

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 80696/2016

In the matter between:

MARIA CHARLOTTE SNYMAN

PLAINTIFF

and

GOVERNMENT EMPLOYEES PENSION FUND

1st DEFENDANT

JOHN DE BEER

2ND DEFENDANT

JUDGEMENT

JOYINI AJ:

INTRODUCTION

[1] The Plaintiff is Maria Charlotte Snyman, an adult female residing at 2[...] S[...] Street, Extension 11, Mbombela, Mpumalanga Province. She has instituted action against the 1st and 2nd Defendants claiming payment of R1 318 951-66¹ as pension benefits of her deceased daughter, Maria Charlotte De Beer. The Plaintiff relies on the contents of the deceased's testament which is annexure "A"² to the particulars of

¹ Caselines 005-10 to 11

² Caselines 005-8.

claim and her appointment as executrix in the deceased's estate.³ She also relies on the contents of the prescribed nomination form that is nowhere to be found. It is common cause that the Plaintiff is the mother of the deceased who passed away on 16 December 2015. At the time of her death, she was employed by the South African Police Service (SAPS) and as such, she was a member of the Government Employee Pension Fund.

[2] The 1st Defendant is the Government Employees Pension Fund (GEPF or "the Fund"), a juristic person, with its registered office at 3[...] H[...] Street, A[...], Pretoria, Gauteng Province. The GEPF was established as a defined-benefit fund in 1996 through the amalgamation of various pension funds. The GEPF is governed by the Government Employees Pension (GEP) Law (Proclamation 21 of 1996). Its core business is to manage and administer pensions and related benefits for government employees and employees of certain other participating employers.

[3] The 2nd Defendant is John de Beer, a 72 years old male residing at 6[...] P[...] D[...] Street, B[...], Mpumalanga Province. He was still married to the late Maria Charlotte De Beer at the time of her death. She was also survived by three children of which two were already adults while the third one was still a minor. This is also confirmed by marriage certificate, childcare statement and financial dependency statement.⁴

[4] The matter was set down for trial on 19 and 20 February 2024. Before turning to the issues for determination, let me take this opportunity to thank all the parties' legal representatives for assisting the Court with their Heads of Argument.

ISSUES FOR DETERMINATION

[5] The Court is called upon to determine the Plaintiffs claim for payment by the 1st Defendant of R1318951-66 plus interest on this amount calculated at the rate of 9%

³ Caselines 005-9

⁴ Caselines 014-33 to 34.

per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action.

PLAINTIFF'S CASE AND ARGUMENT

[6] It is the Plaintiffs case that her late daughter nominated her as the sole beneficiary of her estate including the pension benefits. The Plaintiff was appointed as the executor of her late daughter's estate in terms of a letter of executorship dated 2 February 2016, issued by the Master of the High Court in Nelspruit under Estate number 0[...], and attached to the particulars of claim as annexure "A1" Caselines 005-9.

[7] It was the Plaintiff's testimony that, the deceased told her verbally that she wanted to change her pension beneficiaries so that the Plaintiff could be a 100% beneficiary for her pension benefits. On 17 February 2014, the late daughter visited her at her house where she prepared and signed the said testament. She completed the nomination form WP1002 nominating her. She informed the Plaintiff that she was going to submit the said form to the South African Police Service (SAPS), her employer.

[8] It must be mentioned for the record that the WP1002 form allegedly completed by the Plaintiffs daughter in the presence of the Plaintiff could not be traced at the employer's and 1st Defendant's offices. The Plaintiff could not confirm nor provide clear evidence as to whether the form was duly submitted or not. The aforesaid nomination form is nowhere to be found. The Plaintiff also testified that she and her husband, Adv Snyman, who happened to be her Counsel *in casu* could not find the said form from the SAPS and the 1st Defendant offices. The Plaintiffs husband inspected the files of the deceased at the SAPS in Barberton and at the Headquarters of the SAPS in Nelspruit. Unfortunately, the said nomination form was not found. Furthermore, the Plaintiff's husband telephonically contacted Lt Col Piet Kruger at the SAPS Headquarters in Pretoria who informed him that he could not trace any nomination form in the deceased's file.

[9] Be that as it may, the Plaintiff's Counsel contended that the deceased was legally entitled to bequeath her pension benefits to the Plaintiff as stated in clause 2 of her testament. It was her wish on 17 February 2014 that her mother (the Plaintiff) is the sole beneficiary of her pension benefits. Furthermore, the deceased's aforesaid bequeathment should also be seen as a nomination in writing of the beneficiary as is required by the rules promulgated in terms of the Pension Fund Act (PFA). The Court was also referred to *inter alia* the statements by Burger Huyser Attorneys, Randburg, to the effect that one of the requirements for a nomination is that it must be in writing. Counsel also argued that there is no legislation and/or rule that states that the only nomination form is the WP1002 form issued by the National Treasury Pensions Administration.

[10] In conclusion, the Plaintiff's Counsel submitted that the Plaintiff has successfully proved her case, and that she is therefore entitled to a judgement against the 1st Defendant for payment of an amount of R1 318 951-66 plus interest on this amount calculated at the rate of 9% per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action. The Plaintiff also prays for a costs order against the 2nd Defendant, such costs to be on a scale as between attorney and client.

