

DEATH AND DEPENDENCY: THE MEANING OF 'DEPENDENT'
UNDER SECTION 37C OF THE PENSION FUNDS ACT 24 OF 1956

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INTRODUCTION

In a recent decision on the disposition of pension benefits in terms of s 37C of the Pensions Funds Act 24 of 1956 ('the Act'), the present Pension Funds

Adjudicator, Mamodupi Mohlala, determined that cohabiting life partners who are financially inter-dependent on each other at the time of one partner's (the deceased's) death, automatically qualify to be treated as factual dependents of the deceased, and as such are entitled to be considered amongst the potential pool of beneficiaries when the trustees decide on an equitable distribution of the deceased's death benefits. The decision in point was that of *Hlathi v University of Fort Hare Retirement Fund* (PFA/EC/9015/2006), handed down on 18 March 2009. In reaching this decision the Adjudicator broke with the test for factual dependence of cohabittees established by her predecessor, Vuyani Ngalwana, in 2005 in *Van der Merwe v Central Retirement Annuity Fund* (PFA/EC/1566/02/KM). The approach adopted in *Hlathi* (supra) appears to have found favour with commentators in the industry (see for example Alexander Forbes Legal Department 'The legal status of cohabittees' in *On the Scales*, Alexander Forbes legal update (May 2009) in which it is stated that 'trustees will take comfort from this case, which recognises that interdependency is sufficient for the purposes of proving financial dependency between couples'), and accords with the previously expressed view of scholars, who would appear to be of the view that the present approach is to be preferred on both the law and on the equities (see for example Mtendekwa Owen Mhango 'An examination of the accurate application of the dependency test under the Pension Funds Act 24 of 1956' (2008) 20 *SA Mercantile LJ* 126). I would respectfully disagree, both with the adjudicator's decision and with the support it appears to have garnered in the industry. The approach to factual dependence adopted in the case is difficult to reconcile with the test for legal dependency under our common law, and the result is that cohabiting partners, and 'factual' dependents more generally, may find it easier to obtain a share of the deceased's death benefits than those family members towards whom the deceased owed a legal duty of support during his lifetime. This inconsistency in approach and outcome could not have been what our legislature intended when it enacted s 37C in 1976 for the purpose of protecting the deceased's dependents (see further Tukishi Manamela 'Chasing away the ghosts in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956' (2005) 15 *SA Mercantile LJ* 276 and Mhango op cit).

The purpose of this note is to provide an overview of the law on dependence to the extent that it is relevant for dispositions of death benefits under s 37C of the Act, and to highlight some of the anomalies and inconsistencies that can arise when different tests are used for determining who qualifies to be treated as a legal versus a factual dependent — as is the case at present.

MEANING OF DEPENDENT

Determining who qualifies as a dependent is the nub of s 37C. Section 37C stipulates that pension fund benefits payable on the death of a retirement fund member do not form part of the assets of the estate of that member, and as

such are not freely disposable by the member, but must instead be paid to the member's dependents and/or nominees, if any, in such proportions as the trustees deem equitable. Trustees are placed under a statutory duty to override the wishes of the member, as expressed in a will or a nomination of beneficiary form, when it is necessary to do so to safeguard the financial interests of the member's dependents. In this regard, the adjudicator has stated that '[i]t is the trustees' responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants, to thereafter decide on an equitable distribution and finally decide on the most appropriate mode of payment of the benefit' (*Hlathi* (supra) para 18).

Similarly, in *Baloyi v PPAWU National Provident Fund* (PFA/NP/11689/2006/LTN) the adjudicator rebuked trustees for failing to conduct a sufficiently thorough investigation, re-iterating the view that '[i]t is the trustees' duty to conduct a proper investigation to establish the extent of dependency of the dependants. It is not the dependants' responsibility to do this'.

Trustees are thus required to conduct a thorough investigation to establish both the existence of dependents and, having done so, the extent of their dependency on the deceased. In order to do so trustees must naturally have an understanding of who qualifies as a dependent under the Act. Unfortunately, determining who should be treated as a dependent is not a simple matter, notwithstanding the fact that the Act contains a recently-amended definition of dependent, which reads as follows:

“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;
 - (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.’

