

2. Recent death benefit decisions

2.1 Factual dependency

The issue of factual dependency was considered by the Financial Services Tribunal in *Gunpath v Momentum (FundsAtWork) Umbrella Provident Fund and PFA*.

The deceased member did not leave any legal dependants (i.e. persons in respect of whom he was legally liable for maintenance) and he also did not complete a nomination form. The board of trustees of the Fund found that he was also not survived by any factual dependants (as contemplated in the definition of “dependant” in the Pension Funds Act) and therefore decided to allocate the death benefit to the deceased’s estate.

The Pension Funds Adjudicator (PFA) reversed the board’s decision and ordered them to re-investigate the allocation of the death benefit – the PFA among others relied on deposits made by the deceased into the bank account of the applicant (complainant), the sister of the deceased. The applicant referred the PFA’s decision to the Financial Services Tribunal, apparently because she was of the view that she should be regarded as a dependant of the deceased as a result of the payments made to her by the deceased.

The Tribunal considered whether the applicant was a factual dependant (i.e. factually dependent on the deceased for maintenance as contemplated in the definition of “dependant” in the Pension Funds Act). It was established that the applicant was employed and owned a motor vehicle and immovable property. The deceased made 9 payments into the applicant’s bank account over the course of about 22 months. In this regard, the Tribunal found that the amount deposited by the deceased into the account of the applicant do not indicate a factual basis to conclude that the applicant was in fact dependent on the deceased for maintenance. According to the Tribunal “the amounts vary greatly in value, the deposits are very few, irregular and are spaced far apart from each other to provide a pattern indicative of factual maintenance of the Applicant by the deceased”.

In paragraphs 28 and 29 of the Tribunal’s decision the following important findings were made:

- “28 What is obvious is that the deceased was generous in giving some money to the Applicant on an ad hoc basis in order to assist her as and when needed. Our view is that this does not create an obligation entitling the Applicant to acquire a right to be maintained by the deceased.
- “29 In our view, for a person, such as the Applicant, to qualify as being factually dependant (sic) on the deceased for maintenance, there should be a need for such maintenance and secondly the maintenance should be contributed on some regular basis and should ideally be in the form of amounts which do not differ in value drastically as appears in the amounts contributed by the deceased to the Applicant. The irregular, and widely different payments of amounts paid into the Applicant’s account do not, in our view, establish a pattern that the Applicant was being factually maintained by the deceased. At best the deposits made by the Applicant indicate generosity on the part of the deceased towards the Applicant.”

As a result, the Tribunal concluded that the applicant was neither factually nor legally a dependant of the deceased and that the board of the Fund’s decision to allocate the benefit to the deceased’s

estate was correct. The PFA's determination was therefore set aside and the matter was remitted back to the PFA for reconsideration.

2.2 Must dependants be determined as at date of death or date of distribution?

In the case of *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* the Supreme Court of Appeal had to determine when dependants of a deceased member are to be identified for the purpose of making a distribution in terms of section 37C. The court found that the applicable date is the date of distribution of the benefit and not the date of death of the member. Accordingly, the court found that no benefit may be paid in respect of a person who died before a section 37C distribution was made.

In paragraph 23 of the judgment the court stated as follows:

“The purpose of s 37C is to provide some protection for dependants, both existing and potential. The obvious time at which decisions should be taken in that regard is when the determination is made. At that stage the board should have completed its enquiries and be in a position to assess the relative present and future needs of the members of the class of dependants it has identified. Those such as the posthumously born child, or the person who has fallen on hard times, can then be assisted and those whose fortunes have improved, so that they no longer need to be maintained, can drop out of the picture.”

The court came to the following conclusion in paragraph 25 of the judgment:

“Given all these considerations of language, purpose and practicality, in my view, the proper construction of s 37C (1) (a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.”