

# The status of nomination forms and wills when retirement funds' death benefits are distributed

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## SUMMARY

This paper discusses the importance of deceased retirement fund members nominating their preferred beneficiaries to receive their accumulated retirement benefits when they die. It assesses whether nominations made by deceased members through nomination forms (and at times wills) are binding on retirement funds boards when distributing death benefits. It further assesses whether nominated beneficiaries are entitled to be allocated the available death benefits. Most importantly, this paper highlights the inherent weakness in section 37C of the Pension Funds Act 24 of 1956 regarding the treatment of nominated beneficiaries. It demonstrates that these beneficiaries are often requested to prove financial dependency despite this provision being silent on the issue. It illustrates further that the nominated beneficiaries' entitlement to be considered and allocated death benefits does not arise from financial dependency but from the act of nomination. It argues that there is no mechanism that retirement funds' boards can utilise to determine what should be allocated to the nominated beneficiaries. Furthermore, this paper argues that section 37 of the PFA is constitutional.

## 1 Introduction

The distribution of retirement funds' death benefits leads to challenges in South Africa with different boards of management (hereafter "boards") exercising their discretion differently when distributing these benefits to the identified beneficiaries and dependents. Boards are often confronted by clear and unequivocal wishes of deceased members either in their nomination forms or wills indicating who should be allocated their accumulated retirement benefits. However, boards are statutorily empowered to materially interfere with deceased members' expressly stated wishes and distribute available benefits in a way that is contrary to such wishes when it is justifiable to do so.

This paper discusses the impact (if any) of deceased members' clearly expressed wishes in their nomination forms or wills when boards distribute death benefits in South Africa. It aims to evaluate whether nominated beneficiaries have an automatic right to benefit from deceased members' death benefits without having to establish their financial dependency on the deceased. In other words, are nominated

beneficiaries entitled to be allocated death benefits by virtue of being nominated without proving anything further? This paper also seeks to address the concern regarding the constitutionality of section 37C of the Pension Funds Act,<sup>1</sup> in relation to the limitation it places on deceased retirement fund members' freedom of testation.<sup>2</sup>

## 2 Deceased members clearly expressed wishes

### 2 1 Nomination forms

Retirement funds have the responsibility to adequately record their members' relevant information. This makes it easier when these members die for retirement funds to identify all their dependents to whom the available death benefits should be distributed. Adequate recording of members' information can go a long way to prevent death benefits from becoming unclaimed benefits.<sup>3</sup> Upon retirement fund members' deaths, the updated and acquired information will assist retirement funds in their investigations which are meant to identify those who were dependent on deceased members during their lifetimes. One of the most effective means by which retirement funds can record members' information is through nomination forms. These forms record retirement funds' deceased members' personal information and identify people who should be allocated their accumulated death benefits.

Nomination forms appear to play two important roles. First, according to the Government Employees Pension Fund (GEPF), they "inform the trustees as to who [the member's] legal and financial dependents are, and how the Fund can contact them".<sup>4</sup> On this understanding, it appears that nomination forms are completed to assist retirement funds in locating deceased members' potential dependents who should be considered when boards allocate available death benefits on the death of such members. To achieve this goal, retirement funds must encourage their members to regularly update their nomination forms when their life circumstances change, and other potential beneficiaries and dependents become available. Failure to complete or update nomination forms can make it difficult for retirement funds to timeously process and distribute death benefits. Retirement funds may be forced to conduct extensive

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1 24 of 1956 (PFA).

2 See generally Lehmann "The distribution of retirement fund death benefits: An analysis of the equitability and constitutionality of section 37C of the Pension Funds Act 24 of 1956" (Unpublished Thesis, UCT 2021) 213.

3 See generally Marumoagae "The conundrum of unclaimed retirement benefits held by South African retirement funds" 2018 *Industrial Law Journal* 2116.

4 GEPF "Have you UPDATED your nomination form?" 2021 *FundTalk* 1. See generally Lehmann "Death and dependency: The meaning of 'dependent' under section 37C of the Pension Funds Act 24 of 1956" 2009 *South African Law Journal* 650, for an overview of the law on dependence regarding the dispositions of death benefits under s 37C of the PFA.

investigations to identify beneficiaries and dependents.<sup>5</sup> Such investigations can be challenging when potential dependents are not providing accurate information to assist retirement funds in establishing the extent of their dependency. Delays can also occur when it becomes clear that there are other dependents but their whereabouts are unknown. To prevent these delays, during their lifetimes, members should be encouraged to regularly insert the names of persons that they are financially obliged to support in their nomination forms.

Second, according to Techzone, “[a] nomination form (or a letter of wishes) allows the pension scheme member to tell the trustees/administrators who they would like to benefit on [their] death”.<sup>6</sup> On this understanding, retirement fund members speak through their nomination forms and expressly inform boards as to who they wish should be allocated their accumulated death benefits. Nomination forms are not instruments that can be used to disinherit persons whom retirement fund members are legally entitled to support or those whom these members voluntarily decided to offer financial support during their lifetimes, even though they do not have the legal duty to do so.<sup>7</sup>

Despite the deceased members’ clearly expressed wishes in their nomination forms as to who should be allocated death benefits, boards are not bound by these documents when distributing death benefits.<sup>8</sup> It is accepted in South Africa that what deceased members inserted in their nomination forms will merely guide boards when distributing death benefits and not dictate how such benefits should be distributed between identified dependents.<sup>9</sup> However, while boards are not obligated to follow and implement the deceased members’ wishes as expressed in their nomination forms when there are rational and reasonable reasons

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5 Obdadmin “The importance of an up to date beneficiary nomination form for your retirement fund and death benefits” <https://cfsg.co.za/2019/09/11/the-importance-of-an-up-to-date-beneficiary-nomination-form-for-your-retirement-fund-and-death-benefits/> (last accessed 2021-02-20).

