



Supreme Court of Appeal case: when are dependants to be identified for the purposes of making a distribution under section 37C?

Fundsatwork Umbrella Pension Fund v Guarnieri and Others, delivered on 31 May 2019.

It is hard to believe that section 37C was inserted into the Pension Funds Act (“PFA”) in 1976 and that the courts are still being asked to interpret it. This case has received quite a bit of attention, including about how it should be applied practically. The matter has been through the mill as it has been through the Adjudicator as well as the High Court and then ended up in the Supreme Court of Appeal.

BACKGROUND

On 22 February 2014, Mr Massimiliano Guarnieri (“**deceased member**”) and his girlfriend were killed in a motor vehicle accident. He was still married to the Mrs Anna Marie Guarnieri (“**Mrs Guarnieri**”), although they had been living apart and she had commenced divorce proceedings. They had a major son and a major daughter. The deceased member was also survived by his mother Mrs Anna-Maria Guarnieri (“**Mrs Guarnieri Snr**”), who was then 71 years old and suffering from emphysema.

When he died, the deceased member was a member of the Fundsatwork Umbrella Pension Fund (“**the Fund**”). The death benefit due after tax was R1 164 657.19. No will or nomination form, completed by the deceased member, was found.

The board's allocation:	42 %:	Mrs Guarnieri Snr
	37 %:	Mrs Guarnieri
	8 %:	deceased member's son
	13 %:	deceased member's daughter

Mrs Guarnieri Snr died four days before the decision was made by the Board. She had signed a power of attorney in favour of her daughter, Ms Swart, and an election form so her allocation (less an advance) was paid to Old Mutual to purchase an annuity. The beneficiary of that annuity, after her death, was her daughter, Ms Swart.

Mrs Guarnieri challenged the distribution of that portion of the death benefit awarded to Mrs Guarnieri Snr as she wanted an allocation of that portion to herself and her children. The Adjudicator ordered the Fund to reconsider its decision. The Fund did so and made the same allocation decision as it did previously. The matter eventually ended up in the Supreme Court of Appeal. It seems unlikely that this matter will be appealed further, we need to understand this decision.

THE MAIN QUESTION IN FRONT OF THE COURT

To answer the question of whether Mrs Guarnieri Snr was a dependant or not, the court had to determine:

At what stage must a person be a dependant in order to be entitled to participate in a distribution under section 37C. Is it:

-  (a) the date of the member's death, or
-  (b) the date upon which the decision in regard to the distribution is made, or
-  (c) the date of the distribution itself?*

* It is our view that (c) means the date that the distribution *is paid* to the dependant.

The board's contention was that its determination of dependency had to be made at the date of death of the member and that subsequent changes in circumstances of dependants should be ignored by it.

INTERPRETATION OF THE MEANING OF DEPENDANT IN THE PFA

The court went through a thorough reasoning process, which was refreshing to read as courts seem not to always do so, as regards pension benefits. Some important points emerged from this case and these are set out below.

A deceased member is still a member of the fund

It first considered the definition of dependant in the PFA and stated that a deceased member is still a member of the fund until the death benefit has been fully distributed. The court said further:

"Their continued membership also has implications for the operation of the fund and would have to be taken into account, along with that of all other members, in an actuarial valuation of the obligations of the fund."

The definition of dependant uses past, present and future tenses deliberately

The court went through a process of considering each of the sub-sections of the definition of dependant to see which of them used past, present or future tenses. Basically, in our view, this gives an indication of whether the PFA wording requires the board to consider dependency as at the time of the member's death or after the date of the member's death. It came to different conclusions for different sub-sections.

THE COURTS ALSO CONSIDERED THE PRACTICALITIES AND PURPOSE OF SECTION 37C

In particular, the court pointed out that the purpose of s 37C is to provide some protection for dependants, both existing and potential.

Section 37C provides that a fund has twelve months in which to trace dependants.



The court said that if a Board is satisfied that it has completed tracing dependants during the course of the twelve months, it may proceed to make the distribution immediately, without waiting for the expiry of the twelve months. After that it must take a decision on how the death benefit of the member is to be distributed. Where there is doubt about the identity of the dependants who are to receive a distribution, or as to the correct distribution among those dependants, the board is not bound by the twelve months period, but may delay for a time necessary to resolve the issue.

Circumstances change

However, the court pointed out that practically speaking, the twelve month period inevitably means that, in the course of the period of investigation, factual circumstances change. The court provided many examples of this, both of circumstances getting better or worse, for example: a dependent child may attain their majority, graduate from university or obtain gainful employment, a spouse may remarry, an inheritance may be received, there may be a windfall gain on the national lottery, a person may be taken seriously ill or injured and relinquish gainful employment, lose their job, be sequestered or an elderly and ill relative may die.

