SESHEGO BENEFIT CONSULTING

Insights

MAY 2021: EDITION 4 of 2021

In case you missed it…

1. March 2021 – Section 37D and withholding of benefits Final
2. February 2021: Smoothed Bonus Policies Final
3. January 2021: Seshego Legal Insights

Section 37C of the Pension Funds Act When does dependency commence? Is a death benefit decision subject to PAJA? ("the Promotion of Administrative Justice Act, Act No 3 of 2000")

1. Section 37C of the Pension Funds Act ("Section 37C") – onerous duty for the Trustees

1.1 Most members of a board of trustees would agree that the duty to trace dependants of a deceased member and decide on an equitable distribution of the death benefit is one of their most onerous duties. Section 37C was always a difficult section of the Pension Funds Act to interpret and it is becoming more litigious in that more potential beneficiaries are querying decisions made by the trustees.

1.2 If the Conduct of Financial Institutions Bill is implemented in its present form it is likely to add to the trustees' burden, since one of the proposals is that where a fund has successfully traced a dependant, the benefit must be paid to the dependant within **two** months of the fund tracing the dependant. This raises the obvious question of whether the requirement applies even if the fund has not identified and traced all potential dependants and nominees.

1.3 Industry bodies (the Pension Lawyers Association, the Institute for Retirement Funds, Africa, and Batseta) have recognised that the interpretation of Section 37C is problematic and have sent a submission to the regulatory authorities listing their concerns and requesting the authorities to look at a complete revision of Section 37C.

1.4 In this publication we consider the effect on the concept of dependency of a recent decision by the Supreme Court and also whether a death benefit decision is an administrative action and therefore subject to PAJA.

2. The Guarnieri Case – when does dependency commence?

2.1 The facts of the Guarnieri case were as follows:

2.1.1 Mr Guarnieri, a member of the Funds at Work Umbrella Fund ("the FAW") died in a motor cycle accident on 22 February 2014;
2.1.2 The board decided on 25 July 2014, to allocate 42% of the benefit to the mother, 37% to the widow, 8% to the son and 13% to the daughter;
2.1.3 The board also decided to make an advance payment to the frail care home on 23 May 2014 in respect of the allocation to the deceased's mother;
2.1.4 On 17 July 2014, the board of the FAW allocated the benefit and on 1 August 2014 they applied the portion reserved for Mrs Guarnieri senior to Old Mutual to purchase a living annuity
2.1.5 Unknown to the board, Mrs Guarnieri senior had died on 21 July 2014. Before her death she had named her daughter living in Australia and who had not been dependent on the deceased member as the beneficiary of the proceeds of the living annuity.

2.2 The widow of Mr Guarnieri complained about the distribution to the Pension Funds Adjudicator ("the PFA") and asked that a larger share of the benefit should be allocated to her son and daughter. The PFA agreed and told the board to reconsider its decision. The board then took exactly the same decision, but now in the full knowledge that the elder Mrs Guarnieri had died and that the major part of the benefit would go to someone who had never been dependent on the deceased. The younger Mrs Guarnieri then approached the High Court who set aside the second determination by the board of the FAW. The board of the FAW then appealed to the Supreme Court.

2.3 The main issue was when did dependency exist – at the date of death, at the date of distribution or the date of payment? Counsel for the FAW attempted to argue that the definition of dependant in the Pension Funds Act should be interpreted to mean that trustee boards should only take into consideration dependency at the date of death.

2.4 The Supreme Court took a very different view and argued that in the first place, a deceased member remained a member of the fund until such time as the death benefit had been paid out as it was a benefit the member was entitled to in terms of the rules of the fund, although he or she was necessarily represented by the executor of the estate. Therefore, dependency as at date of death, date of distribution and date of payment needed to be considered by trustee boards when making a determination in terms of Section 37C.

2.5 This judgement has several implications for trustees when making a determination in term of Section 37C.

The following are the most critical:

2.5.1 A deceased member remains a member of the fund until the benefit has been fully distributed.

2.5.2 A potential beneficiary must qualify as a dependant both at the time when the trustees decide on the allocation of the benefit and at the time of the actual distribution. Trustees therefore need to keep themselves abreast of developments in a particular case before making the final distribution and be aware that someone who initially qualified as a dependant may cease to qualify during the period before payment is made. For example, a potential beneficiary could have won the lottery or, as in the Guarnieri case, could have died.

2.5.3 Trustees may have to look at the life expectancy of an individual when making a determination. In the Guarnieri case, the board should have considered that Mrs Guarnieri was elderly, suffering from a serious disease and in a frail care centre before allocating the major part of the benefit to her.

