if an insured person (pension fund member) dies while still in service?<sup>29</sup>
- Do the governing bodies of pension fund or pension fund management boards face the same challenges as those faced by pension fund trustees in South Africa?

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<sup>25</sup> A range of factors influence the kind of retirement funding structure that a country selects to support the financial needs of its pensioners and those of their dependants in the case of the death of a fund member before retirement. These factors include the availability and adequacy of other sources of income that can be used to support these people. These factors also influence the choice of method used to distribute retirement fund death benefits. Thus, the importance of occupational pension funds in Germany can only be understood by taking a range of these factors into consideration. See Chapter 2, par 2.3, where the importance of historical considerations in shaping a retirement funding method in a country is discussed.

<sup>26</sup> The purpose of this chapter is thus not to provide a comprehensive overview and detailed discussion of the retirement funding structure in Germany or the applicable pension laws generally, but to focus on the distribution of death benefits in Germany.

<sup>27</sup> As indicated in the discussion in Chapter 3, dealing with the distribution of retirement fund death benefits in South Africa, the issues that hinder the efficient distribution of the death benefits include not only the lack of certainty regarding the discretionary powers of pension fund trustees but also some other factors highlighted in the chapter. The challenges faced by pension fund trustees when distributing retirement fund death benefits in South Africa are discussed in Chapter 3 of this thesis.

<sup>28</sup> See pars 1.1, 2.1 (the *GRV*), 2.2 (company pensions), and 2.3 (private pensions) below, where the mandatory state pension system or statutory pension insurance (*gesetzliche Rentenversicherung (GRV)*), company pensions, and individual accounts in Germany are discussed.

<sup>29</sup> In Germany, the process of distributing retirement fund death benefits is divided into two categories: one includes the *GRV* (see par 2.1 below in this regard) and the other includes company pensions (see par 7 below in this regard).

- Are there any bodies and/or institutions mandated to protect the interests of the insured persons (fund members) and their dependants or beneficiaries?<sup>30</sup>

To appreciate the role of occupational pensions (company pensions) in Germany, one needs a basic understanding of the German retirement funding structure. This structure consists of the following three-pillar pension system:<sup>31</sup>

- First-pillar pensions: the mandatory state pension system or statutory pension insurance (*gesetzliche Rentenversicherung*, hence “GRV”) <sup>32</sup> managed by the German Pension Insurance (*Deutsche Rentenversicherung*);<sup>33</sup>
- Second-pillar pensions: the occupational pension funds (company pension funds) (*betriebliche Altersvorsorge*, hence “BAV”);<sup>34</sup> and
- Third-pillar pensions: the private voluntary insurance plans.<sup>35</sup>

This three-pillar pension system follows the pillar system advocated or recommended by the World Bank.<sup>36</sup> Germany’s pension system is also similar to

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<sup>30</sup> See par 5 below, discussing the key role-players in the distribution of occupational pension death benefits in Germany, as well as the regulation and supervision of occupational pension funds. The Insurance Supervision Act of 1 April 2015 (*Versicherungsaufsichtsgesetz (VAG)*) § 294(1) states that the primary objective of insurance supervision is the protection of policyholders and beneficiaries of insurance services.

<sup>31</sup> Foster *Benefits* at 179; Bönke *et al* 2019 *Review of Income and Wealth* 834 at 838.

<sup>32</sup> A specific section of this Act, say, section 11, is referred to as GRV § 11. The GRV is discussed below in par 2.1. Pensions that are set up for civil servants fall outside the scope of this chapter of the thesis and are not discussed. In 2021, about 70 per cent of the German working-age population (20-65 years) was insured through the statutory pension insurance (the GRV). See in this regard “German Pension Entitlements & Retirement Age” (*Welcome Center Germany*, 11 April 2021) available at <https://welcome-center-germany.com/german-pension-entitlements-retirement-age/> (last accessed on 30 June 2021).

<sup>33</sup> All German pension funds are represented uniformly under the name *Deutsche Rentenversicherung* (German Pension Insurance). There are sixteen regional pension funds, and all employed people are divided among them. The *Deutsche Rentenversicherung Bund* (German Federal Pension Scheme) has a dual function: as a regional pension fund, it looks after customers of the former *Bundesversicherungsanstalt für Angestellte (BfA)* (Federal Insurance Agency for Salaried Employees), and it represents joint issues at a higher level for all pension funds. See Deutsche Rentenversicherung “Company Profile” available at [https://www.deutscherentenversicherung.de/DRV/EN/Deutsche\\_Rentenversicherung/unternehmensprofil.html](https://www.deutscherentenversicherung.de/DRV/EN/Deutsche_Rentenversicherung/unternehmensprofil.html) (last accessed on 21 September 2021).

<sup>34</sup> Occupational pensions are discussed in par 2.2 below.

<sup>35</sup> Individual private pensions are discussed briefly in par 2.3 below; but this review does not focus on these pensions.

<sup>36</sup> The World Bank recommends a three-pillar system: the first is for poverty relief, the second pillar is occupational-based or earnings-related, and the third pillar is individual savings. See in this

the one in South Africa in that both countries have three-pillar systems.<sup>37</sup> Yet, although there are similarities between the structures in the two countries, there are also differences, as highlighted below.<sup>38</sup>

### 1.1 *Similarities and differences between the GRV and occupational (company) pensions in Germany*

There are some similarities between Germany's *GRV* (first-pillar pensions) and company pensions (second-pillar pensions). Together, these two types of pensions form part of the earnings-related pension provision in Germany.<sup>39</sup> In Germany, it is mandatory that every economically active person be insured under the old age pension scheme, with those not subject to mandatory insurance also being given the opportunity to purchase insurance under the scheme.<sup>40</sup> Workers who are not subject to compulsory insurance can belong to either compulsory insurance or voluntary insurance — the *GRV* or company pensions.<sup>41</sup> Company pensions were established to supplement the pensions provided by the *GRV*. Both members of the *GRV* and members of company pension schemes<sup>42</sup> are required to make contributions to the *GRV* or their company pension scheme to qualify for pension benefits from the respective scheme when the insured event occurs.<sup>43</sup> To receive benefits from the scheme, both the *GRV* and company pensions require the insured person to be a member or to have been a member of the scheme in the past in order to qualify themselves or their dependants. The *GRV* and company pensions are

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regard the World Bank *Averting the Old Age Crisis* at 15-16 (also cited in Chapter 1, n 14), where the three-pillar pension system recommended by the World Bank is discussed.

<sup>37</sup> See in this regard Chapter 1, par 2.1, where the three-pillar pension system in South Africa is highlighted.

<sup>38</sup> The similarities and differences between the *GRV* and company pensions in Germany are discussed in more detail in par 1.1 below.

<sup>39</sup> See Whiteford *Adapting* at 26, n 78, stating that the statutory scheme, the *GRV*, put in place in Germany was earnings-related from its inception. More details on the *GRV* are given in par 2.1 below.

<sup>40</sup> See the Social Security Code Sixth Book of 18 December 1989 (*Sozialgesetzbuch Sechstes Buch (VI) (SGB VI)*) § 7. See also Whiteford *Adapting* at 60 in this regard. And see par 2.1 below for exceptions to this mandatory rule.

<sup>41</sup> See par 2.2.2 below for a discussion of the establishment of company pensions in Germany.

<sup>42</sup> In this chapter of the thesis, a member of the *GRV* or of a company pension scheme is sometimes referred to as “a pension fund member”, “a contributor”, or “an insured person” — all these terms refer to a person who contributes or has contributed to the scheme, whether it be the *GRV* or any other company pension scheme.

<sup>43</sup> The insured event often includes the member's (insured person's) retirement, disability, or death. See par 2.2.1 below for a discussion of the objective of occupational pensions in Germany.

linked to the labour market in that the insured person should be employed or working to be a member of either fund. The Federal Republic of Germany encourages participation in both the *GRV* and company pensions by providing incentives in favourable tax treatment.<sup>44</sup> Both the *GRV* and company pensions have one ultimate objective: to provide income to the insured person on retirement or to provide income to the insured person's dependants when the insured person dies while still in service.<sup>45</sup>

Both the *GRV* and company pensions in Germany have some features similar to those of occupational pension funds in South Africa. These features include the following: members of these three pension funds (*GRV*, company pensions in Germany, and occupational pensions in South Africa) must contribute to the pension fund or pension scheme to qualify for pension benefits. They all require past or present members of the insured person (pension fund member) to qualify or for the member's dependants to qualify to receive benefits from the funds. All these three pension funds are linked to the labour market in that the fund member should be employed or working. The South African Government, through the South African Revenue Service (SARS) (like the Federal Republic of Germany), encourages participation in pension funds by both employers and employees in the form of favourable tax treatment.<sup>46</sup> Both the *GRV* and company pensions in Germany and pension funds in South Africa have one ultimate objective: to provide income to the insured person on retirement or to provide income to the dependants of the insured person when the latter dies while still in service.<sup>47</sup>

Although the *GRV* may be comparable to company pensions in Germany because of earnings-related and other features, it is acknowledged that there are also differences between the *GRV* and company pensions.<sup>48</sup> One difference is that the

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<sup>44</sup> See n 92 below regarding the incentives through tax benefits.

<sup>45</sup> See par 3 below in this regard. This objective is shared with the occupational pensions established in South Africa. For this reason, it is important that both the *GRV* and the company pensions be included in the consideration of how financial support to pensioners and their dependants in the event of a fund member's death (or the insured person) before retirement is provided in Germany.

<sup>46</sup> See Chapter 2, par 2.3 in this regard.

<sup>47</sup> See Chapter 1 par 2.4 and below in this chapter, par 2.2.1, where the objectives for establishing pension funds in South Africa and Germany are respectively discussed.

<sup>48</sup> The differences between the *GRV* and the South African occupational funds are discussed above in par 1.1 and below in par 2.1.

*GRV* is a mandatory public insurance scheme, while company pension schemes are a private arrangement between the employer and its employees.<sup>49</sup> And the *GRV* and company pensions are also regulated by different laws and specific rules.<sup>50</sup>

Besides some similarities between the *GRV* and occupational pensions in South Africa, it is acknowledged that there are also differences between the two schemes.<sup>51</sup> The *GRV* forms part of the statutory social security system in Germany and constitutes the first-pillar pensions.<sup>52</sup> This arrangement is a significant difference between the *GRV* in Germany and occupational pension funds in South Africa. In South Africa, there are no earnings-related first-pillar pensions in the form of the *GRV*; and the second pillar, occupational pension funds, which is earnings-related, is not mandatory. Employees (workers) in South Africa only have access to occupational pensions in the form of pension funds regulated by the Pension Funds Act 24 of 1956 (the Pension Funds Act).<sup>53</sup> By contrast, in Germany, employees have both the *GRV* and their occupational pensions in the form of “company pensions” as a source of income on their retirement or, on their death, for their dependants.

In the context of German law, reference to “occupational pension funds” refers to “company pension plans”, “company pension schemes”, and “occupational pension schemes” which are second-pillar pensions in Germany. The focus in this comparative chapter is on establishing the process that both pensions — the *GRV*

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<sup>49</sup> However, see par 2.2.2 below, where it is stated that since 2002, employees in Germany have a legal right to be provided with retirement benefits (company pensions) by their employers.

<sup>50</sup> See par 1.2 below for a discussion of laws that apply to pension funds in Germany.

<sup>51</sup> The differences between the *GRV* and the South African occupational pension funds are explored in par 1.1 above and in par 2.1 below.

<sup>52</sup> Whether occupational pensions in South Africa are part of the social security in the country is debatable, unlike in Germany where the *GRV* (as well as company pensions, see below par 2.2.2 in this regard) is unmistakably part of the social security system. This position contrasts with the one in South Africa, where occupational pensions are not mandatory and only cover a limited number of the population (see Chapter 1, par 2.4, discussing the establishment of occupational pension funds in South Africa). See also Chapter 2, par 5, where an argument is made that occupational pensions in South Africa, more specifically retirement fund death benefits, should form part of the social security system. It was also shown in Chapter 3 that although the intention of occupational pensions in South Africa, through s 37C of the Pension Funds Act, is to achieve a social objective, many factors hinder the fulfilment of this objective in certain instances.

<sup>53</sup> The Government Employees Pension Fund and other occupational pensions regulated by other statutes in South Africa are not included in this thesis. It is sufficient for the purpose of this chapter to mention that these pensions, which are not regulated by the Pension Funds Act, may be categorised as second-pillar pensions in South Africa. See Chapter 2, n 25 for a list of the other pension funds not regulated by the Pension Funds Act.

and company pension funds — follow in distributing retirement fund death benefits (the survivor's benefit) on the death of an insured person (the person covered by the scheme or the member of the scheme). The distribution process followed in Germany is thus considered to determine whether it provides a solution or an alternative distribution method that, if adopted, could enhance efficiency and alleviate the challenges that South African pension fund trustees face in distributing retirement fund death benefits.

## 1.2 Pension laws in Germany

The law governing the different pensions in Germany is found in various sources. These include statutes dealing with specific forms of pension, provisions in the civil and commercial codes, the common law, court decisions,<sup>54</sup> and the law concerning disciplines such as labour law. There is no universal pension law that applies across all pension funds; instead, the law is contained in various statutes, and the applicability of a particular law or statute depends on the nature of the pension fund concerned: for example, whether the fund concerned is the *GRV*, an occupational pension, or a private individual pension. Even for occupational pensions, Germany has five different forms of pension that employers can use to deliver their pension promise to their employees. These include *Direktzusage* (direct pensions or insurance), *Pensionskassen* (pension institution or staff pension insurance), *Pensionsfonds* (pension funds),<sup>55</sup> support funds (*Unterstützungskassen*), and reserve funds.<sup>56</sup>

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<sup>54</sup> German judges are not bound by precedent (*Präjudizienrecht*) but, in pursuit of consistency, they are likely to consider earlier decisions of the higher courts. German judges only interpret and apply the existing law to the facts before them. See in this regard Wells E “Oxford LibGuides: Germany: Legal Resources: Cases” available at <https://ox.libguides.com/law-german/cases> (last accessed on 22 September 2021). For more details regarding the Federal Constitutional Court (*Bundesverfassungsgericht*), see *Bundesverfassungsgericht* “Homepage” available at [https://www.bundesverfassungsgericht.de/EN/Homepage/home\\_node.html](https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html) (last accessed on 22 September 2021).

<sup>55</sup> The word “pension fund” is sometimes used in this chapter to refer to occupational pensions in general. However, there are specific kinds of occupational pensions in Germany, called *Pensionskassen* and *Pensionsfonds*. The literal English translation of these two funds is “pension institutions” and “pension funds”, respectively. To avoid confusion between these terms, *Pensionskassen* and *Pensionsfonds* are referred to by their German names throughout this chapter.

<sup>56</sup> See par 2.2.2 below for a discussion of these five forms of occupational pension and their differences.

The laws applicable to the *GRV*, occupational pensions, and private individual pensions are as follows:

- The main statute that regulates the *GRV* is the Social Code Sixth Book of 18 December 1989 (*Sozialgesetzbuch Sechstes Buch (SGB VI)*).<sup>57</sup>
- The law that provides the legal basis for providing occupational pensions to workers is the Occupational Pensions Act of 19 December 1974 (*Gesetz zur Verbesserung der betrieblichen Altersversorgung (BetrAVG)*)<sup>58</sup> as well as the Act on the Strengthening of Occupational Pensions Strengthening Act of 17 August 2017 (*Betriebsrentenstärkungsgesetz (BetrRSG)*), which became effective on 1 January 2018.<sup>59</sup> The *BetrAVG* provides the legal basis for the rights and duties of employers and employees relating to occupational pension funds.<sup>60</sup> In addition to the Occupational Pensions Acts, there are other pieces of legislation relevant to company pensions. For example, the Income Tax Act of 1 December 1971 (*Einkommensteuergesetz (EStG)*) contains numerous rules of considerable importance for company pensions.<sup>61</sup>

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<sup>57</sup> A specific section of this Code, for example, section 11, is referred to as *SGB VI* § 11.

<sup>58</sup> A specific section of this Act, for example, section 11, is referred to as *BetrAVG* § 11. *Gesetz zur Verbesserung der betrieblichen Altersversorgung* translates as “Law to Improve Occupational Pensions”.

<sup>59</sup> This Act introduced defined contribution schemes that changed the nature of occupational pensions in Germany. A specific section of this Act, for example section 11, is referred to as *BetrRSG* § 11.

<sup>60</sup> *BetrAVG* § 1 deals with the employer’s commitment to a company pension scheme. *BetrAVG* § 1(1) states:

“If an employee is promised retirement, invalidity or survivor benefits on the grounds of his/her employment relationship (Occupational Pension Scheme), the provision of this Act shall apply. The company pension scheme can be implemented directly through the employer or through one of the pension providers listed in 1b, pars 2 to 4. The employer is also responsible for the fulfilment of the benefits promised by him, even if the implementation is not carried out directly by him”.

See Whiteford *Adapting* at 70 for the English translation of the *BetrAVG* § 1. See also Pensions & Retirement Plans “Getting the Deal Through: Germany” (*Lexology*, May 2018) in par 4 available at <https://gettingthedealthrough.com/area/57/jurisdiction/11/pensions-retirement-plans-germany/> (last accessed on 30 June 2020) in par 1 (hence “Pensions & Retirement Plans *Getting the Deal Through*”).

<sup>61</sup> A specific section of this Act, for example, section 11, is referred to as *EStG* § 11. *EStG* § 19(2) exempts qualifying pensions from taxation. *EStG* § 82 deals with pension contributions, and *EStG* § 100 deals with funding amounts for occupational pensions. *EStG* § 10a contains provisions to encourage contributions to pension schemes by means of direct grants or a special allowance. Whiteford *Adapting* at 71 states that tax law plays an important role in German occupational pensions law, influencing the employer in choosing a funding vehicle for the pension promise made.

- The Insurance Supervision Act of 1 April 2015 (*Versicherungsaufsichtsgesetz (VAG)*).<sup>62</sup> The VAG regulates occupational pensions that are set up in the form of direct insurance, *Pensionsfonds*, and *Pensionskassen*. The VAG is the chief legislation governing insurance and reinsurance activities in Germany. So the provisions applicable to insurance undertakings under this Act apply to pension plans in the form of direct insurance, *Pensionsfonds*, and *Pensionskassen*.<sup>63</sup>
- The Insurance Contract Act of 23 November 2007 (*Versicherungsvertragsgesetz (VVG)*) governs insurance contract law, including the distribution of benefits to beneficiaries in Germany.<sup>64</sup>
- Certain provisions (such as those relating to the management boards) of the Companies Act apply to occupational pensions established as stock companies and/or associations, for example, *Pensionskassen* and *Pensionsfonds*.<sup>65</sup> Limited liability companies in Germany are regulated by the Limited Liabilities Companies Act: the Act concerning Companies with Limited Liability of 2 April 1892 (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung (GmbHG)*). Joint-stock companies are subject to the Stock Corporation Act of 6 September 1965 (*Aktiengesetz* — hence “AktG”).<sup>66</sup>

<sup>62</sup> Insurance Supervision Act of 1 April 2015 (*Federal Law Gazette I* page 434), as most recently amended by Art 2 of the Act of 19 December 2018 (*Federal Law Gazette I*, page 2672). The English translation of the VAG by the Federal Insurance Supervisory Office is used in this chapter: see [https://www.theBaFin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl\\_vag\\_en\\_va.html](https://www.theBaFin.de/SharedDocs/Downloads/EN/Aufsichtsrecht/dl_vag_en_va.html) (accessed on 30 June 2021). The Insurance Supervision Act of 1 April 2015 (*Versicherungsaufsichtsgesetz*) is hence referred to as the “VAG”. A specific section of this Act, such as section 11, is referred to as VAG § 11.

<sup>63</sup> VAG § 237(1) states that the requirements for life insurance undertakings that are not *Pensionskassen* apply to *Pensionsfonds*, with the necessary modifications, unless otherwise set forth in this Act. See par 2.2.2 below, where pension forms in Germany, including direct insurance, *Pensionskassen*, and *Pensionsfonds* are explained and discussed.

<sup>64</sup> A specific section of this Act, for example section 11, is referred to as VVG § 11. The distribution of death benefits to beneficiaries is discussed in par 7 below. The English translation of the VVG’s provisions referred in this comparative chapter is provided by the Federal Ministry for Justice and Ute Reusch, available at [http://www.gesetze-im-internet.de/englisch\\_vvg](http://www.gesetze-im-internet.de/englisch_vvg) (last accessed on 30 June 2021), and is used in this comparative chapter.

<sup>65</sup> See VAG § 33, which deals with the application of company-law provisions, with the necessary modification, to insurance undertakings. *Pensionskassen* and *Pensionsfonds* are discussed below in par 2.2.

<sup>66</sup> See in this regard “The Company Act in Germany” (*Leisegang and Partner*, 5 March 2019) available at <https://www.companyformationgermany.com/the-company-act-in-germany> (last accessed on 22 September 2021). For the English version of the Stock Corporation Act (*Aktiengesetz*) used in this comparative chapter see Regelin F and Henkel F “German Stock



- The Certification of Retirement Pension Contracts Act of 2001 (*Altersvorsorgeverträge-Zertifizierungsgesetz*, hence “*AltZerG*”) applies to individual private pensions. It prescribes the requirements that individual private pensions must meet to be eligible for subsidies or tax relief.<sup>67</sup>

In addition to the statutes listed above, other laws apply to German pension law: for example, the Civil Code of 18 August 1896 (*Bürgerliches Gesetzbuch*, hence “*BGB*”),<sup>68</sup> the Commercial Code of 10 May 1897<sup>69</sup> (*Handelsgesetzbuch*, hence “*HGB*”),<sup>70</sup> and the Constitution of the Federal Republic of Germany of 8 May 1949 (*Grundgesetz für die Bundesrepublik Deutschland* — the Basic Law for the Federal Republic of Germany, hence “*GG*”).<sup>71</sup> Furthermore, specific rules under other statutes and rules that arise under common law cannot be disregarded. The rules of the relevant pension funds are also crucial in guiding their management boards.<sup>72</sup> The role played by the courts in applying pension law should not be underestimated in determining legal principles.<sup>73</sup> And where applicable, German law is further guided by European Union laws and directives.<sup>74</sup>

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Corporation Act (*Aktiengesetz*)” (*Norton Rose Fulbright*, December 2016) available at <https://www.nortonrosefulbright.com/en/knowledge/publications/imported/2018/07/18/05> (last accessed on 22 September 2021). Their English translation is as at 10 May 2016.

<sup>67</sup> A specific section of this Act, for example, section 11, is referred to as *AltZerG* § 11.

<sup>68</sup> A specific section of this Act, for example, section 11, is referred to as *BGB* § 11. The English translation used in this chapter was provided by the Langenscheidt Translation Service, regularly updated by Neil Mussett and by Samson Übersetzungen GmbH, Dr Carmen v. Schöning; it is available at [https://www.gesetze-im-internet.de/englisch\\_bgb/](https://www.gesetze-im-internet.de/englisch_bgb/) (last accessed on 22 September 2021).

<sup>69</sup> A specific section of this Act, for example, section 11, is referred to as *HGB* § 11.

<sup>70</sup> Both these Codes came into operation on 1 January 1900 and have subsequently been amended. While the *BGB* applies generally in Germany, the Commercial Code applies only to merchants (*Kaufmänner*). See in this regard Havenga *Fiduciary Duties* in Chapter 7, n 3 at 229.

<sup>71</sup> The *Grundgesetz* is the Constitution of the Federal Republic of Germany. It stipulates the basic human rights (Arts 1-19 and 101-104 *GG*). See in this regard Koch *Germany* at 39. South African courts, including the Constitutional Court and the Pension Funds Adjudicator, refer to the *Grundgesetz* in interpreting comparable provisions of the South African Constitution. See in this regard *Ferreira v Levin NO and Others*; *Vryenhoek and Others v Powell NO and Others* 1996 1 SA 984 (CC) in pars 83-87, cited in Chapter 3 n 30, with regard to the interpretation of the “right to freedom”; *Manzini v Metro Group Retirement Funds and Another (1)* 2001 BPLR 2808 (PFA), cited in Chapter 1 n 82; and *Sebola v Johnson Tiles (Pty) Ltd and Others* 2002 3 BPLR 3242 (PFA). Both the *Manzini* and *Sebola* determinations dealt with pension fund benefits as a right to property.

<sup>72</sup> See, for example, par 7.3 below in this regard.

<sup>73</sup> See in this regard n 54 above, n 153 and n 196 below.

<sup>74</sup> European Union directives apply to Germany as a member state of the Union. For example, Clause (25) of the Directive 2014/50/EU of 16 April 2014 on minimum requirements for

It is clear from the preceding discussion that a comprehensive codification of German pension law does not exist. There are various forms of pension provisions in Germany, and the applicable laws are contained in the different statutes. The various laws are explored in the relevant paragraphs below dealing with specific pensions in Germany. The following paragraph provides an overview of the retirement funding structure in Germany comprising three pillars: the *GRV*, occupational pensions (company pensions), and individual private accounts. These pillars are discussed individually below.

## 2 RETIREMENT FUNDING STRUCTURE

### 2.1 *First pillar pensions: public retirement insurance*

First-pillar pensions in Germany take the form of a public pension system or public insurance scheme (the “*GRV*”). The *GRV* provides pensions for private and public sector employees.<sup>75</sup> It broadly covers wage-earners and salaried employees (excluding civil servants) as well as self-employed persons who apply for mandatory coverage.<sup>76</sup> Participation in the *GRV* is mandatory for employees. However, there are certain employees to whom mandatory coverage does not apply, including civil

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enhancing worker mobility between Member States by improving the acquisition and preservation of supplementary pension rights states that where survivors' benefits are attached to schemes, surviving beneficiaries should also have the same right to information as deferred beneficiaries. See Pub. L. No. 32014L0050, OJ L 128 (2014), <http://data.europa.eu/eli/dir/2014/50/oj/eng> (last accessed on 22 September 2021).

<sup>75</sup> In Germany, civil servants who belong to a career-based system and hold posts in the traditional administration, such as management, education, and police, are distinguished from other public sector employees whose positions are secured under an employment contract. See in this regard “Archive:Public Employment - Germany” (*eurostat*, 18 April 2016) available at [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Public\\_employment\\_-\\_Germany](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Archive:Public_employment_-_Germany) (last accessed on 22 September 2021).

<sup>76</sup> See Steinmeyer *Pensions* at 14.

servants,<sup>77</sup> the self-employed, and certain workers,<sup>78</sup> especially those who earn below the official minimum earnings threshold.<sup>79</sup>

Workers understand contributions to the *GRV* to be “insurance premiums”.<sup>80</sup> This position contrasts with the one in South Africa, where the public pension system (the state social pension or older person’s grant) is not in the form of insurance and is referred to as “social security”.<sup>81</sup> The *GRV* was established as a separate entity from the government.<sup>82</sup> So it does not form part of the government’s budget and is financed by contributions from employees and employers.<sup>83</sup> It is administered by the German Federal Insurance Office (*Bundesversicherungsamt*), which since 1 January 2020 is called the Federal Office for Social Security (*Bundesamt für Soziale Sicherung* (hence the “*BAS*”)).<sup>84</sup> This office is responsible for paying pension benefits to pension fund members and for paying retirement fund death benefits to dependants of the insured person when the latter dies before retirement. In addition to the *BAS*, regional pension insurance institutions also handle the payment of pension benefits and/or death benefits to pensioners and dependants in the

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<sup>77</sup> The pensions of civil servants are provided by the *Beamtenversorgung* (the civil service scheme) run by the authority of the sixteen regions (*Länder*) by the federal state (*Bund*). The *Bund* provides the framework for the regional legislation. Civil servants do not pay contributions; their pensions are financed from general tax revenue. The scheme is quite generous: benefits depend not on the entire earning career, but also on the most recent income before retirement. See in this regard Berner *New Private Pensions* 127 at 130.

<sup>78</sup> See Pensions & Retirement Plans *Getting the Deal Through* in par 4, stating that the excluded employees include those in the liberal professions, management board members of German stock corporations, and civil servants.

<sup>79</sup> See Börsch-Supan and Wilke *Pension System* at 10-11.

<sup>80</sup> At 3.

<sup>81</sup> See Chapter 1, par 2.1, where the state’s “social security” in South Africa is discussed, particularly the older person’s grant. In South Africa, state social security is distinguished from pensions provided to public servants by the government.

<sup>82</sup> See Börsch-Supan and Wilke *Pension System* at 3.

<sup>83</sup> See, for example, the *SGB VI* provisions about the contribution rates that should be paid by employees and their employers to the statutory retirement scheme.

<sup>84</sup> The Federal Office for Social Security (*Bundesamt für Soziale Sicherung* (*BAS*)) supervises social insurance funds and other institutions under direct federal control. It is an independent Superior Federal Authority established by law in 1956 and responsible to the Federal Ministry of Labour and Social Affairs. It is a legal supervisory authority of statutory pensions. More than half the persons insured under the statutory social security insurance system are covered by funds supervised by the *BAS*. The remaining social security insurance providers are supervised by the federal state in which they are located. See “About the Federal Office for Social Security” (*Bundesamt für Soziale Sicherung*) available at <https://www.bundesamtsozialesicherung.de/en/federal-office-for-social-security/about-the-federal-office-for-social-security/> (last accessed on 22 September 2021), and <https://www.bundesamtsozialesicherung.de/de/> (last accessed on 30 June 2021).

constituent states (*Länder*).<sup>85</sup> The way in which death benefits provided by the *GRV* are paid in Germany differs from the one in South Africa in that, unlike in South Africa where the payment of death benefits is made through the pension fund boards of many individual funds, the process in Germany is centralised in the *BAS* and the regional pension insurance institutions.<sup>86</sup> The pension benefits provided by the *GRV* are defined benefits.

The contributions of current employees finance the *GRV*. These contributions are, in turn, used to pay pensions to the current pensioners.<sup>87</sup> Employees are required to contribute a certain share of their gross earnings to the *GRV*.<sup>88</sup> These amounts take the form of “insurance premiums” (contributions) deducted by the employer from the employee’s gross earnings.<sup>89</sup> The employer matches the employees’ contributions to entitle them to receive benefits from the *GRV*.<sup>90</sup> The amount that each employee has to contribute is determined by assessing the applicable statutory contribution rate and the annual income of the insured person.<sup>91</sup> The German federal government provides subsidies for participation in the scheme in the form of favourable tax treatment.<sup>92</sup> This position contrasts with the South African one, where the older person’s grants form part of the government budget.<sup>93</sup> In Germany,

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<sup>85</sup> See in this regard n 24 above.

<sup>86</sup> See Chapter 3, par 2.2 discussing the process of distributing death benefits in South Africa.

<sup>87</sup> The statutory scheme operating in Germany offers a high level of earnings-related benefits to beneficiaries. See in this regard Whiteford *Adapting* at 59 and authorities cited there.

<sup>88</sup> See Beck C and Eisenlohr MH “Regulation of State and Supplementary Pension Schemes in Germany: Overview” (1 April 2019) available at [https://uk.practicallaw.thomsonreuters.com/0-594-6625?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk](https://uk.practicallaw.thomsonreuters.com/0-594-6625?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk) (last accessed on 30 June 2021) (hence “Beck and Eisenlohr *Regulation*”); and also Rasner *Distribution* at 19 and 20.

<sup>89</sup> See Börsch-Supan and Schnabel *Social Security* at 10.

<sup>90</sup> See Rasner *Distribution* at 19 and 20; and “Pension System in Germany” (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021).

<sup>91</sup> See Beck and Eisenlohr *Regulation*.

<sup>92</sup> See Börsch-Supan and Wilke *Pension System* at 3. The subsidies are indirect: they take the form of tax benefits, which an employee receives for contributing to the *GRV*. This position is similar to the one in South Africa, where employees receive tax benefits or deductions for contributing to a recognised pension fund. See in this regard n 61 above.

