

The Politics of Cohabitation in South Africa: Exploring Who Qualifies for Pension Benefits Under Section 37C of the Pension Funds Act, 24 of 1956

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Abstract

This paper looks at how politics play out when considering who qualifies to claim when distributing pension benefits to beneficiaries particularly those who claimed to be cohabiting. Against this backdrop, previous decisions of the pension adjudicators were examined and the politics inherent in those decisions were articulated. The importance of pension funds tied to social security was also highlighted. The paper emphasises that a lot of claims were declined as a result of unnecessary politicking and therefore concludes that the current position needs to be reformed in order to allow more people to be eligible to access and benefit as prescribed under section 37C of the Pension Funds Act, 24 of 1956 as amended. Bearing in mind that this section seeks to protect those who were benefiting from the deceased during his lifetime, the argument is therefore that, they should continue to benefit in order not to become destitute.

Keywords: Cohabitation, Adjudicator, Benefits, Social Security, Claimants, Destitute

1. Introduction

In 1976, the Pension Funds Act 24 of 1956 ("the Act") was amended with effect from 1 August, 1976 to include section 37C Section 24 of Act 101 of 1976. This section regulates the payment of any benefit payable upon the death of a member of a pension fund organisation as defined in section 1 of the Act (Nevondwe and Choma, 2010). To this end, the pension fund board has the role of distributing the benefits. Describing the role of the board that has been saddled with the responsibility to distribute and pay death benefits and whether the board has been found credible and competent in discharging this responsibility, David (2012) puts it like this:

"the advent of section 37C brought a statutory regime which expressly excludes freedom of testation and rather looks to the board of a fund to distribute the death benefit. The board may only pay the dependants of a deceased (either factual or legal) or the persons he has recorded on his nomination form. The section relies on the board to exercise its discretion in a manner which results in an equitable distribution of the death benefit notwithstanding that it does not provide any guidelines as to how this is to be achieved. Accordingly, numerous decisions are challenged by the identified beneficiaries because they are unhappy with the manner in which the board exercised its discretion. This results in complaints being lodged with the Pension Funds Adjudicator. Many such complaints should never have arisen or could have been easily solved by a proper exercise of discretion on the part of the board. The problem is that these complaints are adding to an already burdened office."

Against the backdrop of the above numerous complaints and concerns lodged before the Pension Funds Adjudicator, The complaints lodged showed an increasing tendency amongst many South Africans to live together as husband and wife without observing the formalities of a legal marriage (Delius and Glaser, 2004) as prescribed in the Marriage Act, 25 of 1961 and other statutes and case law such as the Recognition of Customary Marriages Act 120 of 1998, Civil Union Act 17 of 2006 or the tenets of a religion as observed in the case of *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 [PFA].

The primary purpose of section 37C is to protect those who were financially dependent on the deceased during his lifetime (Manamela, 2005). In effect, section 37C overrides the freedom of testation of the deceased (Nevondwe and Choma, 2010:248). Thus, the court observed in the case of *Mashazi v African Products Retirement Benefit Provident*

Fund [2002] 8 BPLR 3703 (W) at 3705J-3706C) that, although the deceased may have expressed an intention to benefit a certain nominated beneficiary in his nomination form, it does not necessarily imply that the whole amount of the benefit will in fact be awarded to the person because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit. Against the backdrop of this, Marx and Hanekom (2007), are of the view that it is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefits payable. Mango (2008) also supported this position and averred that the board is under an obligation to discharge the responsibility of carrying out investigation in order to establish the veracity of the claims before payment or distribution of benefits.

Hayton (2004), relying on the Pension Funds Act articulates the basic duties of the trustees thus "the basic duties of "pension trustees" (as board members of a pension fund shall hereafter be called) are to ensure proper records are kept, proper control systems are in place, and adequate and appropriate information is communicated to members; to take all reasonable steps to ensure contributions are paid promptly to the fund; to obtain expert advice where sufficient expertise is lacking; and to ensure that the rules and the operation and administration of the fund comply with the Pensions Fund Act 1956 (as amended), the Financial Institutions (Investment of Funds) Act 2001 and all other applicable laws... It is noteworthy that, to safeguard its assets, no fund may carry on any business other than the business of a pension fund...Not only must the fund or a trustee not act in excess of its, his or her powers, but each must not exercise the fund's powers improperly nor cause a fund member to sustain actual or possible prejudice in consequence of the maladministration of the fund...In directing, controlling and overseeing the operations of the fund the trustees must (a) take all reasonable steps to ensure that the interests of the members in terms of the rules of the fund and the provisions of the 1956 Act (as amended) are protected at all times; (b) act with due care, diligence and good faith; (c) avoid conflicts of interest; and (d) act impartially in respect of all members and beneficiaries."

