

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 228/23

SCA Case No: 364/22

Full Court Case no: A164/19

High Court Case No:

78396/14

In the matter of:

MUTSILA TSHIFHIWA SHEMBRY

Applicant

and

MUNICIPAL GRATUITY FUND

First Respondent

PENSION FUNDS ADJUDCIATOR

Second Respondent

PENSION JUSTICE NPC

Amicus curiae

AMICUS CURIAE'S WRITTEN SUBMISSIONS

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INTRODUCTION AND SUMMARY

1. Every year, South African retirement funds distribute billions of Rands¹ upon the death of their in-service² members to those persons whom the fund considers, ought to receive an “*equitable*” portion of the available lump-sum³ death benefit as a result of having been “*dependent*” on the deceased.
2. Most of these benefits are distributed in terms of section 37C of the Pension Funds Act⁴ (the “Act”) – a far-reaching, relatively unique⁵ statutory provision which, often to the shock or anger of surviving family members or other dependants, provide that such death benefits are:
 - 2.1. Not part the deceased’s estate;
 - 2.2. Not payable immediately but after investigation by the fund (an investigation which not infrequently reveals children or romantic partners of which the nuclear family were unaware, and which often takes many months and sometimes years);

¹ For example, in 2014 about R8.8 billion in death benefits was distributed by pension funds regulated by the FSCA (then the FSB). This increased to about R9.3 billion in 2015. FSB *2015 Annual Report of the Registrar of Pension Funds* p 36 Table 13 Note 6.1 Available at: <https://www.fsca.co.za/Annual%20Reports/Registrar%20of%20Pension%20Funds%20Annual%20Report%202015.pdf> (Later reports often do not distinguish between death benefits and certain other benefits paid, but it is reasonable to assume that this amount increases over time.)

Not all retirement funds are regulated by the Act. A number of pension funds linked to state-owned entities, have been established and continue to be regulated, by separate legislation with their governing rules promulgated as regulations or in a schedule to that statute. Examples include: the Post Office Retirement Fund (regulated by the Post Office Act, 1958) and the largest fund in South Africa, the Government Employees’ Pension Fund (“GEPF”) (established and regulated by the Government Employees Pension Law, 1996) to which most provincial and national level state employees belong. These statutes have comparable provisions to section 37C of the Act.

² Meaning, typically, members who have not yet reached retirement age and who are still contributing to the fund.

³ Section 37C only applies to lump sum death benefits payable and not to pensions.

⁴ 24 of 1956. Extracts of the relevant sections from the Act are attached as “Annexure A” for convenience.

⁵ Some SADC countries have comparable statutory provisions. See e.g. section 33 of the Eswatini Retirement Funds Act, 2005; section 51 of the Botswana Retirement Funds Act, 2022. The position in Lesotho is different: see Mhango “Death benefit provisions in the Pension Funds Act 5 of 2019 of Lesotho: Contradictions or deliberate policy choices?” *De Jure Law Journal* 56(1) (2023) 405.

- 2.3. Not automatically payable to the persons nominated by the deceased member in the fund's nomination form, as in the case of funeral or other life policies governed by insurance legislation;⁶
- 2.4. Not automatically payable to any particular family member by virtue of their legal relationship to the deceased (for example, a surviving spouse or children could be assessed by the fund as not being “*dependent*” on the deceased, which is often the case in respect of major children who are employed and/or otherwise financially independent); and
- 2.5. Not dependant on any perceived “*quality*” of the relationship between the deceased and potential dependants.
3. While the death benefit amount varies by fund, this is often an insured benefit determined at a multiple of the member's pensionable salary⁷. For example, a person who has been contributing x% of their annual fund salary of e.g. R300 000 to a fund, could have a death benefit of 3, 4 or 5 times R300 000. In the difficult South African economic context, with more than 45% unemployment, where one worker often supports multiple people (if not households), and where most people have limited other savings and insurance policies, the potential receipt of a portion or all of this death benefit can be transformative to many.⁸ As Mhango notes:⁹

⁶ This has always been the case. Since the first reported judgment on section 37C in 1998 in *Kaplan Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 (3) SA 798 (SCA) 802H – 803C, in which the SCA confirmed that the member's nomination form is not determinative, courts have continued to uphold this principle.

⁷ The term “*pensionable salary*” is usually defined in the fund rules and generally refers to the salary amount which is treated as the baseline for, amongst other things, the calculation of the monthly contribution amounts.

⁸ This Court acknowledged the important role of pension funds in *Mudau v Municipal Employees' Pension Fund and others* 2023 (10) BCLR 1165 (CC). See e.g. pars 2-4, esp par 4: “*Pensions provide an opportunity for individuals to live fully and meaningfully upon retirement. This is especially important in the context of South Africa's racially divided past, its developing economy, and the broad reliance on government social assistance.*”

⁹ Mhango (above) at 405.

“Universally, one of the most controversial aspects of the law that governs pension funds is how it controls the distribution of death benefits – the benefits that become payable to beneficiaries when a member of a pension fund passes away. [...] In the absence of a comprehensive social security system in most of these [SADC] countries, pension funds have become the preferred institutional vehicle through which death benefits or survivors’ benefits are channelled to protect families against the loss of income that follows the death of a member.”