A FUND HAS AN OBLIGATION TO KEEP UP-TO-DATE WITH FACTS

The board had stated to the court that it had been unaware that Mrs Guarnieri Snr had died four days before it made its original decision, that it made the decision in good faith and without knowing the true situation. *The court pointed out that it was the Fund's obligation to keep itself abreast of the situation and to check the facts are accurate, "especially as it was well aware that she was elderly, suffering from a life-threatening condition and in frail care. The possibility of her imminent death should have been apparent"*.

If this is done then the allocations to dependants whose circumstances have deteriorated or improved can be taken into account, even to the extent of them becoming dependants or losing their dependency status.

BOARDS SHOULD NOT ACCEPT ONE-SIDED INFORMATION IS CORRECT – THEY SHOULD REQUIRE PROOF

The court pointed out that in this case the board was too inclined to accept the correctness of one-sided information for example (1) such as that Mr Guarnieri had maintained his mother, without requiring proof, for example by checking who was paying her bills where she was residing, and (2) it did not obtain an informed assessment of Mrs Guarnieri Snr's life expectancy.

THE FUND SHOULD HAVE TAKEN INTO ACCOUNT THE LIFE-EXPECTANCY OF THE PERSON

The court said that, in the circumstances, the board should have had regard to what would happen to the funds if Mrs Guarnieri Snr died. If it had, it would have realised that the principal beneficiary of Mr Guarnieri's death would be Ms Swart who was not a dependant of his.

Dependency must be determined at the time the allocation decision is made by the board AND the person must still be dependant when the distribution is made

The court said that:

"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." (Own emphasis.)

Note that we have interpreted "distribution is made" to mean distribution is paid.

Finding: the Fund's decision was contrary to section 37C

The court found the Fund's decision was contrary to section 37C, invalid and that Mrs Guarnieri Snr was not entitled to participate in the distribution.



THE FACT THAT THE FUND HAD ALREADY PAID THE BENEFIT WAS IRRELEVANT

The payment with respect to Mrs Guarnieri Snr was made without any lawful obligation to do so and the Fund could try to recover it. As regard the other dependants, the allocation and payments to them were lawful. The Fund must distribute the rest of the benefit as the balance of the benefit remaining after the distribution to Mrs Guarnieri and the children remained a lawful claim against the Fund.

DISMISSED WITH COSTS

The appeal was dismissed with costs, including the cost of two counsel.

If dependancy must be determined at the time the allocation decision is made by the board AND the person must still be dependant when the distribution is made/paid, **what does this mean for funds' death benefit processes?**

We believe this means that funds need a process where they can determine, close to date of payment, that dependants are still dependants and that relevant facts have not changed.

Thus, in our view, the following tweaks to the death benefit process may be useful:

1. When funds ask for information from beneficiaries, they should be asked to keep the board up-to-date with any changes in their circumstances or if they know a dependant has died or been born.
2. The period between (a) investigating and making an allocation decision, and (b) making an allocation decision to date of payment, should be kept as short as possible to try to limit the impact of changes in circumstances.
3. Funds should consider, after making a draft allocation decision, sending a written document to each potential beneficiary notifying them of the draft allocation decision, setting out the factors taken into account when arriving at the decision and inviting them to provide any new facts, refute facts and present new arguments.
4. The board should give a reasonable deadline to potential beneficiaries to respond to the draft allocation decision (not too long).
5. Then, the board should either confirm its draft decision (due to no new relevant factors presenting) or change its draft decision, as soon after the deadline as possible. The final decision should be confirmed to beneficiaries with payment advice. The time period between making the final decision and payment should be as short as possible.
6. We also think that it is possible for the board, from a practical point of view, to sign the resolution at the time of making the draft allocation decision and stipulate that it will become final if no new relevant factors become known.
7. The board should not ask potential beneficiaries to approve or agree to distribution decisions. Approval is a board function and agreement is irrelevant to the board's exercise of its discretion. It may, in our view, ask for objections or further argument.

What have we learned?

- A deceased member is still a member of the fund.
- A fund has an obligation to keep up-to-date with facts.
- Boards should not accept one-sided information as correct: they should require proof.
- A fund must take into account the life-expectancy of the person.
- Dependancy must be determined at the time the allocation decision is made by the board AND the person must still be dependant when the distribution is made/paid.
- The fact that a fund had already paid the benefit is irrelevant, the balance of the benefit remaining after the distribution is a lawful claim against the fund.