This apparently straightforward definition hides a myriad of complexities. The principles seem clear on paper, but when one actually comes to apply them in practice, uncertainties and ambiguities are revealed.

LEGAL DEPENDENTS AND POTENTIAL LEGAL DEPENDENTS: WHO QUALIFIES IN THE FIRST PLACE?

Subsections (a) and (c) of the definition of dependent refer to ‘a person in respect of whom the member is legally liable for maintenance, or a person in respect of whom the member would have become legally liable for maintenance had the member not died’. Who, in law, is a member ‘legally liable’ to maintain? The answer is not contained in statutory law (with the

exception of surviving spouses since the enactment of the Maintenance of Surviving Spouses Act 27 of 1990), so trustees have to turn to the common law for guidance. Under South African common law, a reciprocal duty of support exists between the following relatives: husband and wife, parent and child, grandparents and grandchildren (or further ascendants and descendants *ad infinitum*), and siblings. These are the only persons towards whom a member owes a *legal* duty of support under the common law. No duty is owed to more remote relatives in the horizontal line, viz nephews/nieces, uncles/aunts *et cetera*), and equally no duty is owed those who are related to us through marriage only (in-laws and step-children/parents).

It is unfortunate that to date the classification of a legal dependent has been wholly informed by the common law, both as to the identity of the relatives towards whom such a duty is owed, and the thresholds that must be met before a claim based on legal dependency is satisfied. No consideration has been given to the position that might pertain under African customary law, and whether a more extensive duty of support might exist in relation to a broader class of claimants. The role of African customary law in the identification of dependents is an issue that is ripe for consideration by both boards of trustees and the Adjudicator's office, although it is one that will introduce additional complexities to an already difficult process.

Under the common law, the duty of support in respect of eligible relatives is not owed equally by, or to, each relative. Any person in need of support is required to try to obtain support from the nearer relative first. There is a thus a hierarchy amongst potential claimants and duty-bearers. If we assume, by way of example, that a person has relatives within each of the eligible degrees, each of whom is needy, and each of whom would like additional financial support, then the ranking in order of priority would be: i) surviving spouse and children; ii) parents iii) siblings and iv) grandchildren/grandparents. A needy person with children, parents, and siblings would thus first be required to look to her own children for support, and then to her parents, before seeking support from her siblings. In principle therefore, should a relative other than a spouse or child seek to share in the member's death benefits, the trustees need to satisfy themselves that there are no closer relatives from whom the claimant could and should have sought support. This is an exacting requirement that trustees may find difficult, if not impossible, to fulfil.

WHEN DOES THE DUTY ARISE, AND WHAT IS THE SCOPE OF THE DUTY?

The mere fact that someone is a relative within one of the eligible degrees does not of course mean that the person is entitled to claim and receive maintenance on demand. The existence and scope of the duty of support under the common law is dependent on two factors: the first is that the person claiming support must be unable to support him or herself; and the second is that the person from whom support is sought must be able to

provide support. Although these requirements are common to all eligible relatives, the thresholds for each differ, depending on whether the person seeking support is a spouse or child, or a more remote relative.

Spouses and children

A more extensive duty of support exists in respect of a spouse and children than exists in respect of the other categories of claimants. Spouses and children have a right to have their reasonable maintenance needs met.

Precisely what degree of support is required is determined by the member's relative wealth and means. The wealthier the member, the more extensive the duty of support, in the sense that the member must maintain a spouse and children to a degree commensurate with the supporter's means, social status and the like. The duty of support would encompass what are termed the necessities of life (food, clothing, shelter, medical care) and education, including tertiary education in appropriate circumstances. Parents' duties of support towards their children last for as long as children are not self-supporting. The duty does not terminate automatically on majority. It terminates only when the children become self-supporting, and revives should they cease to be self-supporting. Here, as in all cases however, children are not considered to require support if they are capable of being self-supporting, but wilfully choose not to be.