4. It is then unsurprising that death benefit disputes are the third most common type of complaint received by the Pension Funds Adjudicator (“Adjudicator”): In the 2022/23 fiscal year, more than 6.5% (or 507 of about 7800) complaints closed by the Adjudicator concerned the application and interpretation of section 37C.¹⁰
5. The social security purpose and “override” over the deceased’s wishes, is both clear from the plain language of section 37C and from case law already relied upon by Ms Mutsila and the first respondent (“Fund”) and therefore not reiterated here,¹¹ save to commend Manamela’s description:¹²

“Section 37C is intended to protect pension benefits from the imprudence of members of pension funds by restricting their capacity to dispose of such benefits upon their death. The section is seen as a social security measure since it places the benefit payable on a member’s death under the control of the fund, which has to pay it to the member’s dependants in such proportions as it deems equitable. The State is in other words ensuring that monies in

¹⁰ Adjudicator *Integrated Report 2022|2023* Available at: <https://www.pfa.org.za/Publications/AnnualReports/Integrated%20Annual%20Report%2020222023.pdf>

¹¹ See e.g. Applicant’s HoA par 48; *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) p 3705-6; *Municipal Workers Retirement Fund v Mabula and Another* (96855/16) [2017] ZAGPPHC 1153 (7 December 2017) par 7.

¹² 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 276 at 278-9. (footnotes omitted) See also *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA): “This interpretation is supported by the policy and purpose of section 37C as whole. The aim of section 37C is to limit a pension fund members freedom of testation in relation to his pension benefits. Pension benefits accumulate favourably as a consequence of advantageous tax treatment of contributions to the fund. In return the state hopes to ensure that there are fewer persons dependent on it for social security. For this reason the legislature has given preference to dependency over freedom of testation. Therefore, pension benefits are excluded from the estate of a deceased and are applied to provide for the deceased’s dependants.”. *Sithole v ICS Provident Fund* [2000] 4 BPLR 430 par 23: “[T]hrough the guise of section 37C, the legislature is advancing an important social protection policy which is left in the hands of the board or persons managing the business of pension funds to implement”.

respect of which it has allowed tax concessions, are utilised for the benefit of the deceased member's dependants. This reduces State liability in taking care of its citizens who, but for the pension-fund payment, would not have been able to support themselves. The section was enacted to protect dependency, even over the clear wishes of the deceased."

6. This "social security" purpose accords with a constitutional interpretation of section 37C¹³ which gives effect to the section 27(1)(c) constitutional right to have access to social security¹⁴ in a manner not limited to familial connection but focused on financial dependency.¹⁵
7. In these submissions, we:
 - 7.1. Briefly set out the legislative origin and purpose of section 37C;¹⁶
 - 7.2. Summarise key jurisprudential development beyond the text of section 37C which guide and govern retirement fund boards' implementation of section 37C;¹⁷
 - 7.3. Set out administrative law considerations relevant to section 37C decisions;¹⁸
and
 - 7.4. Address appeals of Adjudicator determinations in terms of section 30P of the Act.¹⁹

¹³ In terms of s 39(2) of the Constitution.

¹⁴ The right to social security is entrenched in many international instruments. See e.g. art. 22 of the Universal Declaration of Human Rights; art. 9 of the International Covenant on Economic Social and Cultural Rights, the Protocol to the African Charter on Human and Peoples' Rights on the rights of citizens to social protection and social security, art 4 of the Code on Social Security in the SADC. Section 39(1)(b) of the Constitution.

¹⁵ A right acknowledged by this Court in *Mudau* (above) in respect of pension withdrawal benefits, and by the SCA in *Post Office Retirement Fund v South African Post Office SOC Ltd and others* [2022] 2 All SA 71 (SCA) pars 56 – 59 in respect of the Post Office's failure to pay required monthly contributions to its employees' pension fund.

¹⁶ FA (Amicus application) par 15.1.

¹⁷ FA (Amicus application) par 15.2.

¹⁸ FA (Amicus application) par 15.3.

¹⁹ FA (Amicus application) par 15.4.

SECTION 37C: LEGISLATIVE HISTORY

8. Section 37C was first enacted in 1976 as part of the Financial Institutions Amendments Act²⁰ (the “1976 Amendment Act”). The preamble of the 1976 Amendment Act included the object to “*provide for the protection of pension benefits*”. Under the heading “*How pension benefits to be dealt with on death of a member*”, section 24 of the 1976 Amendment Act provided:

“37C. Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund in respect of a deceased member, shall not form part of the assets in the estate of such a member but shall be paid to any one or more of the dependants of the member, if there is such a dependant or are such dependants, or to a guardian or trustee for the benefit of such dependant or dependants: Provided that if such dependant or dependants cannot be traced by the fund concerned within a period of six months after the death of the member, or if no claim is received by that fund from such dependant or dependants within the said period, the benefit may be paid over to the estate of the member.”