1ST DEFENDANT'S CASE AND ARGUMENT

[11] It is the 1st Defendant's case that the pension benefits of a deceased person does not form part of a deceased's estate.

[12] Counsel for the 1st Defendant argued that the Plaintiff does not qualify as a beneficiary and/or dependent of her late daughter as provided for in the GEP Law and that pension benefits does not form part of an estate of the Plaintiffs daughter. The Plaintiff insists that she is entitled to benefit as a beneficiary as provided for in the testament (will). During examination-in-chief, the P1 Defendant's witness, Ms Nilsson, referred the Court to the definition of beneficiary and dependent as contained in GEP Law and she read it for the Court record. The Plaintiff's daughter nominated 2nd Defendant as the sole beneficiary of the pension benefits. On this

issue, the witness testified that a will or testament has no effect when it comes to the administration of pension benefits. In this regard, she referred the court to section 28 of GEP Law and read it into the record. She also testified that even if the nomination form is submitted, Trustees of the Fund still have a duty to exercise their discretion to distribute pension or death benefits among the legal dependents and spouse of the late member in terms of Section 22(2) GEP Law.

[13] It was confirmed in evidence that the 1st Defendant only received a nomination form from SAPS on 1 April 2016, and that the GEPP did not receive any other nomination form from the SAPS. It was also confirmed that the GEPP only receive this nomination form through a system which is used to minimize fraud as people will not be able to walk in and submit documents without the knowledge of the employer. This means that the Fund will not have an original copy of the nomination form.

[14] The Plaintiff also conceded under cross examination that she was neither a dependent nor beneficiary in terms of the Government Employee Pension Law, Proclamation 21 of 1996 (GEP Law). However, she insisted that she was a beneficiary in terms of the testament referred to above.

[15] The Plaintiff, under cross examination, confirmed that she does not know the provisions of the GEP Law and that she only knows that she is entitled to benefit as a beneficiary in terms of the testament (will). Counsel for the 1st Defendant submitted that it became clear that the Plaintiff was ill-advised even before she could institute these proceedings. This is so because even her Counsel confirmed that he did not consider the provisions of the Government Employees Pension Law (GEP Law), before instituting the proceedings in this matter, but rather only considered a booklet of GEPP which he was holding in his hand when he was testifying.

[16] According to the Counsel for the 1st Defendant, the Plaintiffs husband Adv S. Snyman then realized that the Plaintiff has conceded to the main issues. Namely, that she does not qualify as a beneficiary or dependent and that the testament (will) does not find application in the administration of pension benefits. The Plaintiffs

Counsel therefore decided to testify on behalf of the Plaintiff to simply try and resuscitate the Plaintiff's case.

[17] It was also put to Mr Snyman during cross-examination that the definition of beneficiary and dependent as contained in the GEP Law does not include the Plaintiff and that Section 28 of the GEP Law specifically excludes pension benefits from being part of an estate. He could not dispute this other than just to mention and rely on a testament (will) and a WP1002 form which could not be traced anywhere.

[18] It was put to the Plaintiff that the signatures on the nomination form nominating the 2nd Defendant and the one on the testament look the same. After she could not positively comment on the signatures the Court afforded the Plaintiff time to look at the signatures thoroughly during lunch time and to provide a comment when the Court proceedings resumed after lunch time. The Plaintiff duly considered the signatures during lunch and when we resume just after lunch the Plaintiff responded by saying *"It might be the same, I will not accept it"*. Then it became clear that even though the Plaintiff disputes the signature on the nomination form, the signature looked the same as the one on the testament (will).

[19] The Plaintiff conceded that she was not financially dependent on her late daughter as she is married to Advocate Snyman who is also assisting the Plaintiff in this matter. Advocate Snyman indeed confirmed that he is married to the Plaintiff.

[20] Mr Snyman was asked if he has any other interest in this matter other than as a legal practitioner and he responded with a no answer. According to the Counsel for the 1st Defendant, Mr Snyman failed to properly advise the Plaintiff. Thus one could see the way Mr Snyman was conducting himself as a witness that he has vested interest in this matter other than as a legal practitioner. He is the husband of the Plaintiff, he has been assisting the Plaintiff in this matter since 2016 to date. He will obviously benefit financially if the Plaintiff were to succeed with this meritless claim.

[21] It is clear from the evidence of the Plaintiff as supported by her husband that they failed to consider the Government Employees Pension Law before instituting

this action. They also failed to dispute any question or statement put to them regarding pension law other than to rely on the testament (will) and a nomination form which is non-existent.

[22] The Plaintiff duly confirmed that her daughter was still married to the 2nd Defendant upon her death and that she had two biological children with the 2nd Defendant.

[23] It was put to the Plaintiff that despite the nomination form, the Trustees of the Fund still have authority to consider how the pension benefits should be distributed among the dependents and/or beneficiaries of the late member according to percentages which the fund finds to be fair and reasonable. This was not disputed by the Plaintiff in anyway.