6 “Death benefit nominations” <https://techzone.abrdn.com/public/pensions/death-benefit-nominations> (last accessed 2022-01-30). See also *Pandle v South African Local Authorities Pension Fund* 2015 3 BPLR 440 (PFA) para 5.11, where it was determined that a nomination form “serves a limited purpose as it determines the deceased’s nominees but does not grant them a greater right to the death benefit than any identified dependant”.

7 Marumoagae “Guarding against retirement funds’ arbitrary discretion when allocating death benefits: The urgent need for statutory guidelines” 2021 *Journal of Corporate and Commercial Law and Practice* 40.

8 See *Matlonya v Fundsatwork Umbrella Pension Fund* 2017 JOL 37968 (PFA) para 5.6 where it was determined that “a beneficiary nomination form is not the supreme factor to be considered to the exclusion of other factors in allocating a death benefit however is a guiding tool in assisting the board in the exercise of its discretion”.

9 *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) at 37051–3706C; and *Kirsten v Allan Gray Retirement Annuity Fund* 2017 3 BPLR 566 (PFA) para 4.7. See also *Municipal Workers Retirement Fund v Mabula* 2017 ZAGPPHC 1153 para 8, where Murphy J held that “[t]he contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. [S] 37C(1)(bA) in particular does not

to deviate therefrom, they do have a duty to consider them when distributing death benefits.

Boards are legislatively not obliged to follow nomination forms without having regard to other relevant factors that may impact the distribution of death benefits such as the availability of other dependents who may not be listed thereon. Blindly following members' expressed nominations will amount to the subversion of the objectives of section 37C of the PFA, which plays an important social function of ensuring that those to whom deceased members had a legal duty to support (or supported despite not having such a duty) can benefit from the accumulated death benefits.<sup>10</sup> The boards have a duty to locate all the dependents. The undisclosed dependents in nomination forms stand a chance of losing out on benefits that they should be allocated.

Boards must exercise their discretion properly after investigating the affairs of deceased members. The investigations should establish whether deceased members have dependents who are not listed in their nomination forms. In practice, this is done by requiring affidavits from beneficiaries identified in nomination forms and their relatives, which will provide retirement funds with relevant information regarding persons who are likely to benefit from available death benefits. It has been held that "[s]trict reliance on a beneficiary nomination form will lead to the board of management of the fund fettering its discretion and will restrain it from exercising its discretion properly".<sup>11</sup> Retirement funds do not have an obligation to distribute death benefits to the nominees and in proportions stipulated in nomination forms.<sup>12</sup> Nonetheless, nomination forms remain important documents that boards are obliged to consider when distributing death benefits.<sup>13</sup> While the second role of nomination forms as articulated by Techzone is important, the first role articulated by the GEPF has more practical relevance. The value of nomination forms lies in assisting retirement funds with their investigations and locating potential dependents.

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oblige the fund to give a nominee the portion of the benefit stipulated by the member when making the nomination. Nominees are to be treated as if they were dependants when the board determines what it regards as an equitable allocation of shares of the benefit. This means that, while they must be considered as potential beneficiaries, they are not entitled to be allocated any share of the benefit if it is apparent that there are other potential beneficiaries with greater financial needs. Therefore, the fact that the distribution does not strictly follow the nomination form is not a ground for review".

10 *Janse van Rensburg v Steinhoff Group Umbrella Provident Fund* 2017 JOL 46725 (PFA) para 5.8.

11 *Malan v Preservation Provident Fund* 2017 JOL 37965 (PFA) para 4.4.

12 As above.

13 See generally *Gillings v South African Retirement Annuity Fund* 2010 1 BPLR 66 (PFA) 67.

## 2 2 Testamentary wills

In South Africa, the Department of Constitutional Development at the instance of the Master of the High Court describes a will as “a document in which a person sets out what must happen to their estate when they die”.<sup>14</sup> This is a document that empowers anyone with assets to direct how such assets should be disposed of when they die. In the context of retirement benefits, retirement fund members can use their wills to identify whom they wish should receive their benefits when they die. There have been several instances where retirement funds did not allocate death benefits in accordance with what deceased members expressed in their wills. For instance, in *Whitcombe v Momentum Provident Preservation Fund*,<sup>15</sup> the deceased member did not complete a beneficiary nomination form but had a will in terms of which he allocated his estate to his children.<sup>16</sup> The will did not include the deceased’s life partner who was eventually allocated the largest portion of the deceased’s death benefit.<sup>17</sup> In *Bushula v Satawu National Provident Fund*, the deceased member nominated his brother as an heir to his estate in his will.<sup>18</sup> The deceased was a retirement fund member and did not complete a nomination form. On the deceased death, the fund allocated the available death benefit to the deceased’s wife and two children and excluded the brother from the distribution.<sup>19</sup>

In *Van Zelser v Sanlam Marketers Retirement Fund*, the deceased member in his will stated that the proceeds of his estate should be awarded to the person with whom he was cohabiting.<sup>20</sup> The deceased also indicated in his nomination form that his cohabitation partner should be awarded half of the entire death benefit.<sup>21</sup> After investigation, the fund allocated a large portion of the death benefit to the cohabiting partner and apportioned the proceeds of the insurance policy attached to the retirement fund between the deceased ex-wife, child, and cohabiting partner contrary to what was stated in the will.<sup>22</sup>

On a strict (and incorrect) application of the common law principle of freedom of testation,<sup>23</sup> it can be argued that once retirement fund members express their intentions regarding the distribution of death

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14 The Master of the High Court “Wills” <https://www.justice.gov.za/master/wills.html> (last accessed 2022-02-03).