Parents, siblings, grandparents/grandchildren

In relation to the duty of support owed to other relatives, the scope of the duty is much more limited. Whereas, in relation to a spouse and child, the scope of the duty is determined by the relative wealth of the member against whom the duty is exercised, in relation to other family members the scope of the duty is determined in the main by the claimant's relative poverty. It has been repeatedly stated in cases, both in the ordinary courts and by the adjudicator, that the duty arises only where the person seeking support is indigent, and encompasses only the bare necessities of life. It has been held that what constitutes the bare necessities in relation to parents depends in part on the parents' social status, and the same must surely be true of other relatives. Most of the judicial decisions pertaining to the duty of support as amongst relatives in these degrees arise in the context of delictual actions, where parents seek compensation from an insurer in the context of the wrongful death of a child, and the court in awarding damages to the parent, limits damages claims to the extent of the parent's indigency. In the recent case of *Smith v Mutual & Federal* [1998] 3 All SA 378 (C) at 382, the court held:

'The question whether the parent is so indigent that a child becomes liable to support his parent depends on all the circumstances of each case. Furthermore, the parent must show that considering his or her station in life, he or she is in want of what should, considering his or her station in life be regarded as necessities. It must also be mentioned that a parent is not entitled to claim support from a child if the parent is able to maintain himself (see *Oosthuizen v Stanley* 1938 AD 322 at 328).'

The current adjudicator has interpreted and applied the indigency requirement strictly. In a recent case, *Thene v Bidcorp Group Provident Fund* (PFA/GA/6863/05/LCM), the mother of the deceased sought to share in the deceased's death benefits. The deceased had nominated his daughter, a major, and his son, a minor, as the beneficiaries of his death benefits, and had apportioned his death benefits amongst them in equal shares. On investigation, the trustees identified four dependents, these being his two children, his mother, and his girlfriend (the mother of his minor son) with whom he cohabited. The trustees decided to allocate the death benefits amongst the four in the following proportions: 50 per cent to his girlfriend, 20 per cent each to his minor son and his mother, and 10 per cent to his major daughter. His daughter lodged the complaint, arguing that the trustees should simply have given effect to the deceased's nomination. The adjudicator correctly disagreed with this contention, since it is trite that the trustees are obliged under s 37C to override the express wishes of the deceased when alternate or additional dependents have been identified. Having correctly rejected the complainant's contention on this point, the adjudicator went on to criticise the trustees' inclusion of the deceased's mother in the pool of dependents. In a decision that is unfortunately and unduly terse, the adjudicator concluded that the allocation to the deceased's mother was an improper exercise of the trustees' discretion, since the mother, in her view, did not meet the indigency requirement necessary to qualify as a legal dependent. The only information pertaining to the mother's financial position that is given in the decision is that the mother had submitted an affidavit stating that the deceased supported her financially, and that she was in receipt of a pension. Details regarding the amount of financial support, or the type and amount of the pension, are nowhere mentioned. On the basis of the mother's disclosure that she is a pensioner, the adjudicator concludes that she is not necessarily 'indigent'. The adjudicator's reasoning (para 5.6) was that the *Oxford English Dictionary* definition of indigency means 'very poor', that in our law to be indigent means to be in extreme need or want, and that since the deceased's mother was a pensioner it was not apparent that she was indigent, since she had an income that would support her for the rest of her life. The adjudicator concluded by saying (ibid):

'Had the first respondent properly and comprehensively investigated whether she was indigent and could not support herself it would have found that as she was in receipt of a pension therefore it could not in its opinion upon the deceased's death declare her to be a factual [sic] dependant.'

Although the quotation refers to the deceased's mother as a factual dependent, it is clear from the preceding discussion on the duty of support owed to a parent by a child that the adjudicator was dealing with legal rather than factual dependence. Moreover, even if the mother was properly characterised as a factual dependent because she was receiving financial support from the deceased, it is evident that she was still only considered to be entitled to a share of the death benefits if and to the extent that she was

indigent. The effect of this decision is that in relation to eligible relatives (apart from a spouse and child), the test that will be utilised is whether the claimant was indigent, irrespective of whether the deceased was providing financial support to the particular relative, and the extent to which such support was being provided.

On an application of the decision in *Thene* (supra) therefore, a relative within one of the eligible degrees of consanguinity will have to satisfy trustees that she is in extreme need or want before it will be permissible for trustees to include her within the class of potential beneficiaries. The line between need and extreme need, between poverty and extreme poverty, is a near-impossible line to draw, and boards of trustees are ill-equipped to do so. Trustees can only meaningfully ask whether the claimant's means and income are sufficient to meet her needs with regard to the basic necessities of life, and if they are not, then she must be considered a dependent of the deceased, assuming she has no closer relatives who are equally or better able to support her. Whether the extent of her dependency will be sufficient to entitle her to a share of the deceased's death benefits will be a separate, and subsequent, enquiry — one that can only meaningfully be undertaken once the financial circumstances of all the deceased's dependents and nominees are known to the trustees.

