

**THE LEGAL OBLIGATIONS OF RETIREMENT FUND TRUSTEES IN RESPECT OF
SECTION 37C OF THE PENSION FUNDS ACT 24 OF 1956**

by

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submitted in accordance with the requirements for the degree of

MASTERS OF LAW

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: PROFESSOR M SIGWADI

FEBRUARY 2012

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ABSTRACT

Prior to the introduction of section 37C into the Pension Funds Act. 24 of 1956, the benefit payable as a result of the death of a member would devolve in accordance with his last will and testament or the provisions of intestate succession. The advent of section 37C brought a statutory regime which expressly excludes freedom of testation and rather looks to the board of a fund to distribute the death benefit. The board may only pay the dependants of a deceased (either factual or legal) or the persons he has recorded on his nomination form. The section relies on the board to exercise its discretion in a manner which results in an equitable distribution of the death benefit notwithstanding that it does not provide any guidelines as to how this is to be achieved. Accordingly, numerous decisions are challenged by the identified beneficiaries because they are unhappy with the manner in which the board exercised its discretion. This results in complaints being lodged with the Pension Funds Adjudicator. Many such complaints should never have arisen or could have been easily solved by a proper exercise of discretion on the part of the board. The problem is that these complaints are adding to an already burdened office. Adequate training and understanding of the obligations of section 37C would probably result in fewer complaints to the Adjudicator. This dissertation examines whether the determinations which have been issued by the Adjudicator in respect of section 37C indicate a need for such training and understanding and, if they do, what possible remedies there might be to cure such a problem. Recommendations arising from this are that trustees must receive training focused on section 37C and proposed practical protocols to assist a board when exercising its duty to make an equitable distribution.

KEY TERMS: death benefits; pension funds; section 37C; equitable distribution; dependants and nominees; board of trustees; training; adjudicator determinations; discretion; standard operating procedure; fiduciary duties; nomination form.

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PREFACE

My interest in pension law only began when I started my articles of clerkship in January 2006 at a law firm which has a specialist employee benefits practice. In the intervening years between being a candidate attorney and writing this dissertation I have practiced in the employee benefits department providing advice to boards of trustees of pension funds, participating employers in such funds and individual members or the beneficiaries of such members.

What struck me when I began to work in this field was that I knew many people who were members of funds or who had retired from such funds but I had never once heard anyone speak about their freedom of testation being limited by section 37C. I wondered if this was because they did not think it important or because they were unaware of it. I tested my new found knowledge out on friends and family and was shocked to find that none of them knew that the benefit payable on their death would not necessarily be distributed in accordance with the nomination form that they had completed.

I have since trained a number of boards and am amazed that even with the funds of major JSE listed entities and within the employer appointed trustees that there is often at least one trustee who is shocked to learn about the consequences of section 37C. What follows is usually a fifteen minute question session aimed at figuring out how to circumvent the operation of section 37C.

From my exposure to boards and given that the impact of section 37C is far reaching and has consequences for every member of a fund, I began to appreciate that there was still more to be done on ensuring that death benefit distributions are made in terms of the Act. I also began to appreciate that if Boards could get a distribution “right” there was less chance that a complaint would be lodged, which would in turn have an impact on the capacity within the Adjudicator’s office to make determinations. This dissertation is my attempt at making some of the knowledge which I have obtained available to the boards of funds.

Acknowledgments

First and foremost I would like to thank the almighty for the strength and knowledge which he has given me and for the opportunities which I have had which have made writing this dissertation possible.

None of this would have been possible without the love and support of my family and friends and the encouragement which they have given me over the years. My heartfelt thanks go out especially to my husband Conrad, my children Declan and Mahaylia and to my mum and brother for the years of support. Conrad you were most definitely my inspiration and kept me going when I thought it was time to give up. Thank you all for your patience and your love and understanding even when I was at my most difficult.

To my in-laws, Charles and Cynthia David, who had faith that I would pass.

To Hansueya Naidoo who sacrificed her time and who had the most difficult job of all, understanding my scribbles and transforming them into a document that made sense. Your help can never be repaid. To Rebecca Jansch and Daniel Areias, for their assistance and putting up with all the logistics involved in writing this dissertation, I am grateful. I appreciate all the help and thank you sincerely.

None of this would have been possible without the unfailing assistance of my nanny, Lindi Nkosi, who made sure my kids were fed and entertained while I worked at trying to write a half decent submission.

To David Geral, my pension law mentor, who took time to teach me and gave me an opportunity to think. I thank you for encouraging me to do this and for willingly sharing your knowledge.

Finally, to Professor Sigwadi, my supervisor, who showed such great patience and understood that sometimes my work commitments came first. I thank you for guiding me on this journey and for being willing to take on this task.

CHAPTER 1: OVERVIEW OF SECTION 37C

1. Overview

1.1 Introduction

1.1.1 In relation to the size of the economy, South Africa has one of the largest pension fund industries in the world, with 9 million members and assets in excess of R2 trillion. Pension funds pool funds from both employers and employees, with the aim of providing retirees and their beneficiaries with income upon the retirement, death or disability of a member. This guards against poverty in old age and reduces the potential dependency on the government.¹

1.1.2 In line with government's policy objectives to reduce potential dependency on itself, the Pension Funds Act (hereinafter referred to as the Act) expressly makes provision for the consideration of financial and legal dependency in the event of the death of a member of a pension fund arrangement. The intention being that the correct distribution of a death benefit will result in a lower risk that persons will have to have recourse to the State for monetary social grants.

1.1.3 Section 37C regulates the payment of benefits upon the death of a member of a pension fund, which fund is subject to the provisions of the Act. Section 37C reads as follows:

“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

¹ National Treasury “A safer financial sector to serve South Africa better”2011 at page 49.
National Treasury Policy Document: www.treasury.gov.za, last visited 30 September 2011.

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, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants.*
- (b) If the fund does not become aware of or cannot trace any dependant of the member within 12 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.*
- (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 Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund.*

(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*

- (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."*

1.1.4

Notwithstanding the express wording of section 37C, in recent years there has been a marked increase in the number of cases referred to the Pension Funds Adjudicator (hereinafter referred to as the Adjudicator) for determination, which have emanated from the application of section 37C, a section which was intended by the Legislature to streamline the distribution of death benefits and alleviate the potential burden on the State. In light of the increased referrals, the question which begs to be answered is whether poor drafting has resulted in section 37C becoming a minefield of potential mistakes or whether the very people responsible for giving effect to section 37C are failing in their responsibilities.

1.1.5

Section 37C regulates the distribution of death benefits to the identified dependants or nominees of a deceased pension fund member. The foundation of the section is that the death benefit does not form part of a deceased member's estate but is rather required to be distributed in accordance with a legislated scheme which gives preference to factual need and dependency above a member's freedom to dictate the manner in which the benefit should be distributed upon his or her death.

1.2 Problem

- 1.2.1 It is evident from the wording of section 37C that it imposes an onerous duty on the Board which requires the Board to determine dependency and to effect an equitable distribution among a deceased member's dependants and nominees, notwithstanding the fact that in most instances the Board has no prior knowledge of the parties concerned or the relationship which they shared with the deceased member, and then to effect payment in a reasonable manner in accordance with the options provided in the section. Accordingly, section 37C requires direct input from the Board with regard to who qualifies as a dependant and the amount which is to be allocated to each beneficiary.
- 1.2.2 Thus, by its very nature, section 37C requires the Board to make value judgments and as such provides great scope for error. It is clear from the determinations which are published on the website of the Office of the Adjudicator that the matters which arise for determination are usually due to the negligence or lack of understanding of the Board as to what section 37C requires of them and different aspects of duty which are required at the different stages of a death benefit distribution.
- 1.2.3 Section 37C is recognised in the retirement industry as being a section which is fraught with potential difficulties and which requires a great deal of technical knowledge, which can be extremely prejudicial to both the trustees, who are expected to apply it, and to those who are intended to benefit from its provisions. The Act itself gives very little indication as to how section 37C should operate or be applied.
- 1.2.4 Prior to the establishment of the office of the Adjudicator, Boards faced fewer instances of having their determinations tested before any tribunal. The introduction of the Adjudicator's Office has without doubt placed greater scrutiny on the actions of Boards. The Adjudicator's Office gives fund members a free dispute resolution mechanism, as opposed to the normal litigation procedures in South African courts which are very

expensive. Due to easy access to the Adjudicator's Office many funds and their Boards are now exposed to complaints and are at a greater risk of having their decisions overturned and replaced, causing prejudice to the Fund and its members and exposing the trustees to risk.

1.2.5

The retirement funding industry is very much a closed industry which is reliant upon internal legal advice or legal advice obtained from senior legal counsel, accordingly the legal knowledge garnered remains within the ambit of a close knit group of individuals, resulting in very little information filtering down to the general public or to the Boards of smaller pension funds. It is not unusual in the pension fund environment to find that a Board is unaware of the full extent of their obligations unless they have specifically requested a legal opinion which considers such duties. The retirement fund industry is one which, like any other business is driven by profit, accordingly the legal opinions which are received often take into account the detrimental effect on the business of a fund or the impact on the ability to administer the fund or the actual practice in the industry, in order to substantiate any deviance between a practice and compliance, rather than providing a strict legal interpretation of the manner in which section 37C should be applied. Accordingly, irregular practice, even among the very large pension funds and the large administrators, tasked to provide administration services to pension funds, continues to abound, as the answers to complex legal questions around section 37C remain simply legal opinions which are hardly ever tested in a court. Further, those decisions, in respect of section 37C, which have been given by the Adjudicator, lack precedential value and are hardly ever tested in a court, or where an appeal is noted in accordance with section 30P of the Act, the outcome is rarely ever reported. Accordingly, very little industry change emanates as a result of the Adjudicator's determinations and interpretation of the various aspects of section 37C, although some funds use the determinations as guiding instruments when making decisions.

- 1.2.6 In light of there being no compulsory guidance for Boards on the manner in which section 37C should be applied and the anomalies and uncertainties which have, over time, attached to the application of section 37C, trustees have no clear understanding of what their role is when making a distribution or whether a distribution complies, in all respects, with section 37C. Given the potential prejudice which Boards, and individual trustees, can face if a distribution is incorrect it would be reasonable and logical to expect that they would be better equipped to ensure that the margin for making errors when effecting such distributions is very limited, however it appears that no such “equipping” is evident within the retirement funding industry.
- 1.2.7 Boards are provided with training but often such training only occurs rarely or the content is designed to be a crash course which covers the entire Act rather than focussing on specific aspects and like any form of training, people cannot ask relevant questions if they are not aware of the very essence of their obligations. The limited training provided to trustees is not sufficient and does not appear to equip a trustee to handle the diverse section 37C scenarios which are placed before him or her on a regular basis. It appears that what trustees require is a basic guideline on how a simple distribution should be made. Such a guideline should at the very least better equip trustees to handle more complex distributions.
- 1.2.8 An erroneous application of section 37C can lead to the distribution of a death benefit being incorrect, resulting in prejudice to beneficiaries (where they receive less than they should have received but for the incorrect distribution or are not considered at all in the distribution), the unjust enrichment of a beneficiary (where a beneficiary receives more than is equitable) and/or loss to the pension fund concerned (where the fund has incorrectly paid out to a beneficiary and is still required to make the corrected distribution but is unable to recover the overpayment). Ultimately the incorrect application of section 37C will be prejudicial to the entire membership of a fund as it may result in the fund bearing legal costs and/or having to make a further payment over and above what has

already been incorrectly paid out. Such instances are evident in the Adjudicator's decisions. Even our courts have made decisions which are detrimental to the fund concerned. In the unreported judgment in the case of *Botha v Cape Gate Management Provident Fund and Others*² the court set aside the decision of the Adjudicator which agreed with the Board's distribution of the benefit and ordered that the full death benefit payable be paid to the applicant. The fund in that matter was also ordered to pay the costs of the application. The fund then sought a declarator in which it argued that Ms Botha (the applicant) was required to seek payment of the amount from the beneficiary who had been paid by virtue of the incorrect distribution, that is, Ms Botha should institute enrichment proceedings to recover what should have been paid to her by the fund. The court³ in the declaratory application held that the judgment handed down in the initial case gave rise to a judgment debt against the fund in favour of Ms Botha. Accordingly, the Cape Gate Management Provident Fund and its members were prejudiced by the incorrect distribution made by its Board. As at the date of this dissertation the Cape Gate Management Provident Fund is still in negotiations to recover the overpayment but has had to make payment of the full death benefit to the applicant.

1.2.9

In light of the ever growing trend for judgments and determinations to require funds to make the correct distribution notwithstanding that they would be out of pocket, and placing the onus on the funds to claw back the overpayment from unjustly enriched beneficiaries⁴, it is imperative that Boards ensure that they have sufficient mechanisms in place which mitigate the risk of them making a distribution which could be classified by a judicial tribunal as being incorrect. Further, there is a need for greater understanding of the provisions of section 37C as such an understanding is likely to result in fewer referrals to the Adjudicator or fewer successful challenges and court decisions which are prejudicial to funds in general, a

² *Botha v Cape Gate Management Provident Fund and Others*, South Gauteng High Court (Johannesburg), Case No. 08/6618 (unreported).

³ *Cape Gate Management Provident Fund v Botha and Others* South Gauteng High Court (Johannesburg), Case No. 2010/5463 (unreported).

⁴ *Supra* footnote 2 at paragraph 26.

lower risk of prejudice to members and to individual trustees in particular.

- 1.2.10 Most cases which have come before the Adjudicator for determination show a common misunderstanding of the extent of the discretion afforded to trustees⁵, the reasonable efforts which need to be undertaken to ensure an equitable distribution and the manner in which death benefits may be dealt with. The aim of this dissertation is to attempt to provide trustees with an understanding of section 37C, to highlight the problem areas which arise within that section, to provide possible legal interpretations as to how these problems can be resolved within the provisions of the Act and to provide a guideline to Boards on what considerations should be applied by them when called upon to make a distribution in accordance with section 37C. This dissertation is aimed at providing possible solutions to the lack of understanding and knowledge possessed by Boards in relation to the application of section 37C.

1.3 Hypotheses

- 1.3.1 The hypotheses on which this dissertation is based are the following:

1.3.1.1 The high number of cases dealing with section 37C indicates that a great number of Boards do not have adequate training in respect of the provisions of section 37C and the role which they are required to play in ensuring compliance with that section. Boards should be receiving more training on how this section should be interpreted and applied.

1.3.1.2 The practice within the retirement funding industry does not reflect the legal position as provided for by the Act. An alignment of the practice in the industry and the proper interpretation of section 37C will result in fewer referrals to the Adjudicator and decrease the risk faced by Boards and individual members of the Board.

⁵ *Jones v National Technikon Retirement Fund* 2002 (2) BPLR 2960 (PFA) at paragraph 15.

1.3.1.3 Increased administrative steps which includes a proper recordal of the details of individuals who are dependent upon a member or whom the member perceives as being dependent upon him or her will mitigate the potential prejudice faced by the Board and/or the fund and its members.

1.3.1.4 A breakdown and understanding of the duties which attach to section 37C will give Boards a greater understanding of what is required of them and will enable them to function at their best when considering a distribution of a death benefit.

1.4 Assumptions

1.4.1 For purposes of this dissertation the following is assumed:

1.4.1.1 The nature of a pension fund is a well understood concept and the legal consequences of registration of a fund in terms of the Act are accepted and known to the readers of this dissertation.

1.4.1.2 The problems attaching to section 37C are not as a result of defects in the section itself but result from the application of the section by trustees of pension funds. Accordingly, poor drafting by the Legislature will not be considered in this dissertation as a potential reason for the incorrect application of section 37C and the numerous complaints which arise as a result of its application.

1.4.1.3 The majority of the cases referred to the Adjudicator, which related to section 37C, were as a result of trustee negligence or lack of understanding of the workings and requirements of section 37C.

1.4.1.4 Boards have an understanding, at the very least, of which persons should be considered for qualification as potential beneficiaries, that is, it is assumed that Boards are aware of which persons

should be considered as potential beneficiaries.

1.4.1.5 Only the fiduciary duties of a Board as set out in common law and the Act are relevant for purposes of a section 37C distribution. None of the plethora of financial legislation or any other legislation has an impact on a Board's duty to effect an equitable distribution. Accordingly, the impact of such legislation will not be analysed or considered in this dissertation.

1.4.1.6 The rules do not contain any additional duties to those contained in the Act.

1.5 Conclusion

1.5.1 Section 37C has over the years received severe scrutiny and numerous relevant forums (such as the Pension Lawyers Association, the Principal Officers Association and the Institute of Retirement Funds) have debated its place within South African society and the duties which it places on the Board. Section 37C has formed the basis for numerous discussion papers and has been the focus of many seminars and conferences.

1.5.2 The paternalistic intention which informed the section and its far reaching consequences, in the pension fund context, of limiting a member's ability to determine who should benefit upon his or her death, has received a great deal of criticism. The numerous cases which are before the Adjudicator each year appear to indicate a clear indication that Boards are failing to achieve the purpose of the section, there has been no move by the Legislature to effect any amendments to the section. In light of my assumption that there is no flaw in the section itself I will not consider the merits of the Legislature lack of intervention but will rather take such lack of intervention as strengthening the assumption that there is no flaw in the section therefore no intervention is required by the Legislature. It would appear that the solution which will result in fewer death distribution referrals to the Adjudicator is one which must be found within the context

of section 37C as it currently reads. Accordingly, the pension funding industry needs to consider interventions which will result in fewer referrals being sent to the Adjudicator. A decrease in section 37C referrals to the Adjudicator will decrease the burden on an already over wrought process, which will have a direct positive impact on the industry, as the Adjudicator will then have more time at his or her disposal to consider other issues plaguing the industry.

1.5.3

The stakeholders within the retirement funding industry can be very useful in reducing the risk of a death benefit distribution being taken to a tribunal for consideration but such assistance should take the form of ensuring that Boards are given as much training as possible on the workings of section 37C and their role in ensuring an equitable distribution. Many administrators of pension funds and consultants to such funds have over the years obtained a greater understanding of the workings of the section through the views expressed by the legal fraternity in various opinions, such understanding should be passed on to Boards. However, even if no other stakeholder in the retirement fund industry sought to implement change in the manner in which section 37C is implemented, given that the section places a duty on the Board and no other person or entity, a prudent Board would formulate processes and protocols which seek to reduce the litigation and prejudice which arises in respect of death benefit distributions. Accordingly, each Board has to seek to reduce such litigation. The starting point of such an end goal is to gain an understanding of the duties which the Board needs to satisfy and then develop standard operating procedures or protocols which seek to achieve such an end result. For purposes of this dissertation I intend to provide a Board with an understanding of section 37C and with recommendations which are aimed at protecting against death benefit allocations which are incorrect and which cannot be justified by a Board.

CHAPTER 2: RATIONALE FOR INTRODUCTION OF SECTION 37C**2. Rationale****2.1 Introduction**

2.1.1 It is evident from the numerous discussion papers, including but not limited to the policy paper issued by National Treasury⁶ that the Legislature regards pension assets as a critical and essential component of not just a person's rights but also the economy of the country. It has therefore established a mandatory scheme in terms of which a death benefit has to be distributed.⁷

2.1.2 Section 37C regulates the payment of death benefits, that is, the section only becomes applicable where the rules of the fund in question provide for the payment of a lump sum benefit upon the death of a member. Section 37C, contrary to the practice of a number of funds, does not regulate instances where insurers are required to make payment directly to the deceased's nominated beneficiaries. Such scenario occurs where the risk policy beneficiary is not a fund. Accordingly, the distribution of group life policies, which exist outside of a retirement funding arrangement, are not regulated by the provisions of section 37C and must be distributed in accordance with the deceased member's wishes as recorded in the insurance nomination form which was completed by the deceased.

2.1.3 Although, one of the assumptions is a basic understanding of the provisions of section 37C, I will nevertheless mention that Boards face great risk when they allocate the benefits of an insurance policy, which exists outside a retirement funding arrangement, in accordance with the provisions of section 37C. Such an action could result in the nominated beneficiary of the policy seeking financial redress against the Board or the fund for prejudice suffered as a result of the Board incorrectly deeming the

⁶ *Op Cit 1* at page 49

⁷ *Gowing v Lifestyle Retirement Fund and Others* PFA/WE/9248/2006/KM at paragraph 7.2.

benefit payable in terms of a group life policy to be a death benefit as contemplated by the Act.

2.1.4 There have been numerous writings which have considered the different nuances of the section⁸ and it is not necessary to devote much space to a reconsideration of what should, if a person occupies a role of a member of the Board, at the very least be a minimum understanding of the section. For purposes of this dissertation it is only necessary for me to give the reader a simple understanding of section 37C which is intended to equip the reader to understand the more complex issue of the duties of the Board when effecting the distribution required by section 37C.