<sup>93</sup> See Chapter 1, par 2.1 for a discussion of the older person’s grant in South Africa. As stated in par 1.1 above dealing with the similarities and differences between the *GRV* and company pensions in Germany, although the retirement structure in both Germany and South Africa consists of three pension pillars, the stark difference between the two structures is that in Germany, the first pension pillar is contributory (earnings-related), while in South Africa, the first pillar (the old person’s grant) is not. The former should rather be compared with the second pension pillar in South Africa because they are both contributory and earnings-related. So in this

a person needs to make contributions to the *GRV* to qualify to receive benefits.<sup>94</sup> By contrast, in South Africa, the older person's grant recipients need not contribute but qualify by meeting specific criteria, including age and means tests.<sup>95</sup> Given the stark contrast between the *GRV* and the South African older person's grant, comparing the two would not provide any meaningful lessons for addressing the challenges faced by pension fund trustees in distributing retirement fund death benefits in South Africa. So the comparative study in this thesis focuses on the *GRV* and company pensions in Germany and compares them to the occupational funds registered under the Pension Funds Act in South Africa.

The *GRV* offers the following benefits to qualifying workers or contributors:

- Old age pensions at age 62 and older;<sup>96</sup>
- Disability benefits for qualifying workers aged under age 62, which are converted to old age pensions at age 65 at the latest; and
- Survivors' benefits for spouses and children on the death of the contributor (the deceased insured person).<sup>97</sup>

Among the three stated above, the most relevant benefits for this comparative chapter are the survivors' benefits that the *GRV* grants to spouses and children of the insured person when the latter dies before retirement.<sup>98</sup> Section 46 of the *SGB*

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chapter of the thesis, when comparisons are drawn between the two retirement funding structures, both the first and the second pension pillars in Germany should be highlighted.

<sup>94</sup> *SGB VI* § 1. The *GRV* used to be financed on a pay-as-you-go basis. Since Germany's pension law reform of 2001, the *GRV* has become contributory or contribution-based. See Börsch-Supan and Wilke *Pension System* at 3.

<sup>95</sup> See Chapter 1, par 2.1, where the criteria for qualifying for an older person's grants are discussed.

<sup>96</sup> The retirement age in Germany is 65 years but since 2012 is being gradually increased to 67 by 2029. See in this regard the RV Age Limit Adjustment Act of 20 April 2007 (*RV-Altersgrenzenanpassungsgesetz (RVAGAnpG)*).

<sup>97</sup> Foster *Benefits* at 187; and Stewart *Experiences* at 13. A spouse's pension is provided for widows and widowers on equal terms in Germany. See in this regard Foster *Benefits* at 27.

<sup>98</sup> Werding 2008 *Jahrbücher für Nationalökonomie und Statistik* 110 at 111 states that since the early 20<sup>th</sup> century, widows' and orphans' pensions are standard type benefits that wives and young children who outlive their breadwinner are entitled to receive without the latter's having paid and other regular contributions.

VI provides for widow's pensions and widower's pensions, and section 48 for the orphan's pension.<sup>99</sup> Section 46 states the following:

- (1) After the death of their insured spouse, widows or widowers who have not remarried have a claim to a small widow's pension or a small widower's pension if the insured spouse completed the general qualifying period. The claim exists for a maximum of twenty-four calendar months after the end of the month the insured person died.
- (2) After the death of their insured spouse who completed the general qualifying period, widows or widowers who have not remarried have a claim to a large widow's pension or a large widower's pension if they
  1. Are bringing up a child of their own or a child of the deceased spouse which has not yet reached the age of eighteen,<sup>100</sup>
  2. Have reached the age of forty-seven, or
  3. Have reduced earning capacity

The following are also deemed to be children:

1. Stepchildren and foster children (§ 56.2 nos. 1 and 2 of the First Book) who have been taken into the household of the widow or widower,
2. Grandchildren and siblings who have been taken into the household of the widow or the widower or who are **mainly supported** by the widow or the widower.

Care for a child of the widow or widower or of the insured spouse in a common household, where the child, by reason of physical, mental or psychological disability, is incapable of maintaining itself [sic], is equivalent to upbringing even after the child has reached the age of eighteen.

- (2a) Widows or widowers have no claim to a widow's pension or a widower's pension if the marriage did not last for a minimum of one year, unless in the particular circumstances of the case it is unjustified to assume that the sole or predominant purpose of the marriage was to acquire a claim to a survivor's pension.

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<sup>99</sup> In Germany, the translated version of the *SGB VI*, especially that of §§ 46 and 48, implies that the definition of an "orphan" is not exactly how it is understood in South Africa. In South Africa, an orphan means a child whose parents are both deceased. However, in Germany the translated version of the *SGB VI* refers to an orphan who has lost one or both parents through death. It is submitted that the word "orphan" in this chapter of the thesis should be understood to mean a "child" who has lost one or both parents through death. In Germany, an "orphan" pension is payable even when there is a surviving spouse.

<sup>100</sup> This is a pension paid to mothers who are taking care of young children below the age of 18.

- (2b) Nor is there a claim to a widow's pension or a widower's pension from the calendar month at the beginning of which splitting is carried out.
3. If the other requirements of subsections 1 to 2b are satisfied, surviving spouses who have remarried have a claim to a small or large widow's pension or widower's pension if the new marriage is dissolved or annulled (widow's pension or widower's pension in relation to the last-but-one spouse).
4. With regard to a claim to a widow's pension or widower's pension, marrying also includes entering into a civil partnership, marriage also includes a civil partnership, widow or widower also includes a surviving civil partner, and spouse also includes a civil partner. The dissolution or termination in another manner of a new civil partnership is equivalent to the dissolution or nullity of a new marriage (my emphasis).<sup>101</sup>

The amounts paid as pensions to the survivors of the contributor to the *GRV* (the insured person) vary depending on the recipient's social needs.<sup>102</sup> The widow or widower can inherit about 60 per cent of the pension that could have accrued to the contributor.<sup>103</sup> A pension (*Waisenrente*) is also payable to the dependent children of a deceased insured person.<sup>104</sup> The surviving dependent children are entitled to a half or full pension up to the age of 18 years or up to 27 years if these dependants are still at school or in vocational training or are unable to support themselves because of physical, intellectual, or psychological disability.<sup>105</sup> The spouses and young children who outlive their breadwinners (the persons that contributed to the *GRV*: thus, the insured individuals) are entitled to receive survivors' benefits from the *GRV*. Certain conditions and requirements must be met for one to receive a

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<sup>101</sup> This translation of the *SGB VI* § 46 is found in pars 9 to 19 on pages 3 to 4 of the judgment of the Federal Constitutional Court (*Bundesverfassungsgericht*) at *BVerfG*, *Order of the First Senate* of 7 July 2009 - 1 *BvR* 1164/07 -, paras. 1-127, [http://www.bverfg.de/e/rs20090707\\_1bvr116407en.html](http://www.bverfg.de/e/rs20090707_1bvr116407en.html) (last accessed on 23 September 2021).

<sup>102</sup> In par 21.

<sup>103</sup> Disney and Johnson *Pension Systems* at 8.

<sup>104</sup> *SGB VI* § 48, which deals with the orphan's pension.

<sup>105</sup> *SGB VI* § 48(4). See also Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 149, where the orphan's pension (*Waisenrente*) is discussed. If both parents are dead, the children's pension is doubled. The children's pension, together with any spouse's pension, must not be greater than 100 per cent of the employee's actual retirement pension that would have been payable if the scheme member had not died. See in this regard Foster *Benefits* at 189.

widow's or widower's pension or a dependant's pension, but they are not explored further here.<sup>106</sup>

The *GRV* is the chief component of Germany's retirement funding structure,<sup>107</sup> providing the major source of income after retirement in Germany.<sup>108</sup> It covers much of the population and makes up over 80 per cent of an average household's retirement income (pension income).<sup>109</sup> The *GRV* clearly plays a significant role as one of Germany's pension pillars that provide social security.<sup>110</sup>

It is clear from the discussion above that the first pillar in Germany, the *GRV*, differs from the older person's grant in South Africa but shares certain characteristics with occupational pension funds registered under the Pension Funds Act. There are some similarities but also some differences between the *GRV* and occupational pension funds in South Africa.<sup>111</sup> The *GRV* and South Africa's occupational pension funds are distinguishable from each other in terms of funding methods,<sup>112</sup>

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<sup>106</sup> See Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 148, stating that widows and widowers are entitled to a statutory widow's or widower's pension (*Witwen-/Witwerrente*) if the deceased spouse has completed the general qualifying period and the widow or widower has not remarried since the spouse passed away. The general qualifying period is five years. The maximum widow's or widower's pension is paid at 55 per cent of the deceased spouse's full statutory pension if the widow or widower has reached the age of 47 (in line with the rise in the statutory retirement age, this age limit has been increased from 45 to 47 since 2012), or has reduced earning capacity, or is rearing a child under 18 years, or cares for a child who for reasons of disability is unable to fend for him- or herself.

<sup>107</sup> See Honekamp and Schwarze 2010 *Pensions* 214 at 214, confirming that until the pension reform in 2001, most Germans relied almost solely on their statutory pension entitlements.

<sup>108</sup> See Börsch-Supan and Schnabel *Social Security* at 10.

<sup>109</sup> See in this regard Stewart *Experiences* at 13; How To Germany "The German Retirement and Pension System - Basic Facts" (updated in January 2020) at 1, available at <http://www.howtogermy.com/pages/german-retirement.html> (last accessed on 23 September 2021) (hence "How to Germany *German Retirement*") stating that about 85 per cent of the workforce is enrolled in the *GRV*; and Blaich *Pension Provision* at 2. See also Bönke *et al* 2019 *Review of Income and Wealth* at 838, stating that in 2014, about 78 per cent (or 36.1 million) of the German working-age population (20–65 years) was insured through the statutory pension insurance, the *GRV*.

<sup>110</sup> See Dekker *Social Security* at 176-180 for further authorities on and a brief discussion of the pillars that provide social security in Germany.

<sup>111</sup> See par 1.1 above for a discussion of the similarities and differences between Germany's *GRV* and company pensions and the South African old person's grants and occupational pensions.

<sup>112</sup> In Germany the first pillar (*GRV*) and in South Africa the occupational pensions are both funded by the employee's and the employer's contributions — by contrast with South Africa's first-pillar pensions, which are funded by the government from taxes. See in this regard Chapter 1, par 2.1.



membership coverage,<sup>113</sup> eligibility for benefits,<sup>114</sup> and their functions in the two respective jurisdictions.<sup>115</sup>

Under the *GRV*, survivors' benefits to widows, widowers, and dependent children are allocated by law, and the potential recipients of the death benefit are limited to dependants of the insured person.<sup>116</sup> The relevant provisions of the law also define a "dependant" for these sections by listing people who qualify therein.<sup>117</sup> In South Africa, a member of an occupational fund may nominate any person (including friends and colleagues) as the beneficiary of the lump sum death benefit.<sup>118</sup> By contrast, the process of distributing survivors' death benefits under the *GRV* is codified and appears uncomplicated.

In distributing the death benefits to surviving dependants (widow(ers) and children), the *BAS* and regional offices are guided by the law. They have no discretion like the one that which pension fund trustees in South Africa exercise under section 37C of the Pension Funds Act. This restriction reduces the burden on the *BAS* in balancing the interests of many potential beneficiaries in the way that pension fund trustees in South Africa have to perform. This restriction also helps the fund members (the insured persons) to plan and arrange their financial affairs, as they know what will be paid to their surviving dependants when the fund members die. It also excludes unrealistic expectations about receiving a death benefit by people who fall outside sections 46 and 48 of the *SGB VI*. This comparative certainty is what is lacking in South Africa. There is a huge contrast between how the *GRV* survivors' death benefits are distributed in Germany and how the retirement fund death benefits are

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<sup>113</sup> In Germany, it is mandatory that employees belong to the *GRV*, while in South Africa, first-pillar pensions do not require a person to be a member to qualify to receive the older person's grant.

<sup>114</sup> In Germany, the benefits provided by first-pillar pensions are for people who made contributions to the *GRV*, while in South Africa, a person is not required to make any contributions to qualify for an older person's grant.

<sup>115</sup> The function of the *GRV* is similar to that of occupational pensions in South Africa. This function differs from the function of the older person's grant in South Africa, which is to serve as a safety net for any qualifying pensioners who, if it were not for the grant, would not have any income on retirement. See Chapter 1, par 2.1 for a discussion of the older person's grant in South Africa.

<sup>116</sup> See in this par 2.1 above. See also Bönke *et al* 2019 *Review of Income and Wealth* at 860, stating that in the German system, widow(er) pensions are granted to married couples only.

<sup>117</sup> See in this par 2.1 above, where *SGB VI* §§ 46 and 48 are discussed.

<sup>118</sup> See Chapter 3, par 2.2.2 for a discussion of nominated beneficiaries in South Africa.

distributed under section 37C of the Pension Funds Act in South Africa.<sup>119</sup> As regards South African older person's grants, no survivors' benefits are paid to dependants when the grant recipient dies.<sup>120</sup>

## 2.2 *Second-pillar pensions: occupational pension schemes or company pensions*

The preceding discussion has shown that the *GRV* is the main provider of pensions at retirement in Germany.<sup>121</sup> Various developments since 2001 have aimed to encourage the establishment of company pensions and other pension funding methods.<sup>122</sup> These developments play a significant role in pension individualisation and the enhancement of funded occupational pensions. The statutory provisions on company pension schemes date back to 1974.<sup>123</sup> Significant reform to the *BetrAVG* was introduced on 11 May 2001 by several Acts, including the Retirement Savings Act of 26 June 2001 (*Altersvermögengesetz (AVmG)*),<sup>124</sup> and the Retirement Savings Extension Act of 21 March 2001 (*Altersvermögensergänzungsgesetz (AVmEG)*).<sup>125</sup> The latest of these developments is the promulgation of the Company Pension Strengthening Act of 17 August 2017 (*Betriebsrentenstärkungsgesetz (BetrRSG)*).<sup>126</sup> The use of private and occupational pensions is promoted through

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<sup>119</sup> See Chapter 3, pars 2 and 3, where the distribution of retirement fund death benefits under s 37C of the Pension Funds Act in South Africa is discussed.

<sup>120</sup> See in this regard Chapter 1, par 2.1 for a discussion of the older person's grant in South Africa.

<sup>121</sup> See in this regard par 2.1 above.

<sup>122</sup> In 2001, Germany introduced reforms that strengthened the three-pillar system by lowering benefits from the first pillar and expanding the second and third pillars through tax relief and subsidies. The State encourages employers and employees to use company pension plans by making earnings paid into them exempt from tax and social security contributions. See How to Germany *German Retirement* at 1; Blaich *Pension Provision* at 2; Whiteford *Adapting* at 62-71; and the Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 157.

<sup>123</sup> Whiteford *Adapting* at 65; and Bönke *et al 2019 Review of Income and Wealth* at 839. The objectives of both *AVmG* and *AVmEG* were to reform the statutory pension system and promote funded pension plans. Germany's company pensions or occupational pensions (*Betriebsrenten*) were established in 1974 by the *BetrAVG*.

<sup>124</sup> The *AVmG* introduced a system change in the structure of financing and providing old-age security. See in this regard Rüb and Lamping 2010 *German Policy Studies* 143 at 162.

<sup>125</sup> These 2001 reforms were also referred to as the Riester Reform after the German Minister of Labour, Walter Riester. The *AVmEG* provided a reform within the institutional framework of social pension insurance. It aimed primarily to reduce benefits and costs of the PAYG scheme in order to stabilise the contribution rate. See in this regard Rüb and Lamping 2010 *German Policy Studies* at 160.

<sup>126</sup> See par 1.2 and n 59 above dealing with the *BetrRSG*. See also Burger C and Clark GL "Underwriting the Value of Riester-Rente: The German Model of Risk Distribution in Supplementary Occupational Pensions" (Centre for Work, Employment and Finance, Oxford University Centre for the Environment, Oxford 2010) at 4 (hence "Burger and Clark *Underwriting*").

tax credits and government-funded subsidies provided to contributing employees and employers.<sup>127</sup>

### 2.2.1 The objective of occupational pensions in Germany

Second-pillar pensions in Germany consist of employer-funded pension or occupational pension funds (*betriebliche Altersvorsorge*), here also sometimes referred to as “company pension funds” or “company pensions”. The objective of establishing occupational pension funds in Germany is clear from the definitions of “employer-funded pension” or “occupational pension fund” in the statutes that apply to pension funds. The discussion below covers the definition of “occupational pension fund” as provided in the *BetrAVG* and those provided in the *VAG*.

The *BetrAVG* provides for employers’ commitments to company pension schemes. It applies if an employee is promised a pension upon retirement or becoming disabled, or when survivor benefits are paid to the employee’s dependants on the grounds of the employment relationship.<sup>128</sup> This arrangement by an employer protects its employees and their surviving dependants against financial shortfalls caused by retirement, death, or disability.<sup>129</sup> The *BetrAVG* regulates the relationship between the employees and their employers concerning the provision of pensions. It does not regulate the relationship between the employees and pension providers such as the *Pensionskassen* and/or *Pensionsfonds*. The insurance law governs that relationship under the *VAG*.

The *VAG* requires a pension fund to afford employees (insured persons) an independent (direct) claim to the payment of benefits from the *Pensionsfonds*.<sup>130</sup> The *VAG* also obliges a pension fund to provide retirement benefits as a life annuity

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<sup>127</sup> *ESTG* § 19(2) provides for the exemption of qualifying pensions from taxation. See also n 61 above.

<sup>128</sup> *BetrAVG* § 1 defines occupational pensions as “benefits paid in relation to old age, invalidity or survivorship as a consequence of the employment relationship”. See Whiteford *Adapting* at 70 for the English translation of the *BetrAVG* § 1. Whiteford (at 70) states that three features can be distilled from the definition: first, the objective served by the promise must concern caring for the individual in question. Second, the payment must be triggered by one of the listed eventualities. Finally, the undertaking must find its roots in the employment relationship subsisting between the employer and the beneficiaries.

<sup>129</sup> *BetrAVG* § 1. See also Hertrich *Strategic Asset Allocation*.

<sup>130</sup> *VAG* § 236(1). See also “Legislation on Insurance in Germany” (*LawyersGermany.com*, 6 January 2016) available at <https://www.lawyersgermany.com/legislation-on-insurance-in-germany> (last accessed on 23 September 2021).

or once-off lump sum.<sup>131</sup> The VAG defines *Pensionskassen* (pension insurance funds) as legally independent life insurance undertakings whose purpose is to offer insurance cover to their members for the loss of income because of old age, invalidity (disability), or death.<sup>132</sup> Usually, the insurance cover does not provide benefits until the actual loss of income occurs.<sup>133</sup> The VAG states that when the member (insured person) dies, only surviving dependants have a legal claim to the benefits.<sup>134</sup>

Section 236(1) of the VAG regulates a *Pensionsfonds*. It states that a *Pensionsfonds* within the meaning of the VAG is a scheme with legal personality that:

1. offers funded occupational retirement provision for one or more employers for the benefit of employees;
2. is not permitted to guarantee, in the way that an insurance contract guarantees, the level of benefits or the level of future contributions required to provide a given level of benefits in respect of all benefit cases provided for;
3. affords employees an independent entitlement to payment of benefits from the *Pensionsfonds*; and
4. **is obliged to provide the retirement benefits as a life annuity or one-off lump sum** (my emphasis).<sup>135</sup>

It is clear from the definitions above that the purpose of establishing an occupational pension fund in Germany is to provide benefits upon the member's retirement or disability, or upon the death of the insured person. So the objective of establishing occupational pension funds in Germany, in so far as the provision of benefits at retirement, disability, and death is concerned, is similar to that in South Africa.<sup>136</sup> The difference is that the relevant German statutes expressly list the persons with

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<sup>131</sup> VAG § 236(1) sentence 1 number 4.

<sup>132</sup> VAG § 232(1) dealing with institutions for occupational retirement provision, Chapter 1 (*Pensionskassen*).

<sup>133</sup> VAG § 232(1) number 2 dealing with institutions for occupational retirement provision, Chapter 1 (*Pensionskassen*).

<sup>134</sup> VAG § 232(1) number 3. This provision also provides an exception to the general rule that restricts the payment of death benefits only to surviving dependants by allowing payment of a death grant to third parties who have to bear the costs of a funeral. The amount of this grant may not exceed standard funeral costs.

<sup>135</sup> See VAG § 236(1) sentence 1 numbers 1 to 4. VAG § 236(1) sentence 2 states that an annuity within the meaning of § 236(1) sentence 1 number 4 can be combined with a partial or full lump sum option. VAG § 236(1) sentence 3 states that *Pensionsfonds* may also make payments for funeral expenses to surviving dependants, with the funeral expenses being limited to the level of normal burial costs. It should be noted that "Fonds" denotes the nominative singular and the nominative plural of this word.

<sup>136</sup> See Chapter 1, par 2.4.

a legal claim on the death benefits.<sup>137</sup> This position contrasts sharply with the one in South Africa, where section 37C of the Pension Funds Act specifically provides for the distribution of death benefits to surviving dependants and nominated beneficiaries.<sup>138</sup>

The *BetrAVG* and the *VAG* clearly state which people may receive survivors' death benefits when a member dies while still in service. This clarity is lacking in South Africa.<sup>139</sup>

### 2.2.2 The establishment of company pension funds

Previously, employers in Germany were not required to provide occupational pensions (company pensions) for their employees,<sup>140</sup> although some did so voluntarily.<sup>141</sup> Since 2002, though, employees have had a legal right to be provided with retirement benefits (company pensions) by their employers.<sup>142</sup> This change renders occupational pensions (company pensions) part of social security in Germany, in stark contrast to the South African system in which employees do not have a right to occupational pensions.<sup>143</sup> In Germany, employers are free to decide how this occupational retirement provision should be implemented or structured.<sup>144</sup> This provision can be done through individual or group contracts between employers and employees,<sup>145</sup> by agreement (*Betriebsvereinbarung*) between the employer

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<sup>137</sup> See in this regard n 134 above.

<sup>138</sup> See Chapter 3, pars 2.2.2 and 2.2.3.

<sup>139</sup> See Chapter 3, par 2.2.3.

<sup>140</sup> *BetrAVG* § 1(2) number 2a states that the employer is obliged by a collective agreement to pay contributions to a pension fund, or direct insurance in accordance with *BetrAVG* § 22 for the purpose of financing occupational pension benefits. See also "Germany Pension Summary" available at <https://euracs.eu/summaries/summary-germany/> (last accessed on 30 June 2021).

<sup>141</sup> See Burger and Clark *Underwriting* at 3, stating that "the employer decided whether to provide occupational pensions or not and determined its amount. The law treated these occupational pensions as gifts from employer with no further obligations and with no ties to the employee's salary. This meant in practice that the employer had the right to withdraw an existing pension promise. An employee received pension usually only after a very long employment that ended with retirement, while job change resulted in the loss of eligibility (Wiedemann 1991)."

<sup>142</sup> Under the 2001 reforms introduced by *AVmG* and *AVmEG*, employees acquired a comprehensive set of rights in relation to occupational pensions. See in this regard Burger and Clark *Underwriting* at 4, and nn 123-125 above.

<sup>143</sup> See Chapter 1, par 2.4, where the establishment of occupational pension funds in South Africa is discussed, and par 3 below for a discussion of the role of occupational pensions in the German social context.

<sup>144</sup> See Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 149.

<sup>145</sup> Whiteford *Adapting* at 71.

and the workers' council, or by collective agreements (*Tarifverträge*) between employers or associations of employers and trade unions.<sup>146</sup> If there is no agreement between the employees and the employer, each employee is entitled to have part of his or her earnings paid into an insurance policy. This arrangement is known as *Direktversicherung* — direct insurance.<sup>147</sup>

The *BetrAVG* provides five ways to implement occupational pension funds under German law.<sup>148</sup> Employers may choose from the following five different funding vehicles:<sup>149</sup>

- *Direktzusagen* (book reserve or direct pension promises),<sup>150</sup>
- *Unterstützungskassen* (support funds),<sup>151</sup>

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<sup>146</sup> See Steinmeyer *Pensions* at 50; Whiteford *Adapting* at 71; and Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 149. Whiteford states that where the pension promise is contained in a collective agreement, that will only bind the parties to the agreement. It is, however, possible to apply to the Federal Minister of Labour and Social Affairs for a declaration that the collective agreement in question is of general applicability in the entire branch or undertaking concerned. See in this regard Whiteford *Adapting* at 71, n 193.

<sup>147</sup> See in this regard the Federal Ministry of Labour and Social Affairs *Social Security at a Glance 2018* at 149.

<sup>148</sup> See also in this regard Bönke *et al* 2019 *Review of Income and Wealth* at 840, n 11.

<sup>149</sup> *BetrAVG* § 1b(1)–(5) deals with the vesting and implementation of occupational pensions. It provides five implementation types in terms of which employers can organise occupational retirement provision.

<sup>150</sup> Direct pension promises are usually funded via book reserve accruals. The employer enters into a written agreement to provide benefits for employees, and a reserve is set up in the company's balance sheet to reflect its liability. The employer gives a promise to the employee to pay him or her a certain amount once he or she retires. The employer is directly responsible for meeting the pension promise, accounts for pension liabilities on the company balance sheet, and pays pensions from cash flow. There is no legal separation of assets between the fund and the employer. In effect, the employer acts as the pension fund, paying the promised pensions from the company assets as they fall due. Most companies insure their direct pension promises through an insurance company. See in this regard "Pension System in Germany" (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021); Blaich *Pension Provision* at 2-3; Foster *Benefits* at 203-204; and Steinmeyer *Pensions* at 50-51. Whiteford states that because in direct promises there are no separate pensions formed to protect the pension rights accruing to employees, the members of the pension scheme are in an extremely precarious position, since their pension "rights" are entirely at the mercy of the prosperity of the undertaking. *BetrAVG* §§ 7 to 15 recognise the potential vulnerability of the beneficiaries of direct promise by obliging the employer who has made such a promise to take out insolvency insurance. See in this regard Whiteford *Adapting* at 67.

<sup>151</sup> Support funds are separate legal entities from the employer. They are set up as a registered association (*eingetragener Verein*), less often as a limited liability company or as a foundation (*Stiftung*). Support funds offer occupational retirement provision, but not the legal right to their benefits. In other words, the employee has no legal claim against the support fund but has a claim directly against the sponsoring employer. The obligation to pay benefits to employees remains with employers, who must use the support fund to meet their pension commitments. Support funds can either be sponsored by a single company or can be founded as a group support fund used by several companies. Support funds are not subject to insurance

- *Direktversicherung* (direct insurance),<sup>152</sup>
- *Pensionskassen* (pension institution or staff pension insurance),<sup>153</sup> and

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supervision. See in this regard *BetrAVG* § 1b(4); Steinmeyer *Pensions* at 51; Foster *Benefits* at 205; and “Pension System in Germany” (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021).

<sup>152</sup> Under a direct insurance scheme, the employer takes out an insurance policy on behalf of the employee and pays contributions under the contract. The employee and his or her survivors have a direct entitlement to the benefits accrued under the contract against the insurance company. This contract takes the form of an insurance contract between the employer and the insurance company in favour of the employees. The employer acts as the policyholder, taking out an individual or group life insurance policy for employees. Insurance companies are subject to supervision by the Federal Financial Supervisory Authority (*BaFin*). See in this regard Steinmeyer *Pensions* at 51; Foster *Benefits* at 205; Whiteford *Adapting* at 68; and “Pension System in Germany” (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021). See also in this regard *BetrAVG* § 1(2).

<sup>153</sup> *Pensionskassen* grant rights directly to the employee and his survivors. They are the main pension vehicle for sponsored pension provision by private employers after the direct pension promise. *Pensionskassen* are special insurance companies that serve one or several employers who take out an insurance contract for the employee which builds up capital from which the pension is paid. See in this regard Blaich *Pension Provision* at 3; Stewart *Experiences* at 13; Steinmeyer *Pensions* at 51; Whiteford *Adapting* at 69; and “Pension System in Germany” (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021). See also Koch *Germany* at 261, which provides the English translated version of VAG § 232. In *Pensionskasse für die Angestellten der Barmer Ersatzkasse V.V.a.G. v Menauer* Case C-379/99 (Reference for a preliminary ruling from the *Bundesarbeitsgericht* (Germany), available at <https://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-379/99&jur=C> (last accessed on 26 September 2021), the case dealt with the application of the principle of equality between men and women to occupational pensions. First, the opinion of Advocate General Tizzano was heard in the Court of Justice of the European Union (Sixth Chamber) on 27 March 2001 (<https://curia.europa.eu/juris/document/document.jsf?jsessionid=87269CED6F8616D7E470C9B2276F8B43?text=&docid=45932&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=2215875>). The Advocate General explained that a *Pensionskasse* is a pension fund entrusted by the employer with administering its occupational pension scheme and financed by contributions paid by it (par 3). Under *BetrAVG* § 1(3), the *Pensionskasse* is a social security institution with a legal personality of its own separate from the employer, which pays an employee or his survivors the benefits due to them (par 5). In German law, the basic relationship between employer and employee, which is subject to the rules of employment law, must be distinguished from the relationship between the employer and the pensions provider, which is governed by insurance law (see in this regard par 2.2.1 above). Secondly, the court gave judgment on 9 October 2001. Among other things, the court confirmed the various ways in which benefits relating to companies’ supplementary old age pensions may be provided (par 5). In the case of a *Pensionskasse*, the pension fund is a pension institution with legal capacity which give employees or their survivors a legal claim (*BetrAVG* § 1(3)). The employer is obliged to make up any shortfall between the rules of the pension fund and the pension cover that the employer is obliged to provide under the employment contract (*BetrAVG* § 1(1)(4)). The surviving husband of the deceased pension fund member claimed a widower’s pension, arguing that he was entitled to the same survivor’s benefits as a widow of a former employee of the *Barmer Ersatzkasse* (par 13). After considering the relevant law and decisions, the court held that Article 119 of the EC Treaty “is to be interpreted to the effect that bodies such as German pension funds (‘Pensionskasse’) entrusted with providing benefits under an occupational pension scheme are required to ensure equal treatment between men and women, even if the employees discriminated against on the basis of sex have, as against those directly liable, namely their

- *Pensionsfonds* (pension funds).<sup>154</sup>

The employer may implement or combine two or more of these options.<sup>155</sup> A full exploration of these five options is beyond the scope of this thesis. It is sufficient for this comparative research to note that in all five options, the employee has a legal expectation of receiving a pension on retirement. These pension options often include rules that provide for the payment of survivors' benefits on the insured person's death.<sup>156</sup> Depending on the nature of the pension option that the employer has implemented, it may be responsible for paying the benefits directly to the employee (direct promise), or the employer may take out an insurance policy for the employee (indirect promise).<sup>157</sup> The nature of the pension option that the employer selects also determines who will be responsible for paying pension or death benefits on the occurrence of the insured event (retirement or death). In the case of a direct promise, the employer pays the benefits; in an indirect promise or an insurance policy, the insurer pays.<sup>158</sup>

A defined benefit pension (*Leistungszusage*) has been the default system for the five occupational pensions in Germany.<sup>159</sup> However, as of 1 January 2018, the *BetrRSG* gives employers an option also to provide defined contribution schemes

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employers in their capacity as parties to the employment contracts, a protected right in the event of insolvency that excludes all discrimination" (par 33).

<sup>154</sup> *Pensionsfonds* are pension funds that have a legal personality separate from that of the sponsoring company or companies. They were introduced in 2002 and comprise occupational retirement provision that grants employees a legal right to pension benefits. VAG § 237(1) states that a *Pensionsfonds* is formed either as a joint-stock company or a mutual pension fund association. See OECD "Country Profile: Germany" in *OECD Private Pensions Outlook 2008* (OECD Publishing Paris 2009) available at <https://doi.org/10.1787/9789264044395-en> (last accessed on 24 September 2021) 195 at 196; and par 2.2.1, where the definition of *Pensionsfonds* in the VAG § 236(1) sentence 1 is stated.