Factual dependents: subsections (b)(ii) and (iii) of the definition (spouses and children)

The definition of factual dependents in the Act is, on the face of it, rather peculiar. The definition reads as follows:

- '(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;'

The definition of spouse in turn has recently been amended to include 'a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006), or the tenets of a religion'.

The first, and obvious, point is that someone will only be treated as a factual dependent if that person is not someone the deceased was legally liable to maintain at the time of his death. It is arguable that a relative within one of the recognised degrees of consanguinity who is not indigent, but is receiving financial support, will be treated as a factual rather than a legal dependent. But this does not appear to have been the approach adopted by the adjudicator in *Thene v Bidcorp Group Provident Fund* (supra), for the adjudicator spoke of factual dependence while applying the test for legal dependence. The distinction would not matter if the same test was used to establish the

existence of 'dependency' in respect of both categories of dependents, but since his is not the case, as will be shown further below, the appropriate classification potentially matters a great deal at this time in our law.

A question that must be asked is why the definition includes the reference to spouse and children, when they are already potential legal dependents? The primary reason is that even spouses and children (whether the children are minors or majors) only qualify as legal dependents if the deceased would have been legally liable to maintain them; ie if they were in need of support, and if the deceased could afford to support them. If these threshold tests are not satisfied, they would not qualify as legal dependents. The legislature, however, wants trustees to consider the interests of spouses and children in every disposition of death benefits they may make, regardless of the spouse and children's personal circumstances and ages. Spouses and children are therefore, by definition, dependents, and in the absence of any other dependents or nominees, trustees would be obliged to allocate the death benefits to them, rather than paying the benefits to the deceased's estate. The question whether cohabiting life partners are spouses within the meaning of the Act has arisen for consideration in a number of decisions, most recently that of *Hlathi v University of Fort Hare Retirement Fund* (supra). Some commentators have interpreted the adjudicator's decision to mean that the recently amended definition of spouse, as set out above, now includes cohabiting life partners (Alexander Forbes newsletter op cit). Their interpretation of the newly-amended definition of spouse, and of the adjudicator's decision in *Hlathi*, is that persons in permanent life partnerships whose partners die after the amendment took effect fall to be treated as spouses, while those whose partners died before the amendment took effect fall to be treated as factual dependents. The adjudicator's reasoning in *Hlathi* is not altogether clear, but she ultimately concluded that permanent life partners, whose relationship has not been formalised in accordance with one of the Acts mentioned in the definition or in accordance with the tenets of a religion, would not qualify as a spouse. This must be the correct approach, for the inclusion of all life partnerships would render the words 'in accordance with' in the definition meaningless. Notwithstanding considerable expressions of support for permanent life partners to be treated as spouses in respect of death benefit dispositions (*Van der Merwe v Southern Life Association Ltd* (PFA/WE/21/1/98); Mhango op cit), the legislature has, for good reason in this author's opinion, not done so. Unless and until the legislature intervenes to extend the definition of spouse, permanent life partners should not automatically be considered to be dependents, but must meet the test for factual dependence. The proposals contained in the Domestic Partnerships Bill (GN 36 GG 30663 of 14 January 2008) as currently drafted will not change the status of permanent life partnerships under the Pensions Funds Act, since the Bill in its current form does not apply to death benefits under s 37C of the Pension Funds Act. If permanent life partners are to qualify for automatic consideration as dependents under the Pension Funds Act, as do spouses, either the Pensions Funds Act will have

to be amended, or the scope of the Domestic Partnerships Bill will have to be extended. This author is of the view that the definition should not be so extended, but that is an issue beyond the scope of the present note.

Factual dependents: subsection (b)(i) of the definition (excluding spouse and children)

Who then falls within the general class of 'factual dependents' within the meaning of subsec (b)(i)? The Act simply requires trustees to consider, in any allocation of death benefits they may make, those who were 'in fact' dependent on the deceased member. The Act itself provides no further guidance. Two possible approaches therefore present themselves. A broad or liberal interpretation of dependent, which seems to be the approach that finds general favour amongst commentators, and a narrower approach, which is the approach I advocate as the legally more correct, and ultimately more equitable, one.