2.2 Freedom of testation

2.2.1 Section 37C did not form part of the Act when it was enacted in 1956 and was only inserted into the Act in 1976. Section 37C was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of a deceased member. Section 37C specifically restricts an individual's freedom of testation in order that no dependants are left without support. This is intended to indirectly decrease the burden on the State to provide for these persons and promotes social protection, which is to be implemented by Boards.⁹

2.2.2 In the case of *Mashazi*¹⁰, Judge Hussain, when dealing with a complaint regarding the distribution of a death benefit, stated that section 37C

⁸ See Marx GL and Hanekom K *The Manual on South African Retirement Funds and Other Employee Benefits* 2009 ed (Lexis Nexis Durban 2009) and Hunter R *et al The Pension Funds Act: A commentary on the Act, regulations, selected notices, directives and circulars* 2010 ed (Hunter Benefits Law Johannesburg 2010). These are the main publications from which a clear understanding pension funding can be obtained. There are very few academic writings in this specialized area of law. All relevant academic literature has been used and referenced in this dissertation. There are a number of commercial articles and an academic writing which have not been used as they are not relevant to the topic under discussion. The academic article which I have read but which I have not used is: Mtendeweka Owen Mhango "An examination of the accurate application of the dependency test under the Pension Funds Act 24 of 1956" (2008) 126-135 SA Merc LJ.

⁹ Per Hussain J in the judgment in *Mashazi v African Products Retirement Benefit Provident Fund* 2003 (1) SA (W) at 632H-J, [2002] 8BPLR 3703(W) at 3705-6.

¹⁰ *Ibid* at paragraph 6.

serves a social function. It was enacted to protect dependency even over the clear wishes of the deceased. The learned judge accepted that section 37C specifically restricts freedom of testation in order that no dependants are left without support and specifically excludes the benefit from the assets of the estate of a member.¹¹

2.2.3

The intention which is given effect to by the provisions of section 37C is evident in the decision of *Dobie NO v National Technikon Retirement Pension Fund*.¹² In *Dobie*, the deceased member nominated his estate as the beneficiary of his death benefit. The Board of the National Technikon Retirement Pension Fund duly paid the benefit into the deceased member's estate. A complaint was subsequently lodged with the Adjudicator, by the executor of the estate, regarding the payment of interest. The determination however contained legal observations regarding the application of section 37C which are worth considering. The Adjudicator pointed out that:

*“the purpose of section 37C is to restrict a deceased member's freedom of testation in relation to the benefits payable by the fund in the event of death. The guiding principle is that such assets do not form part of the deceased's estate and are required to be distributed in accordance with the statutory scheme which gives preference to need and dependency above the member's choice. The section imposes an onerous duty on the board of management of a fund to determine need and to effect an equitable distribution among the deceased's dependants and nominees.”*¹³

2.2.4

The legal position in South Africa, subject to common law and statutory law intervention, is that a person enjoys the freedom to determine upon whom his or her estate will devolve in the event of his or her death. The provisions

¹¹ *Ibid* at paragraph 7.

¹² *Dobie NO v National Technikon Retirement Pension Fund* (1999) 9 BPLR 29 (PFA) at page 36.

¹³ *Ibid.* at page 36.

of section 37C expressly alter a person's ability to determine who will receive the benefit of payment from his or her retirement fund, in the event of his or her death. Accordingly, section 37C is a statutory mechanism which alters a person's freedom of testation. Neither the provisions of the Intestate Succession Act¹⁴ nor the last will and testament of a deceased member can be used to determine the disposition of a death benefit other than where section 37C makes express provision for the death benefit to form part of the deceased member's estate.

2.2.5

The overarching provision of section 37C is that a death benefit payable by a fund does not become a part of the deceased fund member's estate except insofar as section 37C itself provides for such an inclusion.¹⁵ One of the main principles of section 37C is that members of a fund cannot dictate the manner in which the benefits payable upon their deaths, by a pension or provident fund, will be paid nor can members dictate to whom such payment will be made. Although it is usual practice within the retirement funding industry for members to complete a nomination form, such nomination form is not binding on the Board and serves only as guidance to the Board as an indication of the deceased member's wishes. The nomination form serves a limited purpose as it determines a deceased fund member's nominees but does not give them a greater right to the death benefit than the right of any dependant identified by the Board.¹⁶ The dilution of the member's freedom of testation together with the limited impact of a completed nomination form, is a very clear indication of the Legislature's intention of ensuring that no dependants of pension fund members, regardless of whether such dependants are factual or legal, should be left without financial support in the event of the member's death. This is

¹⁴ Intestate Succession Act 81 of 1987.

¹⁵ In accordance with section 37C(1)(b) of the Act, the death benefit or a portion thereof may be paid into the deceased's estate where no dependants can be identified but the deceased has nominated beneficiaries and the liabilities in the deceased's estate exceed the assets. In such a case an amount of the death benefit which equals the difference in the assets and liabilities of the deceased's estate must be paid into the estate. Further in accordance with section 37C(1)(c) of the Act if a fund cannot trace any dependants of a deceased member and such a member has not nominated any beneficiaries then the death benefit payable by the fund must be paid into the deceased member's estate.

¹⁶ *Reuters v Telkom Retirement Fund* 2003 (3) BPLR 4501 (PFA) at paragraph 12

intended to have the indirect effect of decreasing the burden on the State to provide for these persons and promotes social protection, which is to be implemented by Boards.¹⁷

2.3 Conclusion

2.3.1 The intention which informed the enactment of section 37C is the achievement of a social outcome. As stated above, the social outcome that is intended is that the dependants of deceased members do not become a burden on the fiscus. The allocation of the death benefit to such dependants is intended to give such persons financial means even after the death of the person on whom they were dependent, that is, the fund member. One of the consequences of section 37C is that the Board is then tasked with ensuring that a social purpose is achieved. Social aims and considerations differ from person to person and will by their very nature differ depending on the facts of a situation. Accordingly, achieving a social purpose within the context of a death benefit distribution which has no extenuating circumstances attached, is relatively easy, but being called upon to achieve a social outcome when the facts are complicated and the family situation is one which does not resound with the Board is a difficult but not impossible task. It is accepted that the task of the Board is a difficult one, such difficulty has often been acknowledged by the Adjudicator as is evident in the *Dobie*¹⁸ determination. Accordingly, by the very nature of the section it is inevitable that situations will arise where the intended social outcome envisaged by the Legislature, is not satisfied by the Board's distribution of a death benefit.

¹⁷ *Op Cit* at footnote 1 at page 49.

¹⁸ See *supra* at 12.at page 41.

CHAPTER 3: TRUSTEES ROLE**3. Role****3.1 Trustee duties**

3.1.1 Section 37C cannot be discussed in isolation, as a Board when acting in terms of that section is still required to ensure compliance with the other provisions of the Act. Accordingly, to the extent that the Act has overreaching sections which regulate performance by a Board then a Board would need to ensure compliance with such provisions as well as with section 37C. The Board has a fiduciary duty to both the fund and its members. This fiduciary duty exists in both the common law and statutory intervention, that is, is expressly recorded in the Act. Further a Board is also obliged to act in accordance with the rules of the relevant fund. Thus, if the rules record duties over and above those contained in law then the Board would also need to comply with those other duties when distributing a death benefit.

3.1.2 The Act, other relevant legislation and the different rules place onerous duties on Boards. The Board is tasked not only with the important duty of ensuring that the fund is run in a financially responsible manner and is maintained in a financially sound manner, but also with a further duty to the members of that particular fund. This multifaceted duty looks after the interests of at least two personas whose interests and outcomes may tend to diverge more often than not. The Board must at all times be aware of the duty it owes to the differing stakeholders and must be wary of taking decisions which are obviously prejudicial to one of the stakeholders for the benefit of the other. The duties of the Board are far reaching and are intertwined with numerous provisions of the Act. For purposes of this dissertation it is not necessary to consider all the facets of the Boards' duties. This dissertation will only consider the interplay between the fiduciary duties of the Board and section 37C. Accordingly, this dissertation will only consider the Board's duty to a fund and its members, at common law and in terms of the Act, when investigating and effecting an equitable distribution in terms of section 37C.

3.1.3 The Adjudicator in the *Dobie* determination made a profound observation of section 37C and stated the following:

“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 intention. The problem lies in the execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make senses of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even members of the board of management”¹⁹.

3.1.4 It is acknowledged, not just by the Adjudicator’s office, but throughout the retirement funding industry that the distribution of the death benefits payable by a Board is fraught with difficulty and is one of the areas in which the Board is most vulnerable and at the greatest risk of erring. Although the Act gives express guidelines as to who should be considered as a dependant for purposes of the section and the section places an obligation on Boards to effect a distribution in a specified manner, neither the Act nor the section expressly indicates to Boards what factors should be considered when the Board is called upon to give effect to the provisions of section 37C. This is where the wide discretion which has been granted to Boards becomes a pertinent and somewhat worrying issue as a Board is required to ensure compliance with its fiduciary duties by employing tools which it has formulated, if any.

3.2 Common law and statutory obligations

¹⁹ See *supra* at footnote 12 at page 41.

3.2.1 In order to fully understand what a Board is required to do to comply with the provisions of section 37C it is necessary to understand what common law and statutory duties a Board must adhere to. The common law duties of trustees are well established. These common law duties that are relevant to the relationship between a Board, a fund and its members have been codified and have been recognised in sections 7C and 7D of the Act.

3.2.2 The common law fiduciary duties of trustees were summarised as follows in the Mouton Committee Report:²⁰

***“To act with due care:** the standard of care required is greater than that of the reasonable person. The duty is to act with diligence. To ensure the above standard of care when matters relevant to the fund's administration and management are being considered, trustees should follow a carefully worked out agenda which will reinforce the discipline required. 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 thereto. **To act in good faith:** there are no degrees of good faith. This is important since any judgment of a trustee's action is based on an unqualified standard of good faith, e.g. a breach of good no matter how minor, means that the trustees' action is mala fides or in bad faith. There are no degrees of good faith, only good faith and mala fides. **To hold assets for the benefit of the fund and its members:** a trustee must be satisfied that only members and their beneficiaries benefit from the fund's assets. Thus a trustee must ensure that any person regarded by them as a beneficiary is indeed a beneficiary and correctly entitled to benefits. Therefore, for example, a trustee must receive adequate confirmation that anyone claiming to be a spouse or orphan and therefore entitled to receive a spouse's or orphan's pension, is indeed so entitled. **To avoid conflicts of interest:** The trustee is required to maintain an independent and*

²⁰ “Report of the Committee of Investigation into Retirement Provision System for South Africa”, 1992.

*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...**To hold assets for the benefit of the fund and its members:** A trustee may not have any personal interest in trust property...**Act with impartiality:** This means that all members must receive equal and objective treatment from the trustee. A trustee may not discriminate or act against the interest of one member to the benefit of others.”*

3.2.3 Numerous rulings by the Adjudicator take the view that the section 7C and D provisions of the Act introduced and constitute no more than a restatement of the existing law and are merely a codification of trustees’ common law duties.²¹ Section 7C(1) appears to say no more than that the board of management shall manage the fund in accordance with the rules and law while sections 7C(2) and 7D itemise the fiduciary duties and general duties that trustees or members of the board have in respect of the fund. A failure to comply with these requirements does not constitute an offence in terms of section 37 and there are no prescribed penalties.²²

3.2.4 Accordingly, for purposes of this dissertation it is not necessary to consider the impact of a Board’s common law fiduciary duties in respect of the provisions of section 37C as these duties are exactly the same as those which are recorded in sections 7C and 7D of the Act.

3.2.5 Section 7C²³ records the objects of the Board, which are in effect to

²¹ Marx GL and Hanekom K *The Manual on South African Retirement Funds and Other Employee Benefits* 2009 ed (Lexis Nexis Durban 2009) page 311.

²² *Ibid* at page 104.

²³ **7C.Object of board.—**

- (1) The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund.
- (2) In pursuing its object the board shall—
 - (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times,

direct and control the operations of the fund in accordance with the applicable laws and the rules of the fund. Section 7C provides that in pursuing its object the Board shall do the following:

- Take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times;
- Act with due care, diligence and good faith;
- Avoid conflicts of interest; and
- Act with impartiality in respect of all members and beneficiaries.

3.2.6 Section 7D²⁴ records the duties of the Board and requires a Board to do the following:

especially in the event of an amalgamation or transfer of any business contemplated in [section 14](#), splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

- (b) act with due care, diligence and good faith;
- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries.

²⁴ **7D. Duties of board.**—The duties of a board shall be to—

- (a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
- (b) ensure that proper control systems are employed by or on behalf of the board;
- (c) ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;
- (d) take all reasonable steps to ensure that contributions are paid timeously to the fund in accordance with this Act;
- (e) obtain expert advice on matters where board members may lack sufficient expertise;
- (f) 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.

- Ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the Board;
- Ensure that proper control systems are employed by or on behalf of the Board;
- Ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund;
- Take all reasonable steps to ensure that contributions are paid on time;
- Obtain expert advice on matters where Board members may lack sufficient expertise; and
- Ensure that the rules and the operation and administration of the fund comply with this Act, the Financial Institutions (Protection of Funds) Act²⁵ and all other applicable laws.

3.2.7 Accordingly, when effecting a distribution in accordance with section 37C a Board needs to ensure compliance not just with section 37C but also with the provisions of section 7C and 7D of the Act.

3.2.8 The considerations which a Board needs to contemplate when effecting a death benefit distribution are not confined within the Act. The Registrar also issues circulars and directives in terms of the Act which may be relevant to a death benefit distribution. It has been accepted that the circulars issued by the Registrar are not law and serve merely as guidance on what the Registrar considers to be good practice. Directives however have legal force and are binding on a fund, its board and members.²⁶ The Registrar has not issued any directives which are relevant to section 37C. The Registrar has however issued a circular

²⁵ Act 28 of 2001.

²⁶ Section 33 of the Act.

relevant to good governance²⁷ which records that a Board stands in a position of trust or fiduciary relationships to funds and therefore must act with integrity. PF Circular 130 clearly contemplates, amongst other tasks which are performed by a Board, the distribution of a death benefit and the discretion which a Board is called upon to exercise. The Registrar's recommendation to decrease the risk which attaches to such a wide discretion appears to be that a Board should introduce governance measures which require a certain standard of behaviour of a Board.²⁸ Accordingly, a Board which is called upon to make a distribution in terms of section 37C is required to comply with section 7C and 7D of the Act, the provisions of the section itself and to consider, but not necessarily comply with, the provisions of PF Circular 130. PF Circular 130 does not appear to add to the duties which must be complied with by a Board rather it is more of a guideline which seeks to foster compliance with sections 7C and 7D of the Act by expanding and explaining the manner in which the Board must act in order to meet its objects and duties.

3.3 Exercise of discretion

3.3.1 Notwithstanding the statutory requirements which must be complied with, a further complication and an added level of compliance attaches to the discretion which must be exercised in every death benefit distribution. The distinguishing feature of section 37C is the extent of the discretion which the Board is expected to exercise. All Boards must understand that where discretion is exercised it cannot be exercised in an arbitrary manner. Thus, even if a Board was to somehow comply with the Act but the exercise of its discretion was flawed, such a Board would be at risk of having its decision overturned or tasked to revisit it. Although a Board is not an administrative body, it is likely that administrative law principles will apply to the exercise of discretion by a Board. South African administrative law principles provide that a decision made by the Board should be made in a manner which makes the decision least

²⁷ "Good governance of retirement Funds", PF Circular 130, Financial Services Board, 11 June 2007, www.fsb.co.za, last visited 30 September 2011.

²⁸ *Op Cit* at paragraph 45.

susceptible to challenge.

3.3.2 Our courts have established a number of factors which need to be considered by an administrative body when exercising discretion. In order to make a challenge of their decision less likely these factors should be considered and adopted by the members of the Board when exercising discretion associated with section 37C. The factors which should be considered are the following:

3.3.2.1 The decision must not be taken for an ulterior purpose or motive;²⁹

3.3.2.2 The decision must not be taken in bad faith, that is, the decision must not be fraudulent or dishonest;³⁰ and

3.3.2.3 The members of the Board must apply their minds to the issue before them.³¹

3.3.3 The factors set out above are self explanatory and have been given much consideration by the Adjudicator. The failure to apply one's mind to an issue is the failure to exercise a power properly. This can result from the following:

3.3.3.1 A failure to decide or consider. This means that the Board members cannot simply ignore the decision before them as this would be an abuse of its discretion;

3.3.3.2 Consideration of all relevant factors and discounting of irrelevant factors;

3.3.3.3 Fettering of their discretion, for example by blindly or rigidly adhering to policies or guidelines;

3.3.3.4 The members of the Board cannot exercise their discretion in

²⁹ *Rikhoto v East Rand Administration Board* 1983 (4)SA 278 (W), this decision was confirmed on appeal in *Oos-Randse Administrasierraad v Rikhoto* 1983 (3) SA 595 (A).

³⁰ *Waks v Jacobs* 1990 (1) SA 913 (T).

³¹ *Johannesburg Stock Exchange v Witwatersrand Nigel Limited* 1988 (3) SA 132 (A) at page 322.

order to fulfil promises or assurances ; and

3.3.3.5 The members of the Board cannot take the decision in an arbitrary or capricious manner.

3.3.4 Notwithstanding the above, the discretion afforded to the members of the Board is fettered by the rules of the fund in question and the Act. The Board members in exercising their discretion must act in accordance with their duties, if any, which are set out in the rules and section 7C and 7D of the Act.

3.3.5 Accordingly, members of the Board may only exercise their discretion when performing their duties in terms of section 37C in a manner which would not result in their contravening their duties, as set out in the rules and the Act. It is therefore necessary for the members of the Board to consider the constraints placed on their discretion before making any decision regarding a distribution of a death benefit.

3.4 **Obligations imposed by section 37C**

3.4.1 Section 37C contains a three stage process that must be followed by a Board, in the event of a member's death, assuming that the rules of that particular fund provides for a lump sum benefit to be payable in the event of the death of a member. As stated previously where no lump sum benefit is payable, section 37C is irrelevant and cannot be invoked by a Board.³²

3.4.2 Section 37C tasks the Board to do the following:³³

3.4.2.1 to determine the potential beneficiaries to be considered in the distribution, that is, those persons who satisfy the definition of dependant³⁴ in relation to the deceased member and those

³² *Shuping v Senwes Pension Fund* (PFA/FS/4440/05/SG) at paragraph 5.1.

³³ The tasks are evident on a reading of the section.

³⁴ As defined in the Act: “**dependant**”, in relation to a member, means—

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

persons, if any, who have been nominated by the deceased member as his or her preferred recipients of the death benefit;³⁵

3.4.2.2 to determine what portions, in the Board's view, would be equitable benefits for each of the identified potential beneficiaries or, if there are only nominees, to determine the amounts which are required to be paid to the nominees in terms of the nomination form;³⁶ and

3.4.2.3 to determine the appropriate mode of payment to each of the identified beneficiaries, to whom the Board has decided to pay a benefit, and thereafter to effect payment.³⁷

3.4.3 Over the years major role players within the retirement funding industry including the numerous Adjudicators, have made important contributions regarding what are considered as being relevant considerations. However these considerations can only be applied by the Board once the Board is fully aware of what its primary duties are.³⁸

3.5 Communication to members

3.5.1 Before even considering the requirements of section 37C and the numerous duties placed on the Board, it is necessary to consider a duty which in the context of section 37C must precede any of the other

-
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person—
- (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.

³⁵ Section 3C(1).

³⁶ Section 3C(1)(a),(b),(c).

³⁷ Section 37C(2),(3),(4),(5).

³⁸ *Bushula v Satawu National Provident Fund* 2009 (2) BPLR 161(PFA)

duties. Section 7D(c) of the Act states that one of the duties of the Board is to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties. The Adjudicator in the 2009/2010 Annual Report³⁹ expressly states that a major factor contributing to complaints is the poor communication with members and that proper communication would obviate the need for a member to complain.

3.5.2

Accordingly, the Board should take all reasonable steps to ensure that its members are given sufficient information regarding the manner in which section 37C works and the implication of the section on their freedom of testation. I have on a number of occasions, while providing training to Boards, been surprised when trustees themselves are unaware of the implications of section 37C on their freedom of testation. Such reactions are a clear indication that Boards need a greater understanding of section 37C and that such training needs to take the form of outcomes based learning. It is vital that members have a good understanding of the implications of section 37C. Accordingly, Boards should in the course of contracting with their administrators, consider whether one of the services which the administrator will be tasked with is a member communication which deals solely with section 37C which gives members an opportunity to ask pertinent questions. Such a communication could also be used as an opportunity to gain insight on a member's family situation. It is reasonable to accept that once the Board has made reasonable efforts to educate its membership about the implications of section 37C, it has already taken a big step towards decreasing the risks associated with section 37C.