In exercising their discretion, trustees are required to consider relevant factors and ignore irrelevant facts. Towards this end, the court said in the case of *Sithole v ICS Provident Fund and Another* [2004] 4 BPLR 430 (PFA) that the trustees are required to exercise that discretionary power properly and not fetter their discretion. What the Act does not prescribe however, are the factors to be taken into account in exercising that discretion. The import of this is that the trustees are given an unfettered discretion to determine which dependant will share in the benefit, to the point of granting a nil benefit to other dependents (Nevondwe and Rapatsa, 2012). The rider is, of course, always that the board must exercise its discretion properly by considering relevant factors and ignoring irrelevant ones. In *TWC and Others v Rentokil Pension Fund and another* [2000] 2 BPLR 216 (PFA) at 224 H-225C and *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25 the following guidelines were set out:

"the fund should have regards to a basket of factors including (but not limited to):

- the age of the parties;
- the relationship with the deceased;
- the extent of the dependency;
- the wishes of the deceased
- the financial affairs of the dependants; and
- the future earning potential and prospects of the dependants."

2. The Meaning of Cohabitation

Cohabitation can be defined as a stable monogamous relationship where couples who do not wish to, or are not allowed to, get married, live together as spouses (Blossfeld et al. 1999). This definition includes people of the same sex living together in a stable, exclusive relationship (Hutchings and Delpont, 1992). Some authors still use the more traditional definition that limits the term cohabitation to two people of the opposite sex living together (Bumpass et al. 1991). Towards this end, they understand cohabitation to mean the dwelling or living together of a man and wife (Manning and Smock, 2005). According to Cronjic and Heaton (2004:227), "cohabitation refers to the two partners who are living together outside marriage in a relationship which is analogous to or has most of the characteristics of a marriage."

Explaining the changing meaning of cohabitation in the Netherlands, Manting (1996) indicated that "the social meaning of both marriage and cohabitation has changed. Cohabitation started as an alternative way of living, developed into a temporary phase before marriage, and finally became a strategy for moving into a union gradually... The

conclusion that both cohabitation and marriage have changed in nature over historical time raises the question whether or not historical fluctuations are present in the influence of forces underlying patterns of cohabitation and marriage."

Cronje and Heaton (1999) has observed that since the coming into operation of the Civil Union Act, marriage is no longer a relationship between a man and women only to the exclusion of all other persons. Accordingly, in terms of section 1, Civil Union Act defines civil union or marriage as the voluntary union of two persons who are both 18 years of age or older which is solemnized and registered by way of either a marriage or a civil partnership in accordance with the procedures prescribed in this Act to the exclusion while it lasts of all others. In the same vein, the South African Constitution particularly section 9 stipulates that everyone is equal before the eyes of the law and all people must enjoy equal benefits of the law (Kaganas and Murray, 1994). The State may not unfairly discriminate either directly or indirectly against anyone on the grounds of sexual orientation (Stychin, 1996). From different jurisdictions with different perspectives, writers have interpreted cohabitation as living together (Gierveld, 2004), shacking-up (Alm and Whittington, 1974), de facto marriage (Rawson, 1974), quasi-marriage (Waalwijk, 2005), common-law marriage (Bruch, 1981), domestic partnership (Bowman and Cornish, 1992) or private marriage (Lewis, 2001).