<sup>155</sup> Foster *Benefits* at 203.

<sup>156</sup> *BetrAVG* §1(2) number 2a states that the employer is obliged by collective agreement to pay contributions to a pension fund or direct insurance in accordance with § 22 for the purpose of financing occupational pension benefits.

<sup>157</sup> See Blach *Pension Provision* at 2. The employer making an indirect pension promise has a choice of financing the pension promise by one of three different financing vehicles: direct insurance, a *Pensionskasse*, or a support fund. See in this regard Whiteford *Adapting* at 68.

<sup>158</sup> See par 5.2 below, where the structure and administration of occupational pension funds in Germany is discussed.

<sup>159</sup> See Chapter 2, par 3 for a discussion of the distinction between defined benefit pension funds and defined contribution pension funds in South Africa. Although the distinction is made in the context of South African law, the same principles apply in Germany.



(*beitragsorientierten Leistungszusagen*).<sup>160</sup> This option is currently limited to the following three forms of pensions: *Direktversicherung* (direct insurance), *Pensionskassen*, and *Pensionsfonds*.<sup>161</sup>

It is clear from the discussion above that the occupational pensions landscape in Germany is diverse, and the various pension vehicles have different arrangements in terms of their administration and control.<sup>162</sup> Although *Pensionsfonds*, *Pensionskassen*, and direct insurance are the most important occupational pension schemes for new contracts and average employees (but with relatively low contributions), book reserve schemes — designed mainly for senior staff — still provide half of all occupational pension liabilities.<sup>163</sup>

*Pensionsfonds*, *Pensionskassen*, and direct insurance are regulated by the *BaFin*, and the statutory provision directly applicable is the *VAG*.<sup>164</sup> By contrast, the book reserve schemes and support schemes are not regulated by the *BaFin*.<sup>165</sup> Direct insurance is an arrangement where an insurance company provides pension benefits to employees.<sup>166</sup> Although *Pensionsfonds* and *Pensionskassen* are classified as pension funds, they are often run by insurance companies. They may be set up for a single company, a financial services provider, multiple companies, or on an industry-wide basis under the sponsorship of employer associations and trade unions in that industry.<sup>167</sup> *Pensionskassen* and *Pensionsfonds* closely resemble the private sector occupational pension funds in South Africa. They are

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<sup>160</sup> See above, par 1.2 and n 59 dealing with the *BetrRSG*. *BetrAVG* § 1(2) number 2 states that occupational pensions are available for defined contribution plans with minimum benefits and salary conversion. *Arteaga Retirement* at 362-364 discusses defined benefits and defined contribution plans.

<sup>161</sup> See in this regard *VAG* § 244b(1). The implementation route of these three pensions is external from the company and is in the nature of an insurance, while the implementation route of the pension commitment and support fund is internal to the company.

<sup>162</sup> See par 5.2 below, where the administration and management of occupational pensions in Germany are discussed.

<sup>163</sup> See Van der Zwan N, Anderson K and Wiß T “Pension Funds and Sustainable Investment: Comparing Regulation in the Netherlands, Denmark, and Germany” *Netspar Academic Series* DP 05/2019-023 (2019) available at [https://www.netspar.nl/assets/uploads/P20190506\\_DP023\\_Zwan.pdf](https://www.netspar.nl/assets/uploads/P20190506_DP023_Zwan.pdf) (last accessed on 24 September 2021) (hence “Van der Zwan, Anderson and Wiß *Comparing Regulation*”) at 20.

<sup>164</sup> See par 5.1 below, where the *BaFin* is discussed.

<sup>165</sup> See par 5.1 below, where the *BaFin* is discussed.

<sup>166</sup> See n 152 above and Van der Zwan, Anderson and Wiß *Comparing Regulation* at 3.

<sup>167</sup> Yermo and Marossy *Pension Fund Governance* at 35 in par 47.

both established separately from the sponsoring employers, and the pension fund assets are separated from those of the employer. They both rely on a managing organ (an agent) to fulfil their mandate. Pension funds in South Africa rely on pension fund boards, and those in Germany rely on a board with a two-tier structure (a management board and a supervisory board).<sup>168</sup> Both the employees and the employer make direct contributions to the fund to build up a pension for the employee. The *BaFin* regulates *Pensionskassen* and *Pensionsfonds* as insurance companies;<sup>169</sup> the FSCA in South Africa also regulates pension funds and insurance companies,<sup>170</sup> though under a separate directorate.

Despite the similarities mentioned above between *Pensionskassen* and *Pensionsfonds* and the private occupational pensions in South Africa, there are also differences between these kinds of funds in the two countries. For example, the *Pensionskassen* and *Pensionsfonds* in Germany are regulated under the Insurance Act. In South Africa, pension funds are regulated by the Pension Funds Act, not by statutes on insurance law. Again, *Pensionskassen* are independent insurance companies that serve one or several employers, while in South Africa, pension funds are not insurance companies.<sup>171</sup>

### 2.3 *Third pillar pensions: private pensions or individual retirement investments*

Third-pillar pensions in Germany consist of individual retirement investments.<sup>172</sup> These are private insurance contracts between the policyholder or contributor and the policy provider, and they supplement both the *GRV* and company pensions. These private pensions include, but are not limited to, the *Riester*<sup>173</sup> and *Rurup* plans.<sup>174</sup>

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<sup>168</sup> The managing boards and supervisory boards are discussed in par 5.2 below.

<sup>169</sup> See par 5.1 below, where the *BaFin* is discussed.

<sup>170</sup> See Chapter 2, par 7, where the FSCA is discussed.

<sup>171</sup> See Chapter 2, par 4, where the legal status of occupational retirement funds in South Africa is discussed.

<sup>172</sup> Individual retirement investments are also referred to as “private individual accounts”.

<sup>173</sup> See How to Germany *German Retirement* at 1.

<sup>174</sup> See Antolín P, Pugh C and Stewart F (2008) “Forms of Benefit Payment at Retirement” (*OECD Working Papers on Insurance and Private Pensions*, No. 26 (OECD Publishing Paris 2008) available at <https://doi.org/10.1787/238013082545> (last accessed on 24 September 2021) at 20.

Individual private pensions such as *Riester and Rürup* are eligible for subsidies or tax relief. To do so, they must satisfy the Certification of Retirement and Basic Pension Contracts Act of 26 June 2001 (*Gesetz über die Zertifizierung von Altersvorsorge- und Basisrentenverträgen*; for short, *Altersvorsorgeverträge-Zertifizierungsgesetz (AltZertG)*).<sup>175</sup> Like occupational pensions (company pensions), individual retirement investments in Germany play a minor role in providing income to pensioners, although this is changing. They also do not play a significant role in redistributing wealth between the rich and the poor.<sup>176</sup> Both the *Rürup* and *Riester* plans in Germany are comparable to private savings in South Africa, which usually take the form of retirement annuities.<sup>177</sup>

#### 2.4 Social welfare benefits

The discussion above has briefly outlined the three pillars of pension provision in Germany. In addition to these three pillars, Germany has a means of accommodating people who do not qualify to receive pension benefits under the three pillars: the means-tested social welfare benefits known as the *Grundsicherung im Alter*. The *Grundsicherung im Alter* provides social welfare benefits to people with no pension entitlement or whose pension income is too low from the statutory pension insurance (*GRV*) or from occupational pensions or private pensions.<sup>178</sup> Social welfare in Germany is regulated by law in the Social Code Twelfth Book “Social Assistance” of 27 December 2003 (*Sozialgesetzbuch SGB XII Sozialhilfe (SGB XII)*). These benefits are comparable to the older person’s grant in South Africa. However, in South Africa, the older person’s grant falls under the first pillar. In Germany, the first pillar is contributory; in South Africa, it is not. In both Germany and South Africa, the people who qualify to receive these welfare benefits are often unemployed and/or have no means to contribute to any of the three pension pillars as discussed above. A country like South Africa, with a very high unemployment rate, about 29 per cent in 2020, needs a considerable budget to sustain the payment

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<sup>175</sup> See Berner *New Private Pensions* at 140.

<sup>176</sup> See Börsch-Supan and Wilke *Pension System* at 10.

<sup>177</sup> See Chapter 2, par 3, n 105 for a brief explanation of retirement annuities in South Africa.

<sup>178</sup> See Blank *et al* 2016 *Intereconomics* 118 at 120.

of welfare benefits. By comparison, the unemployment rate in Germany is exceptionally low at only about 4.5 per cent in 2020.<sup>179</sup>

It has been shown in the preceding discussion that the retirement funding structure in Germany is complex and undergoing a series of reforms to encourage the use of company pensions. It is compulsory for everyone living in Germany to be insured, and entitlement to benefits depends on contributions made, either to the *GRV* or to occupational pensions (company pensions) and individual private accounts. In addition to providing income at retirement, all three of these pension vehicles (the *GRV*, occupational pensions (company pensions), and individual private accounts) often provide financial support, in the form of survivors' death benefits, to dependants if the insured person dies before retirement. The administration of the *GRV* from a federal insurance office and regional offices in the constituent states (*Länder*) of Germany provides a centralised method of distributing the survivors' death benefits. In South Africa, there is no centralised pension fund structure for distributing occupational pensions in the same way as the *GRV* in Germany. It was shown in Chapter 3 that the distribution of occupational pension funds takes place in an individualised manner through the boards (the trustees) of the pension fund to which a fund member belongs or belonged.

In Germany, in addition to the *GRV*, there are also company pensions that are comparable to occupational pensions in South Africa. Still, the mere fact that the *GRV* covers more than 80 per cent of the employees in Germany guarantees that the dependants of insured persons (members) under the *GRV* have access to financial assistance when their breadwinner dies. Germany's pension system also includes occupational pensions (company pensions) and individual private accounts, supplementing the *GRV*. These additional pension forms are administered by their respective pension schemes and/or insurance companies. The manner of payment of survivors' benefits (where these benefits are provided) is usually stated in the rules. Moreover, the potential recipients of the benefits are restricted to dependants of the insured person.<sup>180</sup> This position contrasts with the one in South Africa, where occupational pensions cover only a fraction of the

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<sup>179</sup> See n 24 above regarding unemployment statistics in South Africa and Germany, respectively.

<sup>180</sup> See par 2.2.1 above, where the payment of a death benefit by *Pensionskassen* and *Pensionsfonds* is discussed.

population.<sup>181</sup> In addition, in South Africa, occupational pension funds are the only possible source of income for the dependants of an insured person (the pension fund member) who dies before retirement, unlike in Germany, where these dependants have both the *GRV* and company pension. The distribution process in South Africa is much less certain than the one in Germany. Any person nominated by the insured person (including friends and colleagues of the insured person) may receive the death benefit in South Africa.<sup>182</sup>

### **3 THE ROLE OF OCCUPATIONAL PENSIONS IN THE SOCIAL CONTEXT OF GERMANY**

The number of occupational pension schemes and their participants have increased.<sup>183</sup> However, compared to the *GRV*, company pensions still play a lesser role in providing income to pensioners in Germany.<sup>184</sup> Occupational pension funds (company pensions) form an integral part of the German retirement funding system.<sup>185</sup> All occupational pension funds may, and usually do, provide their members (the insured persons) with a retirement benefit or disability benefit and death benefits to the surviving dependants should the member die while still in service.<sup>186</sup> In Germany, occupational pensions are supplementary to the *GRV*. By contrast, in South Africa, occupational pension funds are the main source of financial support available to surviving dependants of a fund member who dies before retirement. South Africa lacks a state pension or public pension scheme like the *GRV* in Germany. The rest of this comparative chapter focuses on occupational

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<sup>181</sup> See in this regard Chapter 1, n 35.

<sup>182</sup> See in this regard Chapter 3, par 2.2.3.

<sup>183</sup> Since the major reform of 2001, both private and occupational pensions have grown dynamically with a total of eighteen million employees who are active members of an occupational pension scheme by the end of 2015. See “Pension System in Germany” (*Pension Funds Online*) available at <https://www.pensionfundsonline.co.uk/content/content/country-profiles/germany/92> (last accessed on 23 September 2021).

<sup>184</sup> See par 2.1 above, where it is stated that the *GRV* covers about 80 per cent of workers in Germany. See also Honekamp and Schwarze 2010 *Pensions* at 216, stating that even taking into account recent pension reforms, statutory pensions will continue to be the most important source of retirement income in Germany. See also Bönke *et al* 2019 *Review of Income and Wealth* at 840 in this regard.

<sup>185</sup> See par 2 above.

<sup>186</sup> See Börsch-Supan and Schnabel *Social Security* at 10.

pension schemes because they closely resemble private occupational pension funds registered under the Pension Funds Act in South Africa.<sup>187</sup>

#### 4 THE LEGAL STATUS OF OCCUPATIONAL PENSIONS

As mentioned above, occupational pensions in Germany are established in five legal forms, each with different governance implications.<sup>188</sup> There are two types of autonomous pension funds: institutional types where the fund is an independent entity with legal personality and capacity, such as pension associations (*Pensionskassen*), and joint-stock companies (*Pensionsfonds*).<sup>189</sup> The VAG states that *Pensionsfonds* are schemes with their own legal personality and internal governance boards.<sup>190</sup> The establishment and legal form of *Pensionskassen* and *Pensionsfonds* closely resemble those of private occupational pension funds in South Africa. Both funds (*Pensionskassen* and *Pensionsfonds*) are independent entities with legal personalities separate from the sponsoring employer.<sup>191</sup> The difference is that, in South Africa, pension funds are registered neither as companies nor as insurance companies.<sup>192</sup> *Pensionskassen* in Germany may take the legal form of a mutual insurance association.<sup>193</sup> *Pensionskassen* and *Pensionsfonds* are regulated by the VAG and are subject to the same regulatory and supervisory framework, including the same governance regulations that apply to insurance

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<sup>187</sup> See par 1.1 above, where these similarities are discussed.

<sup>188</sup> See par 2.2.2 above.

<sup>189</sup> See Stewart F and Antolin P “Supervisory Oversight of Pension Fund Governance” (International Organization of Pension Supervisors Working Paper No. 9) (1 August 2008) available at SSRN: <https://ssrn.com/abstract=1809823> or <http://dx.doi.org/10.2139/ssrn.1809823> (last accessed on 24 September 2021) at 6, n 3, stating that “autonomous pension funds are independent legal entities, different from insurance undertakings, or segregated pools of assets without legal personality that are dedicated primarily to the provision of retirement and related benefits. Non-autonomous pension funds consist of reserves and other assets that are not legally separate from the plan sponsor or administrator (e.g., book reserves) and other pension assets over which the plan sponsor has legal ownership” (hence “Stewart and Antolin *Supervisory Oversight*”).

<sup>190</sup> VAG § 236(1). See also par 2.2.1 above, where this section is briefly discussed.

<sup>191</sup> Foster *Benefits* at 206 states that pension funds are private or captive insurance companies operated by the employer and subject to insurance company regulations. See nn 153 and 154 above, where *Pensionskassen* and *Pensionsfonds* are briefly explained; and Chapter 2, par 4 for a discussion of the legal status of pension funds in South Africa.

<sup>192</sup> See Chapter 2, par 4 for a discussion of the legal status of pension funds in South Africa.

<sup>193</sup> VAG § 233(1) sentence 2 number 1 deals with *Pensionskassen* with the legal form of a mutual society. See also Burger and Clark *Underwriting* (Abstract).

companies.<sup>194</sup> In South Africa, occupational pension funds are regulated separately from insurance companies, and different laws apply to each.

In Article 14 of the *Grundgesetz*, pension benefits are classified as property and thus enjoy constitutional protection.<sup>195</sup> This classification is comparable to that in South African law, where pension fund benefits qualify as “property” and enjoy the protection of the Constitution in terms of section 25.<sup>196</sup>

## 5 KEY ROLE-PLAYERS IN THE DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS

### 5.1 *The regulatory body of pension funds in Germany (the BaFin)*

The *Bundesanstalt für Finanzdienstleistungsaufsicht* (Federal Financial Supervisory Authority, hence the “*BaFin*”) was established in 2002.<sup>197</sup> The *BaFin* is responsible for the supervision of pension schemes that are in the form of direct insurance, *Pensionskassen*, and *Pensionsfonds*. These three pensions are regulated by the *VAG*.<sup>198</sup> The *BaFin* must authorise the operation of a pension fund:<sup>199</sup> so pension funds can start operating only after approval by the *BaFin*. The approach adopted by the *BaFin* to supervising pension funds is based on the system used to supervise the insurance sector.<sup>200</sup> The *BaFin*’s objective is to ensure that the interests of the insured (policyholders or beneficiaries) are adequately safeguarded and that the laws applicable to the operation of the insurance business are observed.<sup>201</sup> This

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<sup>194</sup> Both *Pensionskassen* and *Pensionsfonds* are supervised by the *BaFin*. The *BaFin* is discussed below in par 5.1.

<sup>195</sup> See n 71, where the *GG* is stated.

<sup>196</sup> See Chapter 2 par 4.3 in this regard. See also *Manzini v Metro Group Retirement Funds and Another (1)* 2001 12 BPLR 2808 (PFA) in par 42 (cited in Chapter 2 of the thesis, n 135), where the South African Pension Funds Adjudicator referred with approval to the decision of the Federal Constitutional Court in *BverfGE* 53, 257 (289) “that the legal interests of members in their pension funds are protected by the constitutional property guarantee” (in *GG* Art 14). The judgment of the Federal Constitutional Court is available at <https://www.servat.unibe.ch/dfr/bv053257.html> (last accessed on 24 September 2021).

<sup>197</sup> The *BaFin* was established by the passing of the Financial Services and Integration Act of 22 April 2002 (*Gesetz über die integrierte Finanzaufsicht (FinDAG)*).

<sup>198</sup> See *Pensions & Retirement Plans Getting the Deal Through* in par 2.

<sup>199</sup> *VAG* § 236(5); and Van der Zwan, Anderson and Wiß *Comparing Regulation* at 21.

<sup>200</sup> See Stewart *Experiences* at 14.

<sup>201</sup> *VAG* § 294. *VAG* § 294(1) states that “the primary objective of supervision is to protect policyholders and the beneficiaries of insurance services”. *VAG* § 294(2) states that “the supervisory authority must monitor all business operations of insurance undertakings within the framework of legal supervision in general and financial supervision in particular”.

role is similar to the FSCA's in South Africa in that pension funds regulated by the Pension Funds Act are required to register with the FSCA before they start operating.<sup>202</sup>

The *BaFin* verifies that the members of pension management boards<sup>203</sup> are qualified, reliable, and suited for the job.<sup>204</sup> Those who do not meet the standards may be refused membership of, or be dismissed from, the management board.<sup>205</sup> The *BaFin* commendably ensures that any person appointed to manage pension funds is suitably qualified and possesses relevant experience.<sup>206</sup>

## 5.2 *The management structure of occupational pension funds, and the administration of occupational pension funds in Germany*

### 5.2.1 Introduction

As stated above, there are five different forms of occupational pensions in Germany.<sup>207</sup> The management structure of these pension forms differs, depending on the type of pension fund or system of pension provision chosen by an employer in a particular workplace. Furthermore, these pension forms are distinguishable regarding who controls them and where and how the contributions received from the workers (employees) are invested. Unlike the *GRV*, where one board controls the entire scheme at the federal level and in the constituent states, each occupational pension fund (company pension fund) has its own controlling board, depending on the type of scheme.<sup>208</sup> The intricacies of each form of pension provision cannot be adequately described in this brief overview. The section below thus focuses on *Pensionskassen* and *Pensionsfonds* because they closely

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<sup>202</sup> See Chapter 2, par 7 in this regard.

<sup>203</sup> See par 5.2.3.1 below, where the management board is discussed.

<sup>204</sup> See par 5.2.3.3 below, where the qualifications of members of the management board are discussed.

<sup>205</sup> See Stewart and Antolin *Supervisory Oversight*.

<sup>206</sup> See Chapter 2, par 6.4, where the appointment of pension fund trustees in South Africa is discussed.

<sup>207</sup> See par 2.2.2 above for a discussion of the establishment of company pensions.

<sup>208</sup> The main board of directors of the *GRV* consists of the president, acting as chairperson, and two directors. The board of directors is selected by the honorary self-governing authority. Decisions that affect all pension funds are made by an expanded board of directors. This includes five directors from the regional pension funds and one director from *Deutsche Rentenversicherung Knappschaft – Bahn-See*. See n 33 above for a brief explanation of the *Deutsche Rentenversicherung*.



resemble private occupational pension funds registered under the Pension Funds Act in South Africa.<sup>209</sup>

### 5.2.2 The management structure

*Pensionskassen*<sup>210</sup> and *Pensionsfonds*<sup>211</sup> are discussed in one category because of their close similarities in legal form and management structure. *Pensionskassen* are legally independent life insurance undertakings whose purpose is to cover loss of income because of old age, invalidity, or death.<sup>212</sup> The VAG states that a *Pensionsfonds* within the meaning of this Act is a scheme with legal personality.<sup>213</sup> Since they are both established separately from their sponsoring employers, they cannot act independently: their acts are carried out by the pension management organs.<sup>214</sup> Unlike in South Africa, where pension fund boards manage occupational pension funds,<sup>215</sup> German law separates pension fund management and supervision functions.<sup>216</sup> The management structure of *Pensionskassen* and *Pensionsfonds* is thus a two-tier board structure consisting of a management board and a supervisory board.<sup>217</sup> In addition to the supervisory and management boards, the general assembly (the meeting of members or shareholders or their representatives)<sup>218</sup> is the highest body of the company.<sup>219</sup> The supervisory board or management board members are chosen by the company's general assembly or under specific rules in the fund's statutes. The VAG prescribes how the

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<sup>209</sup> See par 2.2.2 above, where these similarities are discussed.

<sup>210</sup> See par 2.2.2 n 153 above, where *Pensionskassen* are described.

<sup>211</sup> See par 2.2.2 n 154 above, where *Pensionsfonds* are described.

<sup>212</sup> VAG § 232(1).

<sup>213</sup> VAG § 236(1).

<sup>214</sup> See par 4 above, where the legal status of a pension fund is discussed.

<sup>215</sup> The management board of pension funds in South Africa consists of pension fund boards comprising employer and employee pension fund trustees, while in Germany the two-tier board is in place. See Chapter 2, par 6.4, where the constitution of pension fund boards in South Africa is discussed.

<sup>216</sup> See Havenga *Fiduciary Duties* at 230, n 14, stating that to inhibit and deter managers from deviating from their responsibilities, supervisory boards are introduced who are sufficiently removed from management to view the conduct of managers objectively. In addition, these supervisory boards are sufficiently powerful to decide who will be managers and for how long they will occupy that position. For a detailed discussion of the German two-tier board, see Du Plessis 2004 *Eur Bus LR* 1139 and Du Plessis 1996 *TSAR* 41.

<sup>217</sup> See also par 5.2 below.

<sup>218</sup> See Stewart and Antolin *Supervisory Oversight* at 17.

<sup>219</sup> See Stewart and Antolin *Supervisory Oversight* at 12, nn 9, 17.

management boards and supervisory boards of insurance undertakings, including those of pension funds, should be constituted.<sup>220</sup>

In the case of book reserves schemes,<sup>221</sup> the management structure is that of the sponsoring company. Since the relevant institution is the company, all management decisions about pensions are made by the company's managers, who usually hire external actuarial or benefits consultants.

In the case of direct insurance,<sup>222</sup> the management structure is that of the relevant insurance company contracted to provide pensions to the employees. The composition of insurance company boards is laid down by legislation.<sup>223</sup>

A board of management of support funds<sup>224</sup> is appointed according to company law. The difference between the rules here and those for *Pensionsfonds* is that the board always includes employer and employee representatives in support funds.<sup>225</sup>

The discussion of the South African law in Chapter 3 focused on pension funds in the private sector, which have a legal personality separate from the employer and are run by pension fund boards.<sup>226</sup> When the types of fund that were discussed in the South African law are compared with the five different forms that are available in Germany, it may be seen that the book reserves or direct pension promises (*Direktzusage*), support funds (*Unterstützungskassen*), and direct insurance (*Direktversicherung*) take a different form from pension funds in the private sector in South Africa. The funds in Germany that closely resemble private sector occupational pension funds in South Africa are pension institution or staff pension insurance (*Pensionskassen*) and pension funds (*Pensionsfonds*). The pension fund's management form differs, depending on which type of pension the employer has implemented in the workplace.

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<sup>220</sup> VAG §§ 188 and 189. These two sections deal with the constitution of a management board and supervisory board, respectively.

<sup>221</sup> See par 2.2.2, n 150 above, where the book reserve scheme is discussed.

<sup>222</sup> See par 2.2.2 n 152 above, where the direct insurance scheme is discussed.

<sup>223</sup> VAG §§ 188 and 189.

<sup>224</sup> See par 2.2.2 n 151 above, where support funds are discussed.

<sup>225</sup> See Steinmeyer *Pensions* at 51.

<sup>226</sup> See Chapter 2, par 4.2, where the separate legal personality of a pension fund in South Africa is discussed.

### 5.2.3 The management board and the supervisory board

#### 5.2.3.1 *The management board*

The *Vorstand* (management board) is responsible for managing and directing the corporate business of a company.<sup>227</sup> The management board is appointed by the supervisory board, which itself is elected by the general meeting.<sup>228</sup> The management board is required, among other things, to manage the enterprise in its own best interests,<sup>229</sup> to keep the required books and records,<sup>230</sup> and to convene general meetings.<sup>231</sup> Only natural persons may be members of the management board, which must comprise at least two members.<sup>232</sup> The management board of a *Pensionskassen* and/or *Pensionsfonds* is responsible for running and controlling the

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<sup>227</sup> *AktG* §§ 76(1) and 77(1). *AktG* § 76(1) provides that the management board shall have direct responsibility for the management of the company. See also Havenga *Fiduciary Duties* at 231. *BGB* § 26(1) deals with the board representing commercial associations. It states that an association must have a board. The board represents the association in court and out of court and it has the status of a legal representative. If the board consists of several persons, the association is represented by the majority of the board members.

<sup>228</sup> See in this regard Stewart and Antolin *Supervisory Oversight* at 17. See also *AktG* §§ 30(4); 84; and 101. The power of appointing and removing the members of the management board is an exclusive power of the supervisory board and cannot be delegated. See in this regard also Du Plessis 2004 *Eur Bus LR* at 1154.

<sup>229</sup> See Principle 1 of the German Corporate Governance Code of 26 February 2002 (*Deutscher Corporate Governance Kodex (DCGK)*) (*Recherchekommission* 16 December 2019), translation [https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216\\_German\\_Corporate\\_Governance\\_Code.pdf](https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf) (last accessed on 15 May 2021) (hence “the German Corporate Governance Code”). The principle deals with the governance tasks of the management board. It states that the members of the management board are jointly accountable for managing the enterprise. The German Corporate Governance Code contains principles, recommendations, and suggestions for the management board and the supervisory board that are intended to ensure that the company is managed in its best interests. The Code is addressed to listed companies and companies with access to capital markets in line with *AktG* § 161(1)(2). Companies that are not capital-market-oriented may use the German Corporate Governance Code’s recommendations and suggestions as guidelines. Principle 5 of the Code states that the management board ensures that all provisions of law and internal policies are complied with, and endeavours to achieve their compliance by the enterprise. See Du Plessis 2004 *Eur Bus LR* 1139 for a detailed discussion of the German Corporate Governance Code.

<sup>230</sup> *AktG* § 91.

<sup>231</sup> *AktG* § 121(2). See also Havenga *Fiduciary Duties* at 231.

<sup>232</sup> *VAG* § 188(1); *AktG* § 76(3). *VAG* § 188(1) states that section 76(1), (3) and (4), sections 77 to 91, and 93(1), (2) and (4) to (6) as well as section 94 of the *AktG* apply to the management board, with the necessary modifications, subject to the proviso that the resolutions of the highest-level representative body must replace the resolutions of the annual general meeting.

fund's business.<sup>233</sup> It is also responsible for making decisions related to the fund, including distributing survivors' death benefits to dependants and beneficiaries.<sup>234</sup>

### 5.2.3.2 *The supervisory board*

The *Aufsichtsrat* (supervisory board) performs a different function from the management board.<sup>235</sup> Members of the supervisory board are elected to the board by the general meeting.<sup>236</sup> The supervisory board consists of three members, except where the articles of association specify a larger number of members which must be divisible by three.<sup>237</sup> The maximum number of supervisory board members is twenty-one.<sup>238</sup> The supervisory board consists of shareholder representatives, as well as employee representatives if applicable. The general meeting usually elects shareholder representatives.<sup>239</sup> Shareholder representatives and employee representatives are obliged to act in equal measure in the best interests of the enterprise.<sup>240</sup> The supervisory board is responsible for appointing, dismissing, and supervising members of the management board.<sup>241</sup> It supervises and advises the management board of the enterprise<sup>242</sup> and is also directly involved in decisions of fundamental importance to the company.<sup>243</sup>

### 5.2.3.3 *The appointment and qualifications of the management board members*

Within legal and statutory parameters, the supervisory board determines the number of management board members, their required qualifications, and the appointment

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<sup>233</sup> VAG §§ 33, 188, and 189.

<sup>234</sup> BGB § 27(1) deals with the appointment and management of the board. It states that the appointment of the board is by resolution of the general meeting. The general meeting can revoke the appointment of a member of the board where there is a compelling reason; such a reason includes without limitation a gross breach of duty or inability to effect proper management (BGB § 27(2)).

<sup>235</sup> See Principle 6 of the German Corporate Governance Code.

<sup>236</sup> See Principle 8 of the German Corporate Governance Code; and AktG § 30. AktG § 30 deals with the appointment of the supervisory board, the management board, and the external auditor.

<sup>237</sup> VAG § 189(1). See also Stewart and Antolin *Supervisory Oversight* at 12, n 9.

<sup>238</sup> VAG § 189(1).

<sup>239</sup> See Principle 10 of the German Corporate Governance Code.

<sup>240</sup> See Principle 10 of the German Corporate Governance Code.

<sup>241</sup> Principle 6 of the German Corporate Governance Code; and AktG § 30(4) and § 84.

<sup>242</sup> AktG § 111(1).

<sup>243</sup> Principle 6 of the German Corporate Governance Code. See also AktG § 111(4) in this regard, stating that the articles or supervisory board have to determine that specific types of transactions may be entered into only with the consent of the supervisory board.

of suitable candidates to individual positions.<sup>244</sup> Section 24(1) of the VAG deals with the qualification of managers and holders of qualified participating interests. These provisions apply to both *Pensionskassen* and *Pensionsfonds*.<sup>245</sup> Section 24(1) of the VAG requires that the directors and managers of insurance undertakings meet the qualification requirement; managers must have sufficient theoretical and practical knowledge relating to insurance companies and at least three years' management experience.<sup>246</sup> In addition, if possible, they should also have knowledge of the portfolios for which they will be responsible.<sup>247</sup> This position contrasts with the one in South Africa, where the knowledge required by trustees is not as specific as that in Germany.<sup>248</sup> In addition to the qualification requirement, in Germany, each management board member is required to sign a statement about whether criminal proceedings are pending against him, whether criminal proceedings have been instituted against him on account of a crime or other offence, and whether he has been involved as a debtor in insolvency proceedings.<sup>249</sup>

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<sup>244</sup> Principle 9 of the German Corporate Governance Code. *AktG* § 100 deals with the personal prerequisites to be fulfilled by members of the supervisory board; § 101 provides for the appointment of the members to the supervisory board; § 102 deals with the term of office of the supervisory board members; and § 103 provides for the removal from office of supervisory board members.

<sup>245</sup> VAG Part 4 deals with institutions for occupational retirement provision. The VAG applies to *Pensionsfonds* (§ 236) and *Pensionskassen* (§ 232). See also VAG § 1(1) number 5, stating that pension funds within the meaning of § 236(1) are subject to supervision under this Act.