3.6 Conclusion

3.6.1

A Board which is called upon to determine a distribution of a death benefit must ensure that each of the three steps which they are required to satisfy is completed while ensuring that the duties and the obligations which are provided by the Act are also satisfied. Thus, for instance if a Board is at step one of a death benefit allocation, the Board must

³⁹ Annual Report of the Pension Funds Adjudicator for the year ended 2010: www.pfa.org.za, last visited 29 February 2012.

ensure that step one is satisfied while also satisfying the requirements of section 7C and 7D of the Act and the principles of good governance which attach to exercise of discretion. In effect it is the Board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.⁴⁰

⁴⁰ *Coetzee v Central Retirement Annuity Fund* (PFA/GA/17436/2007/LTN).

CHAPTER 4: DETERMINATION OF BENEFICIARIES

4. Beneficiaries

4.1 Introduction

4.1.1 First and foremost the Board has a duty to determine the potential beneficiaries to be considered for receipt of the death benefit. These include 'legal dependants', 'factual dependants', spouses, children, future dependants and nominees".⁴¹ Accordingly, the first duty of the Board, to determine the potential beneficiaries to a death benefit, is broken up into two parts, that is, determining whether there are any nominees and determining whether the deceased member had any dependants at the time of his or her death.⁴² Before the Board can undertake a section 37C process it must ensure that it has all the information it requires such as proof of death.⁴³

4.2 Identifying dependants

4.2.1 Determination of the dependants of a deceased member is an onerous task which exposes a Board to a great deal of risk. It stands to reason that if a Board understands the basic steps associated with identifying the dependants of a deceased member then the exposure to risk decreases. A Board is required to identify both legal and factual dependants. Legal dependants are in essence those dependants whom the deceased member would be liable in law to maintain while factual dependants are those persons who were factually dependent on the member notwithstanding the fact that he or she was not obliged in law to provide financial support to the person. It is clear by the very nature of the relationships which the Board is called upon to test that a Board will not be able to determine dependency without investigating the facts associated with each individuals claim to dependency.

⁴¹ Hunter R *et al* *The Pension Funds Act: A commentary on the Act, regulations, selected notices, directives and circulars* 2010 ed (Hunter Benefits Law Johannesburg 2010) at page 684.

⁴² *Mashego v SATU National Provident Fund* (PFA/GA/3542/05/VIA) at paragraph 5.4.

⁴³ *Muila v Cashbuild Group Retirement Fund and Others* (PFA/NP/3188/2005/RM) at paragraphs 7 and 8.

4.2.2 Section 7C(2)(a) and (b) of the Act place an express duty on the Board to take all reasonable steps to ensure that the interests of members are protected at all times and to act with due care, diligence and good faith. These duties clearly place an obligation on the Board when investigating the circle of potential beneficiaries to conduct an investigation which is carried out with diligence. Accordingly, regardless of whether or not the Act gives guidance on the approach which must be adopted when carrying out such an investigation, the Board has a duty to adopt a process which ensures that the investigation is diligent and that the interests of potential beneficiaries are not prejudiced.⁴⁴

4.2.3 To date there is no clear or express set of guidelines in respect of the manner in which dependants should be determined or the process to be followed when investigating and identifying a deceased member's dependants. In the *Zikhali*⁴⁵ determination, the Adjudicator, stated in essence that there is a common misconception amongst the parties in such matters and the pensions 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 entitlements to the death benefit or a portion thereof. The wording of section 37C is very clear in this respect and there is very little room for argument regarding the onus to identify dependants. The onus is firmly on the Board to conduct an investigation with a view to tracing the dependants of a deceased member. Accordingly, in the event of a death benefit claim it is of the utmost importance that the Board take all reasonable and appropriate steps to locate the dependants of a deceased member and not simply wait for potential dependants to make themselves known. The provisions of section 37C are not well understood or known within the general public, a circumstance which can be remedied by better communication. Thus even if a person is a dependant that person may not be aware of his or her potential right to a benefit and may not come forward to make such a claim.

⁴⁴ *Morgan v SA Druggist Provident Fund* 2001 (4) BPLR 1886 (PFA) at paragraph 11.

⁴⁵ *Zikhali and Another v Metal Industries Provident Fund* (1) (2001) 12 BPLR 2895 (PFA) at paragraph 14.

4.2.4 The duty to investigate and identify potential beneficiaries is clear but by no means equivocal. Boards appear to fail when it comes to the actual process of identifying a dependant.⁴⁶ The burning issue which a Board is faced with is what process should be followed and would that process be considered reasonable and appropriate by any tribunal called upon to adjudicate the process employed by the Board to identify dependants. In effect a Board which fails in its identification of the dependants will never be able to satisfy the requirements of section 37C because the basis upon which the section is premised is that the correct dependants have been identified. Accordingly, a failure in the identification process will result in the social outcome envisaged by the Legislature being thwarted.

4.2.5 The basis of section 37C appears to be that a Board would only comply with its duty to investigate and identify dependants and make an equitable distribution, if as its starting point, it has correctly identified all the dependants. However given the complexities which attach to identifying dependants such as the social and economic structure of South Africa (many members live in cities while their dependants reside in rural areas), it is accepted that a Board is unlikely to utilise an identification process which will result in all dependants being identified every time there is a death benefit claim.⁴⁷ It is evident from the decisions of the Adjudicator that where a Board can give evidence that it has utilised a reasonable and diligent investigation such a Board will not be held responsible for failing to identify a potential beneficiary. Accordingly, the question which remains is not whether the Board has identified all the potential dependants but whether the Board has reasonably complied with the duty to investigate and identify potential dependants as stipulated in section 37C coupled with the relevant provisions of section 7C and section 7D of the Act.

4.2.6 What is considered reasonable will depend on the facts of the case at hand but funds are expected to balance on one hand, the need to give effect to the section by identifying all dependants and, on the

⁴⁶ *Nyathi v Leonard Dingle (PTY) Ltd and Others* (PFA/GA/3328/05/LCM) at paragraph 7.5.

⁴⁷ *Supra* at footnote 12 at pages 39 and 40.

other hand, practical considerations such as the time and cost of making such an identification. It is clear from reading numerous decisions of the Adjudicator that the Adjudicator requires a Board to apply its mind to the facts at hand and to make reasonable enquiries in an effort to elicit potential dependants and that the extent of such efforts will change depending on the individual facts of the case at hand.⁴⁸ Such an approach is laudable as it recognises that no single approach can be adopted by a Board to elicit all the dependants in differing death benefit distributions. South Africa is a complex country in which people have differing levels of education and where access to communication is often dependent on a person's socio-economic standing. It is unreasonable therefore for a Board to assume that a person who does not understand English will be able to understand a telephone call in English and provide the information which is required to prove his or her dependency. In such an instance the Board would need to adapt its investigation process to meet the language requirements of the potential dependant.

4.2.7

It has been accepted that there are different ways to investigate but reasonable efforts may include contacting the deceased's members family and neighbours to obtain information; contacting the member's employer or former colleagues, making inquiries at an embassy if the member was not South African, checking medical aid records to ascertain if the member identified anyone who could be a dependant, requesting unabridged birth certificates (which would indicate who the father of a child is), obtaining affidavits from the employer, family, neighbours, tribal or religious elders in the area where the member lived.⁴⁹

4.2.8

There is also no reason why the Board cannot advertise in a national and local newspaper. The argument may be that this procedure will open floodgates of claims for the death benefit, however necessary identity documents and other evidence can be requested to confirm these claims. Media may be an effective way to alert and identify potential dependants especially where a Board is experiencing difficulty.

⁴⁸ *Dyas v CTS Provident Fund and Another* 2003 (3) BPLR 4448 (PFA) at paragraph 13.

⁴⁹ *Mthabela v Sappi Provident Fund* 2004 (7) BPLR 5915 (PFA) at page 5918.

In the *Mthiyane*⁵⁰ determination it was accepted by the Adjudicator that, in the absence of any rebutting evidence, affidavits could be regarded as proof of the identity of the member's dependants beyond a balance of probabilities. Other methods might include the use of a tracing agent and placing advertisements in the newspapers circulating in the area where the member lived.⁵¹

4.2.9 The Adjudicator is empowered, in terms of section 30E of the Act, to investigate a complaint and to make an order which any court of law may make. Given the wide powers of determination, the Adjudicator has over the years made a number of determinations, in the context of section 37C, which have resulted in the substitution of the Board's decision with the Adjudicator's own distribution⁵² or ordering the Board to revisit its decision.⁵³ The Adjudicator's determinations have on a regular basis determined that the errant funds are liable for interest which accumulates on the benefit payable. Although the determinations have no precedential value, they have served as a guide to Boards, which are wary of a complaint being laid against them and being decided in favour of the complainant. Further, the determinations also serve as a warning to Boards that there is a readily available complaints process which can be inexpensively accessed by its members or their beneficiaries and which will readily find against them if the Adjudicator is of the view that there has been no compliance with section 37C. Over the years the Adjudicator's determinations have given Boards a number of clues on what will be considered to be acceptable and reasonable endeavours employed to determine a dependant.⁵⁴

4.3 Status of a nomination form

4.3.1 The default position adopted by a number of Boards is to rely on the deceased member's nomination form, such a reliance is contrary to the

⁵⁰ *Mthiyane v Fedsure Life Assurance Ltd & Others* (2) 2002 (5) BPLR 3460 (PFA) paragraph 27.

⁵¹ *Supra* at footnote 16.

⁵² As a general rule where discretion has been improperly exercised our courts are reluctant to substitute their own decision for that of the functionary's, but tend to refer the matter back to the initial decision maker, unless exceptional circumstances exist.

⁵³ *Ditshabe v Sanlam Marketers Retirement Fund* 2001 (10) BPLR 2574 (PFA) at page 2578.

⁵⁴ *Supra* at footnote 49.

intention and spirit of section 37C and may result in a situation which promotes a dependant becoming dependent on the State. In the case of *R Bouwer v Central Retirement Annuity Fund*⁵⁵ the Adjudicator expressly stated that it is the Board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants and that although, the deceased may have nominated a beneficiary such a nomination is only one of many factors which will be considered when effecting a distribution. Even though the wording of section 37C is express and is abundantly clear that when determining dependants, reliance cannot be placed solely on the nomination form, every year a number of complaints are referred to the Adjudicator which show unreasonable reliance on the recordal in the nomination form. In the *Matlakane* determination the Adjudicator stated that section 37 makes it clear that the freedom of testation and intestate succession are overridden by the provisions of the section. Thus the content of the nomination form does not in law entitle a nominee to *ipso facto* receive the death benefit.⁵⁶

4.3.2 The Adjudicator appears to have adopted the correct position and the determinations mirror the requirements of section 37C. To the extent that it may be claimed that section 37C is not clear, the Adjudicator has made it clear, that possession of a completed nomination form does not relieve the Board of its duty to investigate and identify dependants as required by section 37C. The South African landscape requires such an active investigation given that it is a country known for migrant labour. In the absence of a proper investigation geared towards identifying all dependants, dependants who live in rural areas are unlikely to be identified, and will be left without financial support notwithstanding their financial dependence on the member at the time of death. Such an outcome is not just contrary to the intention of the section but is also a contravention of the Act and more specifically section 7D(f) of the Act which requires compliance with the Act and other applicable laws.

4.3.3 The Board is expressly not bound by a will nor is it bound by the

⁵⁵ *R Bouwer v Central Retirement Annuity Fund* PFA/GA/2789/2005/RM at page 3.

⁵⁶ *Matlakane v Royal Paraffin Provident Fund* (2003) 6 BPLR 4785 (PFA) at paragraph 12.

nomination form. The contents of a nomination form are therefore merely a guide to the trustees when exercising their discretion.⁵⁷ It is evident that regardless of whether the individual trustees or the Board agrees with the curtailing of a deceased members freedom of testation, they are not at liberty to discard the provisions of the Act and place complete emphasis on the contents of the nomination form. The duty of the Board, which trumps all other duties, is to ensure compliance with the Act, which Act expressly requires the Board to investigate and determine who the dependants of a deceased member are.

4.3.4 The paternalism inherent in the section and the effect on freedom of testation has been criticised in different arenas and numerous arguments have considered whether it is in the interests of dependants that the Board, with reference to the Act, determines the circle of beneficiaries and effects a distribution amongst them by not necessarily following the wishes of the deceased.⁵⁸ It does not appear that such a discussion will result in change however it intimates that there is a possibility of a Board member having such a view.

4.3.5 Although a Board cannot, without contravening the Act, rely on the deceased members wishes as recorded in the nomination form, the nomination form is a good starting point in an investigation to identify dependants of a deceased member. The nomination form plays an integral part in identifying beneficiaries and should not be discarded as being of no importance. The contents of the nomination form may, in the absence of any other information, serve as a starting point for an investigation. The Board can use the nomination form as a basis to identify nominees and can also then question those nominees about the life of the deceased member in an effort to identify persons who may be categorised as dependants. It is also usual for the nomination form to contain next of kin information which may not be recorded in any other documentation held by the fund or the deceased member's employer.

4.3.6 To the extent that the Board places any reliance on a nomination form

⁵⁷ *Mashazi v African Products Retirement Benefit Provident Fund* (2002) 8BPLR 70 (W).

⁵⁸ McDonald 'Section 37C- a view from the other side' (2004) 2 Pensions World South Africa 7-9.

whether such reliance is to identify the nominees or as an indication of the members next of kin, the Board must satisfy itself that the nomination form is authentic. A Board cannot simply recognise the recorded person(s) as potential beneficiaries. A Board must ensure that the nomination is written, indicates the nominees with reasonable certainty and is valid. Practically, the only way to ascertain the authenticity of the nomination form is to ensure that it was signed by the deceased member. Once a Board is satisfied that the nomination form is valid and the nominees can be identified with reasonable certainty, such person must be added to the circle of potential beneficiaries.

- 4.3.7 One of the strongest criticism levied against Boards, insofar as nomination forms go, is their failure to ensure that members are given regular opportunities to provide updated indications of their wishes, that is, Boards do not ensure that nomination forms are completed at reasonable intervals ensuring that the information which they have is, in the event of a member's death, likely to be current. Section 7C(2)(a) of the Act expressly provides that the Board must take all reasonable steps to ensure that the interests of its members in terms of its rules and the provisions of the Act are protected at all times. It could be successfully argued that a member has an interest in ensuring that at the time of his death the person(s) who he or she would like to secure financially is considered by the Board to be a beneficiary. Accordingly it is evident that an important step in identifying the beneficiaries is to ensure that members are regularly informed that they may change their wishes recorded in their nomination form and be given sufficient opportunities to effect any changes.

4.4 Prudent mechanisms aimed at identifying dependant

- 4.4.1 Section 37C expressly contemplates a nomination form but it makes no further mention of any tools which Boards can use to determine dependants. Boards should use the non-directory wording of the section as an opportunity to implement tools which can be used as a platform for the investigation and identification of dependants. It is reasonable, given the nature of the Board's duties, to assume that it

will be called on at least once in the financial year to perform its section 37C obligations. Accordingly, it is also reasonable to ensure that a Board should collect as much information as possible from its members while they are living and are able to give the Board 'clues' regarding who should be considered for classification as their dependants.

4.4.2

It appears evident from the number of complaints which are lodged with the Adjudicator regarding the determination of dependants that the Board needs to adopt more tools which are aimed at assisting them to correctly identify dependants. The standard nomination form used by most funds which requires the same information as an insurance policy nomination form is not adequate. Pension funds should consider introducing a form for completion, which requires a member during his or her life time to record all the details of all the people who the member perceives as being financially or legally dependant on him or her. For purposes of this dissertation I will refer to such a form as a dependant recordal form. If such a form is completed by a member then the Board would, at the very least, have an indication of the persons whom the member believed to be his or her dependants in the event of such a member's death. Boards who adopt such a form will not be alleviated of the obligation to investigate and identify dependants, the form will merely be an aid in such an investigation. This would mean that the investigation to identify dependants would not be an uninformed exercise without a reasonable, well founded starting point. The Board could start the investigations by determining whether the persons recorded on the dependant recordal form are dependants. The form could also act as a basis for testing claims of dependency. The investigating process can thereafter be a less stringent exercise which entails confirming the mentioned status of the persons as dependants, whether they predeceased the deceased member or not, determining whether there are any other persons who are dependants but are not recorded on the dependant recordal form. This may effectively render a 12 month investigation period sufficient and result in the benefit being distributed more efficiently.

4.4.3 Another measure could be the provision of a summary of the workings of section 37C at the back of the nomination form which is recorded in very simple language and aimed at providing an understanding to members and ultimately giving the Board direction.

4.5 Assistance from administrator to identify dependants

4.5.1 The usual process adopted by funds is that the actual investigation of potential dependency is undertaken by a fund's administrator. This is acceptable as the intention of the section is not to ensure that every single investigation is actually conducted by the Board. Where the investigation is done by an administrator or a death benefit sub-committee, the Board must still satisfy its section 37C obligations, that is, if the administrator makes an incorrect identification of a dependant, the Board would still be responsible for such a misdirection of its duties.⁵⁹ Where a Board opts to use an administrator, the Board would be contravening its duties, more especially section 7D(b) of the Act which requires proper control systems to be put in place, if it does not oversee the administrator. A Board which uses its administrator to conduct the investigation should put in place a reporting protocol which ensures that the Board gets regular feedback on the investigation, the methods used to identify dependants, information which the investigator believes is still outstanding, provides the Board with case notes and gives the Board an opportunity to ask questions and direct that certain steps be taken. The idea of such a protocol is that the Board would be given an opportunity to ask relevant questions and to ensure that the investigation is diligent, that is, the Board would have oversight of an investigation which it is in any event responsible for.

4.5.2 Regardless of the mechanisms which are adopted by Boards to regulate investigations it is important that a Board does not fetter its discretion by simply rubberstamping a recommendation of an

⁵⁹ *Liutloileng v Municipal Councilors Pension Fund* (PFA/GA/5520/05/VIA) the Adjudicator clearly stated in this decision that the investigation required to be carried out by a Board should not be limited to the information provided by a third party, but should be a thorough investigation conducted independently by the trustees.

administrator or a sub-committee.⁶⁰ Where a Board fetters its discretion in such a way, the Board will not be complying with its duties and will be held accountable by the Adjudicator or other relevant tribunal if a distribution is challenged.

4.5.3 Accordingly, a Board must be prudent and cautious when using sub-committees and/or its administrator to identify dependants. Where the Board uses an administrator, the Board must ensure that it has a contractual remedy on which it may rely to recover any financial prejudice suffered by the fund, where the administrator has conducted a poor investigation and has not taken all the relevant facts into consideration. Having such an agreement in place means that the Board may be liable for the incorrect death benefit distribution but it will have recourse against the administrator should the fund suffer any loss as a result of the administrator's actions.

4.5.4 Perhaps an obligation should be placed on the administrators of funds to encourage members to update their nomination forms on a regular basis. It is unacceptable that a nomination form is only completed when a person becomes a member of a fund. Board's should, where possible, ensure that their service agreements with administrators provide for member communication regarding the operation of section 37C and an opportunity for a member to receive communication, at least annually, which seeks to prompt a member to consider whether he or she should amend the information recorded in the nomination form.

4.5.5 **Conclusion**

4.5.6 The Adjudicator does not provide statistics which record the number of death benefit complaints which are received which relate to the identification of beneficiaries but from a reading of the determinations it is evident that there are sufficient cases to determine that Board's are not complying with their duty to identify potential beneficiaries, especially dependants. It is also evident from the determinations that the incorrect identification of the beneficiaries is because in most

⁶⁰ *Sentsho v University of South Africa and Others* (PFA/GA/3939/05/VIA at paragraph 6.4.

instances the Boards do not understand the role imposed on them by virtue of section 37C when determining the circle of beneficiaries.

4.5.7 The identification of nominees is a relatively simple exercise which calls for very little input from a Board and which in the absence of very unusual circumstances a Board is unlikely to get incorrect.

4.5.8 Accordingly, one of the reasons which contributes to the numerous Adjudicator complaints, in relation to section 37C, is the Board's failure to correctly determine the dependants.

CHAPTER 5: THE 12 MONTH TIME FRAME

5. Timeframe

5.1 Introduction

5.1.1 The next task of the Board, imposed by section 37C(1)(b), is to ensure that the distribution of the death benefit is effected within a reasonable time frame. Section 37C makes references to the distribution being effected at the very least after a period of 12 months from the date of the death of the member. The question which then arises is whether the Board has a duty to effect a distribution within 12 months.