15 2016 JOL 36020 (PFA).

16 *Whitcombe* para 5.11.

17 As above.

18 2009 2 BPLR 161 (PFA) para 2.

19 *Bushula* para 4.3.

20 2003 2 BPLR 4420 (PFA) para 8.

21 *Van Zelser* para 8.

22 *Van Zelser* para 10.

23 See Marumoagae 2018 *Industrial Law Journal* 118, where it is stated that “the concept of ‘freedom of testation’ is one of the basic principles of the Roman-Dutch law of testate succession. It allows a person to express his or her wishes regarding how his or her estate should be divided through a will,

benefits on their wills, retirement funds' boards must implement those wishes. In *Robertson v Robertson Executors*, it was held that

[t]he golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule or law from doing so.<sup>24</sup>

It is worth noting that section 37C of the PFA limits the deceased members' right to freedom of testation by expressly requiring boards to consider the equitable distribution of death benefits.<sup>25</sup> This empowers boards to apply their minds to the members' expressed wishes to ascertain whether any dependent has been excluded.

The boards must satisfy themselves that all the potential dependents have been allocated available death benefits based on what they believe to be equitable, even if this means disregarding deceased members' clearly expressed wishes in their wills. The deceased members' expressed wishes in their wills can be given effect unless there are sound reasons why they should not be implemented. The Constitutional Court held that "[g]enerally, it is accepted that testators have the freedom to dispose of their assets in a manner they deem fit, except insofar as the law places restrictions on this freedom".<sup>26</sup> The testators' power to freely dispose of their assets through a will may be limited when their testamentary dispositions are illegal, contrary to public policy, or vague as well as when specific legislation places restrictions on such power.<sup>27</sup>

The PFA is one of the pieces of legislation that places an important restriction on testators' freedom of testation. In fact, the legislature positioned the PFA in relation to the distribution of death benefits above all other legislation and the common law. Section 37(1) of the PFA provides that,

[n]otwithstanding 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.<sup>28</sup>

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and most importantly, regarding who should benefit from the estate. The idea behind this principle appears to be that the entitlement the person has to his or her own property allows him or her to dictate in writing how what he or she has accumulated during his or her lifetime, should be divided upon his or her death".

24 1914 SA 503 (AD) 507.

25 S 37C(1)(a) of the PFA.

26 *King v De Jager* 2021 5 BCLR 449 (CC) para 23.

27 See *Minister of Education v Syfrets Trust Ltd* 2006 4 SA 205 (C) para 22, and the Maintenance of Surviving Spouses Act 27 of 1990. See also De Waal and Schoeman-Malan *Law of Succession* 5ed (2015) 3.

28 S 37(1) of the PFA.

This means that any provision contained in any statute or rule of the common law that makes provision for the distribution of death benefits when the deceased retirement fund member dies which is contrary to what is contained in section 37C of the PFA will have no force of law, and thus, invalid. Section 37C of the PFA overrides any contrary law or common law rule that deals with the distribution of death benefits, including freedom of testation, which would otherwise empower testators to dictate how their death benefits should be allocated to their beneficiaries.<sup>29</sup> In *Kaplan v Professional and Executive Retirement Fund*, the Supreme Court of Appeal (SCA) held that the phrase “(n)otwithstanding anything to the contrary ... contained in the rules” makes unmistakably clear that it does not matter what the rules or contrary law say, the benefits must be disposed of in accordance with section 37C(1) statutory scheme.<sup>30</sup> Boards are empowered, when there are rational and reasonable grounds to do so, to disregard the clearly expressed wishes of deceased members and equitably distribute the deceased members’ available death benefits to all their beneficiaries.

Most importantly, the legislature through section 37C of the PFA deliberately prevented death benefits from forming part of deceased members’ estates. This provision ensures that the intended social function of protecting dependency and ensuring that deceased persons continue with their financial support obligations within their accumulated means, notwithstanding their death, is not frustrated.<sup>31</sup> This section empowers boards to equitably distribute available death benefits having regard to all the relevant factors that arose during their investigations.<sup>32</sup> The legislature effectively removed retirement fund members’ autonomy to decide how their retirement benefits should be distributed and to whom they should be distributed on their death. It has “burdened” boards with the responsibility of identifying all the dependents, to whom the available death benefits should be distributed in a fair and equitable manner.<sup>33</sup>

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29 See among others *Mashazi* at 3706; *Van Heerden v FundsAtWork Umbrella Provident Fund* 2017 3 BPLR 706 (PFA) para 5.5; *Coetsee/Central Retirement Annuity Fund* 2007 JOL 20902 (PFA) para 5.1; *Khaba/Wizard Universal Provident Fund* 2007 JOL 20346 (PFA) para 11; and *Matlonya* para 4.12.

30 2001 10 BPLR 2537 (A) at 2540.

31 See *Mabula* para 7. See also Nevondwe “Death benefits and constitutionality” 2007 *Juta’s Business Law* 164, who argues that the purpose of S 37C “is to make sure that the dependants of the deceased are not left destitute by the member’s death”.