[24] From the Plaintiff's pleading and evidence led in Court, Counsel for the 1st Defendant submitted that the Plaintiff failed to prove on a balance of probabilities that she was financially dependent on her late daughter during the time of her death and that she was nominated as a beneficiary in terms of Section 22(1) of the GEP Law.

[25] Counsel for the 1st Defendant referred the Court to the following caselaw as authorities supporting their case:

[25.1] On the definition of a dependent, in *Funds at work Umbrella Pension Fund v Guarnieri and Others*⁵, the court held: "[13] In my view no such adjustment is necessary. This part of the definition says that a person is a dependant if there is an existing liability for maintenance on the part of the member. A person's death does not necessarily put an end to their obligation to maintain another person, although the obligation will necessarily have to be performed by their estate. The Maintenance of Surviving Spouses Act 27 of 1990 created and protects a surviving spouse's right to maintenance. There is a continuing obligation on a parent's deceased estate to maintain a minor child who is in need of such maintenance. It appears that

⁵ (83012018) (2019) ZASCA 78 (31 May 2019).

paragraph (a) of the definition of 'dependant' is directed at situations such as these. [14] The duty of a child to support a parent, and other similar situations where a person is obliged to maintain another, is extinguished by death."

[25.2] In the matter of *Mampe v Amplats Retirement Fund and Others*⁶, the Court found as follows. "[9] In terms of section 37C, the Jump sum benefit payable upon the death of a member of a registered fund shall not form part of the assets in the estate of the member, other than a pension payable to a spouse or child of the member. In the present matter there is no pension payable to the applicant as the spouse of the deceased member or his child. Section 37C makes it plain that "notwithstanding anything to the contrary contained in any law", the benefit of the deceased stands to be dealt with by the Board of Trustees of the first respondent in accordance with the Pension Funds Act and rules of the Fund. Section 1(1)(c) of the Intestate Succession Act accordingly finds no application. •

[25.3] In *Sithole v /CS Provident Fund*⁷, the Pension Funds Adjudicator ("PFA") held that section 37C takes precedence over any law, including customary law, and overturned the board's decision to pay the benefit to the grandmother of the deceased, who was also the sole nominee, even though the deceased member was survived by a spouse and three children. The board had decided to pay the benefit to the grandmother, as in terms of customary law she was the head of the household.

[25.4] In determining whether or not to include a dependant in the distribution of the benefit, the trustees must consider relevant factors which include, but not limited to: the extent of dependency; the ages of the beneficiaries; the relationship with the deceased; the amount available for distribution; the financial status of each beneficiary, including the future earning capacity of each beneficiary; and the wishes of the deceased. These factors were set out in the matter of *Sithole v /CS Provident Fund*⁸ and more recently confirmed in the matter of *Mohlomi v Evergreen Provident Fund and others*⁹. The PFA in *Sithole* held that no single factor may be emphasised

⁶ (2017) ZAGPPHC 687 (30 October 2017).

⁷ [2000] 4 BPLR 430 (PFA).

⁸ [2000] 4 BPLR 430 (PFA).

⁹ [2014] JOL 31440 (PFA).

to the exclusion of the other factors. The above list is not exhaustive as relevant factors will depend on the circumstances of a particular case.

[25.5] In the unreported case of *RA Jordaan NO v The Government Employees Pension Fund*¹⁰, the full court stated the following at page 13: *"In my Judgment it is clear that the purpose of section 22 of the proclamation is to allow a member of the Pension Fund to nominate a beneficiary and that upon the death of the member any benefit be paid directly to such nominee without the intervention of the executor of the deceased's estate. In that way the benefit cannot be eroded by payment to creditors of the deceased's estate and be utilized for the exclusive benefit of the deceased's dependant or nominee. That purpose is also clear from other provisions of the proclamation. See for example section 21 (prohibition on session and attachment of benefits). Section 23 (benefit not an asset in the insolvent estate), And section 28 (benefit not property for purposes for estate duty)".*

[25.6] In *Government Employees Pension Fund And Another v Buitendag And Others*¹¹ at paras 6-8, the Supreme Court of Appeal held that the stated purpose of the Law (i.e. the Proclamation) is to benefit, *inter alia*, dependants of a member- not his or her estate and that given the purpose behind the Law, there is no reason for excluding major children who are self-supporting and they qualified as dependants of the deceased envisaged in section 1 of the Law.

[26] It is the First Defendant's submission that the Plaintiff has failed to make out a case for payment of pension benefits of her late daughter as she did not financially depend on her (the late daughter) for support or otherwise.

[27] The Plaintiff does not fall within the definition of beneficiary and/or dependant as provided for in the Government Employee Pension Law.

[28] The Plaintiffs case is based on a testament in a form of a will and it is respectfully submitted that it does not find application when it comes to administration

¹⁰ Case No A565/2004 (TPD).

¹¹ 2007 (4) SA 2 (SCA).

of the pension benefits of a deceased member. Her claim is also based on a non-existent nomination form which could not be traced at the SAPS and/or at the GEPP offices.

[29] In the Plaintiffs Heads of Argument, the Plaintiff failed to make reference to any case law and/or an Act of Parliament, Policy and/or legal research. This is for a simple reason that there is no case law, legislation and/or policy of Government supporting the Plaintiffs case and/or evidence led in this matter.