<sup>246</sup> VAG § 24 deals with the requirements for persons who effectively run the undertaking or assume responsibility for other key tasks. VAG § 24(1) states:

“Persons who effectively run the undertaking or assume responsibility for other key tasks must be fit and proper. The fit and proper requirement includes a requirement for professional skills and qualifications, knowledge and experience that ensures sound, prudent management of the undertaking. This requires appropriate theoretical and practical knowledge of insurance business and, if the person concerned is to take on management responsibilities, adequate management experience. A person can generally be deemed to have adequate management experience if the person concerned can demonstrate that he/she has held a managerial position in an insurance undertaking of comparable size and with a comparable type of business for at least three years.”

This is the translation by the Federal Insurance Supervisory Office, the *BaFin*: see n 62 above. This set of requirements contrasts with the position in South Africa; in Germany, one must comply with the qualification requirements before being appointment as a manager or director of an insurance undertaking. In South Africa, a trustee is required to acquire knowledge when already appointed. The requirements are explained on page 18 of Stewart F and Yermo J *Pension Fund Governance: Challenges and Potential Solutions* OECD Working Papers on Insurance and Private Pensions, No. 18 (OECD Publishing Paris 2008) (hence Stewart and Yermo *Pension Fund Governance*).

<sup>247</sup> Yermo and Marossy *Pension Fund Governance* in par 47.

<sup>248</sup> See Chapter 2, par 6.4.

<sup>249</sup> Stewart and Yermo *Pension Fund Governance* at 18 explaining the requirements.

## 6 THE REGULATION AND SUPERVISION OF OCCUPATIONAL PENSION FUNDS

Pension schemes are provided with the power to make their own rules as long as these rules are aligned with the objectives of the *VAG* and conform to the labour laws applicable to occupational pension funds.<sup>250</sup> Occupational pension funds regulated by the *BaFin* — *Pensionskassen*, *Pensionsfonds*, and direct insurance — must submit their pension plans (rules) for approval to the *BaFin* before commencing their operations.<sup>251</sup> This position is similar to the one in South Africa: pension funds must also register their rules with the FSCA before commencing their operations.<sup>252</sup>

The question is whether the insured person (or fund member) has a say in how the death benefits should be distributed in Germany. The *GRV* lists potential death benefit recipients in the form of survivors' pension and/or orphans' pensions.<sup>253</sup>

The *BetrAVG* does not prescribe how death benefits should be distributed, but it provides the legal basis for workers to be provided with pension plans. For the purpose of this chapter, the *VAG* regulates the relationship between the employer and the pension providers in line with the following three options: direct insurance, *Pensionsfonds*, and *Pensionskassen*. The *VAG* states that in the event of death, a *Pensionskasse* may only provide benefits to surviving dependants of the insured person.<sup>254</sup> Under the *VAG*, the pension fund member or the insured person may nominate a person to receive the death benefit, but this person should be on the list of surviving dependants.<sup>255</sup>

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<sup>250</sup> See par 5.1 above, where the *BaFin* is discussed.

<sup>251</sup> See par 5.1 above, where the *BaFin* is discussed.

<sup>252</sup> See Chapter 3, par 4, where pension fund rules in South Africa are discussed.

<sup>253</sup> *SGB VI* § 46. See par 2.1 above, where the *GRV* and a list of potential recipients of the death benefit in this regard are discussed.

<sup>254</sup> See *VAG* § 232(1) number 3, cited in n 134 above.

<sup>255</sup> See *VAG* § 232(1) number 3, cited in n 134 above; and par 7.2 below for a potential list of surviving dependants that may qualify to receive a death benefit.

The VAG provides for requirements relating to the general information to be given to members and beneficiaries of pension schemes. Section 234I of the VAG states the following:

- (1) For every pension scheme that is operated, the *Pensionskasse* must provide the members and members and beneficiaries with general information about that pension scheme.
- (2) The *Pensionskasse* must inform the members and beneficiaries within a reasonable time of any relevant information regarding changes to the pension scheme rules.
- (3) In the event of significant changes to the methods and assumptions used to calculate the technical provisions, the *Pensionskasse* must provide an explanation of the associated impact on the members and beneficiaries within a reasonable time.

The VAG provides for requirements relating to how information is to be given to members and beneficiaries of pension schemes.<sup>256</sup> The information prescribed for a pension scheme under this segment must

- be prepared in German;
- be written in a clear, succinct and comprehensive manner, avoiding the use of jargon and avoiding technical terms where everyday words can be used instead;
- be coherent, and terms and designations must be used consistently throughout the information;
- be presented in a way that is easy to read;
- be regularly updated.

The information may not be misleading; the prescribed information must be made available free of charge. When a pension scheme member dies, the management board of the pension scheme is obliged by statutory law to provide comprehensive information upon the surviving dependants' request on any accrued death benefit entitlements.<sup>257</sup>

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<sup>256</sup> VAG § 234k(1) numbers 1 to 5.

<sup>257</sup> Jeram, Maurer and Damez 2020 *International Pension Lawyer* 59 at 65.

## 7 THE DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS

### 7.1 Introduction

In Germany, as in South Africa, there are neither mandatory obligations nor mandatory rules for company pension schemes to provide death benefits to surviving dependants of a pension scheme member who dies while still in service.<sup>258</sup> The provision of these benefits thus depends solely on the pension fund rules and differs from one company pension scheme to another. Surviving dependants can thus only receive benefits on the member's death if this is supported in the member's pension scheme rules. Although the survivor's death benefit is a voluntary benefit,<sup>259</sup> it is common for most company pension schemes to provide death benefits for dependants in the event of the member's death before retirement.<sup>260</sup> The death benefits are in the form of widow's, spouse's, and orphan's pension.<sup>261</sup>

A survivor's benefit level for spouses is usually about 60 per cent of the pension that would have been due to the employee if the employee had not died but retired, or 60 per cent of the employee's pension if the insured person was already receiving his or her pension.<sup>262</sup> The level of benefit received is generally linked to the pension and salary previously received by the deceased.<sup>263</sup> In undertaking to continue providing financial support to the spouse of the deceased employee, the employer assumes that the spouse was financially dependent upon the deceased.<sup>264</sup> It is common for occupational funds to provide for a lump sum death benefit of between

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<sup>258</sup> See in this regard Chapter 3, par 2.2, discussing the distribution of death benefits in South Africa. And see Foster *Benefits* at 187.

<sup>259</sup> See Beck and Eisenlohr *Regulation*.

<sup>260</sup> See Steinmeyer *Pensions* at 66, stating that survivors' benefits are generally included in the benefits that are made available in supplementary pensions (company pensions).

<sup>261</sup> Foster *Benefits* at 45.

<sup>262</sup> See Pensions & Retirement Plans *Getting the Deal Through* in par 16. See also the Vodafone Pension Plan as one of the examples of company plans in Germany available at [http://www.pensionsgermany.vodafone.com/vodafone/english/risikovorsorge/3\\_todesfall.html](http://www.pensionsgermany.vodafone.com/vodafone/english/risikovorsorge/3_todesfall.html) (last accessed 9 June 2021); Foster *Benefits* at 201; and Beck and Eisenlohr *Regulation*.

<sup>263</sup> Whiteford *Adapting* at 184.

<sup>264</sup> At 184. Whiteford states (at 184, n 275 and n 276) that only the presumption of dependency can adequately explain the development of the practice of continuing payment after the death of the employee whose labour resulted in the accrual of the pension rights in question. Whiteford is of the view that the assumption of dependency is also reflected in the fact that the survivor receives only a part of the benefit previously enjoyed by the deceased, and this outcome shows that the retirement pension is conceptualised as providing a family income.



one year's and two years' salary to be paid in addition to death benefits in the form of widows', spouses', and orphans' pensions.<sup>265</sup>

## 7.2 *The potential recipients (beneficiaries) of the death benefit*

In South Africa, any person who is nominated as a beneficiary by the fund member qualifies to be considered for receiving a share of the death benefit.<sup>266</sup> By contrast, the surviving dependants of the deceased scheme member are the only persons in Germany entitled to receive death benefits if an occupational pension fund member dies while still in service.<sup>267</sup> The potential recipients of occupational pension fund death benefits are restricted to qualifying dependants. Company pension schemes often have rules that grant death benefits to the surviving spouse, civil partner, and children up to 25 years when still in vocational training.<sup>268</sup> A member of the company pension scheme can nominate any one or more of the following as beneficiaries:

- the deceased member's spouse,<sup>269</sup>
- a registered civil partner of the deceased scheme member according to the Civil Partnership Act,<sup>270</sup>
- a former spouse,
- a named partner, and
- the deceased member's children up to the age 18 (or up to 25 under certain conditions).<sup>271</sup>

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<sup>265</sup> Foster *Benefits* at 45.

<sup>266</sup> See Chapter 3, par 2.2.2 in this regard.

<sup>267</sup> See par 2.2.1, where the objective of occupational pensions in Germany is discussed.

<sup>268</sup> See Beck and Eisenlohr *Regulation* cited in n 88 above.

<sup>269</sup> In a decision published on 11 April 2018, the Federal Labour Court (*Bundesarbeitsgericht*, (hence the "BAG")) ruled that a clause in an occupational pension agreement that excludes from survivors' benefits spouses who are more than 15 years younger than the deceased former employee did not constitute discrimination on the grounds of age (BAG, Feb. 20, 2018, Docket No. 3 AZR 43/17), available in German at <https://www.bundesarbeitsgericht.de/en/entscheidung/3-azr-19-17/> (last accessed on 24 September 2021); the judgment may also be read in English if the necessary arrangements are made in the web browser by going to <https://www.bundesarbeitsgericht.de/en/>. See also Schmidt C and Gesley J "Germany: Companies May Exclude Spouses Who Are More than 15 Years Younger than the Deceased from Survivors' Benefits" (*Library of Congress*, 25 April 2018) available at <https://www.loc.gov/item/global-legal-monitor/2018-04-25/germany-companies-may-exclude-spouses-who-are-more-than-15-years-younger-than-the-deceased-from-survivors-benefits/> (last accessed on 24 September 2021).

<sup>270</sup> The Civil Partnership Act of 1 August 2001 (*Lebenspartnerschaftsgesetz (LPartG)*).

<sup>271</sup> Foster *Benefits* at 189.

This list of beneficiaries is restricted by law, and no one else may be nominated.<sup>272</sup> One or more of the qualifying beneficiaries must be named by the member.<sup>273</sup> A member of a pension fund (insured person) may nominate more than one beneficiary. In that case, the pension fund nomination form should indicate the share (percentage) of the death benefit to be allocated to each of the beneficiaries.<sup>274</sup> If a member does not nominate any beneficiaries, the death benefit will be paid out to that member's spouse or registered civil partner. This position differs from the one in South Africa regarding the payment of death benefits to nominated beneficiaries.<sup>275</sup>

### 7.3 *The sequence of beneficiaries for receiving the lump sum death benefit*

Pension fund rules in Germany often provide that if an insured person dies, the persons identified below will be entitled to a lump sum death benefit. For example, the relevant rules of the Novartis Pension Fund 1 Regulations read as follows:<sup>276</sup>

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<sup>272</sup> VVG § 160 deals with the appointment of a beneficiary in Germany. It states:

“(1) If several persons are appointed as beneficiaries without determining their shares, they shall be entitled to benefit in equal share. The share not acquired by any one beneficiary shall accrue to the remaining beneficiaries.

(2) If the insurer's benefit is to be paid to the policyholder's heirs upon his death, in cases of doubt those appointed as heirs upon his death shall be entitled to benefit in relation to their shares in the inheritance. A waiving of the right to the inheritance shall have no influence on the entitlement.

(3) Where the right to the insurer's benefit is not acquired by the third party beneficiary, it shall be due to the policyholder.

(4) Where the tax authorities are appointed as heir, they shall not be entitled to benefit within the meaning of subsection (2), first sentence” (translated by the Federal Ministry for Justice and Ute Reusch, available at [https://www.gesetze-im-internet.de/englisch\\_vvg/englisch\\_vvg.html](https://www.gesetze-im-internet.de/englisch_vvg/englisch_vvg.html) (last accessed on 24 September 2021)).

<sup>273</sup> VVG 159 provides:

“(1) In cases of doubt, the policyholder shall be entitled, without the consent of the insurer, to appoint a third party as beneficiary and to replace the thus appointed third party with the name of another.

(2) A third party beneficiary by revocable designation shall not acquire the right to payment of the insurer's benefit until the insured event occurs.

(3) A third party beneficiary by irrevocable designation shall acquire the right to payment of the insurer's benefit at the time when he is designated as beneficiary.”

<sup>274</sup> VVG § 160.

<sup>275</sup> See Chapter 3, par 2.2.2 in this regard.

<sup>276</sup> This rule providing for the sequence of beneficiaries appears in the Novartis Pension Fund 1 Regulations, Art. 15 in pars 5-7 at 18-19 (see “Novartis Pension Fund 1 Regulations” (*Novartis Pension Funds*, effective 1 January 2021) available at <https://www.pensionskassen->

- 5 Persons with entitlement, regardless of inheritance law, are:
- a) the spouse and the children of the deceased insured person who are entitled to an orphan's pension from the Pension Fund,<sup>277</sup>
  - b) in the absence of beneficiaries as defined under a) persons who were supported to a substantial degree by the deceased insured person or the person who lived without interruption in a domestic partnership with the deceased insured person for the last five years until death with a mutual obligation of support or who are required to support one or more children from the relationship,<sup>278</sup>
  - c) in the absence of beneficiaries as defined under a) and b) the other children, the parents or siblings of the deceased insured person.<sup>279</sup>
- 6 The insured person may change the groups of beneficiaries listed in Paragraph 5 as follows at any time in a written notification to the Pension Fund:
- a) If persons defined under Paragraph 1 lit. b) exist, the insured person may combine beneficiaries defined under Paragraph 5 lit. a) and b).
  - b) If no persons defined under Paragraph 5 lit. b) exist, the insured person may combine the beneficiaries defined under Paragraph 5 lit. a) and c).
  - c) If no persons defined under Paragraph 5 lit. a) exist, the insured person may combine the beneficiaries defined under Paragraph 5 lit. b) and c).

The notification to change the groups of beneficiaries must be submitted to the pension fund during the lifetime of the insured person.

- 7 The insured person may send a written communication to the Pension Fund defining any entitlements of the beneficiaries within a beneficiary group (Paragraph 5 and 6) as he/she wishes. If no communication is received from the insured person, the lump sum on death falls equally to all beneficiaries within a beneficiary group. The communication must be submitted to the Pension Fund during the lifetime of the insured person.

Furthermore, Rule 18.2 of the *Leica Pensionskasse* (Leica Pension Fund)

Pension Fund Regulations provides the following example:

18.2 The insured person can determine the entitlements of the beneficiaries within any group of beneficiaries (Art. 18.1 a, b or c) as he wishes.

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[novartis.ch/fileadmin/pkn/Reglemente/E\\_Reglement\\_PK1.pdf](https://www.novartis.ch/fileadmin/pkn/Reglemente/E_Reglement_PK1.pdf) (last accessed 24 September 2021). Novatis Pension Fund is a company pension scheme that operates in Germany.

<sup>277</sup> There is no requirement that the spouse and/or children must prove that they were financially dependent on the member before the latter's death.

<sup>278</sup> The persons in this category must prove that they were substantially financially dependent on the member before the latter's death for at least the past two years, or have lived without interruption in a domestic partnership with the deceased insured person for the last five years until death with a mutual obligation of support, or are required to support one or more children from the relationship.

<sup>279</sup> There is no requirement that the remaining children, parents, and siblings of the deceased insured person (fund member) must prove that they were financially dependent on the member before the latter's death.

Notification of this must have been received by the Pension Fund during the lifetime of the deceased person.

If no notification was received by the Pension Fund during the lifetime of the deceased person, the lump-sum death benefit due within the group of beneficiaries is divided between the beneficiaries as follows:

- Beneficiary group a: All beneficiaries to an equal amount.
- Beneficiary group b: All beneficiaries to an equal amount.
- Beneficiary group c: The other children to equal amounts,  
in the absence of whom, the parents to equal amounts,  
in the absence of whom, the siblings to equal amounts.<sup>280</sup>

It is clear from the specimen rules above that the pension fund management board has limited discretion over how the death benefits must be distributed. The law is sure about how the death benefit must be distributed on the death of a fund member, and the fund member is also afforded the power to determine how the death benefit should be distributed. These powers are restricted in that the member cannot decide to distribute the death benefit to persons who do not fall within the categories set by the law. For example, a fund member of an occupational pension fund in Germany cannot nominate a friend and/or a colleague as a beneficiary, unlike a member in South Africa.<sup>281</sup>

#### 7.4 *Duties of management boards and their board members when distributing death benefits*

In Germany, the management boards of pension funds do not have a special duty to identify, trace, and locate any surviving dependants eligible for death benefits.<sup>282</sup> It is the burden of each surviving dependant to assert his or her death benefit entitlements and take any further legal action, if necessary.<sup>283</sup> This position differs

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<sup>280</sup> See Rule 18.2 of the Leica Pension Fund "Pension Fund Regulations" (*Leica Pensionskasse* Version 1 January 2021) available at <http://www.pk-leica.ch/media/aba81cf627e982db9ab25de97011a5d2.pdf> (last accessed 25 September 2021). This rule deals with the lump sum death benefit.

<sup>281</sup> See Chapter 3, par 2.2.2 for a discussion of nominated beneficiaries in South Africa.

<sup>282</sup> Jeram, Maurer and Damez 2020 *International Pension Lawyer* at 65.

<sup>283</sup> At 65. See, for example, Rule 18.3 of the Leica Pension Fund Regulations, stating that in the event of a dispute, the person making the claim must within three months following the death of the insured person prove his or her entitlement.

from the one in South Africa, where pension fund trustees have a statutory duty to conduct a diligent investigation to trace and locate potential beneficiaries of the death benefits.<sup>284</sup>

In Germany, members of management and supervisory boards (“board members”) have duties and responsibilities towards their organisations, and in limited circumstances, to shareholders, third parties, and creditors of the company.<sup>285</sup> The duties that management boards owe to their pension funds and the pension fund members and other beneficiaries are not contained in one piece of legislation but appear in various legislative instruments, such as the *BGB*, the *VAG*, the *AktG*, and the *GG*. The *BGB* imposes duties that are not restricted to members of pension fund management boards but also apply to all organs that represent commercial associations in Germany.<sup>286</sup> German law does not rely on fiduciary law as do the laws of South Africa<sup>287</sup> and the United Kingdom.<sup>288</sup> Havenga states that the expansive development of trust law in English law did not occur in Germany.<sup>289</sup> She is of the view that a possible explanation for this is that reliance is placed upon the supervisory board to properly supervise the functioning of the management board.<sup>290</sup> Unlike the other legal systems investigated in this thesis, those of South Africa and the United Kingdom, Germany pension law does not recognise any general fiduciary doctrine regarding pension fund management. Instead, German law relies on statutory provisions for ensuring that pension governing boards are accountable to their funds and pension fund members.<sup>291</sup> The members of management in Germany have duties and responsibilities based on the law regarding their organisations’ pension funds and the pension fund members.<sup>292</sup> The

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<sup>284</sup> See Chapter 3, par 2 in this regard.

<sup>285</sup> Havenga *Fiduciary Duties* at 240 and authorities cited there.

<sup>286</sup> *BGB* § 22 states:

“An association whose object is commercial business operations acquires legal personality, for lack of special provisions under federal law, by state grant. The grant is in the power of the Land in whose territory the association has its seat.”

<sup>287</sup> See Chapter 3, par 5 for a discussion of duties in South Africa.

<sup>288</sup> See Chapter 4, par 5.4 for a discussion of duties in the United Kingdom.

<sup>289</sup> See Havenga *Fiduciary Duties* at 248 and authorities cited there.

<sup>290</sup> At 248 and authorities cited there.

<sup>291</sup> See Chapter 3, par 5 for a discussion of pension fund trustees’ fiduciary duties and their duties of care and skill in South Africa.

<sup>292</sup> *BGB* § 241 deals with duties arising from an obligation. *BGB* § 241(1) states:

members of the management have to satisfy the following statutes when distributing death benefits to beneficiaries:

The *BGB* provides that the members of management boards should act in good faith.<sup>293</sup> This duty resembles the fiduciary obligation of good faith that pension fund trustees in South Africa owe to their funds and to members of funds that have accrued a benefit.<sup>294</sup> However, the duty to act in good faith in Germany is not a fiduciary obligation but is contained in a statute, the *BGB*.

The *AktG* provides that the members of management boards must act with care and skill while executing their responsibilities.<sup>295</sup> The *AktG* adds that the failure of the board member to act with care and skill amounts to negligence.<sup>296</sup> Markesinis states that “a person who does not exercise the ordinary care that is expected in everyday life is guilty of negligence”.<sup>297</sup> Although the standard of care is objective, the test is wide enough to allow that the care expected is also based on the skills and knowledge of the responsible person. So, for example, if he belongs to a certain

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“By virtue of an obligation an obligee is entitled to claim performance from the obligor. The performance may also consist in forbearance.”

<sup>293</sup> *BGB* § 31. *BGB* § 242 deals with performance in good faith. It states:

“An obligor has a duty to perform according to the requirements of good faith, taking customary practice into consideration.”

Kevin Bork and Manfred Wandt state that good faith “describes the fundamental trust in such upright conduct of the contractual partner” (2020 *ZVersWiss* 243 at 244 in par 2). The principle of good faith applies to every legal relationship in Germany (Bork and Wandt 2020 *ZVersWiss* 245 in par 2). *BGB* § 242 may be used to establish several ancillary duties of contractual parties, which include disclosure duties and protective duties. And parties are obliged to behave in a way that does not endanger the other party’s legal assets, such as health or property (Bork and Wandt 2020 *ZVersWiss* 246 in par 3.1).

<sup>294</sup> See Chapter 3, par 5 where the duties of pension fund trustees in South Africa are discussed.

<sup>295</sup> *AktG* § 93 relates to the duty of the members of the management board to exercise skill and care, liability and responsibilities. *AktG* § 93(1) states:

“In conducting business, the members of the management board shall employ the care of a diligent and conscientious manager. They shall not be deemed to have violated the aforementioned duty if, at the time of taking the entrepreneurial decision, they had good reason to assume that they were acting on the basis of adequate information for the benefit of the company”.

<sup>296</sup> Markesinis and Unberath *German Law of Torts* at 84. *AktG* § 93(2) states:

“Members of the management board who violate their duties shall be jointly and severally liable to the company for any resulting damage. They shall bear the burden of proof in the event of a disputes as to whether or not they have employed the care of a diligent and conscientious manager. If the company takes out an insurance covering the risks of a member of the managing board arising from his work for the company, such insurance should provide for a deductible of no less than 10 per cent of the damage up to at least an amount equal to 1.5 times the fixed annual compensation of the managing board member”.

<sup>297</sup> Markesinis and Unberath *German Law of Torts* at 84.

profession, he is expected to provide the same duty of care as his colleagues who work in that profession.<sup>298</sup> In Germany, this duty to act with care and skill is similar to the duty of care and skill in South Africa.<sup>299</sup>

Germany's Constitution, the Basic Law ("GG"), provides for equal treatment for all people.<sup>300</sup> The GG provides for the general equality clause,<sup>301</sup> an equal treatment clause,<sup>302</sup> and a non-discriminatory clause.<sup>303</sup> According to Kau, the general equality principle does not mean that all people are always to be treated the same, but rather that it is the duty of public authorities to differentiate only for convincing reasons.<sup>304</sup> The equality principle is breached when there is no good reason arising from the nature of things or other evident grounds for the differentiation or unequal treatment when a decision must be described as arbitrary.<sup>305</sup> The general principle of equality applies to the law as a whole; its effects in occupational pension funds law cannot be considered in detail here. Still, it would apply, for example, where individuals or specific groups are arbitrarily excluded from the distribution of retirement fund death benefits.<sup>306</sup> This principle requires that board members should distribute death benefits according to applicable laws and the rules of the

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<sup>298</sup> At 84. See also Soerjaman *Employers' Liability* at 12.

<sup>299</sup> See Chapter 3, par 5, discussing the duties of pension fund trustees in South Africa.

<sup>300</sup> Article 3 of the German Constitution deals with equality before the law. It reads:

"(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favoured or disfavoured because of sex, parentage, race, language, homeland and origin, faith or religious or political opinions. No person shall be disfavoured because of disability"

(translated by Professor Christian Tomuschat, Professor David P Currie, Professor Donald P Kommers and Raymond Kerr, in cooperation with the Language Service of the German Bundestag, available at [https://www.gesetze-im-internet.de/englisch\\_gg/index.html](https://www.gesetze-im-internet.de/englisch_gg/index.html) (last accessed on 28 September 2021).

The provisions of Art 3 of the Germany Constitution are comparable to the provisions of s 9 of the South African Bill of Rights (Constitution), which contains the equality clause. See Chapter 3 par 4.4 in this regard. The *Deutscher Bundestag* is the "national parliament of the Federal Republic of Germany. Its seat is the Reichstag Building in Berlin" ("German Bundestag - The Parliament of the Federal Republic of Germany" (*German Bundestag*) available at [www.bundestag.de](http://www.bundestag.de) (last accessed on 29 August 2021).

<sup>301</sup> GG Art 3(1).

<sup>302</sup> GG Art 3(2).

<sup>303</sup> GG Art 3(3). See in this regard Whiteford *Adapting* at 132 and authorities cited there.

<sup>304</sup> See Kau *Constitutional Law* Chapter 2, § 2.06 [C][2].

<sup>305</sup> See Kau *Constitutional Law* Chapter 2, § 2.06 [C][2].

<sup>306</sup> See Kau *Constitutional Law* Chapter 2, § 2.06 [C][2].

particular pension fund and should not discriminate unfairly between the recipients or beneficiaries of the death benefit. This principle is also similar to the relevant provisions (the equality clause in section 9) of the South African Constitution, 1996.<sup>307</sup>

In Germany, the governing body of a pension fund (the board members) is required to act in the best interests of their pension funds and those of the fund members and their beneficiaries.<sup>308</sup> The German Corporate Governance Code (*Deutscher Corporate Governance Kodex* (“*DCGK*”))<sup>309</sup> states:

The members of the Management Board and Supervisory Board are bound to observe the enterprise’s best interests. In all their decisions, they must neither pursue personal interests nor exploit for themselves business opportunities to which the enterprise is entitled.<sup>310</sup>

In South Africa, pension fund trustees have a duty under the common law and statutory provisions to act in the best interests of the fund, fund members, and beneficiaries with accrued benefits.<sup>311</sup> The governing body of a pension fund in Germany is accountable to pension fund members and their beneficiaries and to the *BaFin*.<sup>312</sup>

Members of the management boards of pension funds in Germany do not wield the same discretionary powers in distributing retirement fund death benefits as pension fund trustees do in South Africa.<sup>313</sup> It was seen in Chapter 3 that in South Africa, trustees have wide discretionary powers in distributing retirement fund death benefits to potential beneficiaries.<sup>314</sup>

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<sup>307</sup> See Chapter 3, par 4.3, discussing the Constitution in South Africa.

<sup>308</sup> See Stewart and Antolin *Supervisory Oversight* at 14.

<sup>309</sup> See n 229 above, where the German Corporate Governance Code is discussed. The Code is neither an Act of Parliament nor an agreement that can formally bind the various organs or the parties referred to in the Code. Section 161 of the *AktG* obliges companies to comply or to explain non-compliance with the German Corporate Governance Code. The comply or explain statement must be made annually and be available to the public on the company’s website. See in this regard Du Plessis 2004 *Eur Bus LR* at 1143 and 1159.

<sup>310</sup> See Principle 19 of the German Corporate Governance Code.

<sup>311</sup> See Chapter 3, par 5, where the fiduciary duties of pension fund trustees in South Africa are discussed.

<sup>312</sup> See par 5.1 above, where the *BaFin* is discussed.

<sup>313</sup> See Chapter 3, par 3, where the discretionary powers of pension fund trustees in South Africa are discussed.

<sup>314</sup> See Chapter 3, par 3 for a discussion of the legal position in South Africa.



## 8 THE LIABILITY FOR WRONGFUL DISTRIBUTION OF OCCUPATIONAL PENSION FUND DEATH BENEFITS

The governing body is legally liable for its actions, so that accountability may be guaranteed. In a two-tier board system, the governing board is accountable to the supervisory board.<sup>315</sup> If board members distribute the death benefits contrary to the applicable laws and the fund rules, their conduct would not be in the best interests of the pension funds. It may result in losses to the pension fund because of damages claims against it by wronged dependants and beneficiaries.<sup>316</sup> A pension fund may be held liable for any culpable non-fulfilment or delayed fulfilment of surviving dependants' death benefit claims.<sup>317</sup> This liability may, in particular, result in additional damage claims and/or interest on arrears of the surviving dependants.<sup>318</sup>

The duties of board members of pension funds when distributing retirement fund death benefits were briefly discussed above. It may happen that board members breach their duties when distributing retirement fund death benefits (for example, by distributing these benefits in a way that is not in the best interests of beneficiaries and/or without the necessary care). Then those board members could be liable for damages to their pension funds, or to pension fund members or their beneficiaries.<sup>319</sup> Pension funds may also be liable for the loss suffered by pension fund members and their beneficiaries (third parties) because their trustees breached their duties. The *BGB* contains several provisions that aggrieved beneficiaries may rely on to sue pension funds and their management boards for breach of duties. These provisions are discussed below.

The *BGB* provides that any association (in this instance, a pension fund) is liable for any damage which the board, a member of the board, or any other duly appointed representative may, in carrying out his or her duty, cause a third party (in this instance, a pension fund member and/or his or her beneficiaries), if the act gives rise to a liability in damages.<sup>320</sup> Board members of pension funds owe duties

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<sup>315</sup> See Stewart and Antolin *Supervisory Oversight* at 15.

<sup>316</sup> See n 296 above, referring to the *AktG* § 93(2).

<sup>317</sup> Jeram, Maurer and Damez 2020 *International Pension Lawyer* at 65.

<sup>318</sup> At 65.

<sup>319</sup> See n 296 above, referring to the *AktG* § 93(2).

<sup>320</sup> *BGB* § 31 deals with the liability of an association for organs.

primarily to their pension funds, and the pension fund is entitled to hold its board members liable for breach of duties. The errant board member must accordingly compensate the fund for damages that it may suffer due to that board member's failure to comply with his or her duties.<sup>321</sup> Liability arises mainly from the *BGB*, *BetrAVG*, *VAG*, and the specific applicable statutes. A damages claim is not limited to board members of occupational pension funds but also applies to the relevant officials that manage the *GRV*.<sup>322</sup> Section 839 of the *BGB* deals with liability in the case of a breach of official duty. It states that if an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this.<sup>323</sup> If the official is only responsible because of negligence, then he may be held liable if the injured person is not able to obtain compensation in another way. The liability of board members of pension funds in Germany is comparable to the liability of pension funds and their trustees for wrongful distribution and breach of duties in South Africa.<sup>324</sup> What is lacking in South Africa is the provision of liability of pension funds and their trustees in the statute, the Pension Funds Act.<sup>325</sup> In Germany, members of the management board are liable for damages if they act contrary to the law.<sup>326</sup> The *BGB* states that a person who is liable in damages must restore the position that would exist if the circumstance obliging him to pay damages had not occurred.<sup>327</sup> Section 823 of the *BGB* deals with liability in damages.<sup>328</sup> A person who, intentionally or negligently, unlawfully injures the life, body, health, freedom, property or another right of another person is liable to make compensation to the other party for the damage arising from

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<sup>321</sup> *BGB* § 280 deals with damages for breach of duty. It states:

“(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty.

(2) Damages for delay in performance may be demanded by the obligee only subject to the additional requirement of section 286.

(3) Damages in lieu of performance may be demanded by the obligee only subject to the additional requirements of sections 281, 282 or 283.”

<sup>322</sup> See par 2.1 above, where the *GRV* is discussed.

<sup>323</sup> *BGB* § 839(1).

<sup>324</sup> See Chapter 3, par 6, discussing the liability of pension fund trustees in South Africa.

