



## **moment** OF TRUTH

# **Legal update 7 of 2021: Case law on death benefits payable**

### **Introduction**

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This update deals with a recent case decided by the Gauteng High Court, Pretoria, dealing with the distribution of a death benefit payable in terms of section 37C of the Pension Funds Act. More specifically, it deals with the nomination of a trust. Below is a summary of the case and insight into how we deal with these issues on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We also included more detail on the case.

### **Summary**

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Case: Swart L N.O. & Others vs Lukhaimane MA N.O. & Others (Case no. 54157/19) [2020] (12 February 2020)

How should the nomination of a beneficiary be treated by the trustees of a fund when distributing a death benefit?  
Can a member of a retirement fund nominate a trust?

- **The finding:** Even though a nomination of a beneficiary is not binding on the trustees, the trustees should not simply ignore it. The trustees should deviate from the wishes of the deceased member where there are compelling reasons to do so and if aligning to the wishes of the deceased would be inequitable or result in an injustice. A trust may receive the death benefit or a portion thereof, not in its capacity as a dependant but on behalf of the dependant.

- **How we deal with this:** When the trustees of the Momentum Retirement Annuity Fund, Momentum Pension Preservation Fund or Momentum Provident Preservation Fund decide on the distribution of a death benefit in terms of section 37C of the Pension Funds Act (the Act), they consider the wishes of the deceased member expressed on the nomination of beneficiary form as one of the factors. Once the trustees have allocated the benefit, they also consider the appropriate mode of payment for each beneficiary, which includes the possibility of payment of the benefit into a trust where the member nominated the trust to receive the benefit on behalf of the beneficiary or where the beneficiary has elected to have their benefit paid into the trust.

### **More detail of the case**

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Case: Swart L N.O. & Others vs Lukhaimane MA N.O. & Others (Case no. 54157/19) [2020] (12 February 2020)

How should the nomination of a beneficiary be treated by the trustees of a fund when distributing a death benefit?  
Can a member of a retirement fund nominate a trust? This matter was heard in the Gauteng High Court, Pretoria (High Court).

#### **Background**

The Second Respondent, the FundsAtWork Umbrella Provident Fund (the Fund), needed to distribute a death benefit in terms of section 37C of the Act following the death of a member. The Fund found the following, among other things:

- The deceased was survived by his spouse (39) and two major children (26 and 27) from a previous marriage.
- The deceased and his spouse got married on 12 February 2011. His spouse was unemployed. The deceased's children were employed and both received regular cash payments from him, including payment of their medical aid contributions and insurance premiums.
- On 31 August 2011, the deceased nominated his spouse (50%) and a trust established for the benefit of his children (50%) as the beneficiaries of his death benefit in the Fund.
- The spouse received R3 920 000 from an insurance policy, R441 960.50 from a policy at Old Mutual and R10 000 from a funeral policy.
- The children each received R220 980.25 from a policy at Old Mutual and both were the beneficiaries of the trust set up by the deceased, which had substantial assets.

Based on the above, the Fund concluded that the financial needs of the children were fully met and allocated 100% of the death benefit to the spouse. This led to the children lodging a complaint against the Fund with the Pension Funds Adjudicator (PFA), who set aside the decision of the Fund. Some of the findings of the PFA were that:

- the deceased's children qualified as dependants and they were financially dependent on him to some extent;
- the fact that the relationship between the deceased and his children was a close one, was relevant for consideration by the Fund;
- the spouse was still relatively young, gainfully employed, and had prospects of remarrying. She also lodged a maintenance claim against the deceased's estate for over R10 million, and
- the Fund failed to consider the estate's liquidation and distribution account.

The Fund, having had its initial distribution decision set aside and being ordered to reconsider its decision, requested additional information. Thereafter, it again decided to allocate 100% of the death benefit to the spouse. Following this second distribution decision, the trustees of the trust and the deceased's children referred the matter to the High Court for a review of the Fund's decision.

### The High Court

The High Court heard arguments on behalf of the deceased's children and the Fund, which opposed the matter, and made the following findings:

- There was a shortage of information regarding the spouse's and the children's financial affairs.
- The impact of the spouse's remarriage on her financial affairs was not investigated.
- Contrary to the Fund's information, the spouse was employed.
- Although the Fund was not bound by the wishes of the deceased, they are not to be lightly ignored without considering if there are compelling reasons to do so. If it would result in an injustice or be inequitable to give effect to the wishes of the deceased, the Fund would be justified in deviating from the wishes of the deceased.

The Fund argued that the trust is not a dependant, and as such, it cannot be considered in the distribution of the death benefit. The High Court referred to section 37C(2)(a) of the Act and held that it is not the trust that would be the dependant, but the person who receives a benefit by way of payment to the trust, that is the deceased's children.

The High Court set aside the Fund's decision and ordered the Fund to reinvestigate the circumstances of the spouse and the children with specific matters set out in the order for the Fund to investigate before making a distribution decision within 90 days of the order.

Our view is that this decision of the High Court does not change the legal position in relation to the nomination of beneficiaries, being that only natural persons may be nominated to receive a death benefit and juristic persons cannot be nominated as death benefits serve a social purpose to replace the support lost when a member dies.

Our interpretation of the judgment is that when the court referred to section 37C(2)(a) of the Act, the learned judge's point was that instead of completely ignoring the nomination of a trust and treating it as if there is no nomination, the trustees should consider the beneficiaries of the trust to be the deceased member's nominated beneficiaries.

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