[30] It is respectfully submitted that this is a case where a mother is so self-centered, which makes her to become so jealous when she realised that her son-in-law and her grandchildren will be receiving the pension benefits of his late wife and their late mother. Counsel for the 1st Defendant implored the Court to show its disgruntlement with the Plaintiffs conduct in this matter by imposing a costs order which will deter litigants from instituting actions based on emotions and jealous.

[31] It is respectfully submitted that should this Court find that the Plaintiff is entitled to receive any pension benefit which is vehemently denied, it is contended that such benefit shall only be at the discretion of the Fund after considering the dependents of the deceased member and the surviving spouse.

[32] Wherefore the 1st Defendant prays that the Plaintiffs claim be dismissed with costs on attorney and client scale.

2ND DEFENDANT'S CASE AND ARGUMENT

[33] The 2nd Defendant confirmed that he was married to the Plaintiffs late daughter, Maria Charlotte Potgieter, on 09 December 1995, and that two children were born from their marriage relationship. However, his late wife had another child born before their marriage. The marriage is confirmed by the marriage certificate¹² and birth certificates.¹³ At the time of his wife's death, they were still

¹² Caselines 008-53.

¹³ Caselines 008-54 to 55.

staying together as husband and wife at number 6[...] P[...] D[...] Street B..., Mpumalanga Province. He disputed the allegation that his late wife nominated her mother as the sole beneficiary. He stated that if she nominated her mother, she would have completed a nomination form nominating her. In the absence of such nomination form, the testament (will) was not applicable.

[34] Counsel for the 2nd Defendant submitted that the deceased nominated her spouse (John De Beer) as a sole beneficiary on the GEPF nomination form dated and signed on 15 November 2008¹⁴. The wishes of the deceased are regulated by the Administration of the estate Act and the Government Employee Pension Fund Law (GEPF) or/and the Pension Fund Act 24 of 1956. The deceased made a testament/will that gave rights to bequeath her estate as she wishes, the deceased also made a nomination to whom her pension fund should be paid to in the event of her unfortunate passing. This nomination procedure is regulated by the GEPF Law and/or Pension Fund Act.

[35] It was put to the 2nd Defendant that at the time of his wife's death he was not financially dependent on her late wife. He disputed that and stated that his wife used to buy things in the house and that they needed money in order to pay tuition fees for his daughter.

[36] Counsel for the 2nd Defendant referred the Court to *Mashazi v African Products Retirement Benefit Provident Fund*¹⁵ where the High Court reasoned that in requiring the board of trustees to exercise its discretion when paying a death benefit, the state (at least in theory) ensures that the monies in respect of which it allowed major tax concessions are utilised for the benefit of the deceased member's surviving spouse, children and other persons dependent on him, thereby reducing the State's liability.

¹⁴ Caselines 008-56 to 58.

¹⁵ 2003 (1) SA629 (W).

[37] The Court was also referred to *Fourie v Central Retirement Annuity Fund*¹⁶ and *Zikhali and Another v Metal Industries Provident Fund*¹⁷ the PFA, referring to the case of *Standerv Royal Exchange Insurance Company*¹⁸ where it was found that there is a legal duty on the child to pay maintenance towards his parents. However, the parent must show that they are unable to support themselves, i.e. there must be a necessity for support.

[38] Counsel for the 2nd Defendant submitted that evidence of the 2nd Defendant must be accepted in its entirety as it was not contradicted and/or discredited during cross examination. It was further submitted that the Plaintiff's case is not based on any law or relevant authorities.

[39] It was further submitted that it is clear from the evidence of the 2nd Defendant that the Plaintiff has not been reasonable in this matter as she did whatever she could with the assistance of her husband (Adv Snyman) to delay payment of pension benefits to the surviving spouse and children of the deceased. It was also submitted that the Court should show its discontent with such behaviour by issuing the necessary costs order.

STATUTORY REGIME GOVERNING PENSION FUND BENEFITS

[40] The disposition of the pension fund benefits upon death of a member of a pension fund is governed by section 37C of the Pension Funds Act²⁴ of 1956 (*"the Ac"*). Section 37C of the Act provides as follows: *"(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 370, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:*

¹⁶ 2001 2 BPLR 1580.

¹⁷ (2) [2002] 5 BPLR 3494 (PFA).

¹⁸ 1962 (1) SA454 (SWA).

(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.

(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.

(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."