9. The concern expressed at the time was that the Act, as it stood pre-amendment, did not sufficiently (or at all) ensure that pension benefits indeed are allocated to dependants. The Minister of Finance explained, at a second reading of the bill, the purpose of these amendments: “*The object of a pension fund is to provide pension benefits to members and their dependants. The Act does not protect the benefits from alienation and attachment, nor does it exclude them from the insolvent²¹ and deceased estates of members in order to ensure that they do in fact accrue to members or their dependants. This deficiency is now being remedied.*”²²

²⁰ 101 of 1976.

²¹ Protection from alienation, attachment and insolvency have been addressed separately by sections 37A and 37B of the Act.

²² Hansard *House of Assembly Debates* Vol 61 (16 March 1976) Col 3253. No explanatory memorandum was published with the 1976 Amendment Act. This Court recently relied exclusively on Parliamentary debates per Hansard as the source of the purpose of an amendment act. *South African Municipal Workers' Union v Minister of Co-Operative Governance & Traditional Affairs* 2017 (5) BCLR

10. That section 37C was always intended to have a broad social security purpose in respect of “dependants”, whether familial or not, is evident from the broad (though perhaps somewhat circular) definition of “dependant” introduced by the 1976 Amendment Act as including a spouse and descendants but not limited thereto:²³

“dependant”, in relation to a member, means a person considered by the person managing the business of the fund concerned as being dependent on the member for maintenance and includes the spouse or a descendant of the member who in accordance with the rules of the fund may become entitled to a benefit”

11. This has been the consistent position over the years since 1976 as various amendments were effected to the definition of “dependants” and section 37C and the concept of nominations by the member have been introduced, in part to reflect changing *mores*, equality and legal and constitutional developments: For example, the definition of “spouse” was inserted in 2007 and includes “*permanent life partners*”²⁴, civil unions, and recognised customary law and religious marriages in the definition of “spouse”. It is not necessary to traverse these incremental historical changes in detail, save to briefly highlight the following aspects of the current statutory position:

11.1. “*Dependants*” now expressly include both financial and legal dependants. The definition includes both classes of persons in respect of whom the member is “*legally liable for maintenance*” and other

641 (CC) par 5 fn 7. This Court in *NSPCA v Min of Justice & Constitutional Development* 2017 (4) BCLR 517 (CC) also placed extensive reliance on Parliamentary debates in interpreting the SPCA Act. See e.g. pars 41, 49, 51, 60 and relevant footnotes, especially fns 66, 71, 73, 94. See further *Case v Minister of Safety and Security; Curtis v Minister of Safety and Security* 1996 (3) SA 617 (CC) at fn 18 (This Court may have regard to the Parliamentary sources referred to herein, at the very least as part of the history of the Act).

²³ Section 21(a). Emphasis added. See also Hansard Vol 61 Cols 3274; 3289 - 3290.

²⁴ The term is not defined in the PFA.

persons if they were “*in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance*”.

11.2. Section 37C now provides, generally, for 12 months for the board to “*become aware of or trace dependants*” of a member and pay to them a portion of any lump sum death benefit that falls due as a result of the in-service member’s death, in a manner “*deemed equitable*” by the fund.

12. Thus, from inception to date, and by design:

12.1. Death benefits do not fall in the deceased member’s estate;

12.2. Who is or is not a dependant is to be identified and determined by the fund not the member;

12.3. Spouses and “*descendants*” (or later, children) are included in the definition of “dependant”;

12.4. The definition of dependant is not limited to blood relations but includes persons “*financially*” dependant on the deceased member; and

12.5. Many months are provided within which to identify dependants – from 6 months in 1976 to 12 months at present, in most circumstances.

13. We turn to the further development of the application of section 37C by case law.

SECTION 37C: JURISPRUDENTIAL DEVELOPMENT

14. Section 37C and its relevant defined terms, provide very little guidance to fund boards on how to exercise their broad discretion. Case law²⁵ has over time expanded the factors and process to be considered by trustees in exercising their discretion and developed principles on how section 37C must be applied. In doing so, courts have acknowledged that the burden on the fund to implement section 37C is an “onerous”²⁶ duty which involves significant fund cost and time. In *Dobie*²⁷ the Adjudicator²⁸ lamented the extensive investigation obligations on funds as follows:

“One thing is certain about section 37C, it is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.

One admirable aspect of the section is its worthy intention to protect dependants who do not reside in the same vicinity as the deceased member. One thinks here naturally of migrant labourers working in the urban areas with dependants in remote rural areas. By imposing a duty on the board to trace dependants the section advances such persons interests. However, there is legitimate concern about the practical difficulties of tracing such dependants. One solution may be for the section to identify more precisely the steps required

²⁵ Predominantly the Adjudicator, Financial Services Tribunal, High Courts and SCA.