However, it is pertinent to point out that Nevondwe and Rapatsa (2012) has expressed the view that "the content of a cohabitative relationship can be distinguished from marriage only by the fact that the couple is not legally married to each other." The term does not include non-sexual relationships (for example, a brother and sister living together), relationships where the couple have only occasional sexual intercourse with no intention of establishing a family unit or relationships where more than two partners live together (Crowe and Ridley, 2008). According to Nevondwe and Rapatsa (2012) "Although the requirements set for cohabitation differ in different legal systems and the different statutes within the legal systems, three elements seem essential for the creation of a factual cohabitative relationship, namely a sexual relationship between the couple, a factual cohabitative relationship and a measure of durability and stability of the relationship. A further element, namely a sense of responsibility for each other, is emphasized in some instances to prove the existence of a cohabitative relationship." These elements establish the importance of the relationship between a man and a woman as husband and wife. The existence of this also establish the so called consortium omnis vitae which simply means love, affection, care, sexual intercourse and et cetera (Sloth-Nielsen and van Heerden, 1996).

In South Africa there is no law of cohabitation regulating cohabitation in the same sense as there is a law of husband and wife (Goldblatt, 2003). Cohabitation is, therefore, not a recognised legal relationship (Nevondwe and Rapatsa, 2012). The fact of cohabitation does, however, have certain legal consequences (Chambers, 1996) and certain legislation defines spouse so as to include a partner in a cohabitative relationship-(Insolvency Act 24 of 1936, Compensation for Occupational Injuries and Diseases Act 130 of 1993 and Domestic Violence Act 116 of 1998).

3. Does a Cohabitee Qualify to Benefit in Terms of Section 37C of the Pension Funds Act 24 of 1956?

The question whether a cohabiting partner qualifies as a dependant in terms of section 1 of the Pension Funds Act is best answered through the definition prescribed by the Act:

"dependant', in relation to a member, means-

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person-
 - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member, including a party to a customary union according to Black law and custom, or to a union recognised as a marriage under the tenets of any Asiatic religion;
 - (iii) is the child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (a) A person in respect of whom the member would have become legally liable for maintenance had the member not died."

Above definition has been changed by virtue of the Pension Funds Amendment Act, 11 of 2007 which came into effect on 13 September, 2007. It now reads as follows:

- "(a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person-
 - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock

(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;"

A spouse is in turn defined as follows:

"a person who is the permanent life partner, spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 120 of 1998), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion."

In series of Constitutional Court and Supreme Court of Appeal decisions, the conventional meaning of "spouse," being a party to a heterosexual marriage which has been formally registered in terms of the Marriage Act 25 of 1961, has been extended to include alternative forms of partnership. The ambit of the concept has been broadened to include monogamous Muslim marriage (Daniels v Campbell N.O. and Others [2004] 6 BPLR 5743 (CC), and same-sex permanent life partnership (Satchewell v President of the Republic of South Africa and Another [2004] 1 BPLR 5333 (CC)). It has not yet extended to include cohabittees.

In respect of the above, another question will be, is a cohabiting partner qualified as a dependant in terms of section 1 of the Act? From the definition, there are three classes of dependants, namely legal dependants, non-legal dependants and future dependants. The cohabiting partner will qualify as a non-legal dependant, the so called factual dependant or de facto dependant since she cannot qualify as legal dependant because she is not a spouse (Nevondwe, 2010).

A person qualifies as a factual dependant if there is no duty of support on the part of the deceased. A person might still be a dependant if the deceased in some way contributed to the maintenance of that person (Nevondwe, 2010). The person alleging to be a factual dependant will have to prove that she was dependant on the deceased at the time of the deceased's death (Mhango, 2010). A person can also qualify as a factual dependant if both the deceased and cohabiting partner were staying together as husband and wife but there are no statutory laws which recognise their union (Mhango, 2010).

The previous Adjudicator, Professor John Murphy made a determination in the matter between Musgrave v Unisa Retirement Fund [2000] 4 BPLR 415 [PFA], where the complainant was excluded from the distribution and payment of the death solely because she was a cohabitee. The Adjudicator held that the complainant qualifies as a factual dependant in terms of section 1 of the Pension Funds Act and she was supposed to have been considered for the benefit in terms of section 37C of the Act.

In 2009, the current Adjudicator issued an important ruling with regards to the cohabittees in the matter between Hlathi v University of Fort Hare Retirement Fund & Others PFA/EC/9015/2006(unreported) where she held that a permanent life partner of a deceased member, who has successfully proven that she had an inter-dependant relationship with the deceased member and as a consequence of his death she is left in a financial predicament, or with a financial void or is financially worse off, is sufficient to bring her within the scope of the definition of a "factual dependant" as set out in section 1(b)(i) of the Pension Funds Act, and eligible to be considered in the distribution of a death benefit by the pension fund.

