



Case Law and POPIA update

A High Court case – allocation of section 37C lump sum death benefits

In the recent matter of *Swart N.O and Others v Lukhaimane N.O and Others* (54157/2019) [2021] ZAGPPHC 124 (12 February 2021), the High Court considered aspects of section 37C of the Pension Funds Act.

The facts of the case

- The member died leaving a wife and two major children in their late twenties. The children (legal dependants) alleged financial dependency. The children were beneficiaries of a family trust.
- After the member's death, the wife remarried. She was employed and 39 years of age. She claimed maintenance from the member's estate.
- The fund allocated 100% of the benefit to the wife.
- The Pension Fund Adjudicator ordered the fund to reconsider its decision. The fund did so and made the same decision again, that is, to allocate 100% of the benefit to the wife. The fund was of the view that the children would be taken care of by the trust and that the children were not factual dependants.
- The children alleged that the fund had just accepted, without evidence, that the trust would be able to take care of them.
- The fund did not take into account the member's beneficiary nomination form in its first decision. The member had nominated his wife for 50% and the trust for 50% of the death benefit.
- The matter was taken to the High Court.

¹ PFA64/2020

² (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA); [2009] 2 All SA 225 (SCA); (2009) 30 ILJ 1533 (SCA)

Certain submissions to the High Court and reasoning of the High Court

Solvency of the estate

The fund submitted that it was not required to take into account the solvency of the estate when making a decision.

The Judge disagreed and stated that:

“this submission is strange considering the Fund's own stance that section 37 C is intended to “protect dependency”, and that it fulfils the social function of ensuring that dependants are protected, even against the wishes of the deceased, if necessary. If the estate (or the trust) is not solvent, it cannot maintain the sixth and seventh applicants [children's], a factor that must surely be considered”.

Solvency of the trust

The fund also submitted that it was not required to take into account the solvency of the trust when making a decision.

Again the Judge disagreed with this assertion, and stated that:

It [the fund] accepted that the trust was possessed of assets and that it could therefore provide for sixth and seventh applicants' [children's] needs. This argument does not take account of the fact that the trust had a substantial cash shortfall. Simply because the trust is possessed of assets does not make it solvent”.

Circumstances not investigated thoroughly enough

The court was of the view that the fund had not investigated the wife's and children's circumstances sufficiently to conclude that the wife was in need of maintenance and the children were not:

“I find it striking that there is such a dearth of information regarding the financial affairs of the fourth respondent [wife] on the one hand, and the sixth and seventh respondents [children] on the other. One would have expected the Fund to have obtained financial statements, bank statements, proof of income, proof of expenses, and suchlike from all the parties. ... Instead, all I have is an unsubstantiated statement that the Fund believes that fourth respondent [wife] is in need of maintenance”.

In addition, the Judge stated that the fund had unreasonably and irrationally ignored the fact that the wife had remarried and not considered the impact of the wife's remarriage on her financial position and maintenance requirements.

The court went on to say that the fact that the wife had filed a maintenance claim of R10 million against the estate did not mean that her claim against the estate was well founded or that she was dependant on the deceased (as submitted by the fund).

The nomination of beneficiary form

When considering how the fund had dealt with the nomination form, the Judge made the following points:

- The fund is not bound by the wishes of the deceased;
- The “wish” expressed in a nomination form or will should not to be lightly ignored;
- A nomination form is one of a number of factors to be taken into account, but it is a “substantial factor”;
- The fund needs “compelling reasons” to ignore the nomination. For example, if it would result in an injustice or be inequitable should the member's wishes be given effect to, then the fund would be “justified in deviating from the member's wishes”; and
- There was no evidence that the fund placed any weight at all on the nomination form.

The nomination of the trust in the nomination form

The court seems to accept the nomination of the trust. The Judge referred to section 37C(2)(a) and stated that:

“It is consequently not the trust that is the dependant, but the person who receives a benefit by way of payment to the trust. Payment to the trust is regarded as a payment to the dependant”. (Own emphasis.)

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PERSONAL DATA PROTECTION

The court's findings

The fund argued that it merely had to show that it took the decision “honestly”. The Judge disagreed and said that this was not the test. The fund was required to act reasonably and rationally. The court found the fund's decision to be irrational and not rationally connected to the section 37C purpose to look after dependants. The court set aside the fund's decision and ordered the fund to remake its decision within 90 days. It also ordered the fund to fully investigate specific questions when reconsidering the matter and to pay the costs of the court application.

Protection of Personal Information Act (“POPIA”) update

1. Most of the provisions of POPIA are now effective and enforceable (as of 1 July 2021).
2. Funds' exemption from having to draft a Promotion of Access to Information Act Manual has been extended again until the end of 2021.
3. There is currently no deadline to register an Information Officer and the Information Regulator's registration portal is being upgraded. Funds, and their Information Officers, will not be penalised if they have not yet registered their Information Officers. Once the portal is up-and-running again, it will be possible for a person to register as the Information Officer for more than one entity.
4. The Information Officer has recently issued guidance on compulsory prior authorisation applications, applications for processing of special personal information or children's personal information and application for exemptions from conditions under sections 36 to 38 of POPIA. This guidance can be found on the Information Regulator's website, <https://www.justice.gov.za/inforeg>
5. The deadline for ensuring that a responsible party has the compulsory prior authorisation it requires from the Information Regulator has been extended until 1 February 2021;
6. Possible guidance to be issued by the Information Regulator in the future includes:
 - The meaning of appropriate and reasonable safeguards;
 - Direct marketing;
 - Which jurisdictions outside of South Africa will be considered to have adequate safeguards in place and guidance on cross-border transfers of personal information;
 - Juristic person's personal information; and
 - Responsible parties and legitimate interest.