²⁶ See e.g. *Snyman v Government Employees Pension Fund and Another* (80696/2016) [2024] ZAGPPHC 364 (8 April 2024) par 45; *University of Pretoria Provident Fund v Du Preeze* 2015 JDR 1978 (GP) par 13 (“*Inherently the discretionary power of the board entails choice, which is the power to identify deserving cases. The board therefore carries a very onerous responsibility to conduct a thorough and credible investigation to establish the existence of beneficiaries, thereafter determine a fair distribution and finally decide on the appropriate mode of payment of the benefit payable. Accordingly, 37C requires an in-depth input from the Board with regard to who qualifies as a dependent and the amount which is to be allocated to each beneficiary.*”)

²⁷ *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA) 41.

²⁸ Murphy J.

to be taken, including an appropriate form of publication, and then allowing for a final distribution to known dependants and nominees at the expiry of a reasonable period culminating in indemnification of the board against further claims. Further discussion and consideration is obviously required.”

15. Funds’ death benefit process comprises three main stages:

15.1. First, the fund must “actively” investigate, to identify and/or trace potential dependants, and to assess each potential dependant’s degree of financial dependence on the deceased.²⁹ The burden to do so falls exclusively on the board of the fund, and may require the fund to resolve factual disputes.

15.2. Second, the fund must make an “equitable allocation” of the available benefit. This typically involves managing competing interests in the available benefit which, unsurprisingly, tends to be insufficient to fully address all dependants’ needs. Also, the mere fact that a person qualifies as a dependant in principle, does not mean that the person is entitled to a benefit – s/he is only entitled to be considered by the board in the distribution phase. Non-exhaustive factors have been held to include:

15.2.1. The age of the dependants³⁰ (for example, a six year old is likely to have greater financial dependence than an 18-year old³¹ and an elderly person may ultimately require less financial support³²);

²⁹ See e.g. *Khwela v Toyota SA Provident Fund & others* (FST) PFA46/2020 (26 Feb 2021)

³⁰ *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) par 24

³¹ *Motsoeneng v AECI Pension Fund & another* [2003] 1 BPLR 4267 (PFA) par 11

³² See e.g. *Guarnieri* (below)

- 15.2.2. Dependants' relation to the deceased;³³
 - 15.2.3. The extent of dependency on the deceased³⁴ (which can include a variety of forms of dependence such as school fee payments; groceries; cash and so forth)³⁵;
 - 15.2.4. The nomination form, reflecting the deceased's wishes;³⁶
 - 15.2.5. The deceased's will, reflecting the deceased's wishes and potentially other income for certain dependants;³⁷
 - 15.2.6. Future prospects of the dependants³⁸ (including for example the likelihood of being employed);
 - 15.2.7. Other income received by the dependants as a result of the member's death, for example, in terms of an insurance policy;³⁹
- 15.3. Third, the fund must decide how to effect payment. This is less relevant, but could involve payment to a beneficiary fund for the benefit of a minor child, instead of to the child's guardian.

16. The assessment by a fund of all these various factors, in terms of the current legal position, at most requires the Fund to have regard to the applicant's status of being married to the deceased as one of several factors to consider. By design and purpose, it does not seek to prioritise married spouses over other financial dependants, whether "girlfriends" or not. All dependants identified are thus on

³³ *Sithole* (above).

³⁴ *Sithole* (above).

³⁵ See Hunter et al Commentary on the Pension Funds Act (2010) pp 691 – 695.

³⁶ *Sithole* (above).

³⁷ *Sithole* (above).

³⁸ *Brummelkamp v Babcock Africa (1997) Pension Fund & another* [2001] 4 BPLR 1811 (PFA).

³⁹ *Van Vuuren v Central Retirement Annuity Fund & another* [2000] 6 BPLR 661 (PFA).

equal footing once identified. No dependant has a “right” to a portion of the death benefit until so allocated by the Fund, or a right to larger benefit than another dependant. Until that time, they only have a right to lawful, reasonable and procedurally fair administrative action.

Guarnieri and the date on which dependence must be determined

17. The *Guarnieri* judgments require special mention on aspects not expressly dealt with by the main parties. Prior to *Guarnieri (HC)*⁴⁰ and *Guarnieri (SCA)*⁴¹ in 2018 and 2019, respectively, the question of which date was the operative date on which the fund must consider dependency and the other factors set out above, was not clear. Many funds took the view that the key date is date of death of the member, and disregarded subsequent changes in dependency considerations.⁴² This also meant that, if a section 37C decision was reviewed, set aside and remitted to the fund board for decision afresh, the board again considered the extent of dependency as of date of death, and not at a later date.

18. *Guarnieri* changed this position: The SCA dismissed the fund’s argument that the correct point in time at which to consider the extent of dependency is the member’s date of death. It found that this interpretation is not sensible and contrary to the purpose of section 37C: “to provide maintenance to those who have need of it”.⁴³ (In this case the deceased member’s mother died after the member, but unbeknownst to the fund, four days before it made its distribution decision. Upon

⁴⁰ *Guarnieri v Fundsatwork Umbrella Pension Fund* 2018 JDR 0740 (GP).

⁴¹ *Fundsatwork Umbrella Pension Fund v Guarnieri* 2019 (5) SA 68 (SCA).