APPLICABLE CASE LAW AND LEGAL PRINCIPLES

[41] In *Ramocha and Others v Alexander Forbes Retirement Fund and Others* (Adv N K Nxumalo),¹⁹ the Financial Service Tribunal held: "[10] The administrator of the fund responded stating the reasons as follows: 'Death benefits are paid out in terms of section 37C of the Pension Funds Act (PFA). Section 37C of the Act provides for the payment of death benefits to dependants. The purpose of this section is to make sure that benefits are paid in such a way as to ensure that the dependants of a deceased member are provided for. Section 37C overrides the freedom of testation. The death benefit is not paid out in accordance with the deceased's wishes, but is determined instead in terms of a very wide discretion given to Trustees. This section specifically excludes the death benefit from the deceased member's estate. It places a duty on the Trustees to trace all dependants of the member. The Pension Funds Act defines a dependant in relation to a member, as: {...] It is important to note that all dependants and nominees must be considered. The Trustees in exercising their discretion can, however, decide to allocate 0% of the benefit to either a nominee and/or a dependant. This will obviously depend on the size of the benefit and the needs of dependants/beneficiaries. The nomination form: In the same way that a Will is not binding on the Trustees, a nomination form is not binding either. In terms of Section 37C all nominees must be considered by the Trustees for a benefit. The allocation made by the member is not binding on the Trustees. The allocation is nothing more than a wish list. The Trustees will take the nomination form into account when making the final allocation of the benefit but they can make an allocation that is completely different from it. This will be especially so when the deceased has omitted dependants and nominees"

[42] In *Kaplan and Ano NNO v Professional and Executive Retirement Fund and Others*,²⁰ the deceased member of the pension fund had setup a trust for his two minor sons whom he had nominated as the beneficiaries to whom his pension death benefits should be distributed. On his death, he was survived by his two minor sons and his widow, who was not their mother. The fund distributed the benefits between

¹⁹ [2023]ZAFST 134 (12 October 2023).

²⁰ 1998 (4) SA 1234 (W).

the two sons and the widow. The trustees of the sons' trusts sought to challenge the distribution on the basis that the widow should not have benefitted because she was not nominated. The Court held per Golstein J: *"Only if a dependant is not discovered does the benefit devolve upon a nominee who is not a dependant. The converse is implicit: if a dependant is discovered, the nominee is ignored. If, of course, the nominee is a dependant, the situation is not covered by ass (1)(b) at all and falls under 1(a). Subsection (1)(bA) provides for the converse situation to which I have referred: if there is a nominee and a dependant, apportionment between the two is to occur. Whilst the latter subsection does not apply in casu, it reveals the Legislature's view that in the absence of such provision no such apportionment would occur and the nomination would be ignored. Essentially the Legislature has provided in the introductory words to ss (1) and in ss (1)(a) for the apportionment of the benefit among dependants. Subsections (1)(b) and (1)(bA) provide exceptions to the general rule. And, needless to say, the applicants' case, which would negate a dependant who is not nominated in favour of nominated dependants, does not fall within such exceptions."* On appeal, the unanimous Appellate Division held:²¹ *"The plain meaning of the subsection is this. All benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with in terms of one or other of the quoted subparagraphs. In other words none fall into the estate save in the circumstances stated in subparagraphs (b) and (c). In addition, these nominations having been made in terms of the rules, and the rules requiring the benefits to go to the nominated beneficiaries, the trustees' case is inextricably linked to the rules. However, as the phrase '(n)otwithstanding anything to the contrary ... contained in the rules' makes unmistakably clear, it matters not in the present situation what the rules say the benefits must be disposed of according to the subsection's statutory scheme."*

ANALYSIS OF EVIDENCE AND FINDINGS OF FACT

[43] The Court is called upon to determine the Plaintiff's claim for payment by the 1st Defendant of R1 318 951-66 plus interest on this amount calculated at the rate of

²¹ Kaplan and Another v Professional and Executive Retirement Fund and Others, [1999] 3 All SA 1 (A).

9% per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action. It is the Plaintiff's case that her late daughter nominated her as the sole beneficiary of her estate including the pension benefits. The Plaintiff relies on the contents of the deceased's testament which is annexure "A"²² to the particulars of claim and her appointment as executrix in the deceased's estate.²³ She also relies on the contents of the prescribed nomination form that is nowhere to be found.

[44] It is my considered view that there is a need, by way of context, to address the issue of the rationale behind Section 37C of the Pension Funds Act. A lot has been said about it already. However, I think there is still a need to unpack it a little bit. Section 37C of the Pension Funds Act governs the distribution and payment of lump sum benefits payable on the death of a member of a pension fund. Section 37C was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act²⁴. Its purpose, however, is to make sure that the dependants of the deceased member are not left destitute upon the death of the member²⁵.

First question: Who identifies dependants and nominees and who allocates the death benefits to them?

[45] Section 37C of the Pension Funds Act places a clear and onerous duty on the board of trustees to determine the fair and equitable distribution of death benefits of fund members. 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. This section empowers boards to equitably distribute available death benefits having regard to all the relevant factors that arose during their investigations.²⁶ This duty requires that the trustees identify the dependants and nominees of the deceased member, effect an equitable distribution of the benefit amongst the said dependants and nominees, taking into account relevant factors,

²² Caselines 005-8.

²³ Caselines 005-9

²⁴ Naidoo v Coca Cola Shanduka Beverage Provident Fund and others {2019}JOL 46217 (FST).

²⁵ Naidoo v Coca Cola Shanduka Beverage Provident Fund and others (2019) JOL 46217 (FST).

²⁶ Mashazi v African Products Retirement Benefit Provident Fund at 3706.

and to select an appropriate mode of payment for the benefit. This can be a complex process and it requires thorough investigation by trustees in order for the board to fulfil its fiduciary duties in terms of the Act. The investigations should establish whether deceased members have dependents who are *inter alia* not listed in their nomination forms.