A BROAD INTERPRETATION

Given that the legislation uses the words 'dependent in fact' without any suggestion that there is a qualifying threshold, it might be supposed that any provision of support by a person to another would qualify the latter as a dependent within the meaning of the Act, however limited the support provided, and irrespective of the purpose for which the support was provided. On the face of it this certainly seems like a plausible approach, and it is one that appears to find favour with a number of commentators and specialists in the retirement fund industry. Examples given by industry experts of the types of financial support that they believe would give rise to a claim based on factual dependency include: paying the school fees of a neighbour's child; the provision of rent-free accommodation; a mistress paying for her married partner's son's university education abroad, albeit on the expectation that the fees will be repaid, and providing the son with 'pocket money' in excess of what he would have received from his father (Mtendeweke Owen Mhango 'Ladies' man creates a tax conundrum' and Jonathon Mort et al 'Making the case for what constitutes factual dependency' *Business Day* August 2007; see too *Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA), in which a previous adjudicator, John Murphy, held that the distinguishing feature of maintenance payments are that they must be regular rather than occasional or incidental payments, but that they can encompass more than the provision of food and shelter. In that case the deceased had contributed to his mistress's daughter's schooling and was considered a factual dependent). In the articles from which the examples are drawn, the authors readily conclude that each gives rise to a claim based on factual dependency. The test for dependency proposed in the *Business Day* case study is simply 'whether the deceased member's payments, irrespective of any reciprocity, enabled the recipient to live at a higher standard of living, ie a standard of living which he or she would not otherwise

have been able to enjoy’, and elsewhere in the same article the authors opine that ‘[a]ll that matters is whether the deceased member’s payments enabled the recipient to live at a higher standard of living. If they were, then factual dependency is established to that extent’.

This is not an approach that would have found favour with the previous adjudicator, Vuyani Ngalwana, but it is the approach that has just recently been endorsed by the present adjudicator, Mamodupi Mohlala, in the case of *Hlathi v University of Fort Hare Retirement Fund* (supra), in the context of cohabiting life partners. Although all the cases discussed below are cases decided in the context of cohabiting life partners, it is important to appreciate that the pertinent provision in the Pension Funds Act is that which deals with factual dependents. Any principles enunciated for establishing dependency in the cases must therefore apply to all factual dependents, and not to cohabiting life partners exclusively. The critique that is being offered in this note is the approach to factual dependency that is mandated by these cases, whether those factual dependents be cohabiting life partners or other claimants. The former adjudicator, Vuyani Ngalwana, had held, also in the context of cohabiting partners, that factual dependency only arises if a dominant/servient relationship existed between the deceased and the claimant, and was one in which the deceased was the substantive provider. Mutual dependence, or inter-dependence, in which both parties to the union contributed similarly to the common household did not suffice to make one party a ‘factual dependent’ of the other (*Van der Merwe v Central Retirement Annuity Fund* (supra) para 16: ‘Factual dependence requires at the very least a dominant-servient relationship, in which one party is the substantive provider.’). In adopting this approach Vuyani Ngalwana himself broke with the approach that had been adopted by his predecessor, John Murphy, who was of the view that mutual dependence, or inter-dependence, was a sufficient basis on which to make a finding of factual dependence (*Van der Merwe v Southern Life Association Ltd* (supra)).

In *Hlathi*’s case, by contrast, the present adjudicator, Mamodupi Mohlala, has reverted to the approach adopted by John Murphy, holding that mutually-dependent cohabittees are factual dependents. I include an extensive extract from paras 34 and 35 of her decision:

‘A purposive and contextual interpretation of paragraph (b)(i) reveals that the true intention of the legislature in enacting the provision was certainly to give effect to the purpose of section 37C, which is to protect proven dependency even for persons who are involved in relationships which the law does not necessarily accept as constituting legal dependency, like the third respondent and many others in her position. It is patently clear that the legislature does not refer to “totally or wholly” dependent in the provisions of section 1(b)(i), which would in any case be interpreted to mean exclusive dependency. It follows therefore that there is no exhaustive list of the degrees or levels of dependency for purposes of section 1(b)(i) of the Act. Put differently, “wholly dependent” is not the sole yardstick to determine or measure dependency for purposes of section 1(b)(i) of the Act. Having that in mind, it would certainly be contrary to

the intentions of the legislature to exclude a party for purposes of section 1(b)(i) of the Act on the basis that he or she had an “inter-dependent” relationship with the deceased member, or alternatively the parties had an equal relationship as opposed to the dominant and servient one. *This leads this tribunal to conclude that in such cases what suffices to prove factual dependency is the sufficient evidence that the parties in a relationship are inter-dependent and as a consequence of the other party’s death the surviving partner is left in a financial predicament, or with a financial void or is financially worse off.*

In the present matter, the evidence indicates that the third respondent and the deceased contributed equally towards bond payments of both their homes and other household expenses listed in paragraph 14. Moreover, the third respondent submits that they mutually supported each other in a relationship that lasted for a period of 17 years and her financial position has changed dramatically since the death of the deceased. It follows therefore that the third respondent and the deceased were inter-dependent, *and without the deceased member her lifestyle will no longer be the same.* That, in my opinion, is sufficient to bring the third respondent within the scope of the definition of a “factual dependant” as set out in section 1(b)(i) of the Act.’ (My italics.)

The adjudicator’s reasoning seems compelling on a first reading. Nevertheless, I would argue that it is wrong in law, and that it will more readily lead to inequities on the facts than would be the case under the former adjudicator’s approach. The effect of the approach adopted in *Hlathi* (supra) is either that only cohabiting life partners are singled out for special treatment when compared with other factual dependents, and are thereby de facto accorded the same status as a spouse, or that all those claiming support on the basis of factual dependence are subject to a lower threshold for establishing dependency than are legal dependents.

There is no legal basis upon which to justify preferring the claims of permanent life partners over other factual dependents in the first instance, or over legal dependents in the second instance, and any singular treatment flies in the face of the legislature’s decision not to include life partners within the definition of spouse, the Constitutional Court’s decision in *Volks v Robinson* 2005 (5) BCLR 446 (CC), and (in many cases) the deceased’s expectation and understanding of the relationship and its legal consequences. The inequities that might arise from an approach that requires that cohabiting partners specifically, or factual ‘dependents’ generally, show only that their lifestyles have taken a dip as a result of the death of the member, are apparent from recent cases. In *Thene v Bidcorp Group Provident Fund* (supra), it will be recalled, the adjudicator held that a deceased’s parent does not fall to be treated as a dependent unless the parent is ‘indigent’, notwithstanding the fact that the parent was receiving financial support from the deceased at the time of death. In that case the trustees were instructed to examine carefully the mother’s financial circumstances to determine that she was properly-speaking indigent, and the adjudicator was of the view that her receipt of a pension was sufficient to raise doubts that she met the indigency requirement. The mere receipt of financial support (support which must have improved the parent’s lifestyle) was not sufficient automatically to bring the

parent within the pool of potential dependents. The deceased's cohabiting partner, on the other hand, was much more sympathetically treated, in that the loss of contributions towards the common household was in and of itself considered sufficient to establish a claim based on factual dependency and to entitle her to an award of 50 per cent of the deceased's death benefits. The only information provided by the deceased's girlfriend was that she and the deceased cohabited, and that the deceased had maintained her. Her bald assertions of dependence sufficed, while the deceased's mother's assertions, a person to whom the deceased owed a legal duty of support, did not. Neither the mother nor cohabiting partner had been nominated by the deceased as beneficiaries of his death benefits.

In *Hlathi*, the potential dependents were again the mother and cohabiting partner of the deceased. The deceased had not nominated any beneficiary. The trustees awarded 33.3 per cent of the R400 000 death benefit to the mother, and 66.6 per cent to his partner. The relevant facts, emphasised by the adjudicator, were that the deceased and his partner had been in a mutually-supportive relationship for seventeen years, had lived together for nine of those years, and had shared the expenses of that household. The evidence that they had shared a common household and were mutually inter-dependent was sufficient to establish factual dependency, since the lifestyle of the surviving partner would not be the same without the financial contributions of the deceased.