⁴² Extensive short form advice to industry is available online. See e.g. Seshego’s (a service provider in the retirement fund industry) caution to funds that, in light of *Guarnieri*, “[f]unds may need to adjust their current processes when dealing with death benefit claims in order to determine before finalising payment of the benefits, whether any factors relevant to the dependency status of the beneficiaries have changed”. Available at <https://seshego.co.za/wp-content/uploads/2021/05/Seshego-Insights-May-2021-Section-37C-of-the-Pension-Funds-Act.pdf>.

⁴³ *Guarnieri (SCA)* pars 22 – 23.

remittal to the fund, it took the same distribution decision with reference to the position as at the member's date of death, despite now being aware of the deceased's mother's subsequent death.)

19. On appeal, the SCA confirmed that a fund must assess dependency at the date of its distribution decision – usually a much later date.⁴⁴

“The purpose of s 37C is to provide some protection for dependant, both existing and potential. The obvious time at which decisions should be taken in that regard is when the determination is made. At that stage the board should have completed its enquiries and be in a position to assess the relative present and future needs of the members of the class of dependants it has identified. Those such as the posthumously born child, or the person who has fallen on hard times, can then be assisted, and those whose fortunes have improved, so that they no longer need to be maintained, can drop out of the picture.

This does not impose too great a practical burden on the board. It will continue to make its determinations on the evidence to hand when it comes to take the decision. It imposes upon a board an obligation to check carefully that the information it has is accurate and to ensure that when it makes distributions the intended beneficiaries will be the persons who benefit from them...

[...]

Given all these considerations of language, purpose and practicality, in my view, the proper construction of s 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.”

20. It may be so that *Guarnieri*'s facts were particularly specific in that general changed circumstances of a set of dependants was not at issue. Rather, the case concerned the more unusual situation where a dependant died after the member did but before the fund's section 37C decision was finalised. Nonetheless, the SCA's findings appear to us to be binding in respect of all types of section 37C

⁴⁴ At pars 23 – 25.

distributions, and not just those cases where a dependant dies. Further, while the judgment concerned section 37(1)(a) of the Act (as opposed to the slightly differently worded further subsections), its reasoning would likely also be applied to distributions in terms of section 37C(1)(bA).

21. *Guarnieri* has significant implications for pension funds: the obligations on funds are already onerous: to conduct an extensive investigation and determine the extent of various persons' dependency. Section 37C provides, generally, for 12 months for a fund to conduct such an investigation. Funds must now also ensure that there has been no change in its investigation findings in respect of all potential beneficiaries or dependants, which will have cost implications and be practically difficult as it could be a moving target.

22. Perhaps the most relevant implication of the *Guarnieri* cases for this matter is that the long time lapse of about 10 years between the fund's original distribution decision in April 2014 and present day, would make it very likely that the relevant dependants' personal circumstances have changed as at the new (future) date of distribution – whether made by this Court or remitted to the Fund for investigation and decision afresh. For example, the applicant's two major children who were attending university in 2014 could now be employed (or not); there could be finality in Ms Masete's custody case (or not); the current dependants' financial prospects could have improved or worsened; the home loan which appears to have needed urgent payments in around 2014, appears not be relevant anymore,⁴⁵ and so forth. The longer the time lapse between date of original decision and the date on which a new decision must be made, the more likely dependants' financial circumstances

⁴⁵ Applicant's HoA par 106.

have changed. Per *Guarnieri*, these changed circumstances have now to be taken into account. Incorrect payments by a fund to dependants in need are unlikely to be recouped if the distribution is set aside, leaving the fund out of pocket and its membership as a whole, on the hook for the fund's additional expenses.⁴⁶

SECTION 37C: ADMINISTRATIVE LAW CONSIDERATIONS

23. Over recent years in particular, a number of high courts have held that a so-called “private”⁴⁷ fund's death benefit distribution decision in terms of section 37C is “administrative action” in terms of the Promotion of Administrative Justice Act (“PAJA”):

23.1. In *Titi*,⁴⁸ probably the most cited authority on this issue, the Eastern Cape High Court found that a fund's section 37C decision is reviewable in terms of PAJA. It said: “*The decisions which [the fund] is empowered to take in terms of s. 37C of the Act, and in particular the power to effectively override the express wishes of its members, may conceivably affect members of the public. Any decision made in pursuance thereof and which could negatively impact on members of the public would therefore be subject to judicial scrutiny and review in terms of the provisions [of] PAJA.*”

⁴⁶ Most funds are defined contribution funds in terms of which members bear fund expenses.

⁴⁷ In the sense that the fund is regulated by the Act and the fund rules are not themselves part of statute, as the Fund in this case. This can be contrasted by funds like to the GEPF which are regulated by fund rules which are part of statute and in which respect the “public” components of the powers are perhaps more clear.

⁴⁸ *Titi v Funds at Work Umbrella Provident Fund* (1728/2010) [2011] ZAECMHC 22 (10 March 2011) par 11. Available on Saffii at: <https://www.saffii.org/za/cases/ZAECMHC/2011/22.html>. This decision has been endorsed by various courts including the full court in *Moropa and Others v Chemical Industries National Provident Fund and Others* (A5041/2021;03656/2020) [2022] ZAGPJHC 420 (29 June 2022) par 48. Available on Saffii at: https://www.saffii.org/za/cases/ZAGPJHC/2022/420.html#_ftnref10.