5.1.2 The determination in *Jacobs NO v Central Retirement Annuity Fund and Another*⁶¹ illustrates the complexities of the time constraints perfectly. The complainant, Mr Jacobs (the executor of the deceased's estate), used the 12 month time frame to support his arguments as to why the death benefit should be paid into the deceased's estate. The argument, which formed the basis of the complaint, was that given that the second respondent had failed to prove her claim to the benefit or a part of the benefit within a period of 12 months, the fund was required to pay over the benefit to the deceased estate to be distributed by the executor to the deceased's heirs.⁶²

5.1.3 Another pertinent submission made by Mr Jacobs was that

*“Section 37C of the Act read within its context and the constitutional framework in which it exists, requires a decision to determine the dependant and a decision on distribution to be effected within the twelve month period following the death of the member. Consequently, it is alleged to be ultra vires for the fund to make any such decisions after the expiry of such period and the fund is in mora to the estate.”*⁶³

⁶¹ *Jacobs NO v Central Retirement Annuity Fund and Another* (2001) 1 BPLR 1488 (PFA).

⁶² *Ibid* at paragraph 6.

⁶³ *Ibid* at paragraph 8.2.

5.1.4 The Adjudicator expressly stated that the duty to investigate potential dependants lies with the Board and that the failure of the second respondent to prove her claim within 12 months was not relevant.

5.1.5 The very intention of section 37C is to ensure that the dependants are provided for even after a member's death. It is probable that where a distribution is not effected within a reasonable time frame, which time frame should be determined with reference to the facts at hand and not solely to the time frame in section 37C(1)(b), the dependants are likely to suffer financial prejudice.

5.2 Interpretation of time frame

5.2.1 The usual position is that the Board has twelve months within which to trace and identify the dependants who may share in the benefit. Firstly in this regard, the duty to trace and identify dependants rests with the Board and it must take all reasonable steps to identify the dependants. As discussed earlier in this dissertation there is no duty on a dependant to come forward and prove that he or she is a dependant.⁶⁴ Secondly, there is also no compulsion on the Board to make payment after twelve months has lapsed, if the Board is of the opinion that there is a need for further investigation.⁶⁵

5.2.2 The Adjudicator held in the determination of *Mthiyane v Fedsure Life Assurance Ltd and Others*⁶⁶ that section 37C(1)(b) does not impose the time frame of 12 months upon beneficiaries or potential beneficiaries. The latter are not under any duty to lodge their claims within a 12 month period. Rather it is a time frame imposed on the trustees who may not distribute the benefit solely to nominees before the lapse of 12 months.⁶⁷

5.2.3 Section 37C(1)(b) appears on first contemplation to require a Board to

⁶⁴ *Mthiyane v Fedsure Life Assurance Ltd and Others* (2) [2002] 5 BPLR 3460 at paragraph 29.

⁶⁵ *Ibid* at paragraph 16.

⁶⁶ *Ibid* at paragraph 15.

⁶⁷ Tukishi Manamela "Chasing away the ghost in death benefits: a closer look at section 37C of the Pension Funds Act 24 of 1956" (2005) 17 SA Merc LJ.

make a distribution within 12 months and if no dependants are determined within that period then it appears to place an obligation on the Board to pay the death benefit to the nominees. Such an interpretation is likely to have an outcome which is contrary to the rationale which informed the promulgation of the section and which may cause the Board to be acting outside of its duties and obligations.

5.2.4 A common analysis of the time frame is that section 37C (1)(b) places a duty on the Board after a lapsing of 12 months, where no dependants have been identified, to pay the benefit to the nominees. This interpretation considers the period to be a sort of suspensive condition for payment.⁶⁸

5.2.5 If the necessary implication of the time period is that the Board must make a distribution within 12 months then many Boards would be tempted not to investigate the existence of potential dependants and rather wait for the expiration of the 12 month period and then give effect to the deceased member's wishes as recorded in the nomination form. Such an action could have the potential impact of causing the dependants (whether financial or legal) to be without financial resources, ultimately becoming the responsibility of the State. To the extent that such an interpretation is correct, it must be considered whether it would impede on the duty of the Board to investigate the existence of dependants. There is no doubt that it would. Boards would then be faced with two competing duties, that is, the duty to effect a distribution within 12 months and the duty to use reasonable endeavours to investigate the existence of dependants. This could very realistically result in a situation where the Board has not exhausted its investigation attempts, notwithstanding that it has been diligently conducting its investigation, but has reached the 12 month time frame. In such a situation the Board would be in the unacceptable position of rating the duties. In such an instance it is probable that some Boards may take the view that satisfying the time frame requirement is most important while other Boards may decide that conducting a reasonable investigation supersedes any other duty.

⁶⁸ *Ibid*

If the interpretation is such that it results in competing duties (duty to conduct a reasonable, diligent investigation versus the duty to effect a distribution within 12 months) it is probable that different principles will be used to determine a distribution resulting in very confusing law and uncertainty in the application of the section. Such an outcome would mean that a potential beneficiary would not have a clear understanding as to his or her rights and would not be in a position to obtain an indication of the merits of his or her claim to the benefit or portion thereof. Further, it has the potential to result in a frustrating of the Legislature's intention. Accordingly, it appears that the time frame imposed by section 37C(1)(b) is unlikely to be interpreted by a dispute resolution tribunal as requiring a payment to a dependant(s) within 12 months of the date of death of the member failing which a fund is obliged to make payment to the nominee(s).

5.2.6

It is evident, both from the decisions of the Adjudicator⁶⁹ and the various writings which consider the duties of the Board insofar as the time frame goes, that there are differing interpretations of what the obligations imposed on a Board by section 37C(1)(b) are. It appears from the determinations that the 12 month time frame should be considered by the Board to be a marker which it should attempt to meet however, while striving to meet this target is to be applauded, the Board cannot make a distribution after it has reached the 12 month time line if it has not taken all reasonable steps to ascertain dependants or is not convinced that all beneficiaries have been identified. This view is accepted as being sensible.⁷⁰ Accordingly, a Board should never be dilatory and should ensure that it uses the 12 months to discharge its obligations. Further to the extent that the time frame is interpreted as being compelling such an interpretation would compete with section 7C(2)(d) of the Act which expressly provides that a Board must act with diligence and due care. A Board should be concerned about falling foul of this provisions as it places an express obligation on them. It is highly probable that a Board could, at the expiration of the 12 month time period, take the view that it has not

⁶⁹ *Mofokeng v Millenium Entertainment Group Provident Fund* (PFA/GA/11337/2006/CMS); *Paris and Other v Servochem Retirement Plan* (PFA/GA/9086/06/FM).

⁷⁰ *Supra* footnote 8, *Marx and Hanekom* at page 211.

complied with section 7C(2)(d) of the Act, as it has not identified all dependants, in which case it would possibly be held to be negligent for a Board to effect a distribution.

5.2.7

It may be prudent where a Board has reached the 12 month marker, for the distribution to serve before the Board and the Board to consider the death benefit payable together with the beneficiaries who have been identified up to that stage and the investigation processes which has been employed. The Board would then need to decide whether, based on the information before it, any tribunal called upon to decide the reasonableness of the investigation would be satisfied with the Board's actions. If the answer is in the negative then the Board should initiate further investigations and call for the distribution to serve again within a very short period. In such cases the Board should also advise the identified beneficiaries that it is still investigating the matter with diligence. Such a communication is likely to mitigate the risk of an identified beneficiary lodging a premature complaint with the Adjudicator which would need to be responded to by the Board and may result in unwarranted costs being expended by the fund. It may also be prudent for a Board which finds itself in such a situation to advise the identified beneficiaries that it is in their best interest to wait for the outcome of the Board's decision, which is being diligently attended to, as lodging a matter with the Adjudicator could unduly delay the distribution as the Adjudicator is experiencing a backlog which has resulted in determinations often only being handed down 2 years after the lodging of a complaint.

5.3 **Adjudicator's interpretation**

5.3.1

The Adjudicator appears to have adopted a wide interpretation of section 37C(1)(b)⁷¹ which is that the duty to pay is not dependent on the expiry of the twelve month period, but rather on whether the Board is satisfied that it has investigated and considered the matter with due diligence and is in a position to make an equitable allocation. The question of whether the Board acted properly under section

⁷¹ *Supra* at footnote 12 at page 40.

37C(1)(a) will therefore not necessarily be determined with reference to the time frame. The relevant question will always be whether the Board took all reasonable steps to identify and trace all possible dependants, so as to allow them to distribute the benefit in the most equitable manner to the correctly identified dependants. The Adjudicator has made it clear that the wide interpretation of section 37C(1)(b) does not mean that the Board can be dilatory in making a decision and that where a Board without good reason fails to take a decision timeously, it will amount to maladministration.⁷²

5.3.2 It is evident from the decisions referred to above, that the Adjudicator has adopted a practical interpretation of the time frame, that is, the Adjudicator will not just determine whether a 12 month period has lapsed but if such a period has lapsed will give consideration to the reasons why the Board has not affected a distribution within such a period.

5.3.3 The Adjudicator has adopted the approach, where a Board is dilatory in conducting the investigation and the delay is unreasonable, of ordering a fund to complete its investigation and to distribute the benefit together with interest at a specified rate from the date which is 12 months after the death of a member.⁷³ Where such an order is made, a fund or its members could seek against the individual members of the Board for any financial prejudice suffered as a result of their conduct. According to the Adjudicator, in two recent cases two provident funds are being investigated for possible gross dereliction of their duty after two claimants had to wait years for the death benefit to be distributed. The Adjudicator's view is that the failure to pay was as a result of the funds failing to discharge their duties. The Adjudicator in both those cases instructed that a copy of the determinations be forwarded to the Registrar as well as the head: surveillance and enforcement at the Registrar's office, for possible action against the trustees of the funds for what would appear to be a gross dereliction of their duties.⁷⁴

⁷² <http://www.pfa.org.zasitesmart/uploads/files/F9E17074-09AE-44BC-388B-406F756A0AD7.pdf>, last visited 30 September 2011.

⁷³ *Johnathan v Illovo Sugar Pension Fund* (PFA/WE/12230/2007/PM).

⁷⁴ "Adjudicator probes two funds", www.fin24.com/economy/Adjudicator (last visited 30 September 2011)- probes -two-funds, 13 June 2011.

5.4 Considerations for Boards

- 5.4.1 Over the past years the 12 month period has been interpreted to mean that payment made before the expiry of such period is premature and defective but that interpretation is unlikely to be accepted as it could result in defeating the Legislature's intention. Boards must adopt a test which has reference to whether it has identified all the dependants by employing a reasonable investigation process and once the Board is satisfied, a distribution should be made, notwithstanding whether 12 months has expired or not.
- 5.4.2 Boards must act prudently and ensure that they employ proper control systems which have as their aim the diligent and reasonable investigation with a proposed completion timeframe of 12 months. Boards should endeavour as far as possible to ensure that the trustees have the necessary skill and expertise to execute their duties within a reasonable time. A Board which has an express duty to protect the interests of its members cannot reasonably argue that an investigation which has not been diligently carried out and is carried out through its own fault, sometime after the 12 month period has passed, has not resulted in them being negligent of their duties.
- 5.4.3 Where a Board can foresee that its investigation will not be completed at the expiration of 12 months then nothing prevents a Board from making an interim distribution to those beneficiaries whom the Board has unequivocally identified and who will definitely receive a portion of the benefit when a final distribution is made. If a Board takes such a course then even if the investigation takes more than 12 months, the Board is unlikely to receive an adverse result from a tribunal as there is unlikely to be prejudice suffered. However, adopting such a course is not without risk. The Board would need to ensure that it implements a protocol or procedure which mitigates any risk that the Board may face such as: an interim payment to a person who is determined not to be a beneficiary at the time of the final distribution or an interim payment which is in excess of the final amount awarded to the beneficiary when the final allocation is made. The payment of

an interim benefit to a potential beneficiary cannot fetter the discretion of the Board when effecting a final distribution, that is, the Board should not consider any advance payments made to any beneficiary when effecting the final distribution. The risk then is if the Board determines that a beneficiary who received an interim payment should in fact receive less than was advanced in which case the Board would need to recover such overpayment.⁷⁵ Ideally if a Board implements an interim payment mechanism it should, to mitigate any potential risk, ensure that it has an agreement in place with the recipient of such payment, which agreement provides for rights of recovery and set off in favour of the fund.

5.4.4 The 12 month period is not without cause for concern and has the potential to operate to the prejudice of beneficiaries. A pertinent consideration is that the trustees are not permanent employees of a fund. In fact they usually serve for a certain specific term depending on the rules of the specific fund. Accordingly, should a trustee's term with the fund end whilst the Board is still investigating and attempting to identify beneficiaries, it means that the newly appointed trustees will need to go through a period of familiarising themselves with the matter before progress is achieved. Unfortunately this leads to further delaying payment of the benefit which can no doubt lead to a frustration on the side of the beneficiaries and potentially a loss of trust in the Board.

5.4.5 The Constitution⁷⁶ grants everyone the right to just administrative action that is lawful, reasonable and procedurally fair and therefore it is reasonable to expect the same from the Board.⁷⁷ Accordingly, even on a constitutional analysis it is likely that a Board will be required to show a concerted effort at investigating the distribution and have to give plausible reasons as to why the distribution could not be finalised within the specified time frame.

5.4.6 Although the Adjudicator appears to have given the application of

⁷⁵ *Supra* at footnote 2 and 3.

⁷⁶ See section 33 of the Constitution of Republic of South Africa, 1996.

⁷⁷ *Supra* at footnote 51.

the 12 month period a wide interpretation which takes into consideration the practical implications of the section, Boards should not discard the implications of the golden rule⁷⁸ of statutory interpretation which requires a reader to give effect to the plain meaning of the words as they are read unless such an interpretation would result in absurdity. However, it could be argued that using the golden rule of interpretation would lead to an absurdity as it would result in the very intention of the legislation being subverted. Given that the 12 month time frame has not yet been expressly considered by our courts, there is no certainty as to the approach which a court would take and whether such an approach would result in Boards having to ensure that the distribution is completed within 12 months. If the Adjudicator were to give a determination which took the view that a Board had acted unreasonably in not completing the distribution within the required time frame then it may prudent, if the Board is of the view that it acted reasonably, for that Board to test the Adjudicator's determination in a high court.

5.4.7

The Adjudicator has adopted an interpretation which is practical and which seeks to give effect to the intention of the section but there is no certainty as to whether a court called upon to consider the issue will take the same stance. There is a possibility that a court could interpret the section as requiring a Board to give effect to the distribution within a 12 month period regardless of whether it has conducted a proper investigation. In such a case, it would not be improbable for a dependant who was not traced and who can show that no reasonable efforts were made to trace him or her, to sue the fund or the Board. Accordingly, it is in the best interest of all stakeholders that a diligent investigation is conducted and a distribution made, where appropriate, within the 12 month time frame. In light of the above, the most prudent position which a Board can adopt, is in the normal course, to effect a distribution of a death benefit within 12 months unless they are of the view that extenuating

⁷⁸ Joubert JA in *Coopers & Lybrand v Bryant* 1995 (3) SA 761 (A) at 767E-768E - According to the golden rule of interpretation the language in a document is to be given its grammatical and ordinary meaning, unless this would result in absurdity, or some repugnancy or inconsistency with the rest of the instrument.

circumstances exist which would support a decision to effect a distribution after 12 months has expired.

- 5.4.8 In light of the above, it is my recommendation, that Boards in an effort to ensure compliance with their statutory duties and obligations should consider implementing processes which seek to mitigate the potential risks which attach to the 12 month time frame. Boards should consider adopting a protocol or standard operating procedure which aligns itself with the time frame. Further to the extent that the Board is one which has a large number of trustees or which is of the view that its death benefit distribution process is affected when new appointments are made, then consideration should be given to adopting a process in terms of which the fund's administrator makes available to a new trustee a full pack of documents relating to each unresolved death benefit allocation so that that trustee can apply his or her mind to the issues and be prepared well in advance of the next Board meeting. The Board should seek to implement a process which results in very little detriment to the section 37C process as a result of new appointments.

5.5 Conclusion

- 5.5.1 The differences in opinion regarding the implications of the time frame and the decisions of the Adjudicator, appear to have resulted in Boards taking a view that it is normal for a death benefit distribution to take more than 12 months. Such a practice is unlikely to be determined to be correct and Boards should be wary of not actively considering the time frame when determining their section 37C process or protocol. The 12 month period is often used by Boards as an indication that they should take the matter seriously and become more actively involved in the death benefit allocation. Adopting such a process may place the Board and the fund at risk of financial prejudice and should be actively frowned upon by Boards.

- 5.5.2 It is evident from the Adjudicator's determinations that Boards do

not understand the implications of not acting with diligence and meeting the 12 month time frame. It is also evident that Boards are not fully aware of the possibility of the fund suffering financial prejudice as a result of not completing the distribution timeously which in turn may result in a claim against the Board members in their individual capacities.

CHAPTER 6: ALLOCATION OF BENEFIT**6. Benefit payment****6.1 Introduction**

6.1.1 Section 37C requires a Board to distribute the death benefit once the circle of beneficiaries has been established. In accordance with the provisions of section 37C(1) there are five possible scenarios within which an allocation may occur. The possible allocations provided for are the following:

6.1.1.1 If dependants have been identified and there are no nominees then the Board must pay the benefit to the identified dependants in a manner which the Board deems to be equitable. The benefit may be paid in its entirety to one dependant or in proportions to some or all of the identified dependants;

6.1.1.2 If the Board is unable to identify any dependants after conducting a reasonable investigation and the deceased member has nominated a person or persons to receive the benefit then the benefit must be distributed in accordance with the nomination form. However in such an instance if the debts of the deceased's estate exceeds the assets then so much of the benefit as is equal to the difference between the assets and liabilities must be paid into the deceased's estate and the balance must be paid to the nominees in the proportions recorded in the nomination form;

6.1.1.3 If the Board identifies the dependants and the deceased has completed a nomination form which records persons other than his or her dependants as nominees then the Board must distribute the benefit between the identified dependants and the nominees in a manner which the Board deems equitable;

6.1.1.4 If the Board is unable to identify any dependants and there are

no nominees then the Board must make payment of the benefit to the deceased member's estate or if no such estate exists, into the Guardians Fund,⁷⁹ and

- 6.1.1.5 If the Board is only able to identify nominees and the entire benefit available for distribution is not allocated to such nominees by the deceased member then the Board must make payment of the remaining benefit to the deceased member's estate or if no such estate exists, into the Guardians Fund.
- 6.1.2 For purposes of this dissertation only section 37C(1) in so far as it places an obligation on the Board to effect an equitable distribution will be considered. To the extent that the Board is not required to exercise its discretion when allocating the benefit, section 37C(1) expressly provides for the manner in which the benefit must be distributed and the Board is obliged to make the distribution accordingly. Thus, only the allocation of a benefit where the Board has identified only dependants or both nominees and dependants and is required to exercise its discretion and make an equitable allocation will be considered.
- 6.1.3 Section 37C requires a Board, in express circumstances, after identifying the beneficiaries to then effect an equitable distribution amongst the identified circle of beneficiaries. It is evident from the requirement that the Board exercise a discretion that this aspect of a Board's section 37C obligations is the one which is the most likely to be fraught with difficulty and potential risk to the Board and the fund.
- 6.1.4 The determination of who qualifies as a dependant poses less risk to the fund and the Board as the Act expressly records the requirements of legal dependency while factual dependency should be evident from the investigation, all that the Board is tasked to do is investigate and determine whether such persons exist. The Adjudicator over the years has also issued enough determinations to give a Board sufficient guidelines on which persons are potentially part of the circle of

⁷⁹ Established by section 91 of the Administration of Estates Act 24 of 1913.

beneficiaries. The main issue which arises in the context of identifying a deceased's beneficiaries is ensuring that a reasonable process has been adopted within a reasonable time frame and such an issue appears to be far less complicated than the issues which arise when exercising the far reaching discretion associated with determining an equitable distribution.

