



- **SECTION 37C - WHEN THERE IS ONLY ONE DEPENDANT**
- **FSCA CONDUCT STANDARD 1 OF 2019: CONDITIONS FOR AMALGAMATIONS AND TRANSFER IN TERMS OF SECTION 14 OF THE PENSION FUNDS ACT**
- **BRIEF FEEDBACK ON THE FSCA'S RECENT CONFERENCE**

In this edition, we include a number of recent developments in the employee benefits industry (a Tribunal decision and a Conduct Standard) as well as feedback on the Financial Sector Conduct Authority's recent conference.

A. SECTION 37C – WHEN THERE IS ONLY ONE DEPENDANT

BACKGROUND

On 25 September 2019, the Financial Services Tribunal handed down a determination in the matter of *Krean Naidoo v PFA and Others*. The Tribunal reconsidered a determination of the Pension Funds Adjudicator (PFA).

Mr Naidoo was the spouse of the deceased member. There were no children or other dependants. The deceased member had not completed a nomination of beneficiary form. Mr Naidoo was not financially dependent on the deceased member prior to her death.

The fund paid the death benefit to the deceased member's estate.

Mr Naidoo applied to the Tribunal for reconsideration of the PFA's determination as he believed that he was entitled to receive the benefit, being the spouse of the deceased member.

The issue before the Tribunal was whether the decision of the fund to allocate the deceased's death benefit into the estate (late) account was justified.

SECTION 37C

The Tribunal stated that in terms of section 37C the fund is required to identify the beneficiaries of a deceased member and exercise its discretionary powers on the proportion and manner of distributing the proceeds of the death benefit.

The fund stated that it had exercised its discretion to pay the estate in terms of section 37C(1)(c) of the Pension Funds Act, which begins:

“If the fund does not become aware of or cannot trace any dependant of the member...” .

Thus, the fund had not applied section 37C(1)(a) of the Pension Funds Act which provides that:

“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.”

Facts were presented about whether Mr and Mrs Naidoo were estranged or not prior to her death. The Tribunal referred to the definition of dependant, which, includes a spouse (as defined in the Pension Funds Act). The fact remained that, he was, in law, the

- SECTION 37C - WHEN THERE IS ONLY ONE DEPENDANT
- FSCA CONDUCT STANDARD 1 OF 2019: CONDITIONS FOR AMALGAMATIONS AND TRANSFER IN TERMS OF SECTION 14 OF THE PENSION FUNDS ACT
- BRIEF FEEDBACK ON THE FSCA'S RECENT CONFERENCE

spouse at date of death. However, the estrangement (and the effect this would have on financial dependency) was seen to be a relevant factor, as the Tribunal pointed out that the main purpose for section 37C is to make sure that the dependants of the deceased member are not left destitute by the member's death. Furthermore, that the fund is required to identify the beneficiaries of a deceased member, and exercise its discretionary powers on the proportion and manner of distributing the proceeds of the death benefit.

The fund did not consider Mr Naidoo to be financially dependant on the deceased and this was their main reason for placing the benefit into the estate.

In this regard, the Tribunal stated that the mere fact that a person qualifies as a dependant does not entitle him to the entire benefit; it only entitles him to be considered by the board in the distribution phase.

The Tribunal stated that:

- Even though Mr Naidoo is a spouse, he is not automatically entitled to a percentage of the death benefit/full benefit.
- The starting point should have been to acknowledge that Mr Naidoo was a legal dependant.
- The Fund still has a discretion to determine whether Mr Naidoo was entitled to the benefits.
- The object of the Pension Funds Act is to ensure that dependants are not left destitute.

IS THIS CORRECT?

So, the conclusion seems to be that in the circumstances where there is only a spouse, and as spouse he qualifies as a dependant, the spouse only qualifies to be *considered* for a benefit, and the fund is not *required* to pay the spouse automatically.

For a number of reasons this conclusion appears, with respect, to be flawed. One of the most compelling of these reasons is the wording of the Pension Funds Act itself, which seems to be quite clear:

"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." (Own emphasis.)

