

Section 37C and settlement agreements

By Lize de la Harpe, Legal Adviser

In this article we will look at the wording of section 37C(1) of the Pension Funds Act No. 24 of 1956 ("the Act") in order to determine if it leaves room for the trustees to consider the terms of an agreement entered into between the beneficiaries regarding the distribution of fund death benefits.

Death benefits payable in terms of the Pension Funds Act

When a member of a retirement fund dies before reaching retirement age (and if the rules of the particular fund permits) the lump sum benefit which becomes payable (hereinafter referred to as the "death benefit") must be paid to the member's dependants and/or nominees.

Section 37C of the Pension Funds Act regulates the payment of death benefits. The primary objective of section 37C is to ensure that those persons who were dependent on the deceased member are not left destitute after his/her death, irrespective of whether or not the deceased was *legally* required to maintain them.

Section 37C of the Pension Funds Act imposes three primary duties on the Board of trustees, namely to:

1. Identify and trace "dependants" (as defined in section 1 of the Act) and those persons, if any, who have been nominated by the deceased member;
2. Make benefit allocations on a fair and equitable basis; and
3. Determine an appropriate mode of payment of the death benefit.

Section 37C of the Pension Funds Act accordingly imposes a duty on the Board to conduct a proper investigation to determine all the “dependants” of the deceased member. What this means is that the trustees cannot merely follow the beneficiary nomination made by the member during his/her lifetime – the Board must establish who the persons are who fall within the ambit of “dependant” as defined in the Act. Once the Board has identified all the dependants the next stage of the enquiry would be to examine the needs of each dependant so that it can make an equitable distribution amongst them. In doing so, it has to consider all the relevant facts to the exclusion of irrelevant facts. Once the trustees have established the needs of each identified dependant they will distribute the death benefit accordingly.

The effect of section 37C(1)

Section 37C(1) specifically provides that regardless of the provisions of any other law, including the common law, and notwithstanding the rules of a registered fund, all death benefits payable by a fund upon the death of a member shall not form part of the assets in the estate of such member, but shall be dealt with in terms of the scheme outlined in the said section.

It reads as follows:

“37C(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:” (my emphasis)

The introductory words of this section makes it clear that the legislature intended the regulation of death benefits (as set out in this section) to override all else, including all other laws.

The effect of sub-section (1) can thus be summarised as follows:

1. death benefits do not form part of the deceased estate of the member (other than in the limited exceptions set out in the section);
2. the member’s freedom of testation is limited;
3. the law of intestate succession does not apply;
4. death benefits are not subject to the law of marriages; and
5. the common law (including law of contract) does not apply either.

Does section 37C(1) leave room for applying principles of contract law?

A settlement agreement is a written agreement entered into between parties in full and final

settlement of a valid dispute. The practice of making settlement agreements is well-established and has existed for a long time in South Africa. In *Van Schalkwyk v Van Schalkwyk* 1947 (4) SA 86 (O) the Court said “[t]he tradition of such orders is very strong in our legal system”.

Whether or not the terms of such an agreement are enforceable against a board of trustees for the purposes of section 37C has been tested by the Adjudicator.

In the matter of *Brummer v CSIR Pension Fund and Another* (2005) 10 BPLR 797 (PFA) the member was survived by two dependants, being his girlfriend (complainant) and his mother (second respondent). The deceased had not completed a nomination form. The trustees of the fund, in the exercise of their discretion, decided to allocate and distribute the deceased's death benefit in terms of an agreement concluded between the dependants in terms of which a R100 000.00 of the deceased's death benefit would be awarded to the girlfriend and the balance would be paid to his mother. After payment of the agreed amount, the girlfriend lodged a complaint alleging that she was in fact financially dependent on the deceased at the time of his death and contending that she was *the only dependant* of the deceased. She further averred that it was as a result of misrepresentations made by the deceased's mother that led her to conclude the agreement with her. Accordingly, she wanted the fund to pay her 100% of the death benefit as the deceased's sole dependant.

The fund, in turn, submitted that the trustees distributed the deceased's death benefit in compliance with the terms and conditions of the agreement entered into independently between the complainant and the second respondent.

They had furthermore concluded that neither the complainant nor the second respondent qualified as a dependant as defined in the Act.

The court reiterated that Section 37C of the Pension Funds Act regulates the distribution of death benefits. The provisions of this section clearly trump testamentary freedom, as well as any other law including the law of contract. It accordingly held that the trustees' reliance on the agreement concluded between the complainant and the second respondent was fundamentally flawed - even where the trustees have concluded that the deceased had no dependants (and no one was nominated as a beneficiary), then the benefit must be paid into the deceased's estate or if no inventory has been filed with the Master of the High Court, the benefit is to be paid into the Guardian's Fund – as prescribed by section 37C(1)(c) of the Act.