<sup>325</sup> See Chapter 3, par 6, discussing the liability of pension fund trustees in South Africa.

<sup>326</sup> See Stewart and Antolin *Supervisory Oversight* at 16.

<sup>327</sup> *BGB* § 249(1): this deals with the nature and extent of damages. This is similar to the claim for damages in South Africa. See Chapter 3, par 6.5.2.

<sup>328</sup> *BGB* § 823.

this.<sup>329</sup> The same duty is held by a person who commits a breach of a statute that is intended to protect another person. If, according to the contents of the statute, it may also be breached without fault, then liability for compensation only exists in the case of fault.<sup>330</sup> Section 826 of the *BGB* states that a person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage.<sup>331</sup> The *BGB* states that a person who obtains something as a result of the performance of another person or otherwise at his expense without legal grounds for doing so is under a duty to make restitution to him.<sup>332</sup> This duty also exists if the legal grounds later lapse or if the result intended to be achieved by those efforts in accordance with the contents of the legal transaction does not occur.<sup>333</sup>

The legal framework for the protection of pension rights is found in labour legislation, the *BetrAVG*.<sup>334</sup> Safeguards have also been put in place by specific supervisory bodies, such as the *BaFin*.<sup>335</sup> Labour-court jurisprudence is equally important; its main principles have been consolidated in the *BetrAVG*.<sup>336</sup> Beneficiaries of company pensions may only enforce their rights under a pension plan by initiating legal action before a competent court. This also applies if the pension plan is implemented through a third-party provider.<sup>337</sup> The labour court has the sole jurisdiction to determine disputes or matters relating to occupational pensions or to

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<sup>329</sup> *BGB* § 823(1).

<sup>330</sup> *BGB* § 823(2). *BGB* § 254(1) states:

“Where fault on the part of the injured person contributes to the occurrence of the damage, liability in damages as well as the extent of compensation to be paid depend on the circumstances, in particular to what extent the damage is caused mainly by one or the other party.”

See Chapter 3, par 6.5.2.7, where apportionment of damages in South Africa is discussed.

<sup>331</sup> *BGB* § 826.

<sup>332</sup> *BGB* § 812(1).

<sup>333</sup> *BGB* § 812(1).

<sup>334</sup> The *BetrAVG* provides that the pension entitlements of the pension scheme member in the scheme cannot be transferred to any other person, cannot be loaned, cannot be sold and may not be utilised prematurely (*BetrAVG* § 22(4)). This is to protect pension benefits from creditors and to guard against the benefit being depleted prior to a member’s retirement. This is similar to s 37A of the Pension Funds Act in South Africa. Under s 37A, pension benefits are not reducible, transferable, or executable. See Chapter 2, par 7, where s 37A of the Pension Funds Act is discussed.

<sup>335</sup> See par 5.1 above, where the *BaFin* is discussed.

<sup>336</sup> See Steinmeyer *Pensions* at 78.

<sup>337</sup> See the Labour Court Act of 3 September 1953 (*Arbeitsgerichtsgesetz (ArbGG)*) § 2(1)(4)(b). See Pensions & Retirement Plans *Getting the Deal Through* in par 32.

the *BetrAVG*.<sup>338</sup> This position contrasts with the one in South Africa, where aggrieved dependants and nominated beneficiaries have many avenues to initiate legal actions against the fund and/or the pension fund trustees.<sup>339</sup> The ordinary civil courts handle disputes regarding pensions for board members as well as pure insurance disputes.<sup>340</sup> The *GG* guarantees everyone the right to have access to courts.<sup>341</sup>

In Germany, the *VAG*, which applies to *Pensionskassen* and *Pensionsfonds*, stipulates that board members are responsible for good and sound business practices.<sup>342</sup> In the event or occurrence of any circumstances that may be relevant to the fitness and propriety of its board members, the management board or supervisory board has to take appropriate measures immediately to remedy the situation so as to comply with the principle of good sound business practices.<sup>343</sup> Members of the management board who commit breaches of their duties or who manage the company's business without taking due care are jointly and severally liable to the company in damages. The general meeting may not release directors from this liability.<sup>344</sup> In respect of the duty of diligence and care, provision is made for compensation for damages in the applicable statutes.<sup>345</sup>

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<sup>338</sup> See in this regard *Arteaga Retirement* at 290; and "Organisation und Aufbau" (*Das Bundesarbeitsgericht*) available at <https://www.bundesarbeitsgericht.de/die-arbeitsgerichtsbarkeit/organisation/> (last accessed 25 September 2021).

<sup>339</sup> See Chapter 3, par 6, where the enforcement remedies in South Africa is discussed.

<sup>340</sup> See *Arteaga Retirement* at 359.

<sup>341</sup> Article 19(4) of the *GG* states:

"Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts."

<sup>342</sup> See in this regard par 7.4 above.

<sup>343</sup> See Stewart and Antolin *Supervisory Oversight* at 16.

<sup>344</sup> *BGB* § 277 deals with the standard of care exercised in one's own affairs. It states:

"A person who owes only the care that he customarily exercises in his own affairs is not released from liability for gross negligence."

<sup>345</sup> *BGB* § 276 deals with the responsibility of the obligor. It states:

"(1) The obligor is responsible for intention and negligence, if a higher or lower degree of liability is neither laid down nor to be inferred from the other subject matter of the obligation, including but not limited to the giving of a guarantee or the assumption of a procurement risk. The provisions of sections 827 and 828 apply with the necessary modifications.

(2) A person acts negligently if he fails to exercise reasonable care.

(3) The obligor may not be released in advance from liability for intention."

## 9 CONCLUSION

Germany's retirement funding structure comprises three pension pillars: statutory pension insurance (the *GRV*), occupational pensions, and private individual pensions. This structure is similar to the pension system used in South Africa and the United Kingdom, although these countries differ in how they apply these pillars. Of Germany's various forms of retirement funding structure, both the *GRV* and occupational pensions closely resemble the private sector occupational pension funds under South African law. The investigation undertaken in this comparative chapter has therefore centred on these two retirement funding structures.

The death benefits of company pensions are distributed to potential beneficiaries under the company pension rules, which may differ from one plan to another.<sup>346</sup> The fund rules limit the list of potential beneficiaries who can qualify to receive the death benefit. However, the pension fund member is afforded the discretion to determine the percentages of the death benefits paid to various qualifying beneficiaries.<sup>347</sup> So the management board members of pension funds do not face the same challenges faced by their counterparts in South Africa to conduct investigations and trace the potential beneficiaries and make equitable distributions.<sup>348</sup>

The German legislature has not left it to the pension fund management board (the pension fund trustees) to decide on the limitations and exclusion of potential beneficiaries.<sup>349</sup>

This chapter has aimed to identify similarities and differences in the distribution of retirement fund death benefits in Germany and South Africa and to explain the role of the *GRV* and occupational pension funds within the retirement structure in

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<sup>346</sup> For example, the *BetrAVG* does not provide any direction on how retirement fund death benefits should be distributed.

<sup>347</sup> See in this regard pars 7.2 and 7.3 above.

<sup>348</sup> Pension fund trustees in South Africa have a duty to make an equitable distribution, and the list of potential beneficiaries is not restricted, as the fund member can nominate any person to receive the death benefit. See in this regard Chapter 3, pars 2.2.1, 2.2.2, 2.2.3, and 3, where the legal position in South Africa is discussed.

<sup>349</sup> See *BVerfG, Order of the First Chamber of the First Senate* of 27 June 2018 – 1 BvR 100/15 – paras. 1-26, [http://www.bverfg.de/e/rk20180627\\_1bvr010015.html](http://www.bverfg.de/e/rk20180627_1bvr010015.html) (last accessed on 27 September 2021) in par 9.

Germany.<sup>350</sup> The chapter has shown that Germany's *GRV* and company pensions have similar objectives to those of private sector occupational pension funds in South Africa. In all three pension scheme types (the *GRV*, company pensions in Germany, and occupational pensions in South Africa), the objectives are to provide financial cover for pension fund members on retirement or disability or to the dependants of a pension fund member if the member dies before retirement.<sup>351</sup> This chapter has also shown that, despite all three pension schemes having similar objectives, those objectives are not being realised similarly in Germany, South Africa, and the United Kingdom. It is submitted that the issues listed below might provide guidance for improving pension funds law in South Africa.

- Unlike the situations in the United Kingdom and South Africa, Germany's management boards of occupational pension funds are not burdened with "discretionary powers" when distributing death benefits.
- Pension fund members in Germany are restricted to nominating only related persons as beneficiaries of the death benefits.
- Based on the investigation undertaken in this chapter, it seems that the codification of pension fund trustees' powers and obligations can effectively regulate the management of pension funds, especially the distribution of retirement fund death benefits.
- The supervisory board controls and monitors the management board in Germany. By contrast, no internal body controls and monitors the pension fund board in South Africa: and so it might be advisable to have another external body monitoring the decisions of this board.<sup>352</sup>

The members of management boards of pension funds in Germany must be suitably qualified and have relevant experience.<sup>353</sup> A formidable array of statutes establishes

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<sup>350</sup> The purpose of alluding to the retirement provisions in Germany is not to attempt a direct comparison, but rather to illustrate that the distribution of retirement fund death benefits can operate effectively where the distribution of benefits is limited to dependants.

<sup>351</sup> See par 2.2.1 above, discussing the objective of company pensions in Germany.

<sup>352</sup> In South Africa, the Pension Funds Act provides for the appointment of an independent trustee (board member) on the pension fund board. See Chapter 2, par 6, where the appointment of pension fund trustees is discussed. See also Chapter 6, par 5.3, where a recommendation is made for the establishment of an external monitoring body in South Africa.

<sup>353</sup> See par 5.2.3.3 above in this regard.

the duties of pension fund management board members and determines their liability if they distribute retirement fund death benefits wrongfully. The statutory entrenchment of the distribution of retirement fund death benefits in both the *GRV* and company pensions provides legal certainty to assist the distribution of death benefits. This certainty also ensures that the insured person is sure of how his or her pension benefits are distributed if he or she dies before retirement. Contrast the situation in South Africa, where pension fund trustees have the power to distribute the death benefits in any way they consider equitable.<sup>354</sup> The German pension system also ensures that only those dependent on the insured person can benefit in cases of death before retirement.<sup>355</sup> It is submitted that the research undertaken shows that, although the legal systems vary in the two countries, German pension funds law provides guidance for improving some aspects of the distribution of death benefits in South African law. This research has been incorporated in the recommendations made in Chapter 6. The discussion now turns to that chapter, which brings this thesis to a close.

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<sup>354</sup> See Chapter 3, par 3 in this regard.

<sup>355</sup> See n 134 above in this regard.

## **CHAPTER 6**

### **SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS**

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- 1 INTRODUCTION**
  - 2 PRINCIPLES ON DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS**
  - 3 THE MAIN AIMS OF THE STUDY AND RESEARCH QUESTION ANSWERED**
  - 4 LESSONS FROM TWO OTHER JURISDICTIONS: THE UNITED KINGDOM AND GERMANY**
  - 5 RECOMMENDATIONS TO ENHANCE THE EFFICIENT DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN SOUTH AFRICA**
  - 6 CONCLUDING REMARKS**
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#### **1 INTRODUCTION**

Chapter 1 stated the research aim of this thesis: to analyse the distribution of retirement fund death benefits in South Africa<sup>1</sup> and explore the role of pension fund trustees in realising the objectives of pension fund establishment.<sup>2</sup> The thesis reviewed relevant legal principles, statutory provisions, and case law, including determinations by pension fund regulators and ombudsmen dealing with pension fund trustees' distribution of retirement fund death benefits. The main focus was the provisions of section 37C of the Pension Funds Act.<sup>3</sup> Challenges were identified, and methods were proposed to enhance the distribution of death benefits in South Africa.

This final chapter of the thesis summarises the conclusions drawn and recommendations proposed and developed in the preceding chapters. Aspects of

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<sup>1</sup> See Chapter 1, par 3 for the research question underlying this thesis.

<sup>2</sup> See Chapter 1, par 2.4.

<sup>3</sup> See Chapter 3, in which a review of the South African law that relates to the distribution of retirement fund death benefits was conducted.



the law on pension funds in the United Kingdom and Germany were explored and relied on to confirm some recommendations. Based on these conclusions, specific recommendations are suggested for improving the distribution of retirement fund death benefits in South Africa.

It was shown that occupational retirement funds play a vital role in providing financial support for pension fund members on retirement and for their dependants and nominated beneficiaries if the fund member dies before retirement. Poverty, unemployment, and the lack of adequate social security for pensioners and surviving dependants are prevalent in South Africa,<sup>4</sup> even though the Constitution protects the right of access to social security.<sup>5</sup> Government resources are too limited to provide adequately for the social needs of every person.<sup>6</sup> The distribution of retirement fund death benefits provides the Government with another tool to ensure that the surviving dependants of a pension fund member who dies before retirement have financial support to sustain them.<sup>7</sup> In this way, pension funds can play a crucial role in alleviating poverty.<sup>8</sup>

It was shown that pension fund trustees face various challenges when distributing retirement benefits.<sup>9</sup> Considering its socio-political history, demographics, and culture, South Africa needs all stakeholders, including pension funds, to join forces in ensuring that the dependants of a fund member have sustainable financial support after the latter dies before retirement. Through the efficient distribution of retirement fund death benefits, pension funds can play a pivotal role in this regard. As shown in Chapter 1, occupational pension funds are an essential pillar of the retirement funding structure in South Africa.<sup>10</sup> Retirement fund death benefits

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<sup>4</sup> See Chapter 2, par 2.3 for a discussion of the South African socio-political history, demographics, and culture.

<sup>5</sup> Section 27(1)(c) of the Constitution of Republic of South Africa, 1996 provides for the right to social security. See Chapter 2, par 5, where s 27 of the Constitution is discussed.

<sup>6</sup> See in this regard Manamela *Social Responsibility* at 231.

<sup>7</sup> In Chapter 2, par 5 the argument is made that retirement fund death benefits should amount to social security.

<sup>8</sup> See Chapter 1, par 2.4, where the societal objectives in the establishment of retirement funds are discussed.

<sup>9</sup> See Chapter 3 generally, and par 2.2 in particular, where some challenges that pension fund trustees face when distributing retirement death benefits to dependants and nominated beneficiaries in South Africa are discussed.

<sup>10</sup> Chapter 1, par 2.

should form an integral part of providing financial support and social security for the surviving dependants of a deceased fund member.<sup>11</sup> This point emphasises the critical role that pension fund trustees should play in ensuring that the Government's objectives of establishing retirement funds are realised. Pension fund trustees are guided by the rules of their pension funds<sup>12</sup> and applicable laws, and the regulatory framework must be clear so that trustees can meet their obligations and fulfil their roles.

## **2 PRINCIPLES ON DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS**

The discussion below summarises the principles on the distribution of retirement fund death benefits, as apparent from the preceding chapters of this thesis, and draws certain conclusions. Before answering the research question posed in Chapter 1,<sup>13</sup> the thesis examined some underlying aspects. It began with the following:

- giving a historical overview of the distribution of retirement fund death benefits;
- describing the different types of occupational pension fund and the retirement funding structure;<sup>14</sup>
- highlighting the significance of occupational retirement funds' role in the social and economic contexts of South Africa, the United Kingdom, and Germany;<sup>15</sup>

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<sup>11</sup> In Chapter 2, par 5 the argument is made that retirement fund death benefits should amount to social security. It is noted that the reach or the role that occupational pensions (retirement fund death benefits) play in providing social security is restricted to the contributing pension fund member, his or her dependants and/or his or her nominated beneficiaries.

<sup>12</sup> Chapter 3, par 4.4, where the rules of pension funds in South Africa are discussed.

<sup>13</sup> The thesis examines the effectiveness of s 37C of the Pension Funds Act in aligning the distribution of retirement fund death benefits with the objectives of the State in the establishment of retirement funds. See Chapter 1, par 3.

<sup>14</sup> See Chapter 2, par 3 in this regard.

<sup>15</sup> See Chapter 1, par 2, South Africa; Chapter 4, par 3, the United Kingdom; and Chapter 5, par 2.2.2, Germany, where the importance of occupational pension schemes in the respective jurisdictions is discussed.

- stating the objectives of the State in establishing retirement funds;<sup>16</sup>
- summarising the regulation and supervision of retirement funds;<sup>17</sup>
- describing the legal status of pension funds;
- identifying the key role-players; and
- explaining the role, competency, powers, and duties of pension fund trustees.<sup>18</sup>

The distribution of retirement fund death benefits and certain related matters were reviewed. Also explored were the remedies on which dependants and nominated beneficiaries can rely when aggrieved by the death benefit distribution process. Attention was also paid to the remedies for pension funds and their trustees to protect or reduce their exposure to liability claims.<sup>19</sup>

In Chapter 1, it was stated that the retirement fund death benefit was introduced to replace the financial support lost by the dependants of pension fund members who die before retirement.<sup>20</sup> Later in Chapter 3, though, it was found that sometimes this goal is not realised by the distribution of death benefits.<sup>21</sup>

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<sup>16</sup> For a discussion of the objectives of the State in establishing occupational pension schemes, see Chapter 1, par 2 for South Africa; Chapter 4, par 3 for the United Kingdom; and Chapter 5, par 2.2.2 for Germany.

<sup>17</sup> For a discussion of the regulation and supervision of retirement funds, see Chapter 2, par 7 for South Africa; Chapter 4, par 4 for the United Kingdom; and Chapter 5, par 6 for Germany.

<sup>18</sup> For a discussion of pension fund trustees in South Africa, see Chapter 2, par 6.4; of pension scheme trustees in the United Kingdom, see Chapter 4, par 4.2.4; and of pension management boards in Germany, see Chapter 5, pars 6 and 7.

<sup>19</sup> See Chapter 3, where remedies (par 6) and measures (par 7) in South Africa are discussed.

<sup>20</sup> See Chapter 1, par 2.4, where the State objectives for establishing pension funds are discussed.

<sup>21</sup> See Chapter 3, pars 2 and 3, where the distribution of retirement fund death benefits is discussed, as well as the challenges that pension funds face when distributing retirement funds. One example of such an outcome is found in *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM) at <https://www.pfa.org.za/Determinations/20062008/22FFC53C-0495-4DEE-8762-4D3450FBF6C4.pdf> (last accessed on 30 June 2021). The total amount of the death benefit involved was R253 347.94 (see Chapter 3, n 281); the pension fund member nominated her friend and colleague to receive 80 per cent of the death benefit and allocated only 20 per cent to her minor daughter. See also *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA) (see Chapter 3 n 268), where the nominee was a friend and was neither the deceased fund member's partner nor lived with him. See Chapter 3, par 2.2.3, where this determination is discussed.

### 3 THE MAIN AIMS OF THE STUDY AND RESEARCH QUESTION ANSWERED

This thesis is the only one to date that includes the United Kingdom and Germany in its comparative research on section 37C of the Pension Funds Act. The thesis contributes to knowledge by recommending ways that would address the disorganised way in which death benefits are handled in South Africa, thus reducing disputes in the sector. The recommendations made in paragraph 5 below are relevant and progressive and, if adopted, will make a sound contribution to the reform of the South African retirement fund system.

Pension fund trustees must distribute retirement fund death benefits fairly and efficiently. So this thesis investigated whether the current legislative framework for distributing those benefits, and section 37C of the Pension Funds Act in particular, is adequate to ensure that the dependants of a fund member who dies before retirement receive the necessary financial support from the pension fund. The social objective of establishing occupational pension funds appears in the Pension Funds Act and the *National Development Plan 2030*. It was found that in some cases, though, the distribution of retirement fund death benefits in South Africa is neither efficient nor fully aligned to the State's objectives in establishing occupational pension funds.<sup>22</sup> As became apparent in Chapter 3 of this thesis, these legal provisions are not implemented effectively because of various challenges that pension fund trustees face when distributing death benefits in South Africa. These challenges include:

- the lack of first-pillar pensions providing adequate financial support for fund members and their dependants if the member dies before retirement;<sup>23</sup>
- the current use of beneficiary nomination forms by funds;<sup>24</sup>
- the lack of legislative clarity about pension fund trustees' discretionary powers;<sup>25</sup>

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<sup>22</sup> Chapter 1, par 2.4.

<sup>23</sup> See Chapter 1, par 2.

<sup>24</sup> See Chapter 3, par 2.1.

<sup>25</sup> See Chapter 3, par 3.

- the trustees' difficulties in balancing the interests of dependants and nominated beneficiaries;<sup>26</sup>
- the differentiation between factual dependants and legal dependants;<sup>27</sup>
- the lack of clear legislative guidelines on the meaning of the "equitable distribution" of death benefits;<sup>28</sup>
- trustees' incompetence or ignorance;<sup>29</sup>
- the non-payment of death benefits, and unclaimed pension benefits;<sup>30</sup>
- the lack of accountability on the part of pension fund boards and their trustees;<sup>31</sup> and
- the difficulties experienced by dependants and/or beneficiaries in enforcing their rights or remedies for the wrongful distribution of death benefits.<sup>32</sup>

The thesis found that despite the identified challenges, occupational pension funds in South Africa are key to providing financial assistance to pension fund members on retirement and to their dependants if the member dies before then.<sup>33</sup> In Chapter 2, it was argued that retirement fund death benefits should form part of the social security system in South Africa.<sup>34</sup> Because financial resources are limited in South Africa, policymakers face a severe challenge in efficiently accomplishing the goal of providing adequate financial support (social security) for the population. A careful analysis of other countries' pension laws, policies, and practices was thus considered necessary to suggest improvements to the current dispensation of distributing retirement fund death benefits in South Africa.

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<sup>26</sup> See Chapter 3, par 2.3, where the allocation of death benefits to dependants and nominated beneficiaries is discussed.

<sup>27</sup> See Chapter 3, par 2.1, where the allocation of death benefits to dependants is discussed.

<sup>28</sup> See Chapter 3, par 3, where "equitable distribution of death benefits" is discussed.

<sup>29</sup> See Chapter 2, par 6 and Chapter 3, par 3, where judges and the Adjudicator, in some case law and determinations discussed, questioned the competency of trustees in certain instances. See, for example, in this regard Chapter 3, n 14.

<sup>30</sup> See Chapter 3, par 2.2.10 where unclaimed pension benefit is discussed.

<sup>31</sup> See Chapter 3, par 6, where the lack of accountability of trustees in some cases is discussed.

<sup>32</sup> See Chapter 3, par 6, where the difficulties in this regard are discussed.

<sup>33</sup> See Chapter 1, par 2.4, where the State objectives of establishing pension funds are discussed.

<sup>34</sup> See Chapter 2, par 5.

#### 4 LESSONS FROM TWO OTHER JURISDICTIONS: THE UNITED KINGDOM AND GERMANY

The choice of the two comparative jurisdictions, the United Kingdom and Germany, was explained and justified.<sup>35</sup> The Bill of Rights also mandates the courts in South Africa to consider foreign jurisdictions when interpreting the law.<sup>36</sup> The research undertaken showed that in South Africa, the United Kingdom, and Germany, occupational pensions include providing death benefits payable to the dependants and/or nominated beneficiaries of a pension fund member who dies before retirement. The thesis recognised that the approach which a country follows in providing financial support to surviving dependants is holistic and influenced by various factors, including the availability of other support mechanisms for the surviving dependants.

A comparative analysis of the laws and principles that apply in the United Kingdom and Germany confirmed that although South Africa can derive many lessons from these two jurisdictions, those countries' historical, political, economic, and social circumstances differ from South Africa's. So transplanting policies on the distribution of retirement fund death benefits from those countries to South Africa should be performed with care and caution. Nor may applying a style for distributing retirement fund death benefits in one jurisdiction always yield the same results in another because occupational pension funds' roles may differ. So, for example, occupational pensions (company pensions) in the United Kingdom are complementary to state pensions,<sup>37</sup> and occupational pensions (company pensions) in Germany are complementary to the statutory pension insurance (the *GRV*).<sup>38</sup> Both the state pensions in the United Kingdom and the *GRV* in Germany provide financial support in the form of survivors' benefit to dependants of the scheme member or contributor who dies before retirement.<sup>39</sup> This position contrasts with the one in South Africa,

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<sup>35</sup> See in this regard Chapter 1, par 6; Chapter 4, par 1; and Chapter 5, par 1.

<sup>36</sup> Under s 39(1)(c) of the Constitution.

<sup>37</sup> See Chapter 4, par 3, where the importance of occupational pension schemes in the United Kingdom was discussed.

<sup>38</sup> See Chapter 5, par 2, where the retirement funding structure in Germany was discussed.

<sup>39</sup> See Chapter 4, par 2.1 in the United Kingdom and Chapter 5, par 2.1 in Germany, where survivors' benefit payable by the state pensions and the *GRV* in the respective countries was discussed.

where occupational pensions (company pensions) are the leading platform for providing fund members with financial support for their surviving dependants if they die before retirement.<sup>40</sup> No state pension in South Africa resembles those in the United Kingdom and the *GRV* in Germany.<sup>41</sup> Also, in South Africa, dependants are not guaranteed financial support: pension fund boards identify the beneficiaries, and the process can be subjective.<sup>42</sup> And in South Africa, there are more potential beneficiaries, including friends and colleagues of the fund member.<sup>43</sup> By contrast, the potential beneficiaries are more restricted in the other two jurisdictions reviewed. South Africa has no pension pillar similar to state pensions in the United Kingdom and the *GRV* in Germany. This lack compels South Africa to strive for a distribution model or process that maximises the use of retirement fund death benefits to provide financial support for the dependants of a fund member who dies before retirement.<sup>44</sup>

The comparative legal survey suggests that various mechanisms are used to distribute retirement fund death benefits. This study found many similarities of trustees' roles in distributing death benefits in South Africa and the United Kingdom.<sup>45</sup>

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<sup>40</sup> See Chapter 1, par 2, where the retirement funding structure in South Africa is discussed. It should be noted that in South Africa as well as in the two comparative jurisdictions in this thesis, there are individual or private pensions in the form of retirement annuity (South Africa), individual accounts (the United Kingdom), and private pensions (Germany) which are different categories from occupational pensions.

<sup>41</sup> See Chapter 1, par 2, where the retirement funding structure in South Africa is discussed.

<sup>42</sup> See Chapter 3, par 3, where the discretionary powers of pension fund trustees to distribute retirement fund death benefits in South Africa are discussed.

<sup>43</sup> *Khulu v Mangxola and Others* (PFA/GA/8012/2006/SM) (cited in Chapter 3 n 223), and *Norris v University of Kwazulu-Natal Pension Fund and Another* 2019 3 BPLR 812 (PFA) (cited in Chapter 3, n 222 and n 21 above).

<sup>44</sup> See Chapter 3, par 3, where this study has shown examples of instances in which pension fund trustees made distributions that did not align with the provisions of s 37C of the Pension Funds Act and/or where the trustees failed to comply with their duties.

<sup>45</sup> It is certain, however, that in both South Africa and United Kingdom (in Chapters 3 and 4, par 5.5, respectively), pension scheme trustees must observe these guidelines when exercising their discretion of distributing:

- to know, understand, and apply the rules of their pension schemes;
- ask relevant questions about the death benefits and potential beneficiaries;
- enquire about potential beneficiaries and their financial needs;
- consider relevant facts and ignore irrelevant ones;
- follow the correct process in reaching their decisions;
- take minutes and keep records of their decisions;
- communicate their decisions to potential beneficiaries;

South Africa's particular circumstances include its demographics, the cultural practices of some fund members, a high unemployment rate, relative financial illiteracy, and the fact that some pension fund trustees may initially lack the required knowledge and skills.<sup>46</sup> Given these circumstances, policymakers and the legislature strive towards enabling pension fund death benefits to be paid to beneficiaries in a manner that matches the social purpose of section 37C of the Pension Funds Act and the objectives of establishing pension funds.<sup>47</sup> When the problems associated with distributing retirement fund death benefits are considered, serious thought should be given to finding alternative procedures that may improve or replace the existing ones. In deciding on the alternatives, priority should be given to what is in the best interests of the pension fund members and their dependants.<sup>48</sup> It has been shown that the broad discretion granted to pension fund trustees in distributing the death benefits does not consistently achieve the intended results of ensuring that surviving dependants are not left destitute on the death of a fund member.<sup>49</sup> For this reason, such extensive discretion is not always desirable and may lead to a cumbersome process.<sup>50</sup> Distributing death benefits should be transparent and straightforward.

The research showed various ways of enhancing the efficiency of retirement benefit distribution and addressing pension fund trustees' challenges.

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- provide reasons for their decisions;
  - comply with their fiduciary duties;
  - ensure that they have proper internal control measures to monitor their performance and compliance with the relevant laws and duties; and
  - ensure that they have adequate indemnity and insurance cover against any potential claims by aggrieved beneficiaries.

<sup>46</sup> Chapter 2, par 2.3 discusses the South African socio-political history, demographics, and culture, and par 6.4 there discusses the appointment of pension fund trustees in South Africa.

<sup>47</sup> See Chapter 3, par 3, where it was stated that the process that pension fund trustees have to follow in distributing retirement fund death benefit is challenging.

<sup>48</sup> See Chapter 3, par 5.3.2.2, where the duty of pension fund trustees to act in the best interests of the retirement fund, fund members, and other beneficiaries is discussed. See Chapter 2, par 5.2, where the social purpose of s 37C of the Pension Funds Act is discussed. See also Chapter 3, par 5.4.1, where the provisions of s 7C of the Pension Funds Act are discussed. Section 7C(2) of the Pension Funds Act requires pension funds trustees to take all reasonable steps to protect the interests of fund members and their beneficiaries.

<sup>49</sup> See Chapter 3, par 3, where the discretionary powers of pension fund trustees in distributing retirement fund death benefits in an equitable manner is discussed.

<sup>50</sup> See Chapter 1, par 2.4, where the State objectives of establishing pension funds are discussed, and Chapter 2, par 5.2, where the social purpose of s 37C of the Pension Funds Act is discussed.



South Africa has a unique political, economic, and social environment. The findings and views applicable in other jurisdictions cannot simply be transplanted or applied locally. Still, some of the proposed solutions are based on practices in the jurisdictions selected for the comparative review.<sup>51</sup> Even then, South Africa's circumstances must be carefully considered. The pension fund rules, the Constitution, and relevant statutory provisions applying to the distribution of death benefits must serve as primary sources of guidance on issues about distributing the death benefits. Recommendations to enhance the efficient distribution of retirement fund death benefits are discussed below.

## **5 RECOMMENDATIONS TO ENHANCE THE EFFICIENT DISTRIBUTION OF RETIREMENT FUND DEATH BENEFITS IN SOUTH AFRICA**

The right of access to social security is a fundamental right protected by the South African Constitution.<sup>52</sup> The Constitution seeks the development of society by improving the quality of life of all citizens and freeing each person's potential.<sup>53</sup> The provision of social security or financial support to a deceased fund member's dependants should not be the Government's responsibility alone:<sup>54</sup> pension funds also have an essential role to play in this regard.<sup>55</sup> Although pension funds' providing financial assistance to dependants of the deceased fund member is pivotal, this thesis has shown certain instances in which the distribution of death benefits does not align with the objectives of pension fund establishment.<sup>56</sup> The conclusions reached in the previous chapters on the pension fund trustees'

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<sup>51</sup> See in this regard Zweigert and Kötz *Introduction* cited in Chapter 1, n 100.

<sup>52</sup> Section 27(1)(c) of the Constitution of Republic of South Africa, 1996 provides for the right to social security. See also Chapter 2, par 5.

<sup>53</sup> See the Preamble to the Constitution of the Republic of South Africa, 1996, where the aims of the Constitution are stated. See also Chapter 2, par 5, where the provisions of the Constitution that are relevant to the distribution of retirement fund death benefits are discussed.

<sup>54</sup> See in this regard Chapter 2, par 5, where the notion of "social security" in the distribution of retirement fund benefits is discussed.