[46] Determining dependants and nominees can prove to be a challenging task for trustees, as they need to ensure that all dependants of the deceased member are taken into account in their decision-making processes. It is the duty of the board of trustees to correctly identify the members' dependants and nominees in order to ensure the equitable and fair distribution of the death benefit. To achieve this, the distribution of death benefits is at the discretion of the board of trustees/management (the board) of a Fund. The board has discretionary powers to distribute the benefits equitably among the beneficiaries.²⁷ The key take-away from *Swart N.O and Others v Lukhaimane N.O and Others*²⁸ is that the Board of Trustees has the discretion to award any proportion of the death benefit to any dependant, even in the face of a nomination by the deceased, depending on what is equitable in each case. Ultimately, Section 37C places the onus on a Fund's board of trustees (not on Courts) in identifying and allocating these 'death benefits' to those who qualify. If this is the case, the question arises as to why the Plaintiff comes to Court instead of going to the Fund's board of trustees? The difficulty this Court faces is that this matter has not been dealt with by the Fund's board of trustees in terms of identifying those who qualify and allocating the death benefits accordingly as required by section 37C.

Second question: Does Section 37C override the member's will?

[47] The Plaintiff relies on the contents of the deceased's testament (will) which is annexure "A"²⁹ to the particulars of claim and her appointment as executrix in the

²⁷ Manamela T. Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956, 2005 17 SA Mere LJ 278 277.

²⁸ (54157/2019) [2021] ZAGPPHC 124 (12 February 2021).

²⁹ Caselines 005-8.

deceased's estate.³⁰ Plaintiffs Counsel, in response to the 2nd Defendant's Heads of Argument, said in paragraph 9.1: *·1 respectfully refer the Honourable Court to the article of Motseotsile Clement Marumoagae published in the 2023 De Jure Law Journal on p675, and I quote: 'The SCA in Fundsatwork Umbrella Pension Fund v Guarnieri and Others cautioned that section 37C(1) of the PFA does not entirely override the deceased members wishes expressed in nomination forms or wills, which remain one of the most important factors that boards should "seriously" consider when distributing death benefits. 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 person they desired to benefit.'* (the aforesaid decision is reported in the Law Reports 2019(5) AS 68 (SCA). I wish to emphasize the following aforesaid statements: section 37 C(1) does not entirely override the members "wishes as expressed in nomination forms or wills which remain one of the most important factors, and to determine how the death benefits to be distributed and the persons they desired to benefit. Having due regard to the aforesaid authority and the undisputed evidence of the plaintiff, the plaintiff must be entitled to the relief claimed."

[48] Professor Motseotsile Clement Marumoagae, in De Jure Law Journal *"The status of nomination forms and wills when retirement funds' death benefits are distributed,"* Volume 56 2023 pp 668 - 686, said: "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.³¹ 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.³² 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."

³⁰ Caselines 005-9

³¹ S 36(1) of the Constitution.

³² De Waal and Schoeman-Malan (2015) 3. See also Crookes v Watson 1956 1 SA 277 (A) at 298. 18

[49] Prior to the introduction of Section 37C into the Pension Funds Act, 1956 (herein referred to as 'the Act' or 'PFA'), the benefit payable as a result of the death of a pension fund member would take place as set out in their last will and testament or according to the provisions of the laws of intestate succession. The advent of Section 37C brought a statutory distribution regime which expressly excludes freedom of testation and rather looks to the board of a fund to distribute the death benefits. As such, Section 37C overrides a member's will and any other laws to the extent that they are contradictory to the provisions of the Pension Funds Act.

[50] Section 37C excludes freedom of testation and overrides the laws of intestate succession or any other law that may be in conflict with the statutory distribution regime contemplated in the section. This means that trustees can't simply follow the wishes of a member as expressed in their last will, or follow the beneficiary nomination made by the members during their lifetime or very often, dictates by family members that may have their origins in customary law or the common law. The board must establish who the persons are who fall within the ambit of "dependant" as defined in the Pension Funds Act, 1956 ('the Act'). Death benefits are expressly excluded from the member's estate, and the benefit must be dealt with according to the Act. Therefore, the member cannot leave the death benefit to a specific person via the terms of their last will, and the executor of the member's estate does not deal with the payment of these death benefits.

[51] The Pension Funds Act in section 37C specifically excludes these death benefits from one's estate and from being distributed in terms of one's will. This means a beneficiary under the last will and testament of the deceased is not necessarily a beneficiary under section 37C of the Act.³³

³³ Mashazi v African Products Retirement Benefit Provident Fund [2002] 8 BPLR 3703 (W). In this case, Hussain J remarked on page 3705 that "Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. It specifically excludes the benefits from the assets in the estate of a member and enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors." 19

[52] The Plaintiff's case is falling flat as she relies on the deceased's testament (will) which is not binding on the trustees.

Last question: What is the legal status of a nomination form?