23.2. In *Mbatha*,⁴⁹ the Gauteng High Court said in 2020: “I subscribe to the generally accepted view that a decision of the board of a pension fund taken in terms of s 37C of the PFA constitutes administrative action for the purposes of [PAJA] and that PAJA applies to such a review.”

23.3. The same position has been endorsed by various High Courts in e.g. *Swart*,⁵⁰ *Mashazi*,⁵¹ *Kim*,⁵² *Guarnieri (HC)*⁵³ and *Rousseau*.⁵⁴

24. We are not aware of any authority which expressly held that a death benefit distribution in terms of section 37C is not administrative action. The only arguably relevant authorities inconsistent with this position, are:

24.1. *Gerson*, in which the Gauteng High Court held in 2013 that the fund’s exercise of a broad discretion to apply a fund rule to determine whether a person was an “eligible spouse”, was not reviewable in terms of PAJA and made a general finding that “a decision of the board of a pension fund likewise does not constitute administrative action”.⁵⁵ To the extent that this general reasoning applies to section 37C, later Courts (for example, in *Mbatha* and *Moshoeshoe*⁵⁶) have expressly declined to

⁴⁹ *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) [2020] ZAGPJHC 18 (19 February 2020) par 9 Available on Saffii at: <https://www.saffii.org/za/cases/ZAGPJHC/2020/18.html>

⁵⁰ *Swart N.O and Others v Lukhaimane N.O and Others* (54157/2019) [2021] ZAGPPHC 124 (12 February 2021) par 11. Available on Saffii at: <https://www.saffii.org/za/cases/ZAGPPHC/2021/124.html>

⁵¹ *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3708.

⁵² *Kim v Agri Staff Pension Fund and Others* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) par 12 (in which it was common cause that PAJA applied and the Court adjudicated on that basis). Available on Saffii at: https://www.saffii.org/za/cases/ZAGPJHC/2019/156.html#_ftnref8. See also Dyani-Mhango “Does the board of a pension fund in South Africa perform a public function or exercise public power when determining death claims under section 37C of the Pension Funds Act? 2021 *De Jure Law Journal* 549 at 561 – 562.

⁵³ *Guarnieri (HC)* (above) par 42 (upheld on appeal).

⁵⁴ In respect of the GEPF. *Rousseau and Others v Government Employees Pension Fund and Others* (2938/2021) [2022] ZAFSHC 285 (21 October 2022) par 15. Available on Saffii at: https://www.saffii.org/za/cases/ZAFSHC/2022/285.html#_ftnref3.

⁵⁵ *Gerson v Mondi Pension Fund* 2013 (6) SA 162 pars 37 – 45.

⁵⁶ *Moshoeshoe v Sentinel Retirement Fund* 2019 JDR 1972 (GJ) pars 11 – 13.

follow *Gerson* in favour of the authorities in support of the application of PAJA.⁵⁷

24.2. Arguably, *Public Servants Association*⁵⁸ (which did not concern section 37C), in which the SCA said in general terms that “[t]here is presently no judicial consensus on whether decisions of pension funds either generally, or in limited circumstances, constitute administrative action as contemplated in the PAJA. It must in my view, depend on the nature of the power being exercised by the fund, having regard to the related statutory provisions or rule under which it is exercised” but did not decide any PAJA-related point.

25. The consequences of PAJA applying to the Fund’s section 37C distribution decision include:

25.1. The decision stands until set aside;⁵⁹ and

25.2. The Fund is *functus* to revisit its own decision once made, save for the established exceptions to the *functus officio* rule such as clerical error.

26. To our knowledge, issues such as whether a Fund has a self-review obligation when facts are brought to its attention after it has made a section 37C distribution

⁵⁷ Even where a later Gauteng High Court (which decided *Gerson*) did not expressly depart therefrom, the later judgments have overruled *Gerson*. *Competition Commission of South Africa v Standard Bank of South Africa Limited and related matters* 2020 (4) BCLR 429 (CC) par 177 (“It is a principle of our law that where a court of the same status hands down successive conflicting judgments, the latest judgment is regarded as having overruled the earlier ones. This principle applies in cases where the later judgment does not say expressly that the earlier one is overturned.”)

⁵⁸ *Public Servants Association of South Africa and others v Government Employees Pension Fund and others* [2021] 1 BPLR 111 (SCA) par 42.

⁵⁹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 26. The applicant makes the point that the Fund’s decision has not been set aside by the SCA. Applicant’s HoA par 37.

decision, and whether and to what extent section 37C decisions fall to be reviewed under the principle of legality, have not yet been decided by our courts.

27. Most relevant for present purposes, however, is that the underlying Fund decision (if the applicant succeeds) will have to be set aside, mindful of the remedies under PAJA in terms of which remittal is the default.

SECTION 30P: HIGH COURT APPEALS OF ADJUDICATOR DETERMINATIONS

28. Litigants dissatisfied with Adjudicator determinations may elect one of two routes: an appeal in terms of section 30P, or judicial review in terms of PAJA.