The court therefore held as follows at paragraph 14:

[14] Taking all the factors into consideration I am of the view that the trustees improperly fettered their discretion by relying upon the terms and conditions of the settlement agreement for purposes of distributing the deceased's death benefit. In my view the trustees' reliance on the said agreement was an abdication of their duties to properly apply their minds to relevant considerations in determining the proper allocation and distribution of the deceased's death benefit. The trustees are firstly required to establish whether the deceased had any dependants as contemplated in the Act. If indeed they establish that he had dependants then their duties in this regard are further cogently summarised in Sithole v ICS Provident Fund and Another [2000] 4BPLR 430 (PFA), at paras 24 and 25, 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.*

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

The trustees' allocation was accordingly set aside and the matter was referred back to the board for allocation with due regard to the observations made in this determination.

Similarly, in the matter of Matene v Noordberg Group Life Assurance Scheme 2 (2001) 2 BPLR 1610 (PFA), the beneficiaries had entered into a settlement agreement confirming the distribution by the fund. Soon after, one of the beneficiaries disputed the distribution and lodged a complaint with the PFA.

Firstly, the fund argued that in terms of section 37A of the Act any payments made in accordance with the Maintenance Act of 1963 could be set off against the proceeds from the death benefit i.e. the payments in respect of school fees and arrear maintenance would in effect be set off against the death benefit. Secondly, the fund argued that an agreement had been signed in which all parties had agreed to the distribution and acknowledged that they would have no further claim against the fund, its trustees and the employer.

The Adjudicator pointed out that section 37C was mandatory in the sense that any death benefit payable by a pension fund did not form part of the member's estate and had to be dealt with in the manner prescribed by that section.

Section 37C was not subject to section 37A(1) (being the section relied upon by the fund to reduce the deceased's benefit in respect of arrear maintenance and school fees) – accordingly, there was no basis in section 37C read with section 37A allowing for payments of school fees and arrear maintenance to the Second Respondent and that any claim for maintenance had to be directed against the deceased's estate.

At paragraph 13 the Adjudicator held as follows:

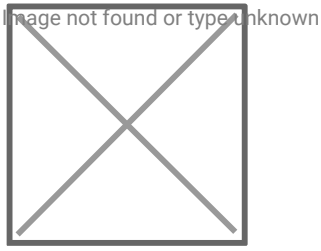
“[13.] As regards to the Respondents' second argument in terms of which the parties entered into a settlement agreement confirming the distribution by the fund. In particular, acknowledging that they will have no further claims against the fund. This argument stands to fall for the same reasons mentioned above. That is, section 37C requires the board of management, in this case, the trustees, to make an equitable distribution amongst the dependants. Therefore, section 37C imposes a duty on the trustees to make an equitable distribution. A distribution would involve an identification of the dependants and nominees and thereafter an equitable distribution amongst the said beneficiaries. The mere fact that the parties have entered into a settlement agreement confirming the distribution of the trustees does not override the legal duties imposed by section 37C, in terms of which the trustees need to identify the dependants as defined in the Act and make the distribution as sanctioned by the Act. Where a party is not a dependant nor a nominee and he or she does not benefit indirectly by virtue of the three exceptions set out in section 37C(1), then any consent or acceptance of a benefit does not make an otherwise unlawful payment/distribution lawful, nor can it override the provisions of the Act. Such conduct would simply be in fraudem legis of section 37C, in that it allows for settlement of the debts of the estate by means of the death benefit, which is explicitly prohibited by section 37C(1).” (my emphasis)

The fund's decision to award a portion of the death benefit to Ms P Matene was declared unlawful and accordingly set aside.

Conclusion

It is clear from the above cited case law (read together with the Act) that Section 37C is mandatory in the sense that any death benefit payable by a pension fund as defined in the Act shall not form part of the member's estate, but rather be dealt with in the manner prescribed in the section. Furthermore, the legislature has prioritised this section by making the section applicable to any distribution of a death benefit *regardless of any other law* or the rules of the fund.

As explained above, Section 37C of the Pension funds Act places a duty on the board of the fund to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration. The board may therefore not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation. Accordingly, the mere fact that the parties have entered into a settlement agreement confirming the distribution of the trustees does not override the legal duties imposed by section 37C.



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Lize de la Harpe obtained an LLB degree in 2005 from the University of Stellenbosch, whereafter she completed her articles and was admitted as an attorney in the Cape High Court. During 2008 she completed a Postgraduate Diploma in Financial Planning (CFP) from the University of the Free State. Lize joined Glacier in June 2012 as the legal adviser and principal officer. Prior to joining Glacier, she worked as legal counsel in the investment cluster at Momentum for four years.

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