6.2 Exercise of discretion by the Board

- 6.2.1 Where assets are governed by a last will and testament or the law of intestate succession, it is very clear to the heirs that the ultimate benefit which they receive is outside the control of the executor or themselves. A distribution of the deceased estate is outside of the control of the executor or any other person and has no discretionary element which could be challenged on the basis of the manner in which the discretion was exercised. In a section 37C distribution however the actual allocation of the benefit is not predetermined by the section. The section only regulates it to the extent that it requires a Board to make an equitable distribution. The making of such a distribution is dependent solely upon the exercise of a discretionary power wielded by the Board.
- 6.2.2 The Board is thus tasked with considering the circle of beneficiaries and making what it considers to be an equitable distribution, that is, there is no objective criteria contained in section 37C which indicates what a Board would need to do to achieve an equitable distribution. The only guidance which is contained in the Act is that the Board when making a distribution must comply with sections 7C and 7D of the Act.
- 6.2.3 I have in the course of giving legal opinions to Boards regarding death benefit distributions observed the subjectivity of the section 37C process. It is not unusual for the preliminary decision of a Board to be changed when new trustees are appointed or for a decision to be swayed by irrelevant factors which the Board considers to be appropriate. It is evident from the number of Adjudicator determinations and case law that the actual allocation of the benefit

results in numerous complaints being lodged against Boards. It is also evident from the determinations that often a distribution which a Board considers to be equitable does not satisfy the Adjudicator's concept of equitable.⁸⁰ Further the determinations are evidence that different Boards which are called upon to make distributions where the facts are similar will allocate the benefit very differently.⁸¹

6.3 Conflicts of interest

6.3.1 Section 7C(2)(c) of the Act expressly requires the Board and its individual trustees to avoid conflicts of interests. A conflict of interest is not a conflict which arises only where a trustee has a financial interest in a matter which is serving before the Board. Such a view is not correct. A conflict of interest is anything which would cause a trustee to have a bias when considering a particular matter in his or her capacity as a Board member. Accordingly, for instance, if a trustee has a negative bias against second wives as a result of his or her own family situation, such a bias would, need to be disclosed to the rest of the Board. The other members of the Board would then need to decide whether the disclosed information could cause the benefit to be allocated in a manner which is not equitable or whether it can be discarded as irrelevant to the deliberations at hand. Requiring trustees to make such personal disclosures is a very far reaching requirement and one which trustees are not usually aware of at the time of appointment. Disclosing to the Board a potential financial conflict appears to be easier than disclosing a personal conflict of interest. Accordingly in many instances although Board members feel strongly about a certain aspect of the distribution which may cause them to be blinded to all other aspects, no disclosure is forthcoming. It is likely that where a perception of bias can be evidenced by a complainant who alleges an inequitable distribution arising from such a bias and such a conflict was not disclosed, there is a possibility that that member of the Board could be determined to have been acting in contravention of his duties and be sued in his or her personal capacity

⁸⁰ *Williams v FFE Minerals South Africa Pension Fund and Another* [2001] 2BPLR 1678 (PFA) at paragraphs 21 and 22.

⁸¹ *Mokoena v Metal Industries Provident Fund* 2003 (3) BPLR 4481 at paragraph 17.

for any loss suffered by the fund as a result of the decision which lead to the complaint.⁸²

6.3.2 Trustees need to, in the course of receiving training on section 37C, be advised that such disclosures of potential conflicts of interests are required and must be made. Once all the disclosures are made, the remainder of the Board can determine whether such disclosures are relevant or not. Disclosures of conflict of interest will serve not only to protect the individual trustees but also the fund.

6.4 Guidelines to achieve an equitable distribution

6.4.1 The Act does not define “equitable” nor does it provide any guidelines on how to make an equitable distribution. The Adjudicator has however, over the years, given determinations which give Boards guidelines on what it should consider in an effort to achieve an equitable distribution. The duties of the Board in this regard were cogently summarised in *Sithole v ICS Provident Fund and Another*⁸³, as follows:

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

- *the age of the dependants;*
- *the relationship with the deceased;*
- *the extent of dependency;*
- *the wishes of the deceased placed either in the nomination and/or his last will; and*
- *financial affairs of the dependants including their future earning capacity potential.*

⁸² *Dollman v Irvin and Johnson Retirement Fund* (2008) JOL 22727 at paragraph 3.

⁸³ *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at paragraphs 24 and 25.

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

6.4.2 It is evident from these guidelines that the investigations stage of the distribution does not stop once a Board has identified the circle of potential beneficiaries but must extend to the determination of the equitable distribution. A view which has on numerous occasions been borne out in decisions of the Adjudicator, a Board cannot contemplate making an equitable distribution without also giving consideration to the intention of the Legislature, that is, how likely is it that a dependant will become a burden on the State if he or she does not receive a portion of the benefit.

6.4.3 In order to be able to give due consideration to the guidelines provided by the Adjudicator, a Board must investigate each of the guidelines in so far as they apply to each beneficiary and satisfy itself that it has all the information necessary to give meaning to the guidelines. For instance when considering the financial circumstances of each beneficiary a Board needs to ensure that they have given the identified beneficiaries an opportunity to make representations regarding their financial situation. A Board must also ensure, as far as possible, that the information provided is evidenced and not based on hearsay or outdated data.⁸⁴ The investigation must consider the current financial status of each beneficiary, that is, not the financial status which existed at the time of death and their potential earning capacity.⁸⁵ It is evident from numerous determinations of the Adjudicator that a Board has a duty to ensure that it gives each beneficiary an opportunity to furnish it with information which is relevant to determining an equitable distribution.

6.4.4 Notwithstanding the existence of guidelines such guidelines are not a closed list. A Board cannot use the guidelines which have evolved as the only relevant factors which it will consider when determining an

⁸⁴ *Govender v Santam Insurance Retirement Fund and Another* (PFA/GA/6041/05/LCM) at paragraph 6.7.

⁸⁵ *Ibid.*

allocation as to do so would result in a fettering of its discretion. It is possible for a Board to discard each of the guidelines as being irrelevant but then the Board would need to adopt guidelines which it believes are of more relevance in a particular situation. It is important that Boards remember that they exercise discretion and as such they cannot be bound by the criteria set out by the Adjudicator however given that the criteria takes into account considerations which appear aimed at satisfying the intention of the Legislature and which appear to contain factors which should be considered in every distribution, it may be prudent for Boards to adopt the criteria as its minimum considerations which can be amended as dictated by the circumstances of a particular distribution.

6.4.5 In the *Mashego*⁸⁶ determination the Adjudicator held that the trustees' decision with regard to the manner in which a death benefit should be distributed must be set aside. The Adjudicator was of the view that the trustees had failed to consider relevant factors such as the ages of the dependants, the financial status of the dependants and the extent of dependency of the dependants on the deceased and so on. From the facts of the complaint in *Mashego* it transpired that the trustees elected to distribute the benefit exactly as suggested by the deceased's spouse. Their discretion was therefore fettered and the exercise of such a fettered discretion was potentially prejudicial to the deceased's other dependants including the minor child.

6.4.6 Many Boards have taken the view, that an equitable distribution can only be achieved if the benefit available for distribution is apportioned in some manner amongst the identified beneficiaries. This is not correct as an equitable distribution can be achieved even where an identified dependant does not receive any portion of the death benefit.⁸⁷ Of course where no dependants have been identified the Board has no duty other than to make payment as recorded in the nomination form, in which case the Board does not usually exercise a discretion as the deceased member would have apportioned the

⁸⁶ *Supra* at footnote 42 at paragraph 5.5.5.

⁸⁷ *Roos v Central Retirement Annuity Fund* (PFA/FS15629/07/KM).

benefit amongst his or her nominees.

6.5 Managing beneficiary expectations

6.5.1 The unique nature of the South African landscape usually results in the distribution of the death benefit being a very emotional exercise. Identified dependants, especially in situations where the member has been married more than once or was involved in extramarital affairs, have expectations which are not usually met by the Board and which do not conform with the provisions of section 37C. For instance the spouse of the deceased will usually make representations that the person with whom the deceased was conducting an extra marital affair should not benefit because the relationship was immoral. People find it hard to believe that regardless of their relationship with the deceased or their status in law that they are on equal footing with other persons in the sense that each of them has a possibility of receiving a benefit. Each dependant believes that he or she has a greater entitlement to the benefit and expects to receive the greatest share. When the distribution is made, dependants are often very unhappy and take the view that proper consideration was not given to their circumstances, that the distribution was not equitable and that the Board did not acquit itself in terms of the requirements of the section.

6.5.2 Boards should be wary of becoming involved in the emotional issues which may exist between dependants and must not take such emotions into consideration when effecting a distribution.⁸⁸ Many, if not the largest percentage of complaints to the Adjudicator, revolve around the actual distribution of the benefit to the identified beneficiaries.⁸⁹ Often the complaints are without merit but it is obvious

⁸⁸ *Khulu v LifeCare Group and Others* (PFA/GA/8012/2006/SM), the Adjudicator stated the following: “The board failed to investigate the financial affairs of the first respondent including her future earning capacity as compared to the complainant who is not financially independent and was a minor at the time of the deceased’s death. It is clear that the Board allowed the family problems and the bad relationship between the deceased and the complainant to overshadow their duty to exercise their discretion properly and equitably.”

⁸⁹ As far as is evident from the Annual Reports of the Adjudicator the complaints received in respect of section 37C are not categorized further and so no information is readily available as to how many of the complaints deal with the equity of a distribution. The Adjudicator’s office, when contacted, advised that they do not keep statistics which indicate the number of complaints received in respect of the individual obligations provided for by section 37C. From my reading of the determinations it appears

from the determinations that the complainant was never given any reasons as to why the Board considered the distribution to be equitable or an opportunity to make representations to the Board as to why the Board's decision was not equitable.

6.5.3 A basic step which could be adopted by Boards and one which would be considered prudent is for a Board to advise beneficiaries of the basic reason for the allocation and give them an opportunity to make representations. Such a process would likely result in fewer complaints around this issue being lodged with the Adjudicator. In fact the Adjudicator has stated unequivocally that if trustees took their roles seriously and understood the responsibility to members and attempted to resolve complaints properly there would be fewer complaints for the Adjudicator to deal with.⁹⁰ Nothing in section 37C prevents a Board from making a preliminary decision, sharing such a decision with the beneficiaries, giving them a specific period within which to make representations and then making their final distribution.

6.6 Use of an administrator

6.6.1 As was considered in the discussion of the investigation of dependants, the investigation is usually conducted by the administrator, who presents its findings for consideration by the Board. The investigation usually also entails an investigation of the criteria set out by the Adjudicator for consideration by a Board when determining the allocation of a benefit. The information is then provided to the Board. The Board cannot simply accept the findings of the administrator but should ensure that it has procedures in place which allow it to test the information provided. The Board must satisfy itself that all the relevant criteria which it needs to consider in order to make an equitable distribution have been investigated fully and that the information which it has is sufficient.

6.6.2 There have been instances where Boards have been provided with

that a great deal relate to the question of equity.

⁹⁰ *Good governance guidelines for retirement funds* at www.pfa.org.za, last visited 30 September 2011.

information intended to assist it with making an equitable distribution, the information has been relied upon by the Board and has formed the basis upon which the allocation is based. Subsequently when the matter goes before a tribunal it becomes evident that the factual information provided by the administrator was incorrect and never tested or challenged by the Board.⁹¹ As the Board has the duty to make an equitable distribution the Board should never accept the information provided by the administrator as being correct. Further, section 7D(b) of the Act requires a Board to put in place proper control systems which systems must contemplate ensuring control over the information gathering process undertaken by the administrator to assist the Board in determining an equitable distribution of the death benefit. The Board should also never rubber stamp an allocation proposed by its administrator without applying its mind to the proposed distribution and considering whether the proposed distribution would be considered to be a proper exercise of its discretion. Once again the duty of the Board to protect its members and beneficiaries interests is important. In terms of section 7C(b) of the Act a Board must act with due care and diligence, it is probable that this object of the Board will only be satisfied where the Board applies its mind to all the facts before it and then based on those facts makes a distribution which it considers to be equitable and which would be viewed by any other reasonable Board as being so.

6.7 Interim payments

6.7.1 To the extent that a Board does adopt a process which allows it to make interim payments of the benefit to identified beneficiaries then a Board cannot consider the value of the interim payments when determining what the final allocation will be to that beneficiary. Such a consideration would be a fettering of the Board's discretion and would not necessarily result in an equitable distribution. A Board should also not allocate an amount to a beneficiary to whom it would otherwise allocate a nil value, simply because that person has received an interim payment. If the Board has made such interim payments and at

⁹¹ *Supra* at footnotes 2 and 3.

the date of the final distribution the beneficiary gets a nil value or less than what was allocated by way of interim payments, then the Board may be liable in their personal capacity for the loss suffered by the fund. Accordingly, it is imperative that Boards which adopt an interim distribution protocol ensure that the protocol contains risk mitigation mechanisms such as agreements which regulate the position in respect of overpayments to beneficiaries.

6.8 Conclusion

6.8.1 It appears from the decisions of the Adjudicator that the Board would satisfy its obligation to effect an equitable distribution if the evidence upon which it based its decision can withstand scrutiny and if the decision were to be considered by another Board the outcome is likely to be the same or a wholly similar distribution of the benefit. In *Carvalho v Lifestyle Retirement Annuity Fund & Others*⁹² the Adjudicator expressly indicated that “in reviewing a decision of the Board, the role of the Adjudicator is not to determine what the wisest, or fairest or most generous distribution would have been, or what distribution he/she would have preferred, but rather, whether the Board has properly exercised its discretion in terms of the law. Whilst the reviewing tribunal may not necessarily agree with the decision taken by a Board, that in itself is not a ground for review.”⁹³ It is evident that the question of equity or fairness is irrelevant in the context of a death benefit distribution and that the fundamental consideration is whether the Boards discretion as been exercised correctly. Accordingly, it appears that the basis of the Adjudicator’s determinations is that a proper exercise of discretion will necessarily result in an equitable distribution.

6.8.2 A position which is emerging more and more as being the default position is that most Boards take the view that a larger allocation to the minor children of a deceased member translates into an equitable distribution. Adopting such a default position is not without risk. Boards

⁹² *Carvalho v Lifestyle Retirement Annuity Fund & Others* (PFA/WE/7998/06/CN) at paragraph 5.4.

⁹³ *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR. 2579 (PFA) at paragraph 13.

should be advised that the allocation of a death benefit; which when ultimately tested is considered to be equitable, can only be achieved, if the Board considers each case on its own merits, that is, even the determination of what is equitable must be made on a case to case basis. It is not improbable that the minor children of a deceased member should not receive the largest portion of the benefit and that such an allocation would be determined to be inequitable by a tribunal called upon to adjudicate a complaint. A specific case could exist which "requires" a Board to make the larger portion of the benefit available to the deceased's wife for instance because she is not working and in need of immediate financial assistance or because when she becomes older her financial situation is likely to be more precarious than that of her children.

6.8.3

The extent of the investigation which must be conducted by a Board can never be dictated other than by the circumstances present in each distribution. For instance some distributions may require a Board to investigate the cause of a member's death especially where a death certificate records the cause of death as being unnatural. At common law there is a tenet which provides that *'de bloedige hand en neemt geen erffenis'*, that is, he who has caused the unlawful death of another is precluded from benefiting financially from such a death. In *Makhanya v Minister of Finance and Others*⁹⁴ the High Court held that the principle could also be applied to benefits conferred by statute. Accordingly, the position appears to be that where a deceased was murdered by his or her dependant or nominee that person cannot receive a portion of the death benefit which is available for distribution. Accordingly, it would be prudent for a Board, where the deceased has died through unnatural causes, to satisfy itself that none of the persons who form the circle of beneficiaries is responsible for the member's death. To the extent that there is a possibility of a dependant or nominee being responsible for the death, that is, the person is being investigated by the police or criminal charges have been laid then the Board should be wary of distributing the benefit or a portion of the benefit to such a person. It would be prudent for a Board

⁹⁴ 2001(2) SA 1251 (D) at 1254C.

which finds itself in such a situation to consider employing a mechanism which does not prejudice the other beneficiaries and which will not prejudice the suspected beneficiary should he or she be cleared of all suspicion.

6.8.4 The position adopted by most Boards appears to be, where there are dependants and nominees, that the Board must ensure the protection of dependants over nominees. Accordingly, the usual position is to consider the financial needs of the dependants and then if there is any portion of the death benefit available after distributing to such dependants to make an allocation to nominees. This position is unlikely to be held to be incorrect if challenged as the basis of the section is to ensure, as far as possible, the financial independence of dependants and as long as Boards are able to show a reasonable and rational exercise of their discretion.

6.8.5 The fiduciary environment within which the Board operates requires it to make an equitable distribution and so a Board needs to ensure that it has the necessary checks and balances in place which require it to apply its mind to relevant considerations while discarding irrelevant ones and to make a decision which is equitable and gives effect to the intention of section 37C. It appears from the Adjudicator's determinations however that many Boards do not understand what a relevant consideration is within specific circumstances and are failing in their duty.

CHAPTER 7: DETERMINING THE MODE OF PAYMENT

7. Payment

7.1 Introduction

7.1.1 Once a Board has determined the beneficiaries and is satisfied that its proposed allocation to the circle of beneficiaries is, in its view equitable, the Board must then decide upon the manner in which payment will be effected. Section 37C(2) provides that a benefit may be paid directly to a beneficiary or to one of three authorised parties, that is, a person who is competent and recognised in law to receive and manage the benefit for the beneficiary, or to the trustees of a trust contemplated in the Trust Property Control Act⁹⁵ or to a beneficiary fund for the benefit of the beneficiary. Section 37C(2) regulates the payment of a benefit to a recognised third party for the benefit of a beneficiary. Where a Board opts to make payment to an authorised third party then that section records that the payment is deemed to be payment to the beneficiary and a fund would no longer be liable to that beneficiary notwithstanding the fact that the beneficiary did not actually receive the benefit directly.

7.1.2 This step of the distribution of the death benefit is also onerous. A Board is not at liberty to simply make payment in cash, directly to the beneficiary, or to make payment through one of the other recognised modes without considering the impact of the chosen mode of payment on the beneficiary. The Board is once again required to apply its mind when considering what manner of payment is appropriate in the circumstances of the case. It is accepted that there are different considerations to be applied when the beneficiary is a minor as opposed to when the beneficiary is a major. It is evident from the determinations of the Adjudicator⁹⁶ that, although the Act does not expressly state that payment must be effected directly to a major,

⁹⁵ Act 57 of 1988.

⁹⁶ *Moralo v Holcim SA Provident Fund* (PFA/GA/5400/2005/ZC) and *Mafe v Barloworld SA Retirement Fund* (PFA/FS/13033/07/CN).

direct payment is the default position unless the Board takes the view that there is sufficient reason for it to elect to use a different mode of payment.⁹⁷ The Board needs to adopt a mode which is reasonable and appropriate in the given circumstances.⁹⁸

7.2 Payment to a trust

7.2.1 The first option available to a Board is payment to a trust. If a Board has opted not to make a direct payment and is considering placing the benefit into a trust then in accordance with section 37(2)(a)(i) only a trust which has been nominated by the deceased member, a major beneficiary or a person recognised in law or appointed by a court to manage the affairs or meet the daily care needs of a beneficiary may be used. However, to the extent that such a trust is nominated in compliance with section 37(2)(a)(i), the Board is not compelled to make payment to such a trust. The Board would have to satisfy itself that payment to such a trust would be in the best interests of the beneficiary.

7.2.2 It has become evident in recent years, given scandals such as Fidentia, where the benefits which were put into trust for the benefit of beneficiaries were swindled, that Boards should be very cautious when opting to put money in to trust. Even the Adjudicator has cautioned that a Board must proceed with the utmost care and diligence when considering an investment vehicle, even when assessing the perceived security offered by trusts especially on consideration of the huge financial loss incurred by the beneficiaries of the Living Hands Trust, whose benefits were recklessly and in some instances negligently placed with Fidentia Asset Management.⁹⁹ A Board needs to always remember that a decision in respect of the investment of funds belonging to beneficiaries is a duty that requires the exercise of sober minds, utmost care and diligence by the Board.¹⁰⁰

⁹⁷ *Ex Parte Oppel and Another* 2002 (5) SA 125 (C); *Moralo v Holcim South Africa Provident Fund* (PFA/GA/5400/2005/ZC).

⁹⁸ *Chitja v Alexander Forbes Financial Services* (PFA/GA/8633/2006/SM).

⁹⁹ *Lebepe v Premier Foods Provident Fund and Others* [2007] 3 BPLR 325 (PFA) at paragraph 5.2.

¹⁰⁰ *Ibid*

7.2.3 A Board which opts to place a beneficiary's benefit into trust would need to ensure that there is unlikely to be prejudice which could be suffered by a beneficiary and that the trust which it is considering is well managed and has a proven track record. Where a Board has not properly investigated the trust and does not apply its mind to placing the funds in such a vehicle, if the beneficiary does suffer prejudice, it is likely that such a beneficiary would have recourse against the fund.