[53] The Plaintiff also relies on the contents of the prescribed nomination form that is nowhere to be found. Be that as it may, the Courts have held that any nomination made by a member is not binding on the trustees. It serves merely as a guide to the trustees and is one of the relevant factors that may be considered by the board in arriving at an equitable distribution.³⁴ In *Ramocha and Others v Alexander Forbes Retirement Fund and Others (Adv N K Nxumalo)*,³⁵ the Financial Service Tribunal held: *"ftOJ The nominaton form: In the same way that a Will is not binding on the Trustees, a nomination form is not binding either. In terms of Section 37C all nominees must be considered by the Trustees for a benefit. The allocation made by the member is not binding on the Trustees. The allocation is nothing more than a wish list. The Trustees will take the nomination form into account when making the final allocation of the benefit but they can make an a/location that is completely different from it. This will be especially so when the deceased has omitted dependents and nominees*

[54] The Plaintiff's case is falling apart and collapsing as she relies on the nomination form and the Courts have held that any nomination made by a member is not binding on the trustees.

CONCLUSION

[55] By way of summary, it is common cause that the Court is called upon to determine the Plaintiff's claim for payment by the 1st Defendant of R1 318 951-66 plus interest on this amount calculated at the rate of 9% per annum *tempore morae*

³⁴ See *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 37068-D; *Kaplan and Another v Professional and Executive Retirement Fund and others* (2001) 10 BPLR 2537 (A) at 25391-J; and *Van Zeier v Sanlam Marketers Retirement Fund and others* (2003) 2 BPLR 4420 (PFA) at 4426A-G.

³⁵ (2023) ZAFST 134 (12 October 2023).

from 17 December 2015 to date of payment and the costs of this action. It is the Plaintiffs case that her late daughter nominated her as the sole beneficiary of her estate including the pension benefits. The Plaintiff relies on the contents of the deceased's testament which is annexure "A"³⁶ to the particulars of claim and her appointment as executrix in the deceased's estate.³⁷ She also relies on the contents of the prescribed nomination form that is nowhere to be found.

[56] The disposition of the pension fund benefits upon death of a member of a pension fund is governed by section 37C of the Pension Funds Act (PFA) 24 of 1956. This means that Section 37C of the PFA is the governing statutory regime of the distribution of death benefits. In this regard, Professor Motseotile Clement Marumoagae, in De Jure Law Journal *"The status of nomination forms and wills when retirement funds' death benefits are distributed,"* Volume 56 2023 pp 668 - 686, said: "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.³⁸ 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.³⁹ 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. •

[57] 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".*⁴⁰ The PFA is one of the pieces of legislation that places an important restriction on testators' freedom of testation. In

³⁶ Caselines 005-8.

³⁷ Caselines 005-9

³⁸ S 36(1) of the Constitution.

³⁹ De Waal and Schoeman-Malan (2015) 3. See also Crookes v Watson 1956 1 SA 277 (A) at 298.

⁴⁰ King v De Jager 2021 5 BCLR 449 (CC) para 23.

fact, the legislature positioned the PFA in relation to the distribution of death benefits above all other legislation and the common law. 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.⁴¹ In *Kaplan v Professional and Executive Retirement Fund*,⁴² the Supreme Court of Appeal (SCA) held that the phrase "notwithstanding 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.

[58] In *Ramocha and Others v Alexander Forbes Retirement Fund and Others (Adv N K Nxumalo)*,⁴³ the Financial Service Tribunal held: "[10] The administrator of the fund responded stating the reasons as follows: 'Death benefits are paid out in terms of section 37C of the Pension Funds Act (PFA). Section 37C of the Act provides for the payment of death benefits to dependants. The purpose of this section is to make sure that benefits are paid in such a way as to ensure that the dependants of a deceased member are provided for. Section 37C overrides the freedom of testation. The death benefit is not paid out in accordance with the deceased's wishes, but is determined instead in terms of a very wide discretion given to Trustees. This section specifically excludes the death benefit from the deceased member's estate. It places a duty on the Trustees to trace all dependants of the member. The Pension Funds Act defines a dependant in relation to a member, as: [...] It is important to note that all dependants and nominees must be considered. The Trustees in exercising their discretion can, however, decide to allocate 0% of the benefit to either a nominee and/or a dependant. This will obviously depend on the

⁴¹ See among others Mashazi at 3706; Van Heerden v FundsAtWork Umbrella Provident Fund 2017 3 BPLR 706 (PFA) para 5.5; CoetzelCentralRetirement Annuity Fund 2007 JOL 20902 (PFA) para 5.1; Khaba/VVizard Universal Provident Fund 2007 JOL 20346 (PFA) para 11; and Matlonya para 4.12.

⁴² 2001 10 BPLR 2537 (A) at 2540.