32 *Mashazi v African Products Retirement Benefit Provident Fund* at 3706.

33 *Mabula* para 7. See also Mhango “Challenges in the distribution of death benefits under the Pension Funds Act: The extent of dependency considered” 2013 *Comparative and International Law Journal of Southern Africa* 477, who argues that “the Board has three statutory duties to discharge in relation to the death benefit apportionments. The first duty is to identify the potential beneficiaries. ... This duty requires the Board to conduct a comprehensive investigation to determine all potential beneficiaries. The second duty, is for the Board to make an equitable

In short, boards are not bound by wills executed by retirement fund members where they express their desire on how their accumulated retirement benefits should be apportioned among their stated heirs.<sup>34</sup> Retirement funds members cannot use their testamentary power to “disinherit” any person who qualifies as either their legal or factual dependent. Should deceased members’ wills exclude dependents identified in the investigations conducted by retirement funds, the boards of such funds have the statutory obligation to equitably allocate available benefits to those dependents, notwithstanding, the deceased clearly expressed wishes to deny them such benefits.<sup>35</sup>

The SCA in *Fundsatwork Umbrella Pension Fund v Guarnieri* cautioned that section 37C(1) of the PFA does not entirely override the deceased members’ wishes as expressed in nomination forms or wills, which remain one of the most important factors that boards should “seriously” consider when distributing death benefits.<sup>36</sup> This means that the starting point when death benefits are allocated is to determine how the deceased retirement fund members desired their death benefits to be distributed and the persons they desired to benefit. Ordinarily, the deceased desires will be honoured unless his or her conduct sought to absolve him or her from his or her duty to provide maintenance. It is only when the deceased’s expressly stated desires would lead to his or her maintenance obligation not being adequately carried out that the board of management will interfere with a view to make what they deem to be an equitable distribution.

Section 37C(1) of the PFA provides boards with the necessary discretion to allocate death benefits by seriously applying their minds to all the relevant factors. Manamela correctly argues that boards have discretionary powers that must be exercised reasonably without unduly fettering the exercise thereof.<sup>37</sup> He further correctly submits that “[a] decision by the board of pension fund which is unreasonable will either constitute an improper exercise of power, or amount to a maladministration”.<sup>38</sup>

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distribution of the death benefits to the beneficiaries identified. ... The final statutory duty in [s] 37C of the Act, is for the Board to make a payment using the most appropriate method under the circumstances” (footnotes omitted).

34 *Mabula* para 7.

35 S 37C(1) of the PFA.

36 2019 5 SA 68 (SCA) para 5.

37 “Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956” 2005 *South African Mercantile Law Journal* 279.

38 As above.

### 3 The constitutionality of disregarding the deceased nomination

#### 3 1 Freedom of testation

The statutory interference with deceased members' ability to freely choose how their death benefits should be distributed and most importantly, to whom they should be allocated is not widely accepted in South Africa. In her thesis, Lehmann argues that section 37C "violates the constitutional rights to human dignity, equality and property".<sup>39</sup> She is of the view that depriving individuals of their testamentary freedom is in and of itself a violation of the right to dignity.<sup>40</sup> Without demonstrating how taking away deceased retirement fund members' testamentary freedom violates their dignity, she introduces the concept of freedom into the debate. She argues that "at a minimum, [there is a need] to safeguard individual autonomy from external interference from a community seeking to dictate to individuals what they should believe and how they should conduct themselves".<sup>41</sup> She argues further that freedom lies at the heart of dignity and necessitates that choices that people freely make as a result of reasoned reflection should be respected.<sup>42</sup> She submits that "[t]he corollary is that individuals are responsible for their life choices. Dignity recognises that as moral agents, individuals are both entitled to freedom of choice, and responsible for their choices".<sup>43</sup> Most significantly, she argues that "[d]ignity does not, however, merely require that the state not interfere with the individual's freedom of choice. It is a positive claim for those choices to be accorded proper respect".<sup>44</sup>

In short, Lehmann is simply advocating for retirement fund members to be allowed to freely determine how their accumulated benefits should be distributed on their death. Once they have clearly indicated persons they desire to benefit, their choice should be implemented. I fundamentally disagree with this view. Lehmann's starting point appears to be that testators are generally reasonable and rational people who are best suited to decide how their benefits ought to be allocated. Unfortunately, the reality is that some people are part of different families where children are born and may not even know each other.<sup>45</sup> There is also a possibility of people favouring some of their dependents over others or even not recognising some of them. If these people are retirement fund members, on their death, boards are duty-bound to carefully assess whether any person that they are legally obliged to support has not been left without financial assistance. By so doing,

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39 Lehmann 42.

40 As above.

41 Lehmann 46.

42 Lehmann 47.

43 As above.

44 As above.

45 See generally *Molokane v Williams* 2023 ZAGPJHC para 12.

boards are not infringing on deceased retirement fund members' right to dignity but are ensuring that they are not unreasonably released from their legal obligations.