7.3 Payment to a minor

7.3.1 A Board also has the option of making payment to the guardian of a minor beneficiary or the person appointed to manage the affairs of a major beneficiary. The Adjudicator has on numerous occasions reiterated that payment to a minor's guardian should be the usual position adopted by a Board unless cogent reason exists for making payment by some other recognised mode.¹⁰¹ Payment to a minor's guardian does not open a Board to much risk. The only time a Board would be open to liability is if it were negligent in making the payment to a minor's guardian, that is, the Board did not consider that person's ability to manage the funds or knew or ought reasonably to have known that paying the benefit to such a person would not be in the best interests of the beneficiary. For instance a Board which makes payment to a guardian who has been convicted of fraud would be at great risk of being liable for any loss suffered by the beneficiary as a result of the guardian's actions. In such an instance the Board would not have exercised its discretion properly as it did not consider all the relevant factors necessary for making the decision.

7.3.2 There have been numerous decisions which consider the failure of a Board to properly consider the necessary factors before making payment of a minor's benefit to a third party other than the guardian. In

¹⁰¹ *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at page 4895/ *Chitja v Alexander Forbes Financial Services* (PFA/GA/8633/2006/SM).

*Malatjie v Idwala Provident Fund*¹⁰² the Adjudicator set out some of the factors which a Board should consider such as the amount of the benefit, the ability of the guardian to properly administer the money, and the fact that the benefit would need to be employed in such a manner that it is provided until the beneficiary attained his or her majority. It also appears from the decided cases that the higher the amount of benefit, the more onerous the duty on the Board to ensure that measures are put in place for the proper care and administration of the amount.¹⁰³ In light of the decisions of the Adjudicator and the obligations of the Board to apply its mind, it is evident that the Board cannot fetter its discretion by simply adopting a mode of payment without considering all the relevant factors. It would be prudent for Boards which opt not to make payment to a minor beneficiary's guardian to have evidence which indicates cogent reasons for adopting such a resolution.

7.3.3

Section 37C also provides that a Board may pay the benefit which is due to a minor in instalments provided that interest accrues from time to time. Once again a Board which considers such an option must have a good reason, based on evidence, for depriving the minor's guardian of control over the entire benefit. Further, the Board must ensure that it has administration processes in place which allow it to elect for such an option. A Board which opts to pay a minor's benefit in instalments must ensure that the interest is accruing at the correct rate and periods, that the instalments are paid and that the instalment arrangement is not so rigid as to prejudice the beneficiary. For instance a Board would need to be able to access the benefit should it be required for payments relating to the maintenance of the minor. It would also be relevant for a Board to consider the cost of such an arrangement to the fund and the benefit which such an arrangement provides and whether such benefit could not be achieved through a beneficiary fund for instance.

7.4 Payment to a person recognised in law

¹⁰² [2005] 1BPLR 45 (PFA) at paragraph 16.

¹⁰³ *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) at page 1031.

7.4.1 Section 37C also recognises payment to a person recognised in law as being responsible for managing the affairs and meeting the daily care needs of a beneficiary. This means that there is a possibility that a person other than the guardian of a minor could be considered as an authorised third party. The Act does not define who such a person is and as such reference would need to be made to other legislation such as the Children's Act¹⁰⁴ Given that there is no clear reference in the Act as to exactly who should be considered as managing and meeting the daily care needs of a beneficiary, it is important that a Board consider whether a person meets such criteria and has any standing in law. If such a person exists, the Board is not compelled to effect payment to that person but would need to investigate the possibility of such a payment. It may be sufficient for a Board to discount payment to such a person in favour of a trust or beneficiary fund as the person has no right to administer the finances of the beneficiary and further the person may only be providing the required care for a short period of time and will not be around to administer the finances until for instance a minor beneficiary attains majority. Given the risks which attach to opting for such a payment it would be prudent for the Board to consider all the options at its disposal ensuring that it opts for the mode of payment which is in its view least prejudicial to the beneficiary both in the short term and the long term.

7.5 Payment to a curator

7.5.1 Payment of a benefit to a beneficiary's curator does not pose issues as the usual process when appointing curators is that the court considers their capabilities to administer finances. It is unlikely that a Board will be considered negligent if it makes payment to a curator given that a court has appointed such a person, However a Board must satisfy itself that the relevant legal requirements have been met and that the curator has been duly appointed.

7.6 Payment to a beneficiary fund

¹⁰⁴ Act 38 of 2005.

7.6.1 The last option which a Board has available to it is payment to a beneficiary fund which is registered in accordance with the Act. Given the prevalence of mismanagement of money within trusts and what appears to be regulatory failure to ensure proper controls within trusts, the retirement fund industry has taken the view that it may be best for a Board to opt to use a beneficiary fund rather than a trust. Once again payment to such a vehicle is not a mindless task and requires a Board to ensure that it chooses a beneficiary fund which is best for the beneficiary.

7.7 **Payment to a major beneficiary**

7.7.1 Boards have come under fire for taking a paternalistic approach to payment of a benefit to major beneficiary who in the view of the Board is incapable of managing his or her own affairs. It is clear from the provisions of section 37C that a Board does not have *carte blanche* when deciding the mode of payment to a major beneficiary who is not prohibited in law from managing his or her own affairs. Regardless of whether the Board believes a major beneficiary capable of managing the benefit or not, the Board may only pay the benefit to a beneficiary fund or in instalments if the beneficiary consents to such mechanisms for payment. The Board can also only pay the funds into a trust nominated by the major beneficiary. It appears that the Board does not have many options other than approaching a court to have a curator appointed to manage such major beneficiary's affairs. Where such a course is considered the Board would need to consider whether the financial costs associated with obtaining such an order would be reasonable, not be more than the benefit itself and cause no prejudice to the fund or its members.

7.7.2 A Board may also pay a major beneficiary by way of instalments but such an arrangement can only be reached with the consent of that beneficiary and must be regulated by agreement between the fund and the major beneficiary, which agreement must satisfy the express requirements of section 37C(4). Given that such a mode of payment can only be reached by agreement, the Board in my view, is only exposed to a very small degree of risk, Which risk would arise for

instance if the agreement was reached on a misrepresentation. Once again however a Board which considers such an approach must ensure that it does not have a financial impact on the fund and its members and that the administration system of the fund is able to administer the provisions of the agreement. If the control systems which the Board has in place are ineffective and the fund does not perform in accordance with the agreement then the fund could be at risk of being sued for breach of contract which in turn would expose the Board to risk and potential claims against the members of the Board in their personal capacity.

7.8 Conclusion

7.8.1 Regardless of the mode of payment which the Board opts for, the Board would need to be able to substantiate its choice should its decision be challenged. When it comes to the mode of payment most of the complaints relate to the reason the Board opted for a mode of payment other than direct payment. Accordingly it would be prudent where Boards opt for payments other than through what can be considered a direct mechanism for the Board to have a cogent reason for such a decision and the evidence to substantiate the reasoning behind its decision.

CHAPTER 8: OBTAINING EXPERT ADVICE

8. Expert Advice

8.1 Introduction

8.1.1 There is no doubt that satisfying the obligations imposed upon it by section 37C is difficult and not without risk to the Board. The Board however is not expected to apply section 37C without assistance. Section 7(D)(e) of the Act expressly provides that the Board must seek expert advice where necessary. It is evident that the advice must be provided by an expert on the particular issue which is being considered. For instance if the Board is struggling with a legal question then the Board must seek out the service of an attorney who has expertise in pension law, if the Board is unsure as to whether a person is the child of a deceased member then the Board must seek out an expert to conduct paternity testing.

8.2 Appointment of experts

8.2.1 A further consideration which a Board must have when appointing an expert is whether the expert is independent. The Registrar has clearly indicated that the Board should satisfy itself that any expert advice obtained is independently given and that where the professional gives expert advice in respect of a service provider or the employer or sponsor to the fund then the Board should satisfy itself that such advice is not compromised by a conflict of interest.¹⁰⁵

8.2.2 The Board also has a duty to appoint registered or accredited or approved experts.¹⁰⁶ Experts are specialists in their field who consider each case on its own facts and are able to pronounce and give a learned opinion in his or her field of specialisation.

¹⁰⁵ *Supra* at footnote 27 at page 5. .

¹⁰⁶ *Ibid* at paragraph 39 and 40.

8.3 Impact of expert appointment

8.3.1 It has become almost impossible for Boards to function without obtaining proper expert advice especially in the areas of the Act which are more likely to be prejudicial to the fund and its members such as effecting an equitable distribution of a death benefit. It appears that the use of experts should be proactive, especially where the potential prejudice is great, rather than reactive. It is evident from the determinations of the Adjudicator that very often a Board will only seek expert advice where a decision is the subject of a dispute. A Board should always be aware that it can use an expert's service and should where necessary apply its mind to whether a particular situation warrants such services being procured by the Board.

8.3.2 Accordingly, a Board can seek whatever expert advice is necessary to ensure that it is complying with its obligations or at least has in place operating procedures which are aimed at mitigating the risk of making an incorrect distribution. However to the extent that the Board does use experts, the Board cannot fetter its discretion by not applying its mind to the facts at hand and blindly following the advice or opinion of the expert. The Board may use experts to assist with effecting an equitable distribution but cannot by using such experts extricate itself from having to make a decision or from the consequences which may attach to the decision.

8.3.3 For instance in the *Jacobz v Altron Group Pension Fund and Others*¹⁰⁷ determination, a complaint which considered a disability benefit claim, the Adjudicator held that the trustees failed to apply their own mind to the complainant's claim and simply rubberstamped the recommendations made by the fund's medical experts. It is clear that notwithstanding the use of experts a Board is required to apply its mind to the facts of a situation.

8.3.4 There is no doubt that, when considering a death benefit distribution, situations may arise which require expert advice. Trustees do not

¹⁰⁷ *Jacobz v Altron Group Pension Fund and Others* (2003) 8 BPLR 5071 (PFA) at paragraph 26.

always have the necessary skill, expertise and qualifications which may be required to effect a specific distribution which an expert may have. The question which then becomes pertinent is how then is a Board supposed to apply its mind to the advice or opinion of an expert who is far more skilled to make the decision. Boards must apply their minds by questioning the expert until they understand the advice given and are in a position to accept or reject it. Boards must take cognisance of the fact that they can agree with the recommendation of an expert or disagree but what is required of them is to consider the recommendations of the expert in light of the facts of the situation, ask relevant questions and take a view on the recommendation. What a Board cannot do is simply rubberstamp the recommendation of an expert without testing and considering it.

8.3.5 The position which needs to be followed by a Board when using an expert are summarised by the Mouton Committee Report¹⁰⁸ and requires the Board to consult experts when the Board does not have adequate knowledge or skills within the Board to deal with an issue. Further, once the expert has responded to the issue, the Board must consider the advice and then make a relevant and reasonable decision.¹⁰⁹

8.3.6 PF Circular 130 records that the Board is not obliged to have all the expert skills necessary for the day to day operation of a fund and it is reasonable for the Board to engage relevant experts for advice on issues which are the responsibility of the Board.¹¹⁰ Most importantly the Board needs to know and understand what they do not know and thereafter appoint people who are most capable to assist them. As stated above however it remains the Board's duty to deliberate and accept those opinions and legal advice that advances the interests of the fund and its members and discard those that may cause the exercise of their discretion to be categorised as unreasonable and exercised without due care and diligence.

8.4 Conclusion

¹⁰⁸ *Supra* at footnote 21.

¹⁰⁹ *Supra* at footnote 20 at page 108.

¹¹⁰ *Supra* at footnote 27 paragraph 39.

- 8.4.1 A Board must be aware that it is empowered to appoint an expert and must give due consideration to appointing such a person where a situation requires such input. However a Board can never opt out of its obligations on the basis of such an appointment. Accordingly, a Board which appoints an expert, regardless of whether the expert is an attorney, medical practitioner or private investigator, is still required to apply its minds to the report of the expert and exercise its discretion in the correct manner.
- 8.4.2 Given the risk of a complaint being lodged with the Adjudicator and a decision being overturned, it may be prudent for Boards that are considering distributions which are not negligible in value to seek advice from an expert where it is of the view that the complexities of the distribution are such that it is very likely to be challenged. This will give the Board the benefit of an outside view which may cause it to exercise its discretion differently and in a manner which makes any challenge less likely to be successful.
- 8.4.3 The use of experts will no doubt reduce the possibility of a complaint being lodged with the Adjudicator if the proper process is followed by the Board. However a Board must be aware of the reality which is that the expert is merely another tool provided by the Act to assist the Board to get the job done correctly. The expert is there to guide the Board and should not cause the Board to abdicate its responsibilities.

CHAPTER 9: POSSIBLE OUTCOMES WHEN A DISTRIBUTION IS CHALLENGED

9. Outcomes

9.1 Introduction

9.1.1 The question which now needs to be considered is what is the position where a complaint is lodged with the Adjudicator and the distribution of a death benefit is determined to be contrary to the provisions of section 37C?

9.1.2 It is evident from the decisions of the Adjudicator that there is a reluctance to alter a decision which has been reached through a reasonable exercise of discretion.¹¹¹ Where a Board has conducted itself well then the usual determination of the Adjudicator is to find that the Board has acted reasonably and properly. For instance in the determination of *Coetzee v Central Retirement Annuity Fund*¹¹² the Adjudicator took the view that the Board was empowered with discretionary power to decide on an equitable distribution of the death benefit and that only in instances where the decision maker has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that the decision of the Board is reviewable.

9.1.3 Throughout this dissertation there are references to the risks which may attach to the members of the Board. The question which is often posed by a Board is what is the risk which the fund will face if a certain decision is made, it is very rare for a member of the Board to question his or her own liability which may arise from a decision of the Board. Very few Boards even understand what recourse there is when a death benefit distribution is determined to be incorrect.

¹¹¹ *Schleicher and Another v SA Retirement Annuity Fund and Others* 2002 (7) BPLR 3677 (PFA) at 3685 B-D.

¹¹² *Supra* at footnote 40 at paragraph 5.7.

9.2 Adjudicator's recourse

9.2.1 The determinations of the Adjudicator adopt the administrative law approach of remitting a decision to the initial decision maker unless to do so would result in a further failure of justice. Where the distribution is referred back to the Board for re-consideration, the Board is required to re-exercise its discretion and to take into consideration the reasons for the determination. However given that the Board has to exercise its discretion taking into consideration factors which it considers relevant, a Board which reconsiders a distribution may not necessarily make a different distribution to its initial distribution. The Adjudicator has also where a distribution is determined to be in contravention of section 37C substituted his or her own decision for that of the Board.¹¹³

9.2.2 In the determination of *Gowing v Lifestyle Retirement Fund*¹¹⁴ a question that lay before the Adjudicator was the respondent's argument that given that an investigation had taken place and dependants identified, there was no longer a need to consider claims by nominees. In considering whether the matter needed to be remitted back to the Board in order for them to re-exercise their discretion the Adjudicator considered the general principle applied by the courts.¹¹⁵ The courts will not readily assume discretion which has been entrusted to another tribunal or functionary, and will refer the matter back to that tribunal or functionary for a new decision. This general principle is only departed from in exceptional circumstances, where for instance the end result is a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter; further delay would cause unjustifiable prejudice to the applicant; the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again; the court is in a good position to make the decision itself.¹¹⁶

¹¹³ *Moir v Reef Group Pension Plan and Others* [2000] 6 BPLR 629 (PFA) at page 640.

¹¹⁴ *Supra* at footnote 7 at paragraph 5.3.

¹¹⁵ *Supra* at footnote 7 at paragraph 9.1

¹¹⁶ *Supra* at footnote 7 at paragraphs 9.1 and 9.2.

9.2.3 In *Gowing*¹¹⁷ the Adjudicator held that justice would not be served by remitting the matter back to the Board.¹¹⁸ The Adjudicator stated that the Board had done little to properly investigate the matter and there was “nothing to suggest that a reconsideration of the matter would be undertaken more comprehensively, or that there would be a consideration of the relevant factors.”¹¹⁹ The Adjudicator considers an important factor to be the length of time it has taken to finalise a distribution.¹²⁰ The Adjudicator took the view that due to the further delay that would be caused by remitting the matter which had already been pending for more than three years, it was best for the Adjudicator to determine the matter using the information before her.

9.2.4 One of the risks a Board faces when a decision is challenged is that the Adjudicator will substitute his or her own decision for that of the Board. Given that the usual process for determining a complaint is that the Adjudicator considers the written submissions of the parties, a Board must ensure that its response to a complaint is comprehensive and provides all the relevant information to the Adjudicator, so that in the event of its decision being substituted, the decision of the Adjudicator will at least take into consideration that which was considered by the Board. Accordingly, where a death benefit distribution is challenged, a Board must ensure that it does respond and that the response is comprehensive and has its basis in the Act and the rules of the fund and provides the evidence which informed the decision.

9.3 Consequences for Board members

9.3.1 In certain instances a fund will suffer financial prejudice as a result of a distribution being found to be deficient. A fund is a separate entity from its Board and the individual members of that Board. A fund is capable of suing and being sued. In most instances an aggrieved person will sue the fund for any loss suffered, if the fund suffers financial prejudice because of the negligence of trustees then the fund has a right of

¹¹⁷ *Supra* at footnote 7 at paragraph 9.4.

¹¹⁸ *Supra* at footnote 7 at paragraph 9.4.

¹¹⁹ *Supra* at footnote 7 at paragraph 9.2.

¹²⁰ *Supra* at footnote 7 at paragraph 9.3.

recourse against the relevant trustee for the financial loss suffered which would include any legal costs associated with defending the claim. Due to the fiduciary relationship which exists even a member or beneficiary could initiate an action directly against a trustee in his or her personal capacity. The ever growing view is that trustees have a strict duty to distribute the trust property to the right person and further that under normal circumstances trustees must be held strictly liable if they fail to distribute the trust property to the right person.¹²¹

9.3.2 There are rules which record that the fund will indemnify the trustees against any loss arising from their negligence. Given that a Board has an obligation to act in the best interests of its members having such an indemnity is unlikely to be considered to be for the best interests of the members as it seeks to protect the Board at the expense of the fund and its membership. In an instance where such an indemnity exists, a fund would have no recourse against the individual trustees for any financial loss suffered as a result of the Board's actions. For purposes of this dissertation I will only consider the liability of the Board in the absence of an indemnity which operates in the Board's favour.

9.3.3 In limited circumstances and obviously depending on the facts of each case, the Adjudicator has taken a robust approach whereby trustees have been held personally liable for benefits. In the *Mes*¹²² determination the Adjudicator held that the third respondent being a trustee of the board of that fund was personally liable to compensate the complainant for the financial loss she suffered because of his failure to exercise his duties with proper care and diligence, to ensure that contributions were forwarded to Liberty Life timeously to avoid the lapsing of the underlying policy resulting in the complainant's claim for an insured benefit being repudiated by Liberty Life.¹²³ The errant trustee subsequently appealed the decision of the Adjudicator¹²⁴ and the appeal was dismissed with costs. As at June 2008 the errant trustee was liable in his personal capacity for an amount

¹²¹ *Supra* at footnote 120.

¹²² *Mes v Art Medical Equipment-PFA/GA/1198/00/LS* at paragraph 29.

¹²³ *Ibid* at paragraph 28.

¹²⁴ Witwatersrand Local Division case number 06/13614 (HC), unreported.

of R2 575 706, 62. It is evident from the *Mes* case that the exposure which a trustee could face can be very substantial and detrimental to the finances of the trustee.

9.3.4 Our courts have even ruled that the Board pay the litigation costs of a beneficiary *de bonis propriis*¹²⁵ on an attorney and client scale. In *Seymour-Smith v Maxam Dantex South Africa (Pty) Limited and Others*¹²⁶ the court held that the Board had acted errantly and with gross negligence and ordered the members of the Board to pay the costs *de bonis propriis* jointly and severally.

9.3.5 Funds usually have fidelity and professional indemnity cover in place which protects the fund in the event of trustee negligence. Where a Board makes a distribution and is subsequently advised that its decision will be challenged then the Board must advise its insurer of the possible claim as soon as possible as most policies of insurance provide that notice must be given as soon as the fund or Board has reason to believe that a claim will be made. Insurers who do not receive notice of a claim as provided for in the policy document are entitled to repudiate such a claim. Where such repudiation occurs and the fund is out of pocket, the fund or its members could initiate a claim against the individual members of the Board in their personal capacity.

9.3.6 Where a Board or its individual members give the Registrar reason to believe that the Board member is not fit and proper to hold office, then in terms of section 26(4) of the Act, the Registrar may, after giving the Board member a reasonable opportunity to be heard, direct the Board member to vacate office. It is very unlikely that the Registrar will invoke such a power where a Board gets a few distributions incorrect but I have no doubt where a Board shows a lack of knowledge time and time again when making a distribution of a death benefit that the Registrar will have cause to have the Board members removed from office.

9.3.7 The Act however does not provide a specific penalty for non-

¹²⁵ This is a type of cost order which a court may grant against a party to litigation where the party has acted in bad faith and unreasonably especially where the matter could have been resolved by means other than litigation.