2.6 Another issue arising from the Guarnieri case is the advisability of making an advance payment. Nothing in the Pension Funds Act prohibits an advance payment but on the other hand, there is no specific provision allowing for it. Boards of trustees deciding to make an advance payment should only do so with caution and if there is reasonable certainty with regard to the status of the beneficiary to whom the payment is made. The Guarnieri case serves to illustrate the pitfalls of making an advance payment in inappropriate circumstances.

***Comment:** The above factors have the potential to make determinations under Section 37C even more difficult for trustees. The Guarnieri case was a decision by the Supreme Court and as such carries a great deal of weight. Funds 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.*

3. Is a determination under Section 37C an administrative decision?

3.1 This is important because if a death benefit decision is regarded as an administrative decision, then it is subject to PAJA, "the Promotion of Administrative Justice Act". PAJA defines administrative action (an administrative decision) as:

"any decision taken, or any failure to take a decision, by an organ of state, when exercising a power in terms of the Constitution or a provincial Constitution; or. exercising a public power or performing a public function in terms of any legislation".

3.2 When making a decision in terms of Section 37C, it can be argued that the trustees are performing a public function in terms of the Pension Funds Act. Further, there is case law to support the view that death benefit decisions are in fact administrative decisions. The judge in the case of Mbatha versus Transport Sector Retirement Fund commented as follows:

"I subscribe to the view that a decision of a board of a pension fund taken in terms of Section 37C of the Pension Funds Act constitutes administrative action for the purposes of the Promotion of Administrative Justice Act…….and that PAJA applies to such a review…….".

3.3 What are the implications for boards of trustees if PAJA must apply to their decisions?

3.3.1 A decision under PAJA must be lawful, reasonable and unbiased.

3.3.2 For a decision to be lawful, the administrator must make a decision in terms of an empowering provision and in accordance with the law, which in the case of Section 37C would include the rules of the pension fund. Any legislative procedural requirement must be followed strictly. The decision must be based upon fact and the application of legal principles to those facts and must not be materially influenced by an error of law.

3.3.3 The decision must be reasonable. The board of trustees must be able to support their decision by providing proper reasons, which must not be arbitrary or capricious and which must take into account relevant considerations and not irrelevant or irrational considerations. The board must be seen to have acted rationally and their actions must be connected to the purpose of the decision on the basis of the information and facts available to them. The board must be able to justify its decision by providing a proper reason for the decision if queried.

Further, failure to take a decision in any particular case may be regarded as unreasonable and a breach of PAJA.

3.3.4 The decision must be unbiased. Therefore, the board of trustees must be independent and impartial and must not be seen to be unfairly slanted towards a particular person or decision. They must not act under the unauthorised dictates of any other person.

3.3.5 A further point is that the decision must be procedurally fair, in that decisions that have a negative effect on any person should not be taken without consulting him or her first.

3.4 If someone who has performed an administrative action fails to furnish adequate reasons within 90 days of taking a decision, it will be presumed in any judicial review of the proceedings that the administrative action was taken without good reason.

3.5 In the context of a retirement fund, when making a decision in terms of Section 37C of the Act, the main factors the trustees are required to take into consideration are the extent of the dependency, the ages of the beneficiaries, their likely future earning capacity, their relationship with the deceased and also the wishes of the deceased, as expressed on the nomination of beneficiary form. In any particular set of circumstances, the trustees may also need to consider additional factors. Therefore, even if a death benefit decision is regarded as administrative action, it should not be difficult for the trustees to provide adequate reasons for their decision should any objection be received from any of the beneficiaries.

3.6 If a death benefit decision is regarded as administrative action, the person affected by the decision is required to exhaust all internal remedies first before approaching a court of law. Therefore, a beneficiary objecting to a decision by the trustees in terms of Section 37C would first have to approach the fund before requesting judicial review of the matter. Further, the beneficiary would have to raise the complaint with the Pension Funds Adjudicator before taking the matter to the Financial Services Tribunal.

3.7 However, there are also some concerns if PAJA applies to a death benefit decision. For example, if trustees are required to provide adequate reasons for their decisions, they may find it difficult to explain their decision to a beneficiary lodging an objection without providing personal information about one beneficiary to another. POPIA will come into full effect on 1 July 2021, and it requires that personal information about beneficiaries is kept confidential. It may be that Section 11 (1) (c) of POPIA will be justification for trustees to disclose information to another beneficiary since it provides that processing of personal information is justified if it ‘’complies with an obligation imposed by law (PAJA) on the responsible party”.

Should you have any questions regarding the above, please contact your consultant to assist you.