It is important to not incorrectly use the concept of dignity, as either a right or value, to distort the clear and important legislative purpose behind section 37C of the PFA. It cannot be doubted that dignity can be used to defend situations where individual decisions and rights are curtailed.<sup>46</sup> However, it is important to seriously assess whether such decisions and rights are reasonably restricted to achieve a particular legitimate purpose. Section 37C of the PFA is a product of the legislative observation, as recorded in some of the determinations dealing with the allocation of death benefits, that retirement fund members can seek to avoid their maintenance duties or prefer some of their dependents over others.<sup>47</sup> Legislatively preventing them from doing so can hardly be viewed as a limitation of their right to dignity. This is an important social security measure that allows those who are legally entitled to be maintained by the retirement fund deceased members not to miss out on their required financial support when these members die. This section represents a legitimate interference with freedom of testation in the context of the distribution of retirement funds' death benefits in South Africa.

With respect, it is not quite clear from Lehmann's thesis how the legislature's social initiative meant to prevent deceased members from distancing themselves from their financial obligations can limit their dignity. The legislature is aware that deceased members can either neglect their maintenance duties or actively seek to deny those that they are obliged to support, the financial support due to them through their wills and nomination forms. Where these members fairly and equitably apportioned their accumulated retirement benefits to all their dependents, there is no justification for boards to interfere. It is only where there is unfairness and inequity that boards should exercise their statutory discretion. Lehmann asks

[i]f the right to property includes the freedom to dispose of property, and the essence of testamentary freedom is the right to select to whom to dispose of one's property, under what circumstances could an owner's exercise of that right be sufficiently harmful to warrant limitation.<sup>48</sup>

This question should be answered with reference to how retirement fund members have generally behaved with respect to their nominations thereby leading to the legislature to insert section 37C into the PFA. Some of the retirement fund members' nominations sought to distance them

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46 Horn and Kerasidou "The Concept of Dignity and Its Use in End-of-Life Debates in England and France" 2016 *Cambridge Quarterly of Healthcare Ethics* 410.

47 See for instance *Kirsten v Allan Gray Retirement Annuity Fund* 2017 3 BPLR 566 (PFA) and *Makume v Sentinel Mining Industry Retirement Fund* 2014 2 BPLR 244 (PFA).

48 Lehmann 63.

from their legal obligations, which is unacceptable. However, Lehmann does accept that interference with testamentary freedom is justifiable where the testator failed to cater to his obligations in circumstances that are manifestly unjust that all reasonable people would agree that such failure is indisputably harmful. It is submitted that boards should be regarded as the reasonable people referred to by Lehmann who should adequately assess whether deceased members' nominations are unjust with a view to ensuring equitable distribution of available death benefits. Boards have the authority to attend to the distribution of death benefits and to seek advice from relevant experts relating to the allocation thereof. There is nothing unconstitutional about section 37C of the PFA.

### **3 2 Deprivation of property**

According to Lehmann, section 37C of the PFA “is both unconstitutional in its design and inequitable in its operation”.<sup>49</sup> She argues that this section deprives deceased members of their property in the form of death benefits.<sup>50</sup> However, it cannot just be assumed that retirement fund members “own” their retirement benefits and are thus, deprived thereof if their freedom of testation is limited upon their death. The first leg is to establish deceased members' alleged ownership of their death benefits before the question of deprivation can be considered. It is trite that while none of the trigger events such as death, resignation, dismissal, or retirement, that lead to the accrual of retirement benefits has occurred, the contributions paid by members to their retirement funds and the interests accumulated from the investment thereof are generally regarded as assets of those funds and not members' properties.<sup>51</sup> In other words, the ownership of the assets held by retirement funds regulated by the PFA vests with those funds. While members know what they have invested with these retirement funds, they ordinarily have no idea how much they will receive once these benefits accrue to them. In fact, they cannot even claim these benefits at any time they wish. They are obliged to wait for any of the prescribed events in the rules of their retirement funds to occur before they can claim to be paid these benefits. This means that any right to property that derives from “ownership” can “only” be claimed by those funds, not members because they do not own these assets before they accrue to them. They only have a claim to receive benefits when these benefits accrue as part of their pension promise.

Any constitutional analysis of whether deceased members are deprived of their property by not being allowed to freely determine how death benefits should be distributed and to whom they should be distributed must start with how these members attained ownership of these benefits. If ownership cannot be established, it will be difficult to sustain the deprivation argument. The fact that retirement fund

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49 Lehmann iv.

50 Lehmann 42.

51 See s 5 of the PFA.

members generally “do not own” the benefits held by retirement funds provide some justification for the legislative approach in section 37C of the PFA. This does not mean an ownership argument cannot be made.<sup>52</sup> However, the issue is not much about ownership but more about the social function of section 37C of the PFA which may be disturbed if deceased members are regarded as owners of the retirement benefits and entitled to protection under section 25(1) of the Constitution of the Republic of South Africa, 1996 (Constitution).

The legislature has provided substantial protection of members' retirement benefits from attachment.<sup>53</sup> When the benefit has not yet been paid to the member, even when one of the trigger events has occurred, such benefit is protected from the member's creditors.<sup>54</sup> This protection is a direct consequence of retirement funds' members' being “stripped” of ownership rights regarding invested contributions with retirement funds. If they are vested with ownership of these benefits, then the legislature will be well within its right to consider withdrawing the protection that these benefits enjoy. It is, nonetheless, not particularly clear whether members whose benefits have accrued but not yet paid to them attain ownership of such benefits. Lehmann seems to believe this to be the case but nonetheless, observes that

there has been no prior analysis of the legal nature of death benefits and whether they are property in the hands of the member, or whether they are deserving of protection as constitutional property. They are simply accepted as being non-disposable assets because s[ection] 37C explicitly provides that they will not form part of the member's estate.<sup>55</sup>

Lehmann's main contention is that deceased members have the right to choose those they wish to benefit or exclude,<sup>56</sup> but the legislature has taken away this right and transferred “it to trustees who are entitled to substitute their view of equitability for that of the member”.<sup>57</sup> While the way some of the boards exercise their discretion can be questioned and improved, this does not justify the criticism of the underlying statutory goal of preventing members from distancing themselves from their maintenance obligations through wills and nomination forms.