¹²⁶ 2008 JDR 0362 (W).

compliance with section 7C and D. Thus when it comes to a failure of a Board to act in accordance with its statutory duties consideration must be given to the recourse available at common law or within other statutes. The recourse at common law Penalties imposed by common law vary from the return of profits made as at result of improper conduct to being liable in one's personal capacity for any loss or damage caused by such conduct.¹²⁷ Further recourse available against errant trustees exists within other statutory regimes such as the Financial Institutions (Protection of Funds Act),¹²⁸ a penalty or up to 15 years' imprisonment can be imposed on a trustee if guilty of a criminal offence¹²⁹.

9.4 Conclusion

9.4.1 There is no doubt that serving as a trustee on a Board is not without risk, however a Board which does not obtain adequate training and an understanding of what section 37C requires of it, will be exposing itself to even greater risk of liability. Given that trustees may be held to be liable in their personal capacity for the actions of the Board or for their individual actions, Boards must ensure that they actively seek to be educated and that they are fit and proper to undertake the role. Accordingly, given that it serves not just the interest of a fund and its members but also the interest of the individuals on the Board, a Board must actively ensure not just training but also the implementation of processes which seek to provide them with a practical guide through their duties when distributing a death benefit.

¹²⁷ See *supra* at footnote 20 at page 109.

¹²⁸ Act 28 of 2001.

¹²⁹ *Ibid* at section 10.

CHAPTER 10: THE POSITION IN THE UNITED KINGDOM**10. United Kingdom****10.1 Introduction**

10.1.1 The South African trust law regime has its basis in the trust law system of the United Kingdom. Accordingly, it is very relevant, in the context of this paper to consider the extent of the duties of trustees who sit on the boards of funds in the United Kingdom. It appears that the responsibilities of the English trustees are divided into three categories: duties, powers and discretionary powers. The general requirements to be met by English trustees appear to be very similar to the fiduciary requirements which need to be met by South African Boards.

10.1.2 Given that this dissertation is focussed on section 37C which empowers Boards with a wide discretion, it is relevant to consider the manner in which the discretionary powers of English trustees is required to be exercised. English pension law requires discretionary powers to be exercised in a reasonable manner and it is accepted that a capricious or irrational decision is likely to be challenged.¹³⁰ The requirement of English trustees is that they consider the circumstances very carefully before making a decision. This requirement is mirrored by the responsibility of South African Boards as discussed earlier.

10.2 Guidance provided to English trustees

10.2.1 English trustees are assisted in meeting their duty by rules which are known as the *Wednesbury Principles* and it is accepted that a Board which follows those rules is unlikely to have a decision overturned. The *Wednesbury Principles* require a Board to ask themselves the correct questions; direct themselves correctly in law, not to arrive at a perverse decision, that is, a decision which no reasonable Board could arrive at and to consider all relevant factors while discarding irrelevant ones. The manner in which an English Board is required to exercise its

¹³⁰ *Edge v Pensions Ombudsman (CA)* (1999) OPLR 179

discretion appears to mirror the requirements which need to be met by a South African Board which is called upon to exercise its discretion. Further as in South African law, the English position is that in the absence of evidence to the contrary, the presumption is that the trustees have exercised their discretion properly.¹³¹ It could also be concluded from the decisions of the Adjudicator, although not expressed, that the guidelines which appear in many decisions have their roots in the *Wednesbury Principles*. The position in English pension law, given the objects of this dissertation, are even more relevant because in the event of a death in service lump sum benefit having to be paid the board of a fund is required to exercise discretion.

10.2.2 Distribution of a death benefit by English trustees

10.2.3 A death benefit must be paid to dependants otherwise tax consequences arise. Dependant, as in South Africa, has a statutory definition which includes the members spouse or civil partner, anyone who is dependent on the member by reason of physical or mental disability, anyone who is financially dependent or financially interdependent on the member and the members children (up to age 23 years regardless of whether such a child is financially dependent on the member or not or still to be educated). The rules of an English pension fund may however place further limitations on the identified group but cannot extend it.

10.2.4 Where a death in service lump sum is payable English trustees are called upon to exercise their discretion to decide who receives the benefit. On first glance this duty appears to be identical to that of its South African counterparts and so it would stand to reason that English trustees must be faced with the same difficulties.

10.2.5 The practice which is followed by most English Boards is to encourage a member on joining a pension arrangement which provides lump sum death benefits to complete an expression of wish declaration form. It is immediately apparent that the form is not called a nomination form and

¹³¹ *Wilson v The Law Debenture Trust Corporation* (1995) OPLR 103

which very name suggests that such a form on completion is binding on a Board. It may be prudent for South African Boards to follow such a model and make it clear that the form which is completed by a fund member is merely a form which is used to advise the Board of his or her wishes but does not bind the Board. A further mechanism employed by English Boards, which has merit, is the recordal of a members wishes on his or her benefit statement each year. This is used as a method to prompt members to revise their declarations if circumstances have changed. It may be prudent for South African Boards to consider adopting such a mechanism as it would increase the chances of a Board having a member's most updated wish at the time of his or her death.

10.2.6 In keeping with section 37C, the board of an English fund is not bound by the completed declaration and such a declaration only serves to record a member's wish. The considerations which must be taken into account by an English Board when considering how the benefit should be split are very similar to those which have been enunciated by the Adjudicator. The Board is called upon to consider the financial circumstances of a deceased member's legal and factual dependants and those people recorded in the expression of wish. The Board is called upon to exercise its discretion and make a reasonable distribution. Although the position appears to be exactly the same as provided for by section 37C, in English law the discretion which attaches to the distribution of the lump sum benefit can be narrowed through the rules of the fund. For instance the rule can provide that the benefit may be split up between identified persons.

10.2.7 Given that the position is regulated by Her Majesties Revenue and Customs and not the actual legislation which governs pension law, very little direction is given other than to state that the lump sum may be paid to the employee's legal representatives or a nominated beneficiary or distributed at the discretion of the trustees/administrator and it is not necessary to limit nomination or distribution to dependants.

10.3 Deviations between South Africa and England – payment of death benefit

- 10.3.1 English pension law has taken the route which is less risky as it allows discretion to be exercised but it also provides that such discretion may be constrained by the provisions of the rules of a particular fund. Accordingly, the rules of a fund can prescribe the parameters within which discretion is to be exercised which in turn provides guidance to trustees and decreases the fund's exposure to financial loss arising from a decision of its board. In South Africa a death benefit can only be distributed in accordance with section 37C which means that the rules cannot be used to mitigate the risk of the fund.
- 10.3.2 A further important deviation between the English position and South Africa's is that English Boards can make payment to a deceased member's estate. Given that deceased estates are structured to meet the wishes of the deceased or in the event of no will existing ensuring the protection of the closest successors of the deceased, payment to such an estate may seem to be the obvious choice however payment to the estate attracts inheritance tax while payment to an individual does not attract tax. It appears that the English model is also structured to give a board motivation to find the dependants of the deceased member and to apply its mind so that the benefit is distributed in a reasonable manner based on relevant considerations.
- 10.3.3 It is evident on comparing the English position with the South African position that the discretion which attaches to the payment of lump sum death benefits is treated very similarly. It is also evident that the Boards in both jurisdictions are tasked with onerous obligations but that the task of a South Africa Board is more difficult as it cannot narrow its discretion through its rules.

10.4 Conclusion

- 10.4.1 Other than the commentary on how the discretion is to be applied there is no real discussion in an English context on how the Board can ensure that it has fewer referrals to the Pensions Ombudsman.¹³² This could be

¹³² The Pensions Ombudsman was established with effect from April 1991 by Act of the United Kingdom Parliament. The statutory powers and provisions governing the ombudsman appear in

because English Boards apply the *Wednesbury Principles* or because trust law, in general, is a well understood concept which individual board members are well versed in. The other prominent feature of English pension law is that it has placed greater emphasis on trustee training in light of numerous pension scandals in the industry. The retirement funding industry in England also provides trustee training which is examinable and which covers a wide range of topics with focus on those areas which are especially problematic. Trustees are required in terms of the Pensions Act 2004 to maintain a level of trustee knowledge and understanding which includes knowledge of pension legislation as well as the key documents of their plan.

10.4.2 In the 2009 and 2010 financial year, 48 of the 889 complaints determined by the Pensions Ombudsman related to spouses and dependants benefits. I have assumed that this includes death benefit lump sum complaints as the annual report does not even have such complaints as a separate line item.¹³³ In the same year there were 3947 enquiries but only 950 of those were accepted for investigation. The Adjudicator's Office during the same financial year¹³⁴ reported receipt of 6188 complaints of which 8% (about 495 complaints) were in respect of distribution of death benefits. This is more than half of the total complaints which were investigated by the Pensions Ombudsman during the same period,

10.4.3 Given the very limited extent of the statutory provisions which regulate the payment of death in service lump sum benefits it is highly probable that there is greater scope for error in distributing a death benefit in the English pension funding environment. For instance Boards are not even given guidance as to the manner in which the benefit is to be paid. However even with the greater scope for error than that which South African Board's face, there are very few referrals to the Pensions Ombudsman regarding the distributions of death in service lump

sections 145-152 of the Pension Schemes Act 1993 (as amended) which make up Part X of that Act. They are supplemented by Regulations.

¹³³ *Annual Report and Accounts 2009/2010*, Pensions Ombudsman, www.pensions-ombudsman.org.uk, last visited 29 February 2012.

¹³⁴ *Annual Report 2009/2010*, Pension Fund Adjudicator, www.pfa.org.za/publications last visited on 29 February 2012.

sums. It can be persuasively concluded that the limited extent of referrals to tribunals is evidence that Boards which are given sufficient training and a clear understanding of their duties as well as guiding principles, will like their English counterparts meet their obligation more often than not, resulting in fewer referrals to the Adjudicator. This is substantiated by the critical concerns raised by the Adjudicator one of which is that manner in which trustee exercise discretion is a problem as they appear to ignore their fundamental mandate which is to ignore irrelevant facts and mainly take into account relevant ones.¹³⁵

¹³⁵ Critical issues facing OPFA with specific reference to the provisions of the Pension Funds Amendment Act, www.pfa.org.za/publications last visited on 29 February 2012.

CHAPTER 11: RECOMMENDATIONS

11. Way forward

11.1 Introduction

11.1.1 In an address to the National Assembly during a debate on Budget dated 24 May 2007, Mr J Moleketi, the then Deputy Minister of Finance stated that there was clearly a failure of proper governance on the part of Boards in exercising their fiduciary duties, especially in respect of the distribution of death benefits. The remedies for the consequences of poor governance which were advanced by him were litigation against errant Boards who have caused prejudice to beneficiaries and promoting collective action in cases where widows and orphans have been left destitute by the actions of a handful of unscrupulous Board members who failed to execute their fiduciary duties in a responsible manner.¹³⁶ Mr Moleketi's address was probably influenced by the Fidentia Asset Management (Pty) Ltd and the Living Hands trust scandal abuse.

11.1.2 In PF Circular 130 the Registrar records that the Board should, at the fund's expense, receive comprehensive training on both the legislative and regulatory framework and governance principles in order to equip them to effectively carry out their functions as board members, and to enable them to minimize their risk of liability as well as to safeguard them against bad decision-making.¹³⁷ The Registrar further emphasized that training is an ongoing process and shall educate trustees about new matter matters relating to risk management, benefit structures, legal issues, compliance requirements and other issue.¹³⁸

11.1.3 There has always been concern in the pension fund industry because

¹³⁶ Address to the National Assembly during the debate on Budget Vote 8 – National Treasury (including South African Revenue Service (SARS) and Budget Vote 13 – Statistics South Africa) by Mr J Moleketi (MP), Deputy Minister of Finance – www.gov.za – last visited 30 September 2011.

¹³⁷ *Supra* footnote 27 at page 7.

¹³⁸ *Ibid.*

the Act does not require trustees to be fit and proper.¹³⁹ The advantages to having a Board with the necessary skill and expertise is that the risk of ill considered decisions decreases. The effect of this is that trustees are not required to meet any specific standard and as such any person may occupy the position of a trustee regardless of whether he or she has the capability of doing a proper job. Pension reform is calling for fit and proper requirements. The advent of fit and proper requirements will hopefully bring with it better equipped trustees.

11.2 Trustee training

11.2.1 National Treasury has accepted that the key to good governance within funds is the role of trustees and as such trustees should have the necessary education, skills and experience to ensure that the decisions which they make are in the best interests of members and beneficiaries. The outcome of National Treasury's deliberations on the governance within funds is that the best way to achieve this is by the application of fit and proper standards which govern the appointment of trustees and the introduction of mechanisms which achieve proper training.¹⁴⁰

11.2.2 In light of the determinations made by the Adjudicator and the relative simplicity which were faced by most Boards that were party to those determinations, an initial recommendation is that Boards need training which focuses on section 37C. To ensure that the training sessions are producing trustees who are capable and competent trustees should be compelled to write examinations before they are appointed to Boards. Such training and subsequent examinations will ensure a more knowledgeable Board which is capable of making a simple death benefit distribution without exposing the fund and its members and ultimately themselves to risk. This recommendation is in keeping with Government policy which is that it may make it a statutory requirement for trustees to be fit and proper with certain minimum qualifications, which must be

¹³⁹ See J Mort & L Butler Beatty *A Comparative Survey of Pension Law Issues* 2nd edition (2011) at 15.

¹⁴⁰ *Supra* at footnote 1.

achieved within a fixed period from the date of their appointment.¹⁴¹

11.2.3

Even the Adjudicator has recommended that trustees need to be trained and that more money should be spent on such training given that a Board is responsible for the its members. The Adjudicator has also taken the view that the current method of training which is sold as an add on to administration or consulting services is not acceptable. The rationale being that different funds have different challenges and those challenges cannot be comprehensively met in a general training session. The Adjudicator has accepted that tailored training will be expensive but clearly states that “it is better in the long term to do things right than to be seen to do things right.”¹⁴²

¹⁴¹ *Supra* at footnote 1.

¹⁴² Adjudicator’s address to the Institute of Retirement Funds Annual Conference 2006, Durban International Convention Centre, 22 August 2006.

11.3 Proposed standard operating procedure for distribution of death benefits

- 11.3.1 A further recommendation is that Boards can mitigate their risk by adopting protocols or standard operating procedures (hereinafter referred to as SOP) which serve as guidance, in fact the adoption of such a document is contemplated by section 7 of the Act which requires a Board to implement proper control systems.
- 11.3.2 This proposed standard operating procedure is aimed at assisting a Board in the exercise of its section 37C obligations. The SOP is not a document which must be adhered to by the Board but is rather intended to be a recommendation of the type of protocols which Boards should implement in order to mitigate the potential risks which attach to section 37C. Such protocols would also ensure uniformity when considering distributions and would be a tool which could be employed by newly appointed trustees to gain an understanding of what is required of them.
- 11.3.3 This recommended SOP can be manipulated by a Board to form a protocol which suites the requirements of a specific fund and to cater for more complex distributions. The idea behind such a recommendation is that it codifies the Boards duties into a practical document while decreasing the Board's exposure to risk.
- 11.3.4 The obligations of the Board and the impact of its fiduciary duties are discussed more fully in the preceding chapters.
- 11.3.5 The proposed SOP is the following:

11.4 PHASE 1 – Does section 37C apply?

11.4.1 What is the date of death of the deceased fund member?¹⁴³

11.4.2 Do the rules of the fund provide only for a spouse or children's pension as a death benefit? If yes, section 37C does not apply. The Board is constrained by the rules of the fund and therefore need not consider this recommended protocol any further or adopt such a protocol as the fund does not provide for lump sum benefits as contemplated by section 37C.

11.4.3 In the event that the rules provide for a lump sum death benefit, section 37C will apply. A standard operating procedure, such as this one, should be adopted by the Board as it is intended to guide the Board in discharging its duties in terms of section 37C.

¹⁴³ Recording such a date will assist in tracking the 12 month period.

11.5 PHASE 2 - Deductions

11.5.1 Are there any deductions due in terms of section 37D of the Act? These are limited to deductions relating to:

- Tax;
- Loan or guarantees granted in terms of section 19(5) of the Act;
- Compensation for damages (including legal costs) caused by the member to the employer by way of theft, dishonesty, fraud or misconduct;
- Any amount assigned to the non-member spouse in terms of a decree of divorce granted under section 7(8)(a) of the Divorce Act;
- Any amount payable by the member in terms of a maintenance order; or
- Any amount which the Fund has paid or will pay by arrangement with the member or beneficiary in respect of a medical aid subscription or insurance premium.

11.5.2 If yes, these deductions must be subtracted from the death benefit, the amount which remains is the value available for distribution. Continue to Phase 3.

11.5.3 If no, continue to Phase 3.

11.6 PHASE 3 – IDENTIFY POTENTIAL BENEFICIARIES

11.6.1 Are there any nominees designated in writing by the deceased member?

11.6.1.1 There are 3 requirements for a valid nomination, namely:

- The nominee must not be a dependant of the deceased;
- The nomination must be in writing; and
- The nomination form must be addressed to the fund.

11.6.1.2 If a nomination exists and the 3 criteria set out above are satisfied then the Board must record the nominees as potential beneficiaries.

11.6.1.3 If a nomination exists but the criteria recorded above are not satisfied then the nomination form is not valid and the persons recorded thereon are not nominees as contemplated in the Act. Such persons are not to be considered in the distribution.

11.6.2 Are there any dependants?

11.6.2.1 The Board must collate as much information as possible with regard to identifying potential dependants. Information should include but is not limited to marriage certificates, birth certificates and the will of the deceased, etc.

11.6.2.2 The Board should ensure that a comprehensive investigation is done in order to identify potential dependants. The investigation can be done by the administrator but the Board will be responsible for ultimately determining the dependants. If the investigation is done by the fund's administrator, the Board should request frequent follow ups and progress reports.

11.6.2.3 Once the Board has all the information in its possession the Board must then consider the different categories of dependants set out in the Act and determine whether a person is a dependant or not.

- 11.7 **“Paragraph (a) dependants”**: Are there any persons in respect of whom the member was legally liable for maintenance? See paragraph 11.8 for guidance as to which person may qualify.
- 11.7.1 Such a person must be dependent on the member for maintenance as a result of a legal obligation at common law or statute. This is satisfied if all of the following criteria are met:
- 11.7.2 Was the relationship such that the law imposed a duty of support?
- 11.7.2.1 If yes, continue to paragraph 11.7.3
- 11.7.2.2 If no, not a ‘paragraph (a) dependant’. Check if person is a “paragraph (b) or (c) dependant” (see 11.911.15 below). If no, person is not a dependant and therefore cannot benefit.
- 11.7.3 Was the person who is claiming maintenance unable to support himself / herself?
- 11.7.3.1 If yes, continue to paragraph 11.7.4.
- 11.7.3.2 If no, not a “paragraph (a) dependant”. Check if person is a “paragraph (b) or (c) dependant” (see paragraph 11.911.15 below). If no, person is not a dependant and therefore cannot benefit.
- 11.7.4 Did the member have the resources to support the claimant?
- 11.7.4.1 If yes, record dependant as potential beneficiary.
- 11.7.4.2 If no, not a “paragraph (a) dependant”. Check if person is a “paragraph (b) or (c) dependant” (see paragraph 11.911.15 below). If no, person is not a dependant and therefore cannot benefit.

GUIDANCE TO TRUSTEES ON PARAGRAPH (a) DEPENDANTS

- 11.8 The following relationships may result in a paragraph (a) dependency:
- 11.8.1 Parents and Biological, Legitimate Children

- 11.8.1.1 If there is a valid court order requiring the deceased fund member to maintain a child the requirements of paragraph (a) are satisfied and the child is a dependant.
- 11.8.1.2 In the absence of a court order there is a common law duty on parents to maintain their children. If a major child requires support and the parents have the means to provide such support, then depending on the station in life of the parents, the parents may be liable to maintain a child beyond majority.
- 11.8.1.3 If the criteria set out above are met, a minor or major child may be a dependant and is entitled to be considered by the Board when effecting the death benefit distribution.
- 11.8.1.4 Trustees must ascertain that the child/children are in fact the children (including disinherited children) of the deceased. Where the Board has doubts as to whether a child is in fact a child of the deceased member the Board needs to ascertain such fact before that child can be considered as a potential beneficiary.
- 11.8.2 Children and Biological Parents
- 11.8.2.1 A child has a reciprocal duty to maintain his/her parents if the parents are indigent and the child has the means to maintain the parents. The parent would need to demonstrate the need for support and not just the existence of a relationship. The indigent parent would need to demonstrate that there is an extreme need or want for the basic necessities.
- 11.8.3 Biological Grandchildren and Grandparents
- 11.8.3.1 There is a reciprocal duty of support between grandparents and grandchildren provided that the criteria set out above are met. A claimant would however be required to claim from the immediate relative first, for example, the parent.