I consider the adjudicator's decisions in the above cases to be unfortunate, establishing as they do a lower bar for a finding of factual versus legal dependency, namely that legal dependents be indigent in order to qualify as dependents, while requiring only that factual dependents have taken a dip in their lifestyles in order to qualify. The cases are also problematic because of the scant provision of, or reliance on, financial evidence to show that the awards were equitable in the circumstances. In these cases the cohabiting partners' assertions that they had suffered a dip in lifestyle was sufficient both to found a claim of factual dependence and to justify the greater apportionment of the death benefits to the cohabiting partner. If financial inter-dependence is to be considered a sufficient basis on which to treat someone as a factual dependent, there must surely be a careful examination of the financial affairs of the survivor relative to the financial circumstances of all the other potential beneficiaries. In those cases in which trustees must apportion death benefits amongst two or more dependents and/or nominees, the trustees must be guided by the equities, and the most important consideration in making a financial distribution must be the relative needs of the potential beneficiaries, having regard to their ages, existing or potential employment and income and the like. Lowering the bar to 'factual dependency' is particularly problematic when one considers that trustees are obliged to override the express wishes of the deceased as stated in a will or nomination of beneficiary form, and that they are obliged to award the death benefits to dependents, if any. Under the present approach it is conceivable that trustees may be obliged to pay the death benefits to a person who the

deceased did not consider to be dependent, who is not financially 'needy' in that the person is well-able to support him or herself, and who is considerably better off financially than the person or persons the deceased has named as his or her chosen beneficiary in a will.

Consider the following hypothetical example. A university lecturer is single and unmarried. She has one relative, a brother, who is self-supporting but struggling, with modest means and a modest, income-dependent, lifestyle. He is able to meet his daily needs comfortably, but his job is relatively insecure, and his income is not such that he can afford to buy property of his own or make investments sufficient to secure his old age. The lecturer becomes involved with and subsequently sets up a common home with a high-earning actuary. They live together for five years. The actuary has, by the lecturer's and her brother's standards, considerable investments abroad, although both the lecturer and her actuary-partner contribute equally to the running of the common household. By pooling their resources they are both able to enjoy a higher standard of living than they would otherwise have been able to enjoy, although both had been self-supporting before setting up a joint household. Now imagine the following scenarios. In the first scenario, the lecturer bequeaths her entire estate to her brother in her will, and nominates him as the beneficiary of her death benefits. Her death benefits are worth considerably more than the assets in her estate. Could the trustees override her death-benefit nomination? Yes, if they consider her partner to have been a factual dependent. Would it be appropriate for them to do so? I say 'no', the present adjudicator says 'yes', the former adjudicator said 'no', and most commentators seem to say 'yes'. Treating her partner as a factual dependent is only possible where the test for factual dependency requires no more than a dip in lifestyle, as it does at present. Under the current approach it is not only probable that the lecturer's surviving partner will be considered a factual dependent; it is furthermore probable that he will receive a share of the lecturer's death benefits, no matter that he is considerably wealthier than the deceased's surviving brother, her nominated beneficiary.

More problematically still, had the lecturer not nominated her brother as her beneficiary, and had simply bequeathed her entire estate to her brother in her will, incorrectly believing that her death benefits formed part of her estate, then the unfortunate outcome would be that her partner would receive 100 per cent of her death benefits as her 'factual dependent', while her brother would simply receive the residual value of her estate, quite contrary to her actual desires, or her partner's and brother's relative financial standing and need.

In the second scenario, she bequeaths everything to her partner in her will, and nominates him as her beneficiary. Could the trustees override her nomination? In this case the answer is probably not. The trustees would have to be satisfied that she would have become legally liable to maintain her brother at some point in the future, a finding they are unlikely to be able to make. The point of these scenarios is to illustrate the inequity that will arise

under the present approach, in which the lecturer's financially secure partner automatically qualifies for consideration as a factual dependent, while her financially insecure brother is not considered a dependent. These different outcomes, which are possible only because a different yardstick is used for determining legal versus factual dependents, is very problematic. The correct approach, in my view, is that neither should qualify as a dependent. Therefore the deceased's wishes, as expressed in her nomination form or in her will, should prevail, whatever sympathy the trustees may feel for one or the other of the parties.

Another hypothetical example that serves to illustrate the inequities and inconsistencies that can arise as a result of the application of the current test for factual versus legal dependency is the following: A financial