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52 See Marumoagae “Should living annuities be used to deprive non-member spouse part of their member spouse's retirement benefits?” 2022 *Journal of African Law* 167, where ownership and deprivation argument is made regarding the division of retirement benefits when spouses are divorcing.

53 See s 21 of the Government Employees Pension Law (Proclamation 21 of 1996) (GEP Law); s 7 of the Transnet Pension Fund Act 62 of 1990; s 10B(1) of the Post and Telecommunication-Related Matters Act 44 of 1958 (POTRMA); s 2 of the General Pensions Act 29 of 1979 (GPA); and s 37A of the PFA 24. See also Marumoagae “Overview of the legislative protection of retirement benefits against transfer, reduction, hypothecation and attachment in South Africa” 2021 *Law Democracy & Development* 411.

54 See ss 37A–B of the PFA. See also *Moreau v Murray* 2020 ZASCA 86 para 17.

55 Lehmann 216.

56 Lehmann 62.

57 Lehmann 97.

If there are concerns regarding the manner boards generally exercise their discretion, then specific focus should be directed thereto and not challenge the entire statutory scheme as being unconstitutional. The alleged unconstitutionality appears to be triggered by viewing section 37C of the PFA as not only limiting deceased members' freedom of testation but also their testamentary control regarding the distribution of their accumulated death benefits.<sup>58</sup> With respect, an argument that section 37C of the PFA is unconstitutional is unconvincing and should be rejected. The main challenge with this section, which Lehmann also identifies, is that it allows for the arbitrary exercise of discretion, which can be resolved by carefully constructed statutory guidelines.<sup>59</sup>

In her critique, Lehmann does not appear to seriously engage the maintenance responsibilities that deceased members have. In particular, she does not appear to seriously consider the fact that, if indeed deceased members have some ownership of their retirement benefits, they also play a role in the alleged deprivation when they consciously strip themselves of their maintenance responsibilities towards their dependents. Even though deceased members have freedom of testation, the law already limits this right by allowing those they owe duty of support to claim maintenance from their estates, even though they may have been disinherited through wills. It is trite that the parental duty to maintain the child or spouse, even the child disinherited by the will, will pass to the deceased estate, entitling the child or spouse to claim maintenance from the estate.<sup>60</sup>

Equally so, the Maintenance of Surviving Spouses Act<sup>61</sup> also enables a surviving spouse who may have been disinherited through the will to claim maintenance from the deceased estate. This is another important limitation of freedom of testation that is necessary to ensure that deceased persons do not pass over their responsibilities to maintain their dependents to the state, particularly where they have left money to cater for their dependents' financial support. Section 37C of the PFA also plays a similar role of ensuring that deceased members are not allowed to disengage themselves from their maintenance responsibilities. If this statutory limitation is viewed as depriving deceased members of their property, then such deprivation cannot be regarded as arbitrary and unconstitutional but as the law of general application that serves an important governmental purpose.

### 3 3 Limitation

It cannot be denied that freedom of testation is constitutionally guaranteed and protected by section 25(1) of the Constitution. In *BoE*

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58 Lehmann 280.

59 This discussion is beyond the scope of this paper and has been addressed elsewhere. See Marumoagae (2021) 36 and Lehmann 213.

60 See *Carelse v Estate De Vries* 1906 23 SC 532.

61 27 of 1990.

*Trust Ltd (in their capacities as co-trustees of the Jean Pierre De Villiers Trust*, it was held that

not to give due recognition to freedom of testation, will, to my mind, also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away.<sup>62</sup>

However, the SCA acknowledged that the freedom of testation and the rights underlying it are not absolute and there is a need for an appropriate balance to be struck between freedom of testation and its limitations.<sup>63</sup> This court held further in *Robertson v Robertson's Executors*, that

the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained, the court is bound to give effect to them, unless we are prevented by some rule of law from doing so.<sup>64</sup>

Section 37C of the PFA is a rational and reasonable law of general application that justifiably limits freedom of testation in relation to the distribution of death benefits.<sup>65</sup> It cannot be denied that one's right to freely decide how his or her property should be disposed of is one of the fundamental rights recognised under the Constitution.<sup>66</sup> However, this right is not absolute and section 37C of the PFA is one of the provisions that aims to ensure that this right is not enjoyed in a manner that absolves deceased members from their maintenance obligations. In terms of section 36(1) of the Constitution, constitutional rights can be limited in terms of law of general application. Section 37C of the PFA is a law of general application that provides a reasonable and justifiable limitation to retirement funds' deceased members' freedom of testation. The Constitutional Court in *Islamic Unity Convention v Independent Broadcasting Authority* held that

[s]ection 36(1) of the Constitution sets out the criteria for the limitation of rights. The limitation must be by means of a law of general application and determining what is fair and reasonable is an exercise in proportionality, involving the weighing up of various factors in a balancing exercise to determine whether or not the limitation is reasonable and justifiable in an open and democratic society founded on human dignity, equality and freedom.<sup>67</sup>

The nature of this right is to provide the deceased members with autonomy relating to how their benefits should be distributed. The purpose of the limitation relates to the legislative desire to provide

62 2013 3 SA 236 (SCA) para 27.