⁴³ [2023] ZAFST 134 (12 October 2023).

size of the benefit and the needs of dependants/beneficiaries. The nomination form: In the same way that a Will is not binding on the Trustees, a nomination form is not binding either. In terms of Section 37C all nominees must be considered by the Trustees for a benefit. The allocation made by the member is not binding on the Trustees. The allocation is nothing more than a wish list. The Trustees will take the nomination form into account when making the final allocation of the benefit but they can make an allocation that is completely different from it. This will be especially so when the deceased has omitted dependents and nominees "

[59] The Court is called upon to determine the Plaintiff's claim for payment by the 1st Defendant of R1 318 951-66 plus interest on this amount calculated at the rate of 9% per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action. The Plaintiff relies on the will and nomination form (that is nowhere to be found). If in the same way that a will is not binding on the trustees, a nomination form is not binding either, then what are the implications of this to the Plaintiffs case? The Pension Funds Act in section 37C specifically excludes these death benefits from ones estate and from being distributed in terms of ones will. This means a beneficiary under the last will and testament of the deceased is not necessarily a beneficiary under section 37C of the Act.⁴⁴

[60] The Plaintiff's case is falling flat as she relies on the deceased's testament (will) which is not binding on the trustees. The Plaintiff's case is falling apart and collapsing as she relies on the nomination form and the Courts have held that any nomination made by a member is not binding on the trustees. This means the legal basis for the Plaintiffs case has totally fallen apart and completely collapsed.

[61] There will therefore be no legal basis for a Court Order to compel the 1st Defendant to pay the Plaintiff R1318951-66 plus interest on this amount calculated at

⁴⁴ Mashazi v African Products Retirement Benefit Provident Fund [2002] 8 BPLR 3703 (W). In this case, Hussain J remarked on page 3705 that "Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. It specifically excludes the benefits from the assets in the estate of a member and enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors." 23

the rate of 9% per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action. The Plaintiff's claim is therefore bound to fail.

COSTS

[62] Counsel for the Plaintiff argued for a costs order against the 2nd Defendant, such costs to be on a scale as between attorney and client.

[63] Counsel for the 1st Defendant implored the Court to show its disgruntlement with the Plaintiffs conduct in this matter by imposing a costs order which will deter litigants from instituting actions based on emotions and jealousy. In this regard, he prays that the Plaintiff's claim be dismissed with costs on an attorney and client scale.

[64] Counsel for the 2nd Defendant submitted that it is clear from the evidence of the 2nd Defendant that the Plaintiff has not been reasonable in this matter as she did whatever she could with the assistance of her husband (Adv Snyman) to delay payment of pension benefits to the surviving spouse and children of the deceased. It was also submitted that the Court should show its discontent with such behaviour by issuing the necessary costs order.

[65] Matters of costs are always important and sometimes complex and difficult to determine. In leaving a Judge a discretion, the law contemplates that he should take into consideration the circumstances of each case. One must carefully weigh the various issues in the case, the conduct of the parties, and any other circumstances which may have a bearing upon the question of costs. and then make such order as to costs as would be fair and just between the parties.

[66] As the starting point, the Court must determine whether any costs are payable to any of the parties. Once the Court has decided that costs are payable it has to decide who of the parties is entitled to costs. This exercise cannot be embarked on capriciously or by chance, there should be sound legal principles upon which the decision is based. The idea behind granting a costs order in favour of a successful

party is to indemnify it for its expense in '*having been forced to litigate*'. Further, a balance must be struck '*to afford the innocent party adequate indemnification within reasonable bounds*'. In order to achieve the necessary balance, the individual circumstances of each case must be taken into account.

[67] A Court exercising a wide discretion may choose from all the options at its disposal and award a cost order that it considers just in the circumstances of the case at hand. The Court has to, *inter alia*, consider the conduct of the parties during the actual litigation process, all other matters that lead up to and occasioned the litigation and whether there were attempts to settle the matter before and during the litigation. The extent to which a party raised, pursued or contested a particular issue and whether it was reasonable for that party to pursue that issue.

[68] The Court's approach is to look first at who the successful party is. I believe that the principle that costs should follow the result is fair too. In the end, the exercise of the Court's discretion on costs, is an exercise to determine what is fair, an enquiry in which substantial success carries significant weight. Substantial success is often described as the general, although not an inflexible rule. It is not easily departed from, as in general, the purpose of a costs award is to indemnify the successful party.

[69] In circumstances such as the present, I am of the view that a punitive order for costs is not appropriate. However, I think, in this case, an order for costs is appropriate and the costs must definitely follow the results. I am therefore inclined to grant the costs order on a party and party scale.

[70] In the premises, I issue the following Order:

[70.1] The Plaintiff's claim for payment by the 1st Defendant of R1318951-66 plus interest on this amount calculated at the rate of 9% per annum *tempore morae* from 17 December 2015 to date of payment and the costs of this action is hereby dismissed with costs.

[70.2] The legal costs are awarded In favour of the 1st and 2nd Defendants on a party and party scale.

T E JOYINI
ACTING JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Adv MM Snyman
Instructed by: Couzyn Hertzog & Horak Attorneys

Counsel for the 1st Defendant: **Adv Adv MB** Lekoloana
Instructed by: Mpoyana Ledwaba Attorneys

Counsel for 2nd Defendant: Adv MI Chauke
Instructed by: L. Guzana Inc Attorneys

Date of Hearing: 19 & 20 February 2024
Date of Judgment: 8 April 2024

This Judgment has been delivered by uploading itto the Courtonline digital data base of the Gauteng Division, Pretoria and bye-mail to the Attorneys of record of the parties. The deemed date and time for the delivery is 8th of April 2024 at 10h00.