The effect of the determination is that pension funds are now obliged to regard permanent life partners who have successfully met the new test for factual dependency to regard them as factual dependants as set out in section 1(b) (i) of the Pension Funds Act in all death benefit matters involving them which happened before 13 September, 2007 (David, 2012). It is, however, significant to note that in terms of the Pension Funds Amendment Act, 11 of 2007, which came into force and effect on 13 September, 2007, the definition of a spouse also include permanent life partners. The point of departure in this matter is that, the cause of action in this matter arose before 13 September, 2007 and therefore the said amendment does not apply retrospectively with regard to this specific issue and thus the permanent life partner could not be considered as a spouse.

There is a third case relating to cohabitation which was determined by then Adjudicator Advocate, Vuyani Ngwalana in Van der Merwe v Central Retirement Annuity Fund and Another, in which he stated that:

"Section 39 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) provides in section 39(2) that when interpreting any legislation, every tribunal must promote the spirit, purport and objects of the Bill of Rights contained in Chapter 2. It is clear that in interpreting the provisions of section 1(b)(ii) of the Pension Funds Act, I am enjoined to have regard to the constitutional background against which such provisions must be interpreted. It must therefore be evaluated, in the light of the recent challenges to the interpretation of the word 'spouse' as it appears in several pieces of legislation, whether it is constitutionally defensible to exclude a co-habitee from the meaning of 'spouse' for purposes of section 1(b)(ii). In Robinson, the Constitutional Court has now given an unequivocal answer to

this question by holding that the different treatment of formally married spouses, on the one hand, and co-habitees in a permanent life partnership, on the other, for purposes of maintenance claims against a deceased estate is not unconstitutional. There can be no difference in principle between that situation and the treatment of a co-habitee for purposes of qualifying as a 'spouse' as defined in section 1(b)(ii) of the Act. In both cases the parties would be relying on a statutorily conferred right of maintenance after death where none lay in life. Also, in both cases, the deceased may still provide for such co-habitee, subject to the limitations of other laws, by testamentary disposition, or, in the case of a pension fund, by nominating the partner as a beneficiary."

Therefore, in a nutshell, the only manner in which a co-habitee, whose relationship has not been formalised either in terms of the Marriage Act, Civil Union Act, Black law and custom or Asiatic religion, can now share in a death benefit distribution is by falling within the provisions of paragraph (b)(i), namely a de facto dependant (Nevondwe nd Rapatsa, 2012). In this regard, many pension funds that provide for spouses' pensions specifically define spouse to include legal spouses, customary and Asiatic spouses, same-sex partners and co-habitees. The rules also place restrictions on eligibility criteria, such as the requirement that the parties must not be separated on the death of the member. It is suggested that these funds amend their rules to define spouse with reference to the Marriage Act, Civil Union Act, Black law and custom and Asiatic religion.

In *Volks NO v Robison and Others* Case No. CCT 12/04, the Constitutional Court as per Mokgoro and O' Regan JJ emphasis that the Constitution prohibits unfair discrimination on the ground of marital status. They conclude that where relationships that serve a similar social function to marriage are not regulated in the same way as marriage, discrimination on the grounds of marital status arises. This does not include cohabitees but it includes same-sex marriages.

4. Conclusion

It is important for people who are staying together as husband and wife to formalise their marriage or to register their marriage so that if one of them passed away, a question of receiving death benefits would not be a nightmare let alone the distribution of the death estates by the Master of the High Court in case the deceased died intestate (Nevondwe, 2009).

The situation is better in South Africa because pension funds are part of social security, which is a mechanism that enables people to escape destitution. Social security thus meets people's basic needs when their income stream has stopped or has been disrupted, or has never adequately developed (Nevondwe, 2008). Pension Funds Act also protect cohabitees who might have spent their entire life together so that if one of them dies, the other can have a share on the death benefit (Bowman and Cornish, 1992). Currently there is no statutory law which recognises cohabitation relationship as a marriage similar to the common law marriage (Hosegood et al. 2009).

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