63 *BoE Trust* para 28.

64 1914 AD 503 at 507.

65 S 36(1) of the Constitution.

66 De Waal and Schoeman-Malan (2015) 3. See also *Crookes v Watson* 1956 1 SA 277 (A) at 298.

67 2002 4 SA 294 (CC) para 36.

oversight over deceased members to ensure that they do not contract themselves from their maintenance obligations. The limitation ensures that there would be equitable distribution of the deceased members' available benefits to their identified beneficiaries, dependents, and nominees. There is a direct link between the limitation and its purpose, which is to ensure that none of those who are entitled to receive financial assistance from the deceased members are left in the cold while others are sharing the available benefits. Section 37C of the PFA is a legitimate and reasonable means to achieve this purpose.

The limitation of the freedom of testation provided by section 37C of the PFA serves an important governmental purpose of ensuring that none of the identified dependents is left out of the distribution of death benefits.<sup>68</sup> Nevondwe correctly argues that, with this section, the state:

ensures that the money in respect of which it has allowed major tax concessions are utilised for the benefit of the deceased member's surviving spouse, children, and other dependents. In such a way, the state's liability in this regard is reduced.<sup>69</sup>

This is a legitimate governmental purpose that prevents deceased members from burdening the state with maintaining their dependents who should be cared for through the available death benefits. The legislature has adopted less restrictive means of limiting freedom of testation in relation to the distribution of death benefits.<sup>70</sup> Section 37C does not completely direct that the deceased wishes should be ignored. In fact, the deceased nomination either in the nomination form or the will is one of the factors that the retirement fund should consider when making the distribution.<sup>71</sup>

In *Morgan v SA Druggists Provident Fund*, the deceased member completed a nomination form and indicated that his girlfriend should be allocated 80% of the death benefit and 20% be allocated to his ex-wife, with whom he had a minor disabled child.<sup>72</sup> In setting aside the fund's allocation, the Adjudicator opined that the extent to which the board members relied on the deceased member's views they failed to exercise their discretion because the "deceased's view is largely irrelevant to the inquiry before the Board", further that the board "has the duty to determine the objective needs of the dependents, not the deceased".<sup>73</sup> This was an indirect contextualisation of the importance of limiting freedom of testation in the context of the distribution of death benefits. Without this limitation on freedom of testation, the deceased member in this determination will be well within his rights to disregard his clear maintenance obligations and withhold the much-needed maintenance to

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68 S 36(1)(d) of the Constitution.

69 Nevondwe "Death benefits and constitutionality" 2007 *Juta's Business Law* 166.

70 S 36(1)(e) of the Constitution.

71 *Swart (née Van der Merwe) v Lukhaimane* 2021 JOL 49952 (GP) para 31.

72 1 2001 4 BPLR 1886 (PFA) para 4.

73 *Morgan v SA Druggists Provident Fund* para 16.

the disabled child. This is the kind of injustice that the legislature sought to prevent by imposing a limitation on deceased members to safeguard the interests of their dependents. In this determination, the fund exercised its discretion and decided not to allocate anything to the deceased member's brother and correctly divided the available death benefits between the wife and two children.

Most importantly, section 37C of the PFA creates a platform for retirement funds' boards to seek to understand the circumstances of deceased members' beneficiaries and make equitable distributions of available death benefits, particularly when deceased members neglected to do so. This limitation is important because it empowers boards to correct otherwise inequitable wishes of deceased members regarding the distribution of their death benefits.<sup>74</sup> The limitation is not far-reaching but operates only where deceased persons did not nominate beneficiaries or where they did but failed to equitably distribute the available benefit to all of their dependents.<sup>75</sup> This seems to be an interference that is invited by deceased members themselves who consciously seek to disregard their maintenance obligations, which retirement funds are duty-bound to restore.

### **3 4 Entitlement to benefit**

The fact that deceased members can nominate their beneficiaries, who may or may not be their dependents, in either the nomination forms or wills necessitate the assessment of whether boards should allocate some percentages of the available benefits to the nominated persons. In terms of section 37C(1)(bA) of the PFA:

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.

This provision seems to suggest that there is no hierarchy between dependents and nominees, both of whom should be considered when death benefits are distributed. This provision does not say that the board is bound to first consider dependants and then deal with nominees thereafter. It enjoins boards of retirement funds to distribute death benefits to both the dependents and nominees in the manner they deem equitable. In other words, this suggests that boards do not have the discretion to not consider nominees and over-prioritise dependents when making distributions. Similarly, it does not follow that boards are bound to prioritise nominated persons who happen to also be dependents above other identified beneficiaries. It has been consistently determined that the fact that a nominee or dependent has been

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74 S 36(1)(b) of the Constitution.

75 S 36(1)(c) of the Constitution.

identified does not guarantee that they will be allocated the death benefits, but they should be considered.<sup>76</sup>

It is important to also note that in terms of section 37C(1)(bA) of the PFA, retirement funds are not prohibited “from paying the benefit, either to a dependant or nominee ... or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees”.<sup>77</sup> This means that after the assessment of factors such as the age of the dependants, the dependents’ relationship with the deceased; their extent of dependency; the wishes of the deceased as expressed in the nomination form; and the dependents’ (and nominees) financial affairs listed in *Sithole v ICS Provident Fund*,<sup>78</sup> the board has the discretion to allocate the available death benefits to either only the dependents or nominees when there is one dependent or nominee. However, if there is more than one nominee and dependent, this provision enjoins the retirement fund to apportion the benefits between them. Nonetheless, the language of the section is not entirely clear.