29. It is well-established that proceedings challenging Adjudicator determinations in terms of section 30P of the Act – which the founding papers in the High Court *quo* says it is⁶⁰ – are appeals in the “wide” sense. Per *Tikly*,⁶¹ this means that a section 30P application is “a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information”. For example, in *Meyer v Iscor*,⁶² the SCA held:

“From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator’s determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator’s determination was based. The Court can consider the matter afresh and make any order it deems fit.”

30. An application in terms of section 30P is considered by the Court *de novo*,⁶³ and has been described as a “*sui generis* application in which a High Court exercises

⁶⁰ FA par 9 Vol 1 p 7 (“*This application is brought in terms of section 30P of the Act.*”)

⁶¹ *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) 590F-G.

⁶² *Meyer v Iscor Pension Fund* [2003] 3 BPLR 4427 (SCA) 4430 – 4431 (endorsed by this Court in *Mudau* at par 20.) See also *Tongaat Hulett Sugar South Africa Limited v Tongaat Hulett Pension Fund 2010 and Others* (AR27/2022) [2023] ZAKZPHC 34 (3 March 2023) par 48.

⁶³ *De Beers Pension Fund v Pension Funds Adjudicator* [2003] 3 BPRL 4764 (C) at 4769.

*original jurisdiction and reconsiders the merits of the complaint that was lodged with the Pension Funds Adjudicator in terms of section 30A(1) of the PFA.*⁶⁴

31. The Court is however limited to a hearing of the “*merits of the complaint in question*” which must still be “*substantially the same ‘complaint’ as the one determined by the Adjudicator*”.⁶⁵

32. A prospective High Court litigant has the typical choice between action or application proceedings depending on whether they reasonably foresee genuine disputes of fact, and the ordinary *Plascon-Evans* rule applies in respect of disputes of fact sought to be decided on application. High Courts presiding over section 30P appeals are not “*required to hear evidence from witnesses*”.⁶⁶ Instead, our anecdotal experience, and that of our instructing attorney, has been that the vast majority of section 30P appeals are motion proceedings without referrals to oral evidence.

CONCLUSION

33. We accordingly submit that the social security purpose of section 37C, which equally protects factual and legal dependants, is important to maintain.

34. If the applicant is successful, the default remedy would be to set aside the Fund’s original decision as it is “*administrative action*” in terms of PAJA, remit it for investigation and reconsideration afresh.⁶⁷

⁶⁴ *Collatz v Alexander Forbes Financial Services (Pty) Ltd* 2022 JDR 0467 (GJ) par 56.

⁶⁵ *Meyer* (above) par 4430 – 4431.

⁶⁶ Fund HoA par 57.4

⁶⁷ Per the ordinary rule, no cost order is to be awarded for or against the *amicus*. *Hoffman v South African Airways* 2001 (1) SA 1 (CC) par 63.

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determine the rates of both their contributions at a fixed rate;

- (b) less such reasonable expenses as the board determines;
- (c) plus any amount credited to the member's individual account upon the commencement of the member's membership of the fund or upon the conversion of the category of the fund to which the member belongs from a defined benefit category to a defined contribution category of a fund or upon the amalgamation of his or her fund with any other fund, if any, other than amounts taken into account in terms of subparagraph (d);
- (d) plus any other amounts lawfully permitted, credited to or debited from the member's individual account, if any,

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

[Definition of "defined contribution category of a fund" inserted by s. 1 (d) of Act No. 39 of 2001, substituted by s. 1 (h) of Act No. 11 of 2007 and by s. 1 (h) of Act No. 45 of 2013.]

"dependant", in relation to a member, means—

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person—
 - (i) was, in the opinion of the board, upon the death of the member 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;

[Definition of "dependant" inserted by s. 21 (a) of Act No. 101 of 1976, substituted by s. 10 of Act No. 80 of 1978, amended by s. 38 of Act No. 99 of 1980 and by Act No. 22 of 1996 and substituted by s. 20 of Act No. 54 of 1989 and by s. 1 (i) of Act No. 11 of 2007.]

"disclosure", in addition to the meaning ascribed to "disclosure" in section 1 of the Protected Disclosures Act, includes the disclosure of information—

- (a) regarding any conduct of a pension fund, an administrator or a board member, principal officer, deputy principal officer, valuator, officer or employee of a pension fund or administrator, made by a board member, principal officer, deputy principal officer or valuator, or other officer or employee, of a pension fund or administrator; and
- (b) relating to the affairs of the pension fund which may prejudice the fund or its members;

[Definition of "disclosure" inserted by s. 1 (i) of Act No. 45 of 2013.]

"employer", in relation to a fund, means an employer participating in the fund;

[Definition of "employer" inserted by s. 1 (e) of Act No. 39 of 2001.]