<sup>55</sup> See in this regard Chapter 2, par 4.3, n 134 for a discussion of *Younghusband and Others v Decca Contractors (SA) Pension Fund and its Trustees* 2000 1 BPLR 88 (PFA), where the Adjudicator (in par 28) explained the role of retirement funds in achieving socially motivated goals.

<sup>56</sup> See in this regard Chapter 3, par 3, where the discussion of relevant case law and determinations of the Adjudicator demonstrated instances in which pension fund trustees had failed to distribute and pay death benefits to dependants many years after the death of a fund member and in which trustees had made distributions of death benefits without complying with the provisions of s 37C of the Pension Funds Act.

distribution of retirement fund death benefits informed the recommendations made below. It was seen that these enhancements could strengthen the distribution of retirement fund death benefits in South Africa:

- improve the financial literacy of pension fund trustees, pension fund members, dependants, and nominated beneficiaries;
- strengthen the retirement fund structure, particularly the first pillar;
- strengthen the regulation and supervision of retirement funds;
- ensure that people appointed as pension fund trustees are competent to execute their duties efficiently;
- amend section 37C of the Pension Funds Act to specify that only dependants of the fund member are eligible to be considered in the distribution of death benefits on the fund member's death;
- amend the definition of a "dependant" in section 1 of the Pension Funds Act;
- limit the discretionary powers of pension fund trustees;
- ensure that the payment mode of death benefits to both minor and major beneficiaries is aligned to the objectives of pension fund establishment and to the social purpose of section 37C of the Pension Funds Act;
- ensure that dependants and nominated beneficiaries have access to relevant documents or information to establish their rights;
- strengthen the accountability of pension fund trustees by ensuring consequences for failure to comply with their duties;
- assist dependants and/or beneficiaries in enforcing their rights; and
- ensure that pension funds and their trustees have adequate insurance cover and/or are indemnified against personal liability.

The recommendations related to these aspects are explored in the paragraphs below.<sup>57</sup> Besides the challenges arising from the complexity of section 37C of the Pension Funds Act,<sup>58</sup> the research found that other underlying factors also contribute to the inefficient distribution of retirement fund death benefits in South Africa.<sup>59</sup> To alleviate these challenges, these suggestions are made to improve the efficient distribution of retirement fund death benefits in South Africa:

#### 5.1 *Training pension fund trustees*

This section discusses three aspects:

- training pension fund trustees on matters such as principles of legislation, regulation, and governance;
- sensitising pension fund members and potential recipients of the death benefit to section 37C of the Pension Funds Act; and
- using plain language in pension fund correspondence with members and beneficiaries.

It was shown that it is not only the fund members who do not fully understand pension fund matters, especially their pension fund benefits and how those are distributed if a fund member dies before retirement.<sup>60</sup> Some pension fund trustees responsible for distributing retirement death benefits also seemed poorly informed about the provisions of section 37C of the Pension Funds Act. No formal qualification or level of expertise is currently required for an appointment as a

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<sup>57</sup> See par 2 above, where a summary (a list) of the identified challenges is provided.

<sup>58</sup> See in this regard Chapter 1, par 4, n 83 and Chapter 3, par 1, where the complexity of s 37C of the Pension Funds Act was explained.

<sup>59</sup> Chapter 2 discussed the demographics, history, and various socio-economic factors that directly or indirectly hinder the efficient distribution of retirement fund death benefits, including the high rate of unemployment and poverty; current tax incentives that apply to retirement fund contributions; the low rate of financial literacy in South Africa among pension fund members, dependants, nominated beneficiaries and pension fund trustees; cultural practices and beliefs that might lead to a lack of sharing of information about death benefits between partners and dependants; and regimes of inheritance of property of the deceased family member based on cultural practices and customary laws versus the distribution of retirement fund death benefits in terms of s 37C of the Pension Funds Act.

<sup>60</sup> See Chapter 2, par 2.3, where the South African socio-political history, demographics, and culture, including the financial literacy of fund members and of pension fund trustees, is discussed.

pension fund trustee.<sup>61</sup> Principle 3 of the Pension Funds Board Circular 130 of 2007 (PF 130) deals with the board's orientation and education.<sup>62</sup> It states that new board members must, at the fund's expense after being appointed and elected, receive rigorous and comprehensive training on legislative, regulatory, and governance principles to minimise their risk of liability and safeguard against poor decision-making.<sup>63</sup> Principle 3 adds that board members should be educated on an ongoing basis, at the fund's cost, about new matters concerning the fund to ensure that they acquire and maintain an understanding of, among other things, risk management, benefit structures, legal issues, and regulatory and compliance requirements.<sup>64</sup> Training or education is an ongoing process, with an emphasis on continuous and lifelong learning.<sup>65</sup> These recommendations of PF 130 are commendable.

However, pension fund trustees in South Africa are appointed for three years, and this span makes the emphasis on continuous and lifelong learning challenging to implement. Once this term finishes, the trustee can no longer be sponsored by the fund. The Financial Services Conduct Authority (FSCA) should also consider extending the tenure of pension fund members from three years to four or five years.<sup>66</sup>

There are also no clear guidelines on what happens to a trustee who refuses training or cannot complete the assessments after training.<sup>67</sup> It is recommended that the

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<sup>61</sup> The appointment of pension fund trustees in South Africa is discussed in Chapter 2, par 6.4. In Germany, members of pension fund management must have knowledge of pension fund matters as well as at least three years' relevant management experience. Chapter 5, par 5.2.3.3 discusses the qualifications of members of pension fund management in Germany.

<sup>62</sup> See Chapter 2, par 6.4; and Chapter 3, par 5.4.4, where the recommendations of the PF 130 are discussed.

<sup>63</sup> See in this regard PF 130, Principle 3 that deals with board orientation and education, par 30.

<sup>64</sup> PF 130, par 31.

<sup>65</sup> PF 130, par 31.

<sup>66</sup> The Financial Services Conduct Authority (FSCA) was formerly known as the Financial Services Board (FSB). The FSCA came into operation in April 2018.

<sup>67</sup> See Chapter 2, par 6, where measures taken by the FSCA and the legislature to improve the knowledge of pension fund trustees through recommended inductions and the Trustee Toolkit programme are recognised. What is lacking in South Africa is a clear indication of what needs to happen to trustees who do not successfully complete the necessary inductions and the Trustee Toolkit programme. The minimum requirements for a person to be appointed as a member of a pension fund board are discussed below in par 5.4. See in this regard PF 130, Principle 4 that deals with Board Assessment and Breach of Code of Conduct, par 34. It states that "where a board member breaches the fund's code of conduct or acts in contravention of any of the responsibilities imposed upon him or her then the board should take such action as it considers appropriate, after consideration of any argument presented in defence of the board

FSCA should lay down clear steps on what needs to be done when trustees fail to comply.<sup>68</sup>

Besides the recommendations of PF 130 above on pension fund trustees' receiving training to improve their knowledge on pension matters, it is recommended that the FSCA should identify programmes offered at various institutions of learning that pension fund trustees can enrol for and complete. This improvement would enhance pension fund trustees' understanding of pension fund rules, applicable laws, duties, and responsibilities. It would, in turn, enhance these trustees' ability to serve pension fund members well and engage with dependants and pension fund beneficiaries efficiently.

The costs of training pension fund trustees would have to come from the assets of pension funds. This outlay may seem like more depletion of these funds' limited resources in the short term. In the long term, though, pension funds' efficient administration and management are crucial, and so, too, the fair distribution of retirement benefits to members, beneficiaries, or dependants. A knowledgeable, confident pension fund trustee should be able to question the decisions and recommendations of service providers, including pension fund administrators,<sup>69</sup> and participate fully and critically in pension fund board meetings. This set of skills would encourage the accountability of fellow trustees, other appointees, and advisors.

The study found a crucial need for pension fund members to understand how pension fund trustees distribute retirement fund death benefits if those members die

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member concerned. This **may, should the rules of the fund permit**, be in the form of, *inter alia*, declaring that such trustees should vacate office; that such trustee is suspended from office for such period or in respect of such function as the board may decide, and subject to any appropriate terms and conditions imposed by the board. The objective of action by the board against a trustee is to preserve the integrity of the board and its governance role. Action against a board member should not be solely driven by whether or not the breach gave rise to financial or other reputational prejudice being suffered by the fund or any other stakeholder. Each matter should be assessed on the facts and merits of the situation, and an appropriate form of discipline should be imposed" (my emphasis in bold). Here the pension fund board monitors the conduct of its fellow trustees. But where the board as a collective is failing to comply with its duties, it may not monitor itself according to the Code of Conduct.

<sup>68</sup> See in this regard Chapter 2, n 214 and n 223 for measures that the FSCA is taking to address this challenge as well as for the discussion of the FSCA's *Trustee Toolkit*. It is submitted that this is a welcome development.

<sup>69</sup> See Chapter 2, par 6.2, where pension fund administrators are briefly discussed.

before retirement.<sup>70</sup> These members need a basic understanding of the relevant, most significant provisions of the Pension Funds Act. They should also understand the criteria listed in section 37C of the Pension Funds Act and used to determine the eligibility of a dependant or a nominated beneficiary to receive a death benefit or a share of it. The preceding paragraph has emphasised the importance of training pension fund trustees to improve their knowledge of pension fund matters. This training will also enable these trustees to help educate pension fund members and to engage with other service providers to provide pension fund members with the necessary information. Pension fund trustees should play a more active role in empowering fund members through education. This initiative will require collaboration between members' pension funds and their employers in resources and time spent on training and workshops with pension fund members.<sup>71</sup>

The study also found that dependants and nominated beneficiaries sometimes do not fully understand the provisions of section 37C of the Pension Funds Act and how retirement death benefits are distributed on the death of a fund member before retirement.<sup>72</sup> The preceding paragraphs have emphasised the importance of training pension fund trustees and educating pension fund members about the provisions of section 37C of the Pension Funds Act. Pension fund members who fully understand these provisions will be able to impart this knowledge to their dependants and nominated beneficiaries.

In tandem with the role that pension fund members can play in this regard, pension fund trustees must also sensitise potential dependants and nominated beneficiaries. Once pension fund trustees complete their investigation into the circle of dependants and nominated beneficiaries in line to be considered for distributions, the trustees should send pamphlets or template forms confirming that the deceased was a member of their fund and explaining how death benefits are distributed to

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<sup>70</sup> See Chapter 2, par 2.3, where the South African socio-political history, demographics, and culture are discussed.

<sup>71</sup> Currently, pension fund trustees in South Africa do not perform their pension fund duties on a full-time basis but do so on a part-time basis. These trustees, in their roles as employees, also have other duties that have nothing to do with their positions as pension fund trustees, although these duties are in terms of their employment contracts. For these employees to fulfil their responsibilities as pension fund trustees efficiently, a delicate balance of their time is needed to perform both roles.

<sup>72</sup> See Chapter 2, par 2.3, where the South African socio-political history, demographics, and culture are discussed.

potential recipients of the death benefit.<sup>73</sup> This study pointed out that some members of retirement funds are reluctant to discuss issues about death benefits and retirement funds that they participate in with their partners. This reluctance makes it difficult for the non-member spouses or partners to know about or trace death benefits that might be payable to them or their children after the death of their fund member spouse or partner.<sup>74</sup> This lack of knowledge could also contribute to the substantial number of unclaimed benefits.<sup>75</sup> Being informed about a retirement fund death benefit could help dependants and nominated beneficiaries identify the relevant pension funds if the member dies before retirement and ask the relevant authorities or institutions which death benefits may be payable.

In Chapter 2, the discussion pointed out the generally meagre education and lack of financial literacy of many pension fund members, their dependants, and nominated beneficiaries in South Africa.<sup>76</sup> This situation requires that the language of pension fund rules and documents should be clear and concise for members and potential beneficiaries to understand.<sup>77</sup> This improvement would empower members, their dependants and/or nominated beneficiaries by ensuring that they clearly understand the pension fund rules and any official correspondence they may receive from pension funds.<sup>78</sup> PF 130 states that communication to the board and members should be appropriate, timely, accurate, complete, consistent, cost-effective, useful, comprehensible, and accessible to allow all parties to understand

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<sup>73</sup> It is acknowledged that some retirement funds may already be doing this, but the case law and determinations discussed in Chapter 3 show that there are dependants and nominated beneficiaries who are facing difficulties when accessing information that is necessary to protect their rights. See also par 5.5 below, where transparency and disclosure by pension fund trustees are discussed.

<sup>74</sup> See Chapter 2, par 2.3, where the South African socio-political history, demographics, and culture are discussed.

<sup>75</sup> See Chapter 3, par 2.2.10.1 for a discussion of unclaimed death benefits.

<sup>76</sup> See Chapter 2, par 2.3, where the South African socio-political history, demographics, and culture are discussed.

<sup>77</sup> Section 22 of the Consumer Protection Act 68 of 2008 requires organisations, including retirement funds, to communicate in plain language to the consumer, in this instance dependants and nominated beneficiaries. Improper communication leads to uninformed and dissatisfied dependants and nominated beneficiaries.

<sup>78</sup> See the preceding par 5.1, where it is suggested that pension fund trustees should send pamphlets or template forms explaining the process and the way death benefits are distributed to the potential recipients of the death benefit. This suggestion can only work if the recipients of the templates or pamphlets can understand what is written in them: so using plain language is important.

the information and make informed decisions.<sup>79</sup> It is recommended that pension funds should go further: they should strive to provide a summary of pension fund rules, specifically the part dealing with the distribution of death benefits, that is translated into the language of the fund member, or they should have translations of the rules readily available in all the official languages.

## 5.2 *Strengthening the retirement funding structure*

The comparative study of the retirement funding structure in the United Kingdom and Germany stressed that those jurisdictions' first-pillar pensions — the state pension and the *GRV*, respectively — are contributory and earnings-related.<sup>80</sup> In South Africa, the first-pillar pensions consist of social grants (older person's grants). As seen in Chapter 2, because of the high unemployment rate<sup>81</sup> and other social factors, a significant part of the South African population is over-reliant on the older person's grants.<sup>82</sup> These grants are not contributory and provide inadequate benefits.<sup>83</sup> Nor do they provide survivors' benefits to dependants after the recipient of an older person's grant dies.<sup>84</sup> This position contrasts with the one in Germany, where the *GRV* is contributory and provides adequate survivors' death benefits to the contributor's dependants.<sup>85</sup> Similarly, in the United Kingdom, the state pension is contributory and provides survivors' death benefits to the contributor's dependants.<sup>86</sup>

The availability of a state pension in the United Kingdom and the *GRV* in Germany ensures that occupational pension funds (company funds) are not the sole providers of income for employees on retirement or for their surviving dependants on their

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<sup>79</sup> See in this regard PF 130, Principle 9, which deals with communication and access to information, par 59. See also Chapter 5, par 6 where information that is required to be given to pension scheme members and beneficiaries in Germany was described.

<sup>80</sup> Chapter 5, par 2.2.1 discusses the objective of company pensions in Germany.

<sup>81</sup> See Chapter 2 n 40 and Chapter 5 n 24 for employment statistics in Germany and South Africa, respectively.

<sup>82</sup> Chapter 1, par 2.3, where the older person's grants in South Africa are discussed.

<sup>83</sup> Chapter 1, par 2.3.

<sup>84</sup> Chapter 1, par 2.3.

<sup>85</sup> Chapter 5, par 2.1 discusses the public pension system (first-pillar pensions: the *GRV*) in Germany. It was also seen that the *GRV*, although categorised under the first pillar, is more comparable with occupational pensions in South Africa, which are categorised under the second pillar in South Africa.

<sup>86</sup> Chapter 4, par 2.1 discusses the state pension in the United Kingdom.



death before retirement. These comparable positions in the United Kingdom and Germany contrast to the position in South Africa, where there are no first-pillar earnings-related pensions, and occupational pensions are the sole provider of income to employees and their dependants. It was shown that the provisions in the state pensions and in the *GRV* are clear and specific about who may receive survivors' benefits on the death of a person who contributed to the pension. Again, this position contrasts with the one in South Africa, where the Pension Funds Act is not clear about the beneficiaries of the retirement fund death benefit. Any person nominated by the fund member may currently be a recipient of the retirement fund death benefit.<sup>87</sup>

South Africa lacks mandatory pensions in the form of the state pension in the United Kingdom or the *GRV* in Germany. In 2004, the National Treasury released a discussion paper on the possible implementation of a National Savings Fund in South Africa.<sup>88</sup> It is suggested that the introduction of this fund and a consideration of its viability should be revisited. With this fund, the apparent gap in providing mandatory pensions in South Africa might be filled. And this fund could also provide another platform for providing retirement benefits to pension fund members and their surviving dependants.<sup>89</sup> The discussion of mandatory pensions in Germany (the *GRV*) and the United Kingdom (the state pension) has revealed their central management. This is an approach that can be considered in South Africa if such a pension scheme is to be introduced. The introduction of such a system in South Africa is a research topic in its own right, though, and is not discussed further in this thesis.<sup>90</sup>

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<sup>87</sup> See Chapter 3, pars 2.2.2 and 2.2.3.

<sup>88</sup> See Chapter 5, n 19.

<sup>89</sup> It is noted that the efficiency of an occupational pension system or any saving scheme which is earnings-related also depends on other fundamental structures such as the employment levels in the population. So there cannot be a significant increase in the number of persons who become pension fund members without improved employment levels. See Chapter 2 n 40, where the employment levels in South Africa are discussed.

<sup>90</sup> In South Africa, this would probably be like the National Savings Fund, but it is beyond the scope of this thesis to discuss the merits and demerits of such a plan in South Africa. See above, Chapter 5, n 19, where the South African National Savings Fund is briefly mentioned.

### 5.3 *Strengthening the regulation and supervision of retirement funds*

The FSCA should devise ways to effectively achieve its fundamental goal to ensure the efficient distribution of retirement fund death benefits and consistently improve the regulations to promote this goal.<sup>91</sup> Its main objective is to protect the millions of South African workers who look to private occupational pension funds for support in their retirement or to provide financial support to their surviving dependants and/or nominated beneficiaries if they die before retirement. Saving for retirement can only be effectively encouraged if pension fund members are assured that the pension funds available to achieve this objective are safe and the fund members and/or their dependants will receive their benefits in full. These members must be confident that their pension fund trustees are competent to safeguard and distribute the pension benefits efficiently. As the National Treasury observed in 2014, “high-profile losses that have been suffered by retirement funds and their members in recent years may indicate that stronger supervision of retirement funds and better enforcement of existing laws are required”.<sup>92</sup> This thesis has shown that pension fund trustees face several challenges in distributing retirement fund death benefits. There are some unacceptable delays in allocating and distributing death benefits to dependants and nominated beneficiaries in good time.<sup>93</sup>

In Chapter 2, it was shown that the FSCA lacks a tool for proactively monitoring how retirement fund death benefits are distributed.<sup>94</sup> When death benefits are not distributed or are distributed in breach of section 37C of the Pension Funds Act, the FSCA intervenes after the fact when the damage has, in most cases, already been done.<sup>95</sup> It is suggested that the FSCA should consider setting up mechanisms, such

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<sup>91</sup> See “OECD Recommendation on Core Principles of Occupational Pension Regulation” (*OECD*, 5 June 2009) available at <https://www.oecd.org/pensions/private-pensions/33619987.pdf> (last accessed on 4 October 2021) at 3; the OECD Core Principle 1: conditions for effective regulation and supervision states that “an adequate regulatory framework for private pensions should be enforced in a comprehensive, dynamic and flexible way (taking into account the complexity of the schemes) in order to ensure the protection of pensions plan members and beneficiaries, the soundness of pensions plans and funds and the stability of the economy as a whole. This framework should however not provide excessive burden on the pension markets, institutions, or employers”.

<sup>92</sup> See in this regard National Treasury *2014 Budget Update on Retirement Reforms* at 9, cited in Chapter 2, n 308.

<sup>93</sup> See Chapter 3, par 3.

<sup>94</sup> See Chapter 2, par 7.

<sup>95</sup> See Chapter 2, n 316.

as a monitoring tool, that may help it detect unnecessary delays in the distribution of death benefits, as well as blatant non-compliance with applicable laws. The non-payment and/or late payment of death benefits to beneficiaries also amounts to non-compliance with applicable laws and pension fund rules by pension fund trustees and goes against the objectives of pension fund establishment.<sup>96</sup> The law on the distribution of pension fund death benefits must be clear and concise. Clarity of the law will assist trustees and pension fund members and also facilitate monitoring.

It is suggested that the powers of the Regulator in South Africa, the FSCA, should be enhanced to include the following:

- First, it should be compulsory for all pension funds to advertise a notice calling on all potential beneficiaries of a particular death benefit to come forward to the relevant pension fund within a particular period.<sup>97</sup>
- Secondly, a body should be introduced in South Africa to check the decisions of pension fund boards.<sup>98</sup> This central supervisory body of between five and ten members could be set up within the FSCA structures and be funded by levies that the FSCA already collects from financial institutions, including retirement funds. As soon as a pension fund is notified of a fund member's death, the fund should notify the central supervisory body and supply progress reports to the supervisory body every three months. What should happen if the fund cannot distribute the death benefits within the period set in the Pension Funds Act (within 12 months where only dependants are involved, and within 24 months where both dependants and nominated

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<sup>96</sup> Non-payment and late payment of death benefits to potential beneficiaries and the period within which pension fund trustees must conduct investigations are discussed in Chapter 3, pars 2.2.5.1, 2.2.10, and 3.

<sup>97</sup> See Chapter 3, par 2.2.5.4.

<sup>98</sup> It should be noted that in South Africa, the Pension Funds Act requires or encourages pension funds to have internal dispute mechanisms to provide complainants (aggrieved potential beneficiaries) with a platform to dispute or contest the decision or the allocation of benefits made or suggested by the pension fund board. But this platform is only triggered where there is a complaint by an aggrieved potential beneficiary or any person who may meet the definition of a "complainant" in the Pension Funds Act. See in this regard Ngalwana *Pension* cited in Chapter 3, par 6.4 n 770, dealing with the forums available to aggrieved dependants and nominated beneficiaries in South Africa.

beneficiaries are involved)?<sup>99</sup> Then the fund should notify the central supervisory body of the delay, giving reasons for the delay and steps or measures taken to complete the distribution process. When the board decides to distribute a death benefit, it must file this decision and its reasons with the central supervisory body. The board should not need to wait for the central supervisory body's approval before making the distribution. The added layer of oversight would reflect the purpose of section 37C of the Pension Fund Act of realising a social objective.<sup>100</sup> It would also enhance trustee efficiency and give effect to the recommendations of King IV of promoting accountability and transparency.<sup>101</sup>

- Thirdly, the central supervisory body (referred above in the preceding bullet point), like a criminal or a civil court, must be accorded powers to compel or subpoena witnesses to present themselves to testify or provide information relating to the distribution of death benefits.<sup>102</sup> Pension fund boards that are faced with uncooperative witnesses can approach the central supervisory body to subpoena witnesses that should appear before them (pension fund boards).<sup>103</sup>

Pension funds' role in the South African social and economic sectors is essential.<sup>104</sup> So the FSCA's powers and resources should be extended,<sup>105</sup> and pension funds

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<sup>99</sup> See Chapter 3, par 2.2.5, where the period within which pension fund trustees must conduct investigations is discussed.

<sup>100</sup> See Chapter 2, par 5.2, where the social objective of s 37C of the Pension Funds Act is discussed.

<sup>101</sup> See Chapter 3, par 5.4.5, where the principles of King IV are discussed.

<sup>102</sup> See Chapter 3, par 2.2.5.3, discussing the plight faced by pension fund trustees in conducting a thorough investigation of beneficiaries and that of compelling witnesses to provide information.

<sup>103</sup> The power that the central supervisory board will have will be in addition to the process where the funds may approach the Adjudicator for directives which the Tribunal deems appropriate. See, for example, *Tabane v Superfund Provident Fund and Another* 2019 3 BPLR 872 (PFA), where the Adjudicator ordered the complainants to provide the fund with information supporting financial dependency. *Tabane* is discussed in Chapter 3, par 2.2.5.3. A person who has been duly subpoenaed to appear before a pension fund board but refuses or fails to comply without good cause will commit contempt of the FSCA. The central supervisory body may refer the finding of contempt to the Pension Funds Adjudicator to make an order that it deems appropriate.

<sup>104</sup> Chapter 1, par 2 discusses the retirement funds and the importance of occupational pension schemes in the South African social and economic contexts.

<sup>105</sup> See National Treasury Technical Discussion Paper A for public comment *Charges in South African Retirement Funds* issued by the National Treasury on 11 July 2013 at 13, stating that "a strong and effective regulator is essential in ensuring a well-functioning retirement system. The regulator needs to have the power to effectively monitor all aspects of the retirement system,

should be enabled to pay death benefits expeditiously. Pension fund trustees should be assisted to fulfil their obligations in distributing retirement fund death benefits.<sup>106</sup>

#### 5.4 *Establishing minimum competency standards for pension fund trustees*

No minimum qualification is required before a person may be appointed as a pension fund trustee in South Africa.<sup>107</sup> It is recommended that the FSCA should specify the minimum qualifications required before a person may be appointed as trustee on a pension fund board. This improvement should ensure that boards and their individual members can manage their pension funds effectively and ensure the fair distribution of death benefits.<sup>108</sup> It is submitted that the current requirement that a trustee must acquire knowledge after being appointed does not adequately help ensure the competency of the board.<sup>109</sup> And it remains essential that trustees receive continuous training after appointment too. A pension fund trustee assumes responsibilities from the first day of the appointment and makes crucial decisions.<sup>110</sup> The current requirement for trustees to acquire the knowledge required does not specify the consequences when a trustee cannot comply with this requirement.<sup>111</sup> Unlike in Germany, there is no minimum qualification standard set for pension fund trustees in South Africa and the United Kingdom. Compared to the equivalent requirements for appointing a management board member (pension fund trustee) in Germany, South Africa is different in that the Pension Funds Act includes no details

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including costs, and the power to intervene, where necessary to protect the interests of members.” The document is available on the Treasury website at <http://www.treasury.gov.za/public%20comments/Charges%20in%20South%20African%20Retirement%20Funds.pdf> (last visited on 4 October 2021).

<sup>106</sup> In Chapter 3, par 3, case law and determinations of the Pension Funds Adjudicator showing the failure of pension fund trustees to comply with their duties and the provisions of s 37C of the Pension Funds Act are discussed.

<sup>107</sup> See Chapter 2, par 6.4.

<sup>108</sup> See Chapter 5, par 5.2.3.3.

<sup>109</sup> See Chapter 2, par 6.4.

<sup>110</sup> In *Howard v Herrigel and Another NNO* 1991 2 SA 660 (A) at 678, the Appellate Division stated: “At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company and is obliged to display the utmost good faith towards the company and in his dealings on its behalf. That is the general rule and its application to any particular incumbent of the office of director must necessarily depend on the facts and circumstances of each case.” Although this case was decided in the context of the appointment of company directors, the principles canvassed also apply to the appointment of pension fund boards and their individual board members (the trustees).

<sup>111</sup> See in this regard Chapter 2, n 214, where s 7A(3) of the Pension Funds Act is discussed. Section 7A(3) of the Pension Funds Act requires board members to attain and retain the levels of skills and training as prescribed by the Registrar of Pension Funds (the FSCA).

on a minimum qualification required before a person is appointed or can assume duties as a pension fund trustee.<sup>112</sup> In Chapters 2 and 3, it was seen that pension fund trustees' conduct does not consistently show competence.<sup>113</sup> The current statutory requirement that pension fund trustees attain and retain certain levels of skills and training is commended but lacks detail.<sup>114</sup> Establishing minimum competency standards will ensure that a person possesses the necessary competency before being appointed to a pension fund board.<sup>115</sup> Competent pension fund boards and pension fund trustees enhance retirement funds' governance, efficiency, and reputation, all crucial when considering the value of pension funds' assets and the savings of pension fund members under the control of pension fund trustees. Competent pension fund boards protect members' and beneficiaries' benefits and protect pension funds and their trustees against potential liability for the mismanagement of funds and the wrongful distribution of benefits.<sup>116</sup>

The research has shown that a person acting as a trustee (a member of a pension fund management board) in Germany should have at least three years' management experience in the industry and hold relevant qualifications.<sup>117</sup> This requirement is considered necessary to ensure that people responsible for managing pension funds are competent. In the context of South Africa's history and

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<sup>112</sup> See Chapter 2, par 6 and n 216, where a comparison is drawn between the appointment of company directors and principal officers of pension funds and the appointment of pension fund board members (trustees).

<sup>113</sup> See, for example, in Chapter 3, n 14.

<sup>114</sup> Section 7A(3) of the Pension Funds Act. Also refer to Chapter 2, par 6.4, where this provision is explored.

<sup>115</sup> See in this regard Chapter 2, par 6, n 222, referring to the recommendations of King IV, Part 6.4 "Supplement for retirement funds" at 98, Principle 7. The suggestion is not that trustees should be experts or become experts in retirement fund matters but that they should possess an appropriate minimum level of knowledge and skills in retirement fund matters. The FCSA's *Trustee Toolkit* is relevant in this regard. Section 7A(3) of the Pension Funds Act states that "(a) A board member appointed or elected in accordance with subsection (1), must attain such levels of skills and training as may be prescribed by the registrar by notice in the *Gazette*, within six months from the date of the board member's appointment. (b) A board member must retain the prescribed levels of skills and training referred to in paragraph (a), throughout that board member's term of appointment." See Chapter 2, n 223, where the FSCA's *Trustee Toolkit* is discussed.

<sup>116</sup> See *Boyce v Bloem and Others* 1960 3 SA 855 (T) (cited in Chapter 2, n 217), where it was stated that lack of the required knowledge or ignorance of duties is not a valid defence against potential liability.

<sup>117</sup> See Chapter 5, par 5.2.3.3.

socio-economic conditions,<sup>118</sup> though, setting rigid requirements like those in Germany may have negative implications because employees in South Africa may appoint at least 50 per cent of the members (the pension fund trustees) of a pension fund board.<sup>119</sup> This right ensures that employees are represented in decisions affecting their pension fund benefits. Especially in funds representing specific industries, most employees nominated or elected to become pension fund trustees might lack the necessary managerial experience and qualifications. Such a proposed rule would then deny them the opportunity to become pension fund trustees and participate in any decision-making about their pension fund benefits. It is suggested that the FSCA should encourage aspirant pension fund trustees (those not yet appointed as trustees) to complete the assessment and/or to provide that any person recommended or nominated as a pension fund trustee should not assume the role before completing the *Trustee Toolkit* training programme assessment or any other programmes identified or recognised by the FSCA. It is submitted that this improvement would provide trustees or potential trustees with an opportunity to acquire at least some of the required or prescribed skills before assuming their roles as trustees. And all trustees, whether appointed by the employer or the employees, should have to complete the prescribed assessments. In this way, trustees would be better placed to distribute the death benefits efficiently, protect the assets of their funds, and protect themselves against any potential liability. All these recommendations could help improve the preparedness of appointees or nominees before they assume the role of pension fund trustees.

#### 5.5 *Transparency and disclosure by pension fund trustees*

This paragraph discusses two aspects. One is access to information by pension fund members, dependants, and/or nominated beneficiaries. The other is pension fund trustees' reasons for distributing a retirement death benefit.

In Chapter 3, it was shown that aggrieved dependants and potential beneficiaries find it challenging to obtain from pension funds the relevant information they need

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<sup>118</sup> See Chapter 2, par 2.3, where the challenges that arise because of culture, demographics, history, and socio-economic conditions are briefly discussed.

<sup>119</sup> See Chapter 2, par 6.4, and n 200.

to establish their rights to the death benefits.<sup>120</sup> Dependants and nominated beneficiaries have a right to access pension fund documents, including the rules.<sup>121</sup> The study also found that pension fund trustees are not always transparent in reaching their decisions and are sometimes reluctant to provide affected parties with the information necessary to establish their rights.<sup>122</sup> It is crucial for fund members, employees, dependants, and beneficiaries that retirement fund death benefits should be distributed fairly and transparently. Beneficiaries need to understand the reasons for the distribution, and aggrieved parties need to make informed decisions about their rights and remedies.<sup>123</sup> Yet the right to disclosure is limited because pension funds may in some cases be justified in refusing disclosure.<sup>124</sup>

Funds and their administrators should be required to communicate clearly with potential dependants and/or nominated beneficiaries about distributing retirement fund benefits. Clear communication would enhance the confidence of dependants and nominated beneficiaries in the efficiency of the distribution. It could also reduce the number of claims before the Pension Funds Adjudicator and the courts. This recommendation also requires pension fund boards to record the minutes and the reasons for distributing death benefits in a particular manner. It was shown that the Ombudsman in the United Kingdom considers pension fund trustees' failure to record their reasons for distributions to be maladministration.<sup>125</sup> Although providing reasons for distributing benefits to members and beneficiaries is important, some information may be justifiably withheld, especially when individual members' right to privacy must be preserved. Consideration should also be given to the cost of providing certain information.

In the light of the considerations above, it is submitted that, in the interests of clarity and certainty, section 37C of the Pension Funds Act should expressly provide for the right of a dependant or beneficiary to receive pension fund trustees' written

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<sup>120</sup> See Chapter 3, par 5.4.6.

<sup>121</sup> See Chapter 3, par 5.4.6.1.

<sup>122</sup> See Chapter 3, par 5.4.6, where the pension fund trustees' duty to disclose is discussed.

<sup>123</sup> See in this regard Chapter 3, par 5.4.6.1 n 712 on the benefits of transparency.

<sup>124</sup> See in this regard Chapter 3, par 5.4.6.2.

<sup>125</sup> Chapter 4, par 5.4.3.



reasons.<sup>126</sup> This express provision would remove uncertainties over whether dependants and/or nominated beneficiaries are entitled to written reasons by the pension fund after distributing a death benefit. To prevent the abuse of this right, though, the dependant or nominated beneficiaries concerned would bear the reasonable costs of providing reasons. The reasonableness of the costs charged would depend on the facts of each case.

#### 5.6 *Beneficiary nominations forms*

In Chapter 3, it was shown that nomination forms are often the source of disputes.<sup>127</sup> Whether in Germany (in company pensions — *Pensionfonds* and *Pensionkassen*), South Africa (in occupational pensions) or the United Kingdom (in occupational pension schemes), members of these pension funds must often complete nomination forms describing how the death benefits should be distributed in case the fund members die before retirement.<sup>128</sup> These jurisdictions still differ over how far these forms are binding on pension fund trustees distributing the death benefits. In South Africa and the United Kingdom, for example, these forms are not binding on pension fund trustees and are used as mere guidelines.<sup>129</sup>

In Germany, the nomination forms are binding on pension funds and the pension fund management board of *Pensionfonds* and *Pensionkassen*. At the same time, the members of occupational pensions (company pension funds) are restricted in whom they can nominate as potential recipients of the death benefits: only beneficiaries who are close dependants.<sup>130</sup> In Germany, a pension fund member cannot nominate just anyone as a recipient of the death benefit.<sup>131</sup> This restriction

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<sup>126</sup> See par 5.14 below for the suggested formulation of the new subsection 37C(1)(d) of the Pension Funds Act.

<sup>127</sup> See Chapter 3, par 2.1, where the use of nomination forms in South Africa is discussed.

<sup>128</sup> See Chapter 3, par 2.1.1, where the use of nomination forms in South Africa is discussed; Chapter 4, par 5.5.1 in the United Kingdom; and Chapter 5, par 6 in Germany. The most appropriate name for the beneficiary nomination form may be “Identification of dependants form”.

<sup>129</sup> The bases for not following the wishes of the deceased pension scheme member are, in particular, if the trustees have grounds for believing that the nomination forms are out of date and that the personal circumstances of the scheme member have changed. See in this regard Chapter 4, par 5.5.1, where pension scheme members’ wishes in the United Kingdom, and Pensions Ombudsman Determinations (10 November 2009) *Winterstein* [76288/1], are discussed.

<sup>130</sup> See Chapter 5, par 7.2.

<sup>131</sup> See Chapter 5, par 7.2.

of potential beneficiaries of the death benefit lightens the burden on the pension management board of trawling the world to identify potential beneficiaries and then determining the correct share to be paid to each beneficiary identified. The members of company pensions must also show the percentage or share of the death benefit that should be allocated to a particular nominated beneficiary. By contrast, in South Africa, pension fund members can nominate any person, including friends and colleagues, as potential recipients of the death benefit.<sup>132</sup> It is suggested that in South Africa, the categories of persons whom a pension fund member may nominate as potential recipients of the death benefits should be restricted. Pension fund trustees distributing the death benefits should focus on the fund member's dependants, whether or not the member nominated them.<sup>133</sup> This recommendation would align with the objectives of establishing pension funds as stated in Chapter 1.<sup>134</sup> It would also reduce the risk of legal disputes by dissatisfied or aggrieved parties.

In Germany, the Government limits the list of people who may qualify as potential beneficiaries of the death benefit.<sup>135</sup> So pension fund management boards there do not face the same challenges that pension fund trustees in South Africa do in tracing potential beneficiaries of the death benefit.<sup>136</sup> The process of distributing death benefits in Germany presents an essential lesson to South Africa's policymakers on avoiding complex methods of distributing retirement fund death benefits.<sup>137</sup>

In Chapter 3, it was pointed out that the disadvantage that arises when the nomination form is binding on pension fund trustees becomes apparent when the pension fund member excludes his or her dependants in favour of other nominated beneficiaries who are not dependants.<sup>138</sup> When pension fund members are

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<sup>132</sup> See Chapter 3, pars 2.2; 2.2.2; and 2.2.3 and notes 222 and 223 for examples of case law where pension fund members nominated friends and colleagues to receive death benefits.

<sup>133</sup> See Chapter 3, pars 2.1.1 and 2.2.1.

<sup>134</sup> See Chapter 1, par 2.4.

<sup>135</sup> See Chapter 3, par 3, where the discretionary powers of pension fund trustees to distribute retirement fund death benefits in South Africa are discussed. See Chapter 5, par 6, where the use of beneficiary nomination forms in Germany is discussed.

<sup>136</sup> See Chapter 5, par 7.4.

<sup>137</sup> It is noted that German's social circumstances are different from those of South Africa because the first pillar (the *GRV*) provides adequate benefits to a huge part of the population in Germany.

<sup>138</sup> See Chapter 3, par 2.1.1, where the beneficiary nomination forms are discussed.

restricted to nominating only their dependants as potential beneficiaries of the death benefits, however, the chances of denying specific dependants the death benefit are reduced. In South Africa, besides occupational pension funds, there are limited options for providing financial support to surviving dependants.<sup>139</sup> The option of restricting the distribution of death benefits to dependants only is essential because the term “equitable distribution” is not defined in the Pension Funds Act. As discussed above,<sup>140</sup> the meaning of this expression is not altogether clear.

#### 5.7 *The discretionary powers of pension fund trustees*

It is submitted that there is merit in permitting pension fund trustees to exercise discretionary powers regarding the distribution of death benefits, as long as they act transparently and there are acceptable safeguards against abuses of their powers. It was shown that pension fund trustees in South Africa and the United Kingdom have discretionary powers to distribute retirement death benefits to dependants and nominated beneficiaries. In Germany, however, a pension fund’s management board, which has an equivalent role to that of pension fund trustees in South Africa and the United Kingdom, lacks discretionary powers regarding the distribution of retirement fund death benefits.<sup>141</sup> In the United Kingdom, established guidelines or key factors assist or guide pension scheme trustees in distributing death benefits.<sup>142</sup> Despite these guidelines, pension scheme trustees still face challenges because the guidelines do not provide clear direction on the extent and scope of the discretionary powers to be exercised.<sup>143</sup> It was concluded that pension scheme trustees in the United Kingdom are not immune to the challenges faced by their counterparts in South Africa. The analysis of the legal positions in both the United Kingdom and South Africa regarding the distribution of retirement fund death benefits shows the challenges faced by pension fund trustees while applying their discretionary powers. This analysis also shows the dissatisfaction felt by

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<sup>139</sup> See Chapter 3, pars 2.1.1.

<sup>140</sup> See Chapter 3, par 3.

<sup>141</sup> See Chapter 5, par 7.

<sup>142</sup> See Chapter 4, par 5.5.

<sup>143</sup> See in this regard Chapter 4, pars 5.5 and 7.

dependants and nominated beneficiaries where the criterion for payment of death benefits is not clearly defined.

It was shown that in South Africa, there is no legal clarity about the extent and limit of pension fund trustees' discretionary powers in distributing death benefits.<sup>144</sup> Specific amendments to the Pension Funds Act are thus suggested to bring legal clarity in this regard.<sup>145</sup> It is crucial that pension fund trustees should understand their roles against the backdrop of the unique social circumstances of South Africa. Too many factors have to be considered when pension fund trustees exercise their discretionary powers in distributing death benefits.<sup>146</sup> It is thus difficult for the dependants and nominated beneficiaries to understand or predict the decisions of pension fund trustees.

The proposals to limit the discretionary powers of pension fund trustees aim to improve the process of distributing retirement fund death benefits and make it less complex. This step would reduce some of the challenges that these trustees face in distributing these benefits. The distribution of occupational pensions fund death benefits (company pensions) in Germany indicates the position in South Africa had a broad discretion not been granted to pension fund trustees in distributing death benefits.<sup>147</sup> Germany exemplifies an effective mandatory state pension system:<sup>148</sup> it ensures high pension levels, removes or at least reduces the discretionary powers of pension fund trustees, and restricts the list of potential beneficiaries of the death benefits. As a result, the dependants (usually, the spouse, partner, or minor children) of a pension fund member who dies before retirement will not need to rely on the discretion of pension fund trustees to receive financial support from the pension funds.

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<sup>144</sup> See Chapter 3, par 3 for a discussion of pension fund trustees' discretionary powers.

<sup>145</sup> See par 5.14 below, for a discussion of legislative amendments.

<sup>146</sup> See Chapter 3, par 3.

<sup>147</sup> See Chapter 5, par 7.

<sup>148</sup> See Chapter 5, n 19; and n 90 above, where the South African National Savings Fund is briefly mentioned.

It was shown that pension fund trustees face challenges in distributing retirement fund death benefits because the Pension Funds Act is unclear about the extent of their discretionary powers.<sup>149</sup> Policymakers face two approaches:

First, if the pension fund trustees' discretion is wide, the disadvantage is that this aspect opens the distribution process to subjective interpretation and is susceptible to abuse. It is also challenging to hold pension fund trustees effectively accountable for their conduct since there is no clear yardstick for judging it.<sup>150</sup> The advantage if the pension fund trustees' discretion is wide is that the distribution process is flexible and may be adjusted to suit the unique situation of the pension fund member.

Secondly, by contrast, where the pension fund trustees' discretion is restricted and/or the process of distributing retirement death benefit is clearly defined or prescribed in the statute, the advantage is that it does not allow too much room for subjective interpretation, and this reduces the chances of pension fund trustees' abusing the process of distributing retirement fund death benefits. It also becomes easier to ensure the accountability of funds and their pension fund trustees because the statute clearly sets out the process that pension fund trustees are expected to follow. The disadvantage, though, is that the distribution process is rigid and may sometimes not provide answers to the unique situation of the pension fund member.

Both the options stated above have advantages and disadvantages. This thesis has shown various challenges faced by pension fund trustees in distributing retirement fund death benefits because of the lack of clarity about the extent of the trustees' discretionary powers in doing so.<sup>151</sup> It is submitted that leaving the current process of distributing retirement fund death benefits as it is will not enhance the efficiency of the system. The task for policymakers is to find common ground between the two approaches stated above. Put differently, policymakers' task is to find a process for distributing retirement fund death benefits that is not too wide (too flexible) and not too restricted (too rigid): this is not an easy task to perform.<sup>152</sup>

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<sup>149</sup> See Chapter 3, par 3.

<sup>150</sup> See Chapter 3, par 3, where it was stated that it is rare for pension fund trustees to be held liable in their personal capacity for their actions in South Africa.

<sup>151</sup> See Chapter 3, par 3.

<sup>152</sup> See pars 5.8 and 5.9 below, where suggestions are made in this regard.

In Chapter 3, it was suggested that the list of potential recipients of the death benefit in terms of section 37C should be restricted.<sup>153</sup> It is recommended that potential recipients of death benefits must be limited to people who fall within the definition of a “dependant” in the Pension Funds Act.<sup>154</sup> If there are no “dependants” as defined, the death benefit should be transferred to the deceased member’s estate for disposal under applicable laws.<sup>155</sup>

#### 5.8 *The “equitable” distribution of pension fund benefits*

The processes of distributing death benefits in the United Kingdom and Germany were compared to the process in South Africa. Compared to the equivalent provisions in the jurisdictions selected for the comparative review, section 37C of the South African Pension Funds Act is unique: pension fund trustees are required to make an equitable distribution of the death benefits.<sup>156</sup> The Pension Funds Act does not, however, define “equitable distribution”. As a result, pension fund trustees, the Pension Funds Adjudicator, and the courts determine the meaning of this phrase case by case.<sup>157</sup> It is suggested that section 37C should be amended to delete the phrase “equitable” in section 37C of the Pension Funds Act and distribute death benefits as proposed in paragraph 5.9 below.

It is also recommended that legal certainty on pension fund trustees’ fiduciary duties regarding their discretionary powers in distributing retirement fund death benefits could be enhanced by prescribing how pension fund boards should allocate the death benefits under the Pension Funds Act. This suggestion is made in full appreciation of the fact that although prescribing or codifying the process that pension fund trustees should follow when distributing death benefits might make their role more straightforward, it could also make the process too restricted. And it is accepted that any prescribed or codified process has limitations because of the inherent complexities of fund members’ family dynamics and the competing interests of potential dependants and beneficiaries. Still, codification also has its

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<sup>153</sup> See Chapter 3, par 2.1.1 in this regard.

<sup>154</sup> See par 5.12 below, where the amendment of the meaning of a “dependant” in the Pension Funds Act, especially as to factual dependants, is suggested.

<sup>155</sup> See Chapter 3, par 2.1.1 in this regard.

<sup>156</sup> See Chapter 3, par 3, where the equitable distribution of death benefits is discussed.

<sup>157</sup> See Chapter 3, par 3, where the equitable distribution of death benefits is discussed.

advantages. These have been stated by Havenga, although in the context of codifying the duties of directors of companies:

[Codification] simplifies the law, makes it more readily accessible and more readily ascertainable. Therefore, it may be expected not only to produce substantial improvements in the law itself, but also to effect enormous savings of time, effort and money spent in ascertaining the law, advising on it and complying with it. Moreover, a statutory statement of directors' duties may educate directors, enabling them to discover and understand their duties much more easily than if they were expected to search through a maze of case law. The general view is that if directors have easy access to the law regarding their position, they will be less likely to act in breach of it.<sup>158</sup>

In the United Kingdom and Germany, the distribution of death benefits (survivors' benefit) in state pensions and the *GRV*, and in their occupational pensions, does not require pension fund trustees to make an equitable distribution to surviving dependants.<sup>159</sup> In the United Kingdom, the potential recipients of the death benefit attached to the state pension are the widow(er) and/or children who have not reached the age of 21 years or who have reached the age of 21 but are still under the age of 24 years and still studying or attending vocational training, or who have physical or mental challenges or a disability.<sup>160</sup> The *GRV* in Germany also includes provisions like those of the state pension in the United Kingdom.<sup>161</sup> So the *GRV* pays survivors' benefits to the scheme member's spouse(s) and/or civil partner and/or children who have not reached the age of 18 years or up to the age of 27 years, if these dependants are still at school or attending vocational training or unable to support themselves because of physical, intellectual, or psychological disability.<sup>162</sup> It should be noted that in so far as occupational pension schemes (company schemes) in the United Kingdom are concerned, the law allows for paying a death benefit to dependants or to a nominee who is not a dependent of the scheme member.<sup>163</sup> In Germany, as far as company pensions are concerned, the law prescribes a list of potential recipients or beneficiaries of the death benefit.<sup>164</sup> Because of the challenges that pension fund trustees in South Africa face in

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<sup>158</sup> See Havenga *Fiduciary Duties* at 431.

<sup>159</sup> See Chapter 4, pars 2.1 and 5 (the United Kingdom) and Chapter 5, pars 2.1, 2.2, and 7 (Germany) in this regard.

<sup>160</sup> See Chapter 4, par 2.1.

<sup>161</sup> See Chapter 5, par 2.1.

<sup>162</sup> See Chapter 5, par 2.1. See also *SGB VI* § 48(4), which deals with dependants' pensions.

<sup>163</sup> See Chapter 4, par 5.

<sup>164</sup> See Chapter 5, par 7.2.

interpreting and distributing retirement fund death benefits equitably, policymakers in this country should consider distributing death benefits to dependants in two options divided into Primary Groups and Secondary Groups of potential beneficiaries. These groups are discussed below.<sup>165</sup>

In brief, it is recommended that death benefits should be payable only to dependants of the deceased fund member. In other words, only persons who meet the definition of a “dependant” in the Pension Funds Act should qualify to receive a death benefit or a share of a death benefit. A pension fund member should thus be restricted to nominating only persons who qualify as a “dependant” under the definition in the Pension Funds Act. No payment could then be made to any person who was not a dependant.<sup>166</sup> This is already the position in Germany, where the laws restrict potential recipients of the death benefits to dependants of the deceased fund member.<sup>167</sup> It was seen that there is no legislative requirement for pension fund trustees or the pension management board to distribute retirement fund death benefits in an equitable manner in the United Kingdom and Germany. In their state pensions (state pensions in the United Kingdom and the *GRV* in Germany), the potential recipients of death benefits are restricted to close family members.<sup>168</sup> The process described below should be the default process that pension fund trustees should follow in distributing death benefits. Any deviations by boards should be explained and justified. The circumstances in which deviations may occur should be identified in the Pension Funds Act and the rules of pension funds.<sup>169</sup>

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<sup>165</sup> See par 5.9 below in this regard.

<sup>166</sup> This is already the case in the United Kingdom’s state pension and Germany’s *GRV*. See Chapter 4, par 2.1 and Chapter 5, par 2.1, respectively.

<sup>167</sup> See Chapter 5, par 7.2.

<sup>168</sup> See in this regard Chapter 4, par 2.1 and Chapter 5, par 2.1.

<sup>169</sup> The identification of these extraordinary circumstances requiring deviation from the prescribed distribution process may be informed by consultations with the relevant stakeholders, including pension fund members. See below par 5.9.2, where the need of these consultations is briefly highlighted.



## 5.9 *Proposals for distribution to potential beneficiaries*

### 5.9.1 The primary group of potential beneficiaries

The primary group would consist of two categories of potential beneficiaries. These two categories would be:

**First category:** a spouse of the fund member according to the definition of “spouse” in section 1 of the Pension Funds Act.<sup>170</sup> This definition means a permanent partner or spouse or civil union partner of a member.<sup>171</sup>

**Second category:** the qualifying children of the pension fund member according to the definition of a “dependant” in the Pension Funds Act:<sup>172</sup>

- who have not reached the age of 18 years, or

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<sup>170</sup> The spouse is entitled to a share as of right, and pension fund trustees need not exercise any discretion. See Chapter 3, par 2.2.1, where the definition of “spouse” in the Pension Funds Act is provided. The only exception will be where the *bloedige hand* doctrine applies. See Chapter 3, par 2.2.8, where this principle is discussed. The spouse need not prove that he or she was financially dependent on the fund member while the member was still alive. See also Chapter 3, par 2.1.4, where the restriction on entitlement by the non-member spouse to 50 per cent of the death benefit is discussed.

<sup>171</sup> See Chapter 3, par 2.2.1, where the definition of spouse in the Pension Funds Act is provided. In Germany, under *SGB VI* § 46 that regulates the *GRV* (mandatory pensions), the widow or widower can inherit about 60 per cent of the pension that could have accrued to the contributor. See Chapter 5, par 2.1 in this regard as well as the requirements that such widow or widower should comply with. See also Chapter 5, par 7.1 and 7.2, referring to the distribution of company pensions to surviving dependants, including spouses, in Germany.

<sup>172</sup> The description of qualifying children under this category is fairly similar to the one contained in the *SGB VI* § 48 that regulates the *GRV* (mandatory pensions) in Germany, except that there it refers to the age of 27 instead of 25 for those children who have reached the age of 18 years but are still studying or attending vocational training. See Chapter 5, par 2.1 in this regard. See also Chapter 5, par 7.2, where reference is made to the distribution of company pensions to surviving dependants, including dependent children, in Germany. It stated that the deceased member’s children who qualify are those who are under the age of 18 years or under the age 25 in certain conditions. It is submitted that if the fund member dies while still employed and leaves behind a minor child and/or a spouse, the requirement for such person to prove financial dependency to pension fund trustees complicates the distribution of the death benefit. Such spouse or minor should qualify to receive the death benefit, irrespective of whether he or she was financially dependent on the fund member. This outcome would avoid a situation in which a fund member out of his generosity takes care of “strangers” while at the same time neglecting his or her own dependants whom he or she has a legal duty to support. In those cases, it would be easy for the “strangers” to prove financial dependency, but difficult for legal dependants to prove that they received any support from the fund member while he or she was still alive. If possible, other people who would like to claim dependency could do so from the deceased estate.

- who have reached the age of 18 years but are still under the age of 25 years and are still studying or attending vocational training, or
- who have physical or mental challenges or disabilities.<sup>173</sup>

The allocation of the shares or percentages to the qualifying children would be calculated on the basis of their ages. The exception to using the age of children to calculate the portion that would be payable might be considered if a child and/or a dependant had physical or mental challenges or disabilities and no other recognisable adequate financial support. The pension fund trustees should justify this exception in the reasons for distribution. In the absence of a spouse defined in the Pension Funds Act (the first category), the death benefit would be paid to qualifying children. In the absence of qualifying children (the second category), the death benefit would be paid to a spouse defined in the Pension Funds Act. In the absence of both the spouse as defined in the Pension Funds Act (the first category) and qualifying children (the second category), the full death benefit would be paid to the deceased scheme member's estate.<sup>174</sup>

#### 5.9.2 The secondary group of potential beneficiaries

In the absence of any beneficiaries as defined under the primary group (the first category and/or second category), and before any amount was paid to the estate of the deceased fund member, any other "dependant" as defined in section 1 of the Pension Funds Act could be considered to be allocated a share of the death benefit under the prescribed conditions stated in the next paragraph below. It should be noted that the definition of "dependant" would be wide and would not cover only

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<sup>173</sup> Under s 1(b)(iii) of the Pension Funds Act, a child of a member includes a posthumous child, an adopted child, and a child born out of wedlock. See Chapter 3, par 2.2.1, where the definition of a "dependant" in the Pension Funds Act is provided. See also Chapter 3, par 2, where suggestions are made for amending the definition of a "dependant" in the Pension Funds Act. The qualifying child or children is or are entitled to a share of the death benefit as of right, and pension fund trustees need not exercise any discretion except to make calculations based on the ages of the children. The only exception will be where the *bloedige hand* doctrine applies. See Chapter 3, par 2.2.8, where this doctrine is discussed. The qualifying child need not prove that he or she was financially dependent on the fund member while the member was still alive. The exception will apply when a person is claiming to be a factual dependant. See Chapter 3, par 2.2.1, where the definition of factual dependant is discussed.

<sup>174</sup> This is already covered in the current provisions of s 37C(1)(c) of the Pension Funds Act, except that this provision also requires the absence of a nominated beneficiary before the benefit can be paid to the estate of the deceased fund member. See par 5.14 below, where the suggested wording of the amended provisions is indicated.

biological relationships.<sup>175</sup> The secondary group would include other persons (including other children of the fund member who would not qualify under the second category, parents, and siblings of the fund member) who would qualify under neither the first category nor the second category.<sup>176</sup> The beneficiaries under the secondary group could be considered to be allocated a share of the death benefit under the following conditions:

- They would have to supply evidence to the pension fund board that they were supported to a substantial degree by the fund member at the time of his or her death.<sup>177</sup>
- If the pension fund member had a legal duty to support these persons, they should only be considered by the boards for the purpose of being allocated a death benefit where they could prove that they needed the financial support for the purpose of affording basic needs in the foreseeable future.
- Except where the pension fund member had a legal duty to support these persons, they should only be considered by the boards for the purpose of being allocated a death benefit where the fund member had, while still alive, identified them in his or her beneficiary nomination form or dependant identification form. Any nominated beneficiary who did not fall within the categories above should not receive (a portion of) the death benefit.
- Any amount payable to these persons under the secondary group of beneficiaries should be limited to the amount that they would be able to prove and/or that would be considered by the pension fund board to be adequate to afford basic needs in the near future.

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<sup>175</sup> See Chapter 3, par 2.2.1, where a suggestion is made for the definition of a “dependant” in s 1 of the Pension Funds Act to be amended, especially the meaning of a factual dependant.

<sup>176</sup> The first category consists of a spouse in terms of the definition of “spouse” in the Pension Funds Act. The second category consists of a qualifying child or children in terms of the definition of a “dependant” in the Pension Funds Act.

<sup>177</sup> This provision that allows any person who belongs in the secondary group of beneficiaries to qualify for consideration, provided no beneficiaries qualify under the first group of beneficiaries and that they should have been supported to a substantial degree by the deceased fund member is like what is provided in the rules of company pensions that apply in Germany. See, for example, Chapter 5, par 7.3 referring to the rule of Novartis Pension Fund 1, Art. 15 pars 5-7. It is noted that considering the financial position of an adult dependant who falls under the second category may create a disincentive to work for such a dependant.

In the absence of any person who would qualify under the primary and secondary groups above, the death benefit should be paid into the estate of the deceased fund member.

It is recommended that the options above should also apply if the rules of a fund do not provide for spousal and/or child pensions.<sup>178</sup> It was pointed out that when the rules do not provide for a pension, the spouse and children of the deceased fund member compete with everyone else for a share of the death benefit.<sup>179</sup> It is submitted that this outcome is not ideal. The Pension Funds Act should be amended to prioritise the payment or allocation of the death benefit to the spouse and the qualifying child or children of the deceased fund member.

It was shown that section 37C of the Pension Funds Act includes some commendable provisions. As explained in Chapter 3, though, the application and interpretation of section 37C by pension fund trustees, the Pension Funds Adjudicator, and the courts in some cases call for clarity and legal certainty. It was also seen that one of the causes of the confusion in interpreting and applying section 37C of the Pension Funds Act is the current distribution process, under which the retirement fund death benefit has become potentially available to almost anyone and everyone. The decision of who ultimately receives the benefit is left to pension fund boards. In the current legislative setting, they are largely unaccountable for their decisions about distributing the death benefits. Much of the uncertainty and many of the interpretational challenges created by the current provisions of section 37C could be reduced if the recommendations made above were incorporated into the Pension Funds Act. It is also conceded, though, that it is impossible to provide in the Act for all eventualities. But the proposed amendments should significantly reduce the challenges that pension fund trustees face in distributing retirement fund benefits and would introduce some certainty into the distribution process.

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<sup>178</sup> See Chapter 3, par 1, n 74, where reference was made to the part of the provisions of s 37C(1) of the Pension Funds Act which excludes “a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund” from the distribution in terms of s 37C. The spousal pension and/or child pension is dealt with in terms of pension fund rules. This renders s 37C(1) inapplicable when the rules of the fund provide that the benefit payable upon a member’s death is payable to the member’s spouse and children in a form of spouses’ or children’s pensions.

<sup>179</sup> See Chapter 3, par 2.1.4, where the restriction on entitlement by the non-member spouse to 50 per cent of the death benefits is discussed.

The distribution process described in this section could restrict the discretionary powers of pension fund trustees in distributing retirement fund death benefits.<sup>180</sup> The suggested distribution process described in this section would necessitate debates in Parliament and consultations with pension fund members, the retirement fund industry, and pension fund trustees. The approach or approaches chosen should reflect the unambiguous policy of the Government and the wishes of pension fund members. The goal should be to design a transparent and straightforward distribution process. This thesis has sought to contribute to the debate by identifying the challenges that continue to hamper the efficient distribution of death benefits in South Africa.

#### *5.10 Payment of retirement fund death benefits*

In Chapter 3, it was shown that there are various options for paying death benefits to the dependants and nominated beneficiaries of pension fund members in South Africa.<sup>181</sup> The law provides payment options based on various factors, including whether the benefit recipient is a minor.<sup>182</sup> In South Africa, death benefits are usually paid out to recipients in cash or a lump sum.<sup>183</sup> It was shown that when death benefits are paid in cash or a lump sum, pension fund trustees and the FSCA have no mechanism to ensure that the amounts are preserved or sustainable.<sup>184</sup> It was argued that when the amounts paid are soon dissipated by the beneficiaries, the objectives of establishing retirement funds and of section 37C of the Pension Funds Act are defeated.<sup>185</sup> To match the objectives of pension fund establishment, the payment of death benefits to both minor and major beneficiaries should take the form of monthly payments or an annuity to ensure the sustainability of death

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<sup>180</sup> It is submitted that the challenges pension fund trustees face will be mitigated, although not removed, through the restriction of persons that qualify as dependants under s 1 of the Pension Funds Act.

<sup>181</sup> See Chapter 3, par 2.2.9.

<sup>182</sup> See in this regard ss 37C(3) and 37C(4) of the Pension Funds Act. See Chapter 3, par 2.2.9, where these payment options of the death benefits are explored.

<sup>183</sup> See Chapter 3, par 2.2.9.

<sup>184</sup> See Chapter 3, par 2.2.9.

<sup>185</sup> See Chapter 1, par 2.4, where the objectives of pension fund establishment are discussed, and Chapter 3, par 2.2.9 for a discussion of the mode of death benefit payment. See par 5.14 below for the suggested amendment to s 37C(3) and s 37C(4) of the Pension Funds Act. In s 37C(3) of the Pension Funds Act, the phrase “payable to a minor dependant or minor nominee, **may** be paid in more than one payment” (my emphasis), the word “**may**” should be replaced by “**shall**”.

benefits. In other words, no full lump sum payment of the death benefits should be allowed. A certain percentage, for example, 25 per cent, could be allowed as a lump sum payment, and the rest in the form of periodic payments (annuities).<sup>186</sup> Pension fund trustees might be allowed to recognise extraordinary personal circumstances brought to their attention by the death benefit recipient, calling for an exemption to the default payment method. Or they might allow for such an exemption where the amount available for allocation to a beneficiary is minimal.

Section 37C of the Pension Funds Act denies the fund member freedom to contract about the pension benefits<sup>187</sup> and prevents a non-member spouse or partner from receiving 50 per cent of the death benefit.<sup>188</sup> There seems no valid reason why the same principle cannot be applied to deny a guardian the right to receive a lump sum death benefit as cash on behalf of a minor beneficiary or beneficiaries. The recommendations stated above are intended to accord with the objective of section 37C of the Pension Funds Act of ensuring that surviving dependants of a fund member who dies before retirement are not left destitute. This outcome is also aligned with the objectives of pension fund establishment.<sup>189</sup>

#### *5.11 Strengthening the accountability of pension fund trustees and available remedies for beneficiaries against pension funds and their board members*

The study has identified a need to strengthen the accountability of pension fund boards and their board members.<sup>190</sup> In Chapter 3, instances were shown in which

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<sup>186</sup> See par 5.14 below for the suggested amendment of s 37C(4)(a) of the Pension Funds Act. The question is whether the pension funds currently have the capacity to keep the benefits and make periodic payments to qualifying beneficiaries. If the Government were to maximise the use of pension fund death benefits as one of the tools to realise its social mandate, it would have to consider and ensure that trust accounts for the benefit of individual beneficiaries are established. Lump sum death benefits therefore can be paid into these trust accounts from which beneficiaries may be paid specified periodic instalments. Alternatively, the beneficiary must use the lump sum that is paid in order to purchase an annuity, or the lump sum should be put into beneficiary funds, from which periodic payments are made to beneficiaries.

<sup>187</sup> See Chapter 3, par 2.1.5, where the restriction on any agreements and any prior arrangements made by the fund member while he or she was still alive is discussed. See also Chapter 3, 2.1.6, where the restriction on the fund member's right to contract is discussed.

<sup>188</sup> See Chapter 3, par 2.1.4, where the restriction on the entitlement by the non-member spouse to 50 per cent of the death benefits is discussed.

<sup>189</sup> See Chapter 1, par 2.4, where the State's objectives in establishing pension funds are discussed.

<sup>190</sup> This is already the case with Germany's *GRV* and with their company pensions. See Chapter 5, par 8 (breach of duties), where the accountability of pension fund management boards and their board members was discussed.

pension fund boards and their trustees appear not to be accountable to anyone. If death benefits are distributed in a manner that does not comply with section 37C of the Pension Funds Act, or trustees have not complied with their duties, the legal route often taken by aggrieved beneficiaries is to complain to the Adjudicator. If the Adjudicator's determination finds the complaint justified, the order given is often that the matter should be sent back to the same board for redistribution. This process does not guarantee that the concerns or complaints of the aggrieved beneficiary will be reconsidered appropriately. In addition, legal costs can deter aggrieved dependants and beneficiaries from pursuing their claims against funds and their trustees.<sup>191</sup> Chapter 3 examined the remedies that may be relied on by dependants and nominated beneficiaries aggrieved by how pension fund trustees have distributed (or are distributing) the death benefit.<sup>192</sup> The following remedies were examined:

- an application to a court or the Pension Funds Adjudicator under the common law and/or the PAJA to review the board's decision,<sup>193</sup>
- the institution of a claim for damages in delict against the pension fund and/or its trustees,<sup>194</sup>
- the institution of a *sui generis* claim against the pension fund and/or its trustees,<sup>195</sup> or
- statutory remedies for breach of duties of care and fiduciary duties.<sup>196</sup>

The liability of pension funds and their trustees and the lack of criminal sanctions against pension fund trustees were also discussed.<sup>197</sup> It was shown that an applicant or plaintiff who is usually a dependant and/or a nominated beneficiary often encounters challenges with each of these remedies. If concerns about pension

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<sup>191</sup> See Chapter 3, par 6 for a discussion of the liability of pension funds and their trustees for the wrongful distribution of death benefits.

<sup>192</sup> See Chapter 3, par 6, where the remedies available to beneficiaries are discussed.

<sup>193</sup> See Chapter 3, par 6.5.1 for a discussion of an application for review.

<sup>194</sup> See Chapter 3, par 6.5.2 for a discussion of a claim in delict.

<sup>195</sup> See Chapter 3, par 6.5.3 for a discussion of a *sui generis* claim.

<sup>196</sup> See Chapter 3, par 6.5.4 for a discussion of statutory remedies for breaches of the duty of care and fiduciary duties.

<sup>197</sup> See Chapter 3, pars 6.5.5 and 6.5.5.3 in this regard.

fund boards that do not comply with relevant applicable laws when distributing the death benefits are to be addressed, the issue of the equitable distribution of death benefits and compliance with the laws cannot be left purely to the judiciary and the Pension Funds Adjudicator to decide. In most cases, the damage is already done by the time the claim or the complaint is decided.<sup>198</sup> Proposed amendments to the Pension Funds Act are contained in paragraphs 5.13 and 5.15 below.

*5.12 Proposed statutory amendment to the definition of a “dependant” in section 1 of the Pension Funds Act*

The study has shown that the definition of a “dependant” in the Pension Funds Act for the purposes of distributing retirement fund death benefits under section 37C of the Pension Funds Act is not appropriately restricted by law in South Africa. Section 1(b)(i) of the Pension Funds Act grants trustees a broad discretion.<sup>199</sup> This factor exacerbates pension fund trustees’ difficulties in identifying potential recipients of the death benefit.<sup>200</sup> And it imposes an unnecessary burden on them in determining who should be allocated all or a portion of the death benefit.

Section 1 of the Pension Funds Act defines a “dependant”, in relation to a member as

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
  - (i) Was, in the opinion of the board, upon the death of the member was in fact dependent on the member for maintenance;
  - (ii) Is the spouse of the member;
  - (iii) Is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;

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<sup>198</sup> See, for example, in this regard *Kim v Agri Staff Pension Fund and Others* (2017/47543) 2019 ZAGPJHC (6 February 2019), cited in Chapter 1, n 83; and *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) 2020 ZAGPJHC 18 (19 February 2020), cited in Chapter 3, par 2.2 and n 434.

<sup>199</sup> See Chapter 3, par 2.2.1, where the definition of a “dependant” is discussed.

<sup>200</sup> See Chapter 3, par 2.2.3 for discussion of the allocation of death benefits to dependants and nominees.



(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.<sup>201</sup>

It is suggested that the definition of a “dependant” in the Pension Funds Act should remain as it is, for the most part. The exception is section 1(b)(i). It currently grants the pension fund board a wide discretion in deciding whether a person was dependent on the fund member for maintenance while that member was still alive. It is submitted that this provision grants pension fund trustees too much power and leads to many potential beneficiaries being identified.<sup>202</sup> This outcome contributes to the high number of disputes that pension funds may face from potential beneficiaries. So it is suggested that factual dependants in section 1(b)(i) of the Pension Funds Act should be limited to these persons:<sup>203</sup>

- (a) the person must have been financially dependent on the member,
- (b) the person’s financial relationship with the member must have been one of mutual dependence, or
- (c) the person must have been dependant on the member because of physical or mental impairment.<sup>204</sup>

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<sup>201</sup> See Chapter 1, par 8.3, where the definition of a “dependant” in South Africa, and Chapter 1, n 131, where the definition of a “dependant” in Australia is provided.

<sup>202</sup> See Chapter 3, par 2.2.1, where the definition of a “dependant” is discussed.

<sup>203</sup> See par 5.9 above for the requirements that persons who fall under *Category B* must comply with to be considered for a share of the death benefit.

<sup>204</sup> This formulation is based on the definition of a “dependant” in the United Kingdom under Schedule 28, s 15(1) of the Finance Act 2004 (part 4). See in this regard Chapter 4, par 4.1.2. It is recognised that the proposed changes to the definition of a “dependant”, by limiting it to specific people and also by ranking different types categories of dependants, may raise the question of whether these proposed changes will not defeat the social security purpose or objective intended by s 37C of not excluding any person who depended on the deceased member for support, and whether the proposed changes are suitable for the unique socio-economic and political history of South Africa, including the high level of unemployment and poverty in this country, the fact that the country currently does not have a mandatory public fund, and that the majority of people including those who were working rely on the State social assistance grant for support or survival. An argument was made in this thesis that where death benefits are paid to friends, and nominees that are financially independent, it is difficult to argue that the distribution achieves a social purpose. Hence the suggested restriction to the definition of a “dependant”.

5.13 *Proposed statutory amendment: sections 7A, 7C, and 7D of the Pension Funds Act (on duties)*

*Section 7A of the Pension Funds Act*

A public register should be provided for to publish the names of persons who are disqualified from becoming members of pension fund boards. The similar provision in respect of South African company directors was discussed above.<sup>205</sup> It is recommended that section 7A of the Pension Funds Act should be amended by adding subsection (5) to the section, which should read as follows:

**Section 7A Board of Fund**

...

(5) The Financial Services Conduct Authority must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a member of a pension fund board, or who are subject to an order of probation as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to the Act or any other law.<sup>206</sup>

*Section 7C of the Pension Funds Act*

The common law and statutory provisions impose fiduciary obligations on pension fund boards and their individual members, the pension fund trustees. The fiduciary duties exist in tandem with their various other statutory duties and their duties of care and skill.<sup>207</sup> This study has shown instances in which pension fund trustees do not comply with their duties when distributing retirement fund death benefits.<sup>208</sup> This compliance is crucial to ensuring that trustees conduct the business of their funds according to the law and their pension fund rules. The compliance also ensures that the distribution of retirement fund death benefits is efficient, that the distribution

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<sup>205</sup> Refer to Chapter 2, in par 6.4. See also Chapter 5, par 5.2.3.3 where the appointment and qualifications of members of pension fund management in Germany are discussed.

<sup>206</sup> See Chapter 2, par 6.4, and n 200 where s 7A of the Pension Funds Act is discussed. This formulation is based on s 69(13) of the Companies Act 71 of 2008 that deals with the ineligibility and disqualification of persons to be a director or prescribed officer. See in this regard Chapter 4, par 4.2.1 where reference was made to s 3 of the Pensions Act 1995 that requires the Pensions Regulator in the United Kingdom to keep a similar register of all persons that are prohibited from acting as trustees.

<sup>207</sup> Chapter 3, par 5 discusses the duties of pension fund trustees in South Africa.

<sup>208</sup> See Chapter 3, par 3, where there is a discussion of case law and the Pension Funds Adjudicator's determinations showing non-compliance with duties and the provisions of s 37C of the Pension Funds Act by pension fund boards and their board members.

process is fair, and that trustees do not abuse their discretionary powers.<sup>209</sup> It was further shown in Chapter 3 that remedies for aggrieved parties need to be adequately enforced through both civil and criminal means, and, importantly, that there should be good corporate governance of pension funds.<sup>210</sup>

This thesis found a lack of accountability by pension fund trustees in some cases.<sup>211</sup> It was reported that only a few of the pension fund trustees who abuse pension fund assets or breach their duties had been found personally liable. This outcome creates an environment in which pension fund trustees are not adequately discouraged from breaching their duties.<sup>212</sup> It was also clear from the discussion on liability for the wrongful distribution of benefits above that pension fund trustees are rarely found personally liable for this wrongful distribution.<sup>213</sup> It was pointed out that although aggrieved parties often sue the retirement fund for wrongful distribution, pension funds have indemnity clauses in their rules and also take out insurance cover to protect the fund and its trustees.<sup>214</sup>

Section 7C of the Pension Funds Act prescribes the duties of pension fund boards and trustees regarding their pension fund operations, including the distribution of retirement fund death benefits under section 37C of the Pension Funds Act. It was shown that unlike the express provisions of the Companies Act 71 of 2008, the Pension Funds Act does not expressly state the consequences of not complying with these duties.<sup>215</sup> It is thus suggested that the Pension Funds Act should expressly impose liability on pension fund trustees for breaching their duties.<sup>216</sup> These provisions should be formulated using the guidance of section 77(2) of the Companies Act 71 of 2008. The success of codification, in this case, section 7C of

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<sup>209</sup> See Chapter 3, par 5 for a discussion of the duties of pension fund trustees in South Africa.

<sup>210</sup> See Chapter 3, par 6, where the need for strong enforcement of remedies through civil and criminal means is discussed.

<sup>211</sup> See Chapter 3 generally.

<sup>212</sup> For example, Fidentia. See Chapter 2, n 317, where the Fidentia matter is discussed.

<sup>213</sup> See Chapter 3, par 6 for a discussion of the liability of funds and their pension fund trustees for the wrongful distribution of death benefits.

<sup>214</sup> See Chapter 3, par 7 for a discussion of the indemnity cover and insurance for the fund and its trustees.

<sup>215</sup> See Chapter 3, par 6.5.5, where the liability of pension fund trustees under the Financial Institutions (Protection of Funds) Act is discussed.

<sup>216</sup> See Chapter 3, par 6.5.5, where this recommendation was made, and the liability of pension funds and their fund trustees was discussed.

the Pension Funds Act, lies in its effective enforcement. It is thus submitted that suitable civil sanctions should accompany non-compliance by pension fund boards and their board members with their duties.<sup>217</sup> Personal liability should thus ensue if the relevant individual's negligence, bad faith, or unlawfulness is proved. This improvement will ensure that pension fund trustees pay attention to their conduct and comply with the applicable laws and duties when distributing retirement fund death benefits. It is recommended that section 7C of the Pension Funds Act should be amended by adding subsection (3) to the section, which should read as follows:

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<sup>217</sup> See Havenga *Fiduciary Duties* at 431.

## **Section 7C Object of board**

...

(3) A member of a pension fund board may be held liable in accordance with the principles of the common law relating to a breach of a fiduciary duty or a duty of care, for any loss, damages or cost sustained by the pension fund as a consequence of any breach by the board member of a duty contemplated in section 7C and 37C of the Pension Funds Act.<sup>218</sup>

## **Section 7D of the Pension Funds Act**

This study has shown that in the United Kingdom, section 70(1) of the Pensions Act 2004 imposes a duty to report breaches of the law on various persons and institutions, including a trustee of a pension scheme.<sup>219</sup> This precaution works as an early notification to the Regulator about breaches of the law that the Regulator could not yet have known of and provides the Regulator with an added tool, besides complaints by aggrieved pension scheme members, dependants and/or beneficiaries, to monitor and protect their interests. It is suggested that a monitoring instrument like the one in section 70(1) of the Pensions Act 2004 should be part of the South African Pension Funds Act. This provision could be added as a new paragraph (h) under section 7D(1) of the Pension Funds Act to read as follows:

## **Section 7D Duties of board**

...

(1)(h) Where a pension fund board member has reasonable cause to believe that (a) a duty which is relevant to the administration of the fund in question, and is imposed by or by virtue of subsections 7C and/or 7D of this Act, has not been or is not being complied with, and (b) the failure to comply is likely to be of material significance to the Regulator in the exercise of any of its functions, he must give a written report of the matter to the Regulator in the exercise of any of its functions, as soon as reasonably practicable.<sup>220</sup>

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<sup>218</sup> See Chapter 3, par 5.4.1, where s 7C of the Pension Funds Act is discussed. This formulation is based on s 77(2)(a) of the Companies Act 71 of 2008 that deals with the liability of directors and prescribed officers. See in this regard Chapter 3, par 5.5.

<sup>219</sup> Refer to Chapter 4, par 5.4.4 where s 70(1) of the Pensions Act 2004 in the United Kingdom is discussed. In South Africa, the provision of the Pension Funds Act that comes close in terms of comparison to the provision of s 70(1) of the Pensions Act 2004 is s 7A(4)(b), which states that "a board member must – (b) on becoming aware of any material matter relating to the affairs of the pension fund which, in the opinion of the board member, may seriously prejudice the financial viability of the fund or its members, inform the registrar thereof in writing".

<sup>220</sup> See Chapter 4, par 5.4.4, where s 70(1) of the United Kingdom's Pensions Act 2004 is discussed. The formulation of this proposed provision (s 7D(1)(h)) to be added to the South African Pension Funds Act 24 of 1956 is based on s 70(1) of the United Kingdom's Pensions Act 2004.

#### 5.14 *Proposed statutory amendment: section 37C of the Pension Funds Act*

The study has shown that section 37C of the Pension Funds Act is complex. In some cases, its interpretation and application by pension fund trustees lead to distributions not aligned with its purpose and that of pension funds establishment.<sup>221</sup> The objectives of pension fund establishment are outlined as providing financial support to pension fund members on retirement and to surviving dependants of the member who dies before retirement.<sup>222</sup> The current legal framework in South Africa should be optimally used to protect the interests of these surviving dependants. This outcome can be achieved only if the law on distributing retirement fund death benefits is unambiguous. The advantages of laws providing certainty about their interpretation and application cannot be overstated. In Chapter 3, it was also seen that the definition of “dependant” in the Pension Funds Act is wide enough to cover all people who are dependent on the pension fund member.<sup>223</sup> This definition is not limited to biological dependants only. So it is submitted that allocating death benefits to nominated beneficiaries who do not qualify as dependants does not align with the objectives of pension fund establishment. It creates unnecessary competition between dependants and the nominated beneficiaries. And it places an unnecessary burden on pension fund trustees to investigate and identify all potential beneficiaries.<sup>224</sup>

This unnecessary competition between dependants and the nominated beneficiaries may be avoided by amending section 37C of the Pension Funds Act to delete the provision mentioning nominated beneficiaries.<sup>225</sup> The discretionary powers of pension fund trustees should also be restricted.<sup>226</sup> This approach is clearly followed in Germany, where potential beneficiaries of death benefits are

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<sup>221</sup> See Chapter 3 for a discussion of the challenges pension fund trustees face with regard to the distribution of death benefits.

<sup>222</sup> See Chapter 1, par 2.4 for a discussion of the objectives of pension fund establishment.

<sup>223</sup> See Chapter 3, par 2.2.1 for the definition of a “dependant”.

<sup>224</sup> See Chapter 3, par 3 for a discussion of the allocation of death benefits.

<sup>225</sup> See s 37C(1A) of the Pension Funds Act. This section introduces “nominated beneficiaries” among the list of potential recipients of the death benefit.

<sup>226</sup> See par 5.7 above for a discussion of the recommendations regarding the discretionary powers of pension fund trustees.

restricted, and pension fund members are allowed to determine the percentage of the benefit that should be allocated to potential beneficiaries.<sup>227</sup>

The proposed amendment of section 37C of the Pension Funds Act is intended to remedy the deficiencies in the distribution of retirement fund death benefits. These deficiencies limit the system's effectiveness in achieving its objective of providing income security on retirement or on the death of a member before retirement. This improvement will ensure that pension funds are fairly administered and death benefits fairly distributed to dependants. It is evident from the findings of this thesis that new legislation on pension funds, or amendments to section 37C of the Pension Funds Act, are long overdue. It is submitted that executing these changes would resolve many issues concerning pension fund trustees identified in this thesis. In this part of the thesis dealing with proposals to amend the statute, the recommended insertion into the Pension Funds Act is underlined. By contrast, the recommended deletion of the specific wording in the Pension Funds Act is "struck out". This approach was selected rather than the one generally adopted in the amendments to statutes which is slightly more complicated.<sup>228</sup> It is submitted that section 37C of the Pension Funds Act should be amended to read as follows:

### **Section 37C Disposition of pension benefits upon death of member**

(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or **dependants under the primary group of potential beneficiaries.**<sup>229</sup>

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<sup>227</sup> See Chapter 5, par 7, where the distribution of retirement fund death benefits in Germany is discussed.

<sup>228</sup> See Cassim *Critical Analysis* in Chapter 8, n 1, following a similar approach, although referring to the position of company directors.

<sup>229</sup> See par 5.9 above for a description of the primary and secondary groups of beneficiaries. This description must be the default position in the fund rules regulating the distribution of death benefits.

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

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

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member **under the primary or secondary group of potential beneficiaries, the benefit** if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

**(d) any dependant of the fund member shall be entitled to written reasons from the fund following the distribution of the death benefit.**

(2)(a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant ~~or nominee~~ contemplated in this section shall be deemed to be a payment to such dependant ~~or nominee~~, if payment is made to—

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by—

(aa) the member;

(bb) a major dependant ~~or nominee~~, subject to subparagraph (cc); or

(cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor



dependant ~~or nominee~~, or a major dependant ~~or nominee~~ not able to manage his or her affairs or meet his or her daily care needs;

(ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant ~~or nominee~~; or

(iii) a beneficiary fund.

(b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.

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

(4)(a) Any benefit dealt with in terms of this section, payable to a major dependant ~~or major nominee~~, may **shall** be paid in more than one payment **unless** if the dependant ~~or nominee~~ has **provided compelling reasons in writing consented thereto in writing for payment of lump sum and such payment shall be limited to twenty-five per cent of the death benefit due to such dependant or where the amount due is minimal:**<sup>230</sup> Provided that-

(i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; ~~and~~

~~(ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.~~

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

(5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No, 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

It is submitted that allocating death benefits to nominated beneficiaries who do not fall within the definition of a fund member's "dependant" does not serve the purpose of section 37C of the Pension Funds Act and does not align with the objectives of pension fund establishment.<sup>231</sup> By contrast, restricting the distribution of death

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<sup>230</sup> See par 5.10 above in this regard.

<sup>231</sup> See Chapter 3, par 2.2, where the allocation of death benefits is discussed.

benefits to “dependants” aligns with the purpose of section 37C of the Pension Funds Act and the objectives of pension fund establishment. Such a restriction would also reduce or remove the pension fund trustees’ burden of balancing the interests of dependants and nominated beneficiaries. And it would reduce or remove unnecessary competition for a share of the death benefit between dependants of the deceased fund member and nominated beneficiaries, as is currently the case under section 37C(1)(bA) of the Pension Funds Act.<sup>232</sup> Removing section 37C(1)(bA) would not represent a new approach to distributing retirement fund death benefits in South Africa. This subsection was only introduced to section 37C of the Pension Funds Act in 1988. By contrast, the section itself was introduced into the Pension Funds Act in 1976.<sup>233</sup>

*5.15 Proposed statutory amendment: section 37 of the Pension Funds Act (on penalties)*

Section 37 of the Pension Funds Act deals with the penalties imposed on anyone who contravenes or fails to comply with sections 4, 19, 13A, 13B, or 31 of the Pension Funds Act. It was shown that no penalties are provided if board members contravene section 37C of the Pension Funds Act.<sup>234</sup> It is suggested that these penalties should be stated in the statute. It is also suggested that the Pension Funds Act should prescribe criminal liability for pension fund trustees in certain instances of gross negligence, fraudulent conduct, wilful misconduct, or gross abuse of the position that a person occupies as a trustee. The proposed amendments would not leave trustees wholly unprotected. The provisions of section 7F of the Pension Funds Act, where the court deems necessary, protect board members who have acted independently, honestly, and reasonably.<sup>235</sup> However, this protection is not extended to board members guilty of wilful misconduct or wilful breach of trust.<sup>236</sup> It

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<sup>232</sup> See in this regard Chapter 3, par 2.2, where subsection 37C(1)(bA) of the Pension Funds Act is discussed, and par 5.14 below, where this suggestion is developed.

<sup>233</sup> See in this regard Chapter 2, par 2.2 and n 26, where the origin of occupational retirement funds in South Africa and a brief history of s 37C of the Pension Funds Act are stated. Paragraph (bA) was inserted into s 37C of the Pension Funds Act by s 6(a) of the Financial Institutions Amendment Act 51 of 1988 and substituted by s 21 of the Financial Institutions Second Amendment Act 54 of 1989 and by s 5(b) of the Pension Funds Amendment Act 22 of 1996.

<sup>234</sup> See Chapter 3, par 6.5.5.1, where the criminal liability of pension fund trustees is discussed.

<sup>235</sup> See Chapter 3, par 6.5.5, where s 7F of the Pension Funds Act is discussed.

<sup>236</sup> Reference to wilful misconduct and/or wilful breach of trust means that the board member (pension fund trustee) did not act honestly.

is also hoped that these recommendations would enhance the distribution of the death benefits and the protection of dependants' and/or nominated beneficiaries' rights. It is submitted that these recommendations are necessary and should enhance the accountability of the pension fund board and its board members.

It is therefore recommended that section 37(1)(a) of the Pension Funds Act should be amended by adding section 37C to the provisions listed in paragraph (a) of the subsection. It is proposed that section 37(1)(a) of the Pension Funds Act should thus read as follows:

**Section 37 Penalties**

(1) Any person who—

(a) contravenes or fails to comply with section 4, 10, 13A, 13B, 31 or **37C**;

(b) ...

(c) ...

is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or both such fine and imprisonment.

*5.16 Policy considerations*

The study highlighted specific essential policy issues. The Government has a responsibility to see that retirement funds operate in an environment conducive to their growth and sustainability. It was shown that besides providing financial support to pensioners and their surviving dependants, retirement funds also play an essential role in fostering the markets and the South African economy as a whole.<sup>237</sup> The Government must thus provide regulatory and legislative infrastructure helping pension fund trustees distribute retirement fund death benefits efficiently.<sup>238</sup> The Government's recognition of its role in this regard appears from various policy documents already issued.<sup>239</sup> The Government should ensure that clear objectives

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<sup>237</sup> See Chapter 1, par 2 for a discussion of the importance of occupational pension funds for the South African economy.

<sup>238</sup> See Chapter 2, par 7 for a discussion of the legislative and regulatory structures in South Africa.

<sup>239</sup> See in this regard Chapter 1, n 2; and n 241 below.

support policies related to the distribution of retirement fund death benefits and that there are systems to monitor trustees' compliance with applicable laws when distributing the death benefits. Pension Fund Circular 130 provides that pension funds should have a code of conduct. However, this code must ensure that pension fund trustees distribute retirement fund death benefits ethically, meeting legal requirements and showing consideration of the role that pension funds play in society.<sup>240</sup>

In 2020, the Government published the Second Draft of the Conduct of Financial Institutions (COFI) Bill.<sup>241</sup> This Bill contained suggestions for amending the Pension Funds Act, including section 37C.<sup>242</sup> It is submitted that the suggested amendments do not address the shortcomings of the section, as pointed out in Chapter 3 of this thesis. These shortcomings include the lack of a clear definition of “equitable distribution” of death benefits,<sup>243</sup> the unnecessary competition between dependants and nominated beneficiaries to receive death benefits,<sup>244</sup> and the expansive definition of a “dependant”.<sup>245</sup>

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<sup>240</sup> See Chapter 3, par 5.4.3, where codes of conduct in South Africa are discussed.

<sup>241</sup> See the National Treasury Notice 519 of 2020 “Financial Sector Regulation Act (9/2017) (FSR Act): Second draft Conduct of Financial Institutions Bill, 2020: Publication for public comment” *Government Gazette* number 43741 of 29 September 2020, available at [https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/CoFI Bill.pdf](https://www.saica.co.za/Portals/0/Technical/LegalAndGovernance/CoFI%20Bill.pdf) (last accessed on 30 June 2021).

<sup>242</sup> See s 47 of Schedule 5 (Laws amended and repealed) of the COFI Bill containing the suggested new provisions of s 37C of the Pension Funds Act.

<sup>243</sup> See Schedule 5 (Laws amended and repealed) to the COFI Bill. Section 47 of the Schedule 5 contains the suggested new provisions of s 37C of the Pension Funds Act. The new s 37C(1)(ii) still refers to equitable distribution of death benefits to dependants without defining the concept “equitable”. This new subsection states: “(ii) Where the retirement fund has successfully traced a dependant or dependants, the benefit must be paid to the dependant or, as may be deemed equitable by the fund, to one of the dependants or in proportions to some of or all the dependants, within two months of the fund tracing the dependant.”

<sup>244</sup> See Schedule 5 (Laws amended and repealed) to the COFI Bill. Section 47 of the Schedule 5 contains the suggested new provisions of s 37C of the Pension Funds Act. The new s 37C(1)(v) still refers to equitable distribution of death benefits to dependants and nominated beneficiaries without defining the concept “equitable”. This new subsection states: “(v) If a member has a dependant and the member has also designated in writing to the retirement fund a nominee to receive the benefit or a portion of the benefit that is specified by the member in writing to the retirement fund, the fund must within 12 months of the death of the member **pay the benefit or a portion of the benefit to the dependant or nominee in the proportions that the board may deem equitable**, subject to subparagraph (vi)” (my emphasis).

<sup>245</sup> See s 1 of the Schedule 5 of the COFI Bill containing the suggested new terms in the Pension Funds Act. COFI does not amend the definition of a “dependant”.

The analysis of pension fund trustees' role in distributing death benefits in South Africa has highlighted some of their challenges. At the same time, it is recognised that occupational pension funds in South Africa play a vital role in providing financial assistance to pension fund members on retirement and to their surviving dependants if they die before retirement. So Government policies, legal provisions, and the role of pension fund trustees in distributing the death benefits must all be aligned with the objectives of the State in providing social security and alleviating poverty. The success or failure of the South African State in bringing to life the social objectives of the establishment of occupational pension funds, alleviating poverty, and enhancing the access of individuals to social security, as provided for in the Constitution,<sup>246</sup> the Pension Funds Act (section 37C),<sup>247</sup> and the *National Development Plan 2030*,<sup>248</sup> depends on how the pension fund trustees interpret and apply their discretionary powers in distributing the retirement fund death benefits.

It was shown that in South Africa, various policy documents and legal instruments encourage the provision of social security and the alleviation of poverty.<sup>249</sup> Realising the intentions or objectives of these policies depends on various factors: the competence of those who carry them out, the legislation to support them, and the remedies for those intended to benefit from them.<sup>250</sup> If the policies do not support each other<sup>251</sup> or the applicable legislation is unclear,<sup>252</sup> the objectives of the policies may not be achieved.

## **6 CONCLUDING REMARKS**

The State plays a key role in the distribution of retirement fund death benefits. The research has shown some areas in which improvements could be made and

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<sup>246</sup> See Chapter 2, par 5 for discussion of the notion of social security.

<sup>247</sup> See Chapter 3, par 1 for a discussion of s 37C of the Pension Funds Act.

<sup>248</sup> See Chapter 2, par 5 on the *National Development Plan 2030*.

<sup>249</sup> See, for example, Chapter 2, par 5 referring to the *National Development Plan 2030*, the Constitution, and s 37C of the Pension Funds Act.

<sup>250</sup> See Chapter 3, par 6 for a discussion of the remedies available to aggrieved beneficiaries.

<sup>251</sup> See Chapter 2, par 5.1 n 148 for a discussion of the role of the National Treasury and the Department of Social Services.

<sup>252</sup> See Chapter 3, par 3 for a discussion s 37C of the Pension Funds Act and the lack of legal clarity.

suggested that some be executed through legislative intervention to provide legal clarity and certainty.

Providing an adequate, secure, equitable income to retirees and/or their dependants if the fund member dies before retirement should be the goal of every retirement income system.<sup>253</sup> This thesis considered various factors hampering the efficient distribution of retirement fund death benefits in South Africa. It is submitted that section 37C of the Pension Funds Act, dealing with the distribution of retirement fund death benefits on the fund member's death, has considerably assisted the achievement of this objective. The research undertaken for this thesis has shown that amendments to some of its provisions may contribute to legal certainty.

The recommendations stated above are intended to accord with the purposes of section 37C of the Pension Funds Act. It is hoped that they will contribute to the realisation of these objectives by

- lessening the burden of the State in terms of the number of people who rely on its social grants;
- ensuring that pension fund trustees are qualified and competent to perform their duties;
- ensuring certainty, efficiency, and transparency in the process of distributing the death benefits, thus reducing the number of disputes or complaints that come before the courts and the Adjudicator;
- providing effective remedies to dependants and/or nominated beneficiaries to enforce their rights; and
- ensuring accountability on the part of pension fund trustees.

Pension funds can be a vehicle for social transformation. If trustees demonstrate competence and transparency in their decision-making, confidence in and the

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<sup>253</sup> See Chapter 1, par 2.4, where the societal objectives of the establishment of retirement funds are discussed. The objectives of establishing retirement funds are to provide financial support to fund members at retirement and financial support to dependants of a fund member who dies before retirement.

reputation of this vital sector would be enhanced. And it is required that the trustees should also remain adequately protected so that highly skilled persons can be recruited as trustees. It is hoped that adopting the recommendations made above in this final chapter of the thesis will contribute to the increased good governance of pension funds and greater transparency and accountability on the part of funds and trustees, and to ensuring that retirement fund death benefits are distributed fairly and can be sustained in line with the objectives for the establishment of retirement funds in South Africa. It is submitted that the distribution of retirement benefits should encompass the original objectives of the State in establishing retirement funds — the provision of income on retirement and the prevention of poverty in old age, as well as provision for surviving dependants if the breadwinner dies.

Many pension fund members look to their pension fund boards to satisfy their hopes and expectations of providing enough income for them on their retirement or for their surviving dependants should they die before then. This huge responsibility rests on the shoulders of pension fund trustees. So they should receive all the necessary assistance through clear guidelines and legal provisions on how to perform their duties, including the distribution of retirement fund death benefits. Dependants and other qualifying beneficiaries should also have mechanisms to enforce their rights when these are threatened or infringed. As Nolan summarises this delicate task:

POWER held by fiduciaries is subject to many forms of control. All of these forms of control have to strike a balance between competing objectives. They must seek to curb the harm that the holder of power can inflict on those affected by it. Yet they must be careful not to abolish the discretion inherent in power itself.<sup>254</sup>

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<sup>254</sup> Nolan 2009 *CLJ* 293 at 293.

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