Does this mean that where there is one nominee and one dependent, the fund has the discretion to provide the benefit to only one of them and disregard the other since none of them is guaranteed to be allocated a benefit? Unfortunately, this question has not yet been conclusively answered by our courts. It is also not entirely clear whether retirement funds can use the financial dependency test established in *Sithole* to exclude a nominee or a legal dependent who has not established factual dependency. The question that needs judicial or preferably legislative clarity is whether a nominee or legal dependent can be excluded from the allocation purely based on not having established financial dependency. In other words, should such a nominee or legal dependent be allocated portions of available death benefits by virtue of either nomination or legal dependency? These are important questions that boards need to be guided on when exercising their discretion to distribute death benefits. The Adjudicator in *Mphahlele v Aon Umbrella Pension Fund* determined that “[s]ection 37C(1)(bA) stipulates further that the fund may, if there is more than one such dependants or nominees, decide to pay one or more in proportions as they may deem fit”.<sup>79</sup> Unfortunately, the Adjudicator did not provide a sense of what she actually meant by this statement. It is submitted that there is no reasonable basis for not allocating a percentage of the benefit to the nominated beneficiary even though he or she does not qualify as a dependent, no matter how negligible.

In *Harmse v Sentinel Retirement Fund*,<sup>80</sup> the deceased nominated his mother, father, and brother in his nomination form to receive his death

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76 *Mphahlele v Aon Umbrella Pension Fund* 2015 3 BPLR 403 (PFA) para 5.5.

77 See *Kaplan v Professional and Executive Retirement Fund; Kaplan v VIP Retirement Annuity Fund* 2001 10 BPLR 2541 (W) at 2544.

78 2000 4 BPLR 430 (PFA) para 24.

79 *Mphahlele v Aon Umbrella Pension Fund* 2015 3 BPLR 403 (PFA) para 5.5.

80 2019 3 BPLR 711 (PFA).

benefit. At the time of his death, the deceased was married but in the process of divorcing his spouse.<sup>81</sup> The fund allocated the entire benefit to the spouse and disregarded all the nominated beneficiaries. The fund argued that the spouse was a legal dependent and had to be considered for the allocation.<sup>82</sup> In directing the fund to reconsider the allocation, the Adjudicator opined that the fact that a dependent has been identified does not mean that the nominee's claim should be disregarded.<sup>83</sup> This was in line with her approach in *Gowing v Lifestyle Retirement Annuity*, where she determined that it

is incorrect, therefore, in assuming that once a dependant is identified, the claim of a nominee need no longer be entertained. This is simply incorrect in law. The ... [fund] has further entrenched this misconception by requiring ... that the ... [nominee] provide it with evidence of her factual or legal dependence in order to be considered. This confuses the nature of the respective types of beneficiary. A nominee is not entitled to be considered as a beneficiary because he or she was financially dependent on the deceased. The entitlement flows from the fact that the person concerned *was nominated* by the deceased. No more is required.<sup>84</sup>

On this approach, which appears to be correct on the current formulation of section 37C of the PFA, it does not seem as if financial dependency should be assessed in relation to nominees. In other words, once they have been nominated, boards do not have the discretion to exclude them from the allocation. At worst, it appears as if boards can exercise their discretion and allocate them lesser percentages of the available death benefits if it is established that it is justifiable to provide one or more of the dependents with a greater allocation.

This exposes an inherent weakness in section 37C of the PFA, which does not adequately address the status of nominees in the distribution of death benefits. It creates an assumption which is carried by retirement funds that the extent of dependency of both the dependents and nominees should be evaluated. Practically, without assessing the extent of the nominees' dependency it will always be difficult to equitably apportion death benefits to them. In any event, it is clear that, notwithstanding the limitation on freedom of testation, deceased members retain some power to allocate death benefits to people they wish to benefit. Once these people have been identified either in nomination forms or wills, boards are "obliged" to equitably allocate some percentage of the available benefits to them, unless there is some rational and reasonable reason not to do so.

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81 *Harmse* para 3.1.

82 *Harmse* para 4.10.

83 *Harmse* para 5.8.

84 2007 2 BPLR 212 (PFA) para 8.2.

## 4 Conclusion

This paper dealt with the importance of deceased members nominating their preferred beneficiaries to receive their accumulated death benefits. It demonstrated that boards are not bound by deceased members' express wishes as to who should be allocated these death benefits, particularly when such wishes have the effect of absolving such members from their maintenance obligations. It was further highlighted in this paper that there is an inherent weakness in section 37C of the PFA regarding the distribution of death benefits between identified dependents and those nominated by deceased persons in their wills or nomination forms to be allocated available death benefits.

This paper further sought to contextualise the importance of wills and nomination forms and demonstrated that deceased members retain a measure of authority on how their accumulated death benefits should be distributed. Most importantly, it illustrated that once deceased members have nominated their preferred beneficiaries, such beneficiaries will be "entitled" to be considered when death benefits are distributed. Further, their entitlement to be considered and paid does not arise from financial dependency but from the act of nomination itself. It was illustrated in this paper that currently, there is no mechanism that boards can utilise to determine what should be allocated to the nominated beneficiaries and ultimately require them to demonstrate financial dependency, which section 37C of the PFA does not seem to require. This is a gap that the legislature should address. This paper also rejected the notion that section 37C of the PFA is unconstitutional.