If there is only one dependant, it is arguable that the fund does not have a discretion as to whether to pay him/her or not, as the Pension Funds Act states that he/she "shall" be paid. The only discretion on the part of the board of the fund is if there is more than one dependant in which case the board exercises a discretion

with regard to which of them to pay and the proportion to pay them. And then in these circumstances, payment to the estate is not an option under the section. The fact that section 37C's main purpose is to ensure dependants are not left destitute does not necessarily mean that if dependants of the deceased member were not financially dependant on the deceased member that a death benefit should or may be paid to the estate.

Thus, we believe that this may not be the last word on this subject. In the meantime, funds are left with another difficulty related to the interpretation and implementation of section 37C.

B. FSCA CONDUCT STANDARD 1 OF 2019: CONDITIONS FOR AMALGAMATIONS AND TRANSFER IN TERMS OF SECTION 14 OF THE PENSION FUNDS ACT

The Financial Services Conduct Authority ("FSCA") published Conduct Standard 1 of 2019 on 5 August 2019. The purpose of this Conduct Standard is to ensure that funds treat members affected by s14 transfers fairly.

Conduct standards must be complied with as they are subordinate legislation.

Applications compiled in terms of the old conditions and forms set out in the existing Directive 6 and submitted before 31 January 2020, will still be considered by the FSCA.

The Conduct Standard sets out the various types of section 14 transfers, the forms applicable to each, how the forms should be submitted and lapsing of applications. It also contains other important requirements such as those related to actuarial surplus, reserve accounts, member communication and time periods.

C. BRIEF FEEDBACK ON THE FSCA'S RECENT CONFERENCE

The FSCA held a conference on 12 September 2019. The conference was video recorded and will be uploaded to YouTube. The presentation slides will be published on the FSCA's website.

The main focus points of the conference appeared to be around sustainable investing, transformation (especially investment managers), retirement fund costs (with some active versus passive debate as well) and an explanation of internal structures. These are all hefty topics on their own, so we have stuck to reporting back on some of the smaller, practical issues below.

- The FSCA will be looking at fund financial statements to check fees against benchmarks and funds will be asked to explain deviations;

- Sustainable investments: funds must not wait for compulsory reporting. They must start now;
- Terminating dormant funds – the new Information Circular is nearly complete. This circular will not apply to funds with assets. Funds should minimise errors in these applications and correct them if they occur. The FSCA is tightening practices related to terminating dormant funds, for example, auditors will be required to check for assets. Administrators must come forward if they have mistakenly terminated funds that have assets;
 - Unclaimed benefits:
 - Not all unclaimed benefits can be traced;
 - A policy decision will be made on how to deal with unclaimed benefits;

Administrators are not doing enough with respect to unclaimed benefits (and are not doing enough tracing);
 - The FSCA is considering adopting Know Your Client (KYC) requirements for funds;
- The FSCA is working on section 37C with certain industry bodies and has asked for submissions on the difficulties;
- The FSCA requested the industry to tone down litigation against it and, in addition, to be polite to FSCA staff;
- Transferring of members in terms of section 14 is taking too long and the delays on the funds' side are disheartening. The FSCA is thinking of reducing the 60 and 180 day periods referred to in section 14. The FSCA is starting to reject extension requests on section 14 transfers;
- The FSCA will be intrusive. Delays in submitting reports will attract penalties (currently R4 000 per day). Penalized funds must be able to explain to their members why the fund was penalized;
- Transformation – reporting will be included in the market conduct returns and governance returns that will be required to be submitted to the FSCA. A guidance notice is to be issued by the FSCA on transformation;
- Administrators must remember to notify the FSCA of the movement of funds from one administrator to another on time;
- Directive 8 – the FSCA currently has a focus on Principal Officers who are in the full time employment of the administrator of the fund (this is not acceptable);
- Administrators are not all collecting the ID numbers of members – this is 'shocking'; and
- Expenses – there is a focus on where expense are included in financial statements. The concern is that expenses are consolidated into the wrong heading and, thus, hidden.