"employer surplus account", in relation to a fund, means an account provided for in the rules of the fund to which shall be credited—

- (a) amounts allocated by the board in terms of sections 15B, 15C and 15F or transferred into the fund for the credit of the account in terms of section 15E (1) (e);
- (b) such contributions as are specified in the rules to be credited to this account; and
- (c) fund return on the balance in the account from time to time: Provided that the board may elect to smooth the fund return,

and to which shall be debited—

- (d) any actuarial surplus utilised by the employer; and
- (e) any actuarial surplus transferred to any other account in the fund at the request of the employer or transferred to another fund in terms of section 15E (1) (e);

[Definition of "employer surplus account" inserted by s. 1 (e) of Act No. 39 of 2001, substituted by s. 1 (j) of Act No. 11 of 2007 and amended by s. 1 (j) of Act No. 45 of 2013.]

(Date of commencement of "employer surplus account": 7 December, 2001, refer to section 40B.)

"fair value", in relation to an asset of a fund, means the fair value of that asset determined in accordance with South African Statements of Generally Accepted Accounting Practice;

[Definition of "fair value" inserted by s. 1 of Act No. 65 of 2001.]

notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

[Sub-s. (1) amended by s. 40 of Act No. 99 of 1980 and by s. 45 of Act No. 99 of 1998.]

(2) (a) If in terms of the rules of a fund the residue of a full benefit, after deduction of any debt due by the person entitled to the benefit, represents the benefit due to that person, such reduction shall for the purposes of subsection (1) be construed as a reduction of the benefit.

(b) The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit.

(3) The provisions of subsection (1) shall not apply with reference to anything done towards reducing or obtaining settlement of a debt—

- (a) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976 (Act No. 101 of 1976), applies, arose before the commencement of that Act;
- (b) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976, does not apply, arose before the commencement of the Financial Institutions Amendment Act, 1977;
- (c) which a fund may reduce or settle under section 37D, to the extent to which a fund may reduce or settle such debt; or
- (d) which is owed to a fund by a member in respect of arrear contributions, but excluding amounts which are in arrear due to the failure of the employer concerned to pay the member's contributions to the fund after deduction thereof from the member's remuneration.

[Para. (d) added by s. 37 (b) of Act No. 104 of 1993 and substituted by s. 4 of Act No. 22 of 1996.]

(4) (a) Despite the provisions of this section, a fund may direct that a member's or beneficiary's benefit may be paid to a third party if that member or beneficiary provides sufficient proof that he or she is not able to open a bank account.

(b) Any such payment must be regarded as being a payment to that member or beneficiary.

[S. 37A inserted by s. 24 of Act No. 101 of 1976 and substituted by s. 12 of Act No. 94 of 1977. Sub-s. (4) added by s. 50 of Act No. 45 of 2013.]

37B. Disposition of pension benefits upon insolvency.—If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund (including an annuity purchased by the said fund from an insurer for that person) is sequestrated or surrendered, such benefit or any part thereof which became payable after the commencement of the Financial Institutions Amendment Act, 1976 (Act No. 101 of 1976), 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 be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors, notwithstanding anything to the contrary in any law relating to insolvency.

[S. 37B inserted by s. 24 of Act No. 101 of 1976 and substituted by s. 13 of Act No. 94 of 1977 and by s. 12 of Act No. 80 of 1978.]

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

(a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.

[Para. (a) substituted by s. 5 (a) of Act No. 22 of 1996 and by s. 51 (a) of Act No. 45 of 2013.]

(b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such

portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

[Para. (b) substituted by s. 21 of Act No. 54 of 1989.]

(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.

[Para. (bA) inserted by s. 21 of Act No. 54 of 1989 and substituted by s. 5 (b) of Act No. 22 of 1996.]

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

[Sub-s. (1) amended by s. 28 of Act No. 104 of 1993 and by s. 27 (a) of Act No. 11 of 2007. Para. (c) substituted by s. 21 of Act No. 54 of 1989 and by s. 51 (b) of Act No. 45 of 2013.]

(2) (a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to—

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by—

(aa) the member;

(bb) a major dependant or nominee, subject to subparagraph (cc); or

(cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs;

(ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or

(iii) a beneficiary fund.

(b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.

[Sub-s. (2) added by s. 6 (b) of Act No. 51 of 1988, substituted by s. 29 of Act No. 83 of 1992 and by s. 15 (a) of Act No. 22 of 2008.]

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the fund return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

[Sub-s. (3) added by s. 5 (c) of Act No. 22 of 1996 and substituted by s. 27 (b) of Act No. 11 of 2007.]

(4) (a) Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that—

(i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and

(ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.

[Sub-s. (4) added by s. 5 (c) of Act No. 22 of 1996.]

(5) The provisions of subsections (3) and (4) do not apply to a beneficiary fund, and any remaining assets held for the benefit of a deceased beneficiary in a beneficiary fund must be paid into the estate of such beneficiary or, if no inventory in respect of the beneficiary has been received by the Master of the High Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.

[S. 37C inserted by s. 24 of Act No. 101 of 1976 and substituted by s. 13 of Act No. 80 of 1978 and by s. 41 of Act No. 99 of 1980. Sub-s. (5) inserted by s. 15 (b) of Act No. 22 of 2008 and substituted by s. 51 (c) of Act No. 45 of 2013.]