11.8.4 Spouses

11.8.4.1 There is a reciprocal duty of support between spouses regardless of whether the marriage was concluded in or out of community of property.

11.8.4.2 Usually this duty terminates upon the death of one of the spouses or the dissolution of the marriage. However, parties to a divorce may agree upon some form of maintenance. The Board should peruse the divorce order and determine whether there is provision for maintenance, if so the spouse would be a paragraph (a) dependant.

11.8.4.3 The Board must determine that the deceased and the spouse or former spouse were official partners. A “spouse” can prove the formal relationship with reference to the Marriage Act, the Civil Union Act, Black law and custom or Asiatic religion. Boards should not ignore the existence of a “spouse” simply because the union occurred in terms of custom or religion. Customary or religious unions can be evidenced.

11.8.5 Adopted Children: see 11.14 below

11.8.6 Illegitimate Children: see 11.14 below

11.8.7 Posthumous Children: see 11.14 below

11.9 **“Paragraph b(i) dependants”**: Are there any persons for whom the deceased fund member was not legally liable to maintain but who were, in the opinion of the Board, in fact dependant on the member for maintenance at the time of the member’s death?

11.9.1 The Board must conduct an investigation and determine whether the deceased member was maintaining the person. This is a factual test.

11.9.2 The Board has discretion when determining whether a person amounts to a

paragraph b(i) dependant or not. Such a discretion should be reasonably exercised and take into consideration all relevant facts.

11.9.3 Isolated payments by the deceased member to the person would not constitute maintenance. There needs to be regular proof of payments made by the deceased during and at the end of the deceased's lifetime. The Board must during the investigation phase ascertain the regularity, if any, and nature and materiality of the payments.

11.9.4 If the Board is satisfied that the person is a paragraph b(i) dependant then the person must be recorded as a potential beneficiary and considered at the time when an equitable distribution is determined.

11.10 **"Paragraph b(ii) dependants"**: Is there any person whom the member was not legally liable to maintain but who was a spouse of the member as at date of death?

11.10.1 "Spouse" is defined in the Act as a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, the Recognition of Customary Marriages Act, or the Civil Union Act or the tenets of any religion.

11.10.2 If the Board has investigated the status of the relationship and is satisfied that the person is a "spouse" as defined then the person must be recorded as a potential beneficiary and be considered at the time when an equitable distribution is determined.

GUIDANCE TO TRUSTEES ON "SPOUSES"

11.11 **African Customary Spouses**

11.11.1 The Board must establish that a customary marriage was celebrated and that the marriage continued to exist at the time of the deceased's death.

11.11.2 The Board must have full understanding of what is required in terms of the law under which the union was celebrated or dissolved eg. Zulu Law or Swazi Law in order to determine that the definition of spouse is satisfied

often such a determination will require the assistance of an expert in that particular cultural law.

11.12 Tenets of any Religion

11.12.1 The Board must investigate whether the requirements of specific religion have been complied with. The Board must satisfy itself that the requirements for a marriage or dissolution of a marriage have been met in accordance with the specific religion. Once again the Board can to the extent necessary call for expert evidence to assist in determining whether the marriage satisfies the specific religious requirements

11.13 Co-habitee

11.13.1 In appropriate situations and provided it has exercised its judgment, the Board may regard a co-habitee as not being a “paragraph b(ii) dependant”.

11.13.2 The Constitutional Court¹⁴⁴ has ruled that the different treatment of formally married spouses on one hand and co-habitees in a permanent life partnership on the other is not unconstitutional in so far as maintenance claims against a deceased estate goes.

11.13.3 The Board could in appropriate cases decide that such a person amounts to a paragraph b(i) dependant instead.

11.14 **“Paragraph b(iii) dependants”**: Are there any person whom the member was not legally liable to maintain but who is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock?

11.14.1 This section would include major children of the deceased who were not dependant on the deceased for maintenance. Prior to the inclusion of this aspect of the definition of dependant, financially independent major children were not entitled to be considered as dependants.

¹⁴⁴ *Satchwell v President of the Republic of South Africa and Another* (2004) 1 BPLR 5333 (CC) at 5339H – 5340C.

11.14.2 The Board should investigate and identify any children who satisfy this category and must record them as potential beneficiaries.

11.15 “Paragraph (c) dependants”: Are there any persons whom the member would have become legally liable to maintain, had the member not died?

11.15.1 Any person who is not a paragraph (a) or (b) dependant as at the date of the death of the member, but who in the view of the Board, either prior to the final distribution date or at a subsequent future date, would have become legally dependant on the pension fund member for maintenance, had he or she survived, qualifies as a paragraph (c) dependant.

11.15.2 Examples of person who may satisfy this section are parents who were not legally dependant on their child for maintenance at the time of the child’s death, engaged couples and parties intending to marry, etc.

11.16 Once all the potential beneficiaries have been identified in terms of Phase 3 above go to Phase 4.

11.17 PHASE 4 - PAYMENT TO DECEASED ESTATE

11.17.1 Has the Board, after 12 months and after conducting a reasonable investigation been unable to identify any dependants or nominees?

11.17.1.1 If yes:

11.17.1.2 The Board must determine whether there has been a deceased estate lodged with the Master of the High Court. If there is an estate the death benefit must be paid into the estate.

11.17.1.3 If there is no estate the death benefit must be paid into the Guardians Fund.

11.17.1.4 Given that payment falls due after the twelfth month, the Board should begin to make inquiries well before that time regarding the existence of a deceased estate.

11.17.1.5 If no, go to 11.17.2

11.17.2 Has the Board, after 12 months and after a reasonable investigation process, only identified nominees as potential beneficiaries, that is, no dependants have been identified?

11.17.2.1 If yes:

11.17.2.2 The Board must ascertain whether the estate of the deceased is in deficit. If the estate is in deficit then the Fund must pay the deficit into the estate and the balance must be distributed in accordance with paragraph 11.17.2.4.

- 11.17.2.3 Given that payment falls due after the twelfth month, the Board should begin to make inquiries well before that time regarding the existence of a deficit in a deceased estate.
- 11.17.2.4 The Board must look to the nomination form. The nominee(s) can only receive the portion of the benefit specified on the nomination form. The Board can reduce this portion by the portion required to make good any shortfall in the deceased's estate.
- 11.17.2.5 There is no law as to what the Board should do if the nomination form does not record how the benefit should be apportioned. A Board which finds itself in such a situation could do a per capita distribution to the nominees or make some other distribution which could be reasonable and which could be successfully defended if challenged.
- 11.17.2.6 If no, go to Phase FIVE

11.18 PHASE 5 - DISTRIBUTION OF DEATH BENEFIT

11.18.1 Payment must be made in proportions deemed equitable by the Board. The Act does not define “equitable” and provides no guidance to the Board as to what would amount to an equitable distribution.

11.18.2 The Adjudicator has through determinations provided guidance on what factors could be considered by the Board. These factors are not exhaustive and the Board has discretion to reject a factor as being irrelevant or to include other relevant factors which it considers to be necessary in the circumstances of the particular distribution.

11.18.3 The Board must consider all relevant factors in making an equitable distribution.

11.18.4 It may be equitable in appropriate circumstances to give as much as 100% of the benefit to one potential beneficiary and nothing (0%) to another potential beneficiary. It is important that a Board remember that equitable does not translate into equal shares but rather amounts to a distribution which reflects the circumstances of a specific distribution.

11.19 Wishes of the Deceased

11.19.1 The Board should not fetter its discretion by blindly following a nomination form or the will of the deceased.

11.19.2 If the Board is considering the wishes of the deceased the Board must ensure that they have an accurate indication, that is, they are not relying on an outdated or forged nomination form.

11.19.3 This is only one consideration which may be taken into account by the Board and is not a decisive factor.

11.20 Financial Status or Future Earning Capacity of Each Beneficiary

11.20.1 The Board should obtain all relevant financial information from each potential beneficiary and verify such information. The Board needs to consider the current financial status of each potential beneficiary and their potential earning capacity.

11.20.2 The Board should in assessing the financial status of a potential beneficiary consider insurance policy payments and benefits received from estate of the deceased. Consideration should also be given to inheritances received in terms of the last will and testament of the deceased.

11.20.3 The financial status of a potential beneficiary should be reconsidered when the Board is about to effect the distribution as it is possible that such status may have changed to such an extent that the beneficiary could no longer be considered dependent on the deceased member. For instance if a potential beneficiary wins the National Lottery, such a person is unlikely to benefit.

11.21 Extent of Dependency

11.21.1 In assessing the extent of a potential beneficiary's dependency on the deceased the Board would need to evaluate the extent to which the deceased was liable for the maintenance of the beneficiary and then evaluate the reasonable maintenance needs of each

potential beneficiary.

- 11.21.2 The Board should determine the extent of dependency at the time of death of the member and then evaluate the current and future reasonable maintenance needs of a dependant.

11.22 Age of Beneficiaries

- 11.22.1 The age of a potential beneficiary will give the Board an indication of the length of time over which a potential beneficiary will require maintenance.

- 11.22.2 A younger child is likely to require maintenance for a longer period than an older dependant or an older potential beneficiary may be given a greater amount as he or she has fewer income earning years than a younger potential beneficiary.

- 11.22.3 The Board should evaluate the age of each dependant and then determine the period for which maintenance will be required. This will assist in effecting an equitable distribution.

11.23 Relationship with Deceased

- 11.23.1 The Board must examine social and emotional relationship which existed between the potential beneficiary and the deceased member.

- 11.23.2 Bloody hand cannot benefit – the Board may decide that a potential beneficiary is precluded from benefitting if he or she (eg Najwa Pietersen) murdered the deceased or caused the deceased to be murdered.

11.24 Amount Available for Distribution

11.24.1 Often the benefit is insufficient to cover the maintenance needs of all potential beneficiaries.

11.24.2 The Board must weigh all relevant factors and this may result in a potential beneficiary receiving less than his or her maintenance needs or being excluded from the distribution altogether.

11.25 Social Policy

11.25.1 According to a number of decided cases, section 37C is a social security measure. In theory it is designed to ensure that the dependants of a deceased do not become a burden on the state.

11.25.2 The Board should try, where possible, to effect a distribution which promotes the intention of the legislature.

11.26 PHASE 6 – DETERMINING THE APPROPRIATE MODE OF PAYMENT

11.26.1 Once the Board has determined the equitable distribution of the death benefit, the Board must determine the appropriate mode(s) of paying the amount payable to each beneficiary.

11.26.2 Is the beneficiary a minor or a major?

11.26.2.1 If a minor go to paragraph 11.27.

11.26.2.2 If a major go to paragraph 11.32.

11.27 Payment to a Minor

11.27.1 The Board has the discretion to determine the mode of payment having regard to the best interests of the minor. The Board may after consideration choose one of the following methods of payment:

11.27.1.1 payment may be made to a trust company provided that such company has been nominated by the member or a person recognised in law (such as a guardian) or appointed by a court as the person responsible for managing the affairs or meeting the daily care needs of the minor. If a trust is nominated this does not deprive the Board of discretion and the Board will need to consider whether placing the money in the specified trust would be better for the minor than for instance making payment to the minor's guardian.

11.27.1.2 the Board may pay the benefit to the person recognised in law (such as a guardian) or appointed by a court as the person responsible

for managing the affairs or meeting the daily care needs of the minor.

- 11.27.1.3 The benefit may be paid to a beneficiary fund. Where payment is made to such a fund then if the beneficiary dies and assets remain in such fund, the assets must be paid to the beneficiary's deceased estate or if no such estate exists to the Guardians Fund.
- 11.27.1.4 The Board has the option of paying the benefit on an instalment basis.
- 11.27.2 Once the Board has investigated the available options in light of specific beneficiary circumstances the Board may then effect payment in accordance with the determined mode.

GUIDANCE TO BOARD RE: PAYMENT TO MINORS

- 11.28 The Board cannot randomly opt for one of the options. The Board needs to investigate and evaluate what the best method of payment would be in light of the prevailing circumstances.
- 11.29 The Board would need to be able to provide reasons as to why a specific mode of payment was jettisoned in favour of another.
- 11.30 The Board must consider all potential persons recognised by law to whom payment can be made on behalf of the minor. For instance section 32 of the Children's Act, No. 38 of 2005, provides that a person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, including a care-giver who otherwise has no parental responsibilities and rights in respect of a child, must, whilst the child is in that

person's care:

- safeguard the child's health, well-being and development; and
- protect the child from maltreatment, abuse, neglect

"Care giver" for this purpose means any person other than a parent or guardian, who factually cares for a child and includes

- (a) a foster parent;
- (b) a person who cares for a child with the implied or express consent of a parent or guardian of the child;
- (c) a person who cares for a child whilst the child is in temporary safe care;
- (d) the person at the head of a child and youth care centre where a child has been placed;
- (e) the person at the head of a shelter;
- (f) a child and youth care worker who cares for a child who is without appropriate family care in the community; and
- (g) the child at the head of a child-headed household

11.31 The Board can make payment to a minor in more than one payment and in amounts which the Board considers appropriate and is in the best interests of the minor. If the Board elects to make such payments then interest at a reasonable rate (fund return must be considered when determining a reasonable rate) must be added to the balance. Once the minor attains his/her majority or dies the balance owing must be paid into the minor or his or her estate depending on whether the event which occurs first is the attaining of majority or the death of the minor.

11.32 **Payment to a Major**

11.32.1 The Board has the discretion to choose one of the

following methods of payment:

- 11.32.1.1 Payment to a major beneficiary;
- 11.32.1.2 Payment may be made to a trust company provided that such company has been nominated by the member or the major or a person recognised in law or appointed by a court (such as a curator) as the person responsible for managing the affairs or meeting the daily care needs of the major;
- 11.32.1.3 Payment may be made to 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 the major;
- 11.32.1.4 Payment to a beneficiary fund; or
- 11.32.1.5 Payment on an instalment basis provided the major beneficiary consents to this in writing.
- 11.32.2 Once the Board has investigated the available options in light of specific beneficiary circumstances the Board may then effect payment in accordance with the determined mode.

GUIDANCE TO BOARD RE: PAYMENT TO MAJORS

- 11.33 The Board cannot randomly opt for one of the options. The Board needs to investigate and evaluate what the best method of payment would be in light of the prevailing circumstances.
- 11.34 The Board would need to be able to provide reasons as to why a specific mode of payment was jettisoned in favour of another.

- 11.35 The default position is payment to the major beneficiary unless the Board has very good reason for rejecting this mode of payment.
- 11.36 If the major consents, in writing, the benefit payable to him/her can be paid in more than one payment. If such a situation exists then an agreement must be entered into between the fund and the major which records the amount of payments, intervals of payment, interest to be added and any other appropriate and relevant terms and conditions. The agreement must be capable of being cancelled by either party on notice of not more than 90 days and on such cancellation the balance of the benefit owing must be paid to the major in full.

12.

12.1 Status of hypotheses

12.1.1 It is my submission that it is evident from the information which has been discussed above and more especially the determinations of the Adjudicator which were considered that there is without a doubt a lack of understanding on the part of individual Board members as to what is required of them when considering a death benefit distribution. Further the decisions of the Adjudicator are in essence very similar with the exception of the facts which are germane to a specific case. It appears that the Adjudicator simply cuts and pastes the basic principles and then addresses the differing facts. I further submit that such a practice is further evidence that the death benefit cases which are considered by the Adjudicator can be dealt with at Board level by applying the simple guidelines expressed by the Adjudicator and by Boards understanding their duty so that they can meet it.

12.1.2 The situation in English law is that Board members have numerous opportunities to attend training and to write examinations. The Board members are also well versed in fiduciary duties. Given that the distribution of death benefits in England is very similar to the South African model and that the English legislation which governs the distribution of death benefit lump sums provides minimum guidance to Boards, it is my view that the low number of referrals to the Pensions Ombudsman is evidence that better training and

understanding will result in fewer referrals to the Adjudicator.

12.1.3 My submission is that the determinations of the Adjudicator show that the practice within the industry, very often, differs from the correct legal interpretation of section 37C. Very often Boards exercise their discretion without recourse to the Act or the rules of the fund concerned. In such instances it is inevitable that the practice will differ from the legal instruments. The difference in practice is also fostered by lack of understanding and a sometimes over paternalistic approach which overshadows the duties which are imposed on the Board by the Act.

12.1.4 It is reasonable to conclude that a Board which lacks understanding of the basic principles which it is required to adhere to, will be better equipped if it were given a guideline. The use of the Wednesbury Principles in England for instance must contribute to the low rate of death benefit referrals which are made to the Pensions Ombudsman. Very little evidence exists in the pension fund industry of Boards being equipped with the minimum factors which it needs to consider when exercising its discretion in accordance with section 37C. I submit that the use of such protocols and guidelines will result in fewer decisions of a Board being challenged and fewer successful challenges.

12.1.5 It is evident from the discussion above that section 37C provides many opportunities for a Board to make errors. It is also evident that the different steps associated with a death benefit distribution require a Board to have different considerations. The decisions of the Adjudicator have expressly recorded that there

are different considerations concerned, for instance, with the identification of potential beneficiaries as opposed to the considerations which need to be had when determining an equitable distribution of the benefit. In light of this, I conclude that a Board which understands each step of the distribution will be better equipped to make a decision which is less susceptible to challenge and less likely to be overturned by the Adjudicator.

- 12.1.6 I submit I have successfully shown that the actions of a Board, due to lack of knowledge, has a direct impact on the number of complaints made to the Adjudicator regarding the distribution of death benefits and that such a submission is evidenced by the statements of the Adjudicator. I have also provided Boards with recommendations aimed at obtaining an understanding of their role in the distribution of death benefits and with mechanisms which can be implemented by Boards which seek to draw a map through the minefield which is death benefit distribution. It is my view that by adopting the recommendations Boards will be equipped to consider simple distributions and will be aware that they may seek the services of an expert for assistance with complex death benefit distributions.

12.2 Possible further study

- 12.2.1 Notwithstanding that this dissertation expressly assumed that defective drafting of section 37C is not the cause of the number of complaints arising within the context of death benefit distributions, after completion of this dissertation it is my submission that an analysis of the Act and more especially section 37C would reveal further insights as to why Boards are not

able to always comply with their duties when distributing a death benefit. Accordingly, further study into the legislative framework and whether legislative intervention is needed may result in the hypotheses which I confirmed above being weakened but not necessarily proven wrong.

LIST OF ABBREVIATIONS

the Act	means the Pension Funds Act, No 24 of 1956;
the Adjudicator	means the Pension Funds Adjudicator or Deputy Pension Funds Adjudicator and any acting Pensions Fund Adjudicator appointed in terms of section 30C of the Act;
administrator	means a person approved by the Registrar in terms of section 13B(1) of the Act and appointed by a fund to provide it with administration services;
beneficiary	means a nominee or dependant of a deceased member who is entitled to be considered when a Board determines an equitable distribution of a death benefit;
beneficiary fund	means a fund referred to in paragraph (c) of the definition of a pension fund organisation as defined in the Act;
the Board or a Board	refers to the board of a fund contemplated in terms of section 7A of the Act;
death benefit	means, in relation to a fund, any amount payable upon the death of a member in terms of the rules of the fund;
deceased	means a member who is deceased;
dependant	means, in relation to a member, (a) a person in respect of whom the member is

legally liable for maintenance;

(b) a person in respect of whom the member is nor legally liable for maintenance, if such person:

(i) Was in the opinion of the board, upon the death of the member in fact dependant 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.

(c) a person in respect of whom the member would have become legally liable for maintenance; had the member not died;

English Boards	the board of trustees mandated to manage the affairs of a pension fund registered in terms of the laws of the United Kingdom
fund	means a pension fund organisation as defined in the Act and 'pension fund' has the same meaning;
FSB	means the Financial Service Board provided for by the Financial Services Board Act;
ILJ	means the <i>Industrial Law Journal</i> ;
LAWSA	means the <i>Law of South Africa</i> ;
National Treasury	Department of National Treasury in the Republic of South Africa;

Major	a person who has attained 18 years of age;
member	means a person who satisfies the eligibility criteria of a fund and has been accepted for membership of the fund;
minor	a person who has not yet attained 18 years of age;
PF Circular 130	circular issued by the Registrar which reflects his interpretation of good governance within pension funds and which has no legal status;
Registrar	means the Registrar or Deputy Registrar of Pension Funds;
Rules	means the registered rules of a fund as recorded at the Office of the Registrar;
SA Merc LJ	means the <i>South African Mercantile Law Journal</i> ;
section 37C	means section 37C of the Act;
SOP	means a standard operating procedure; and
trustee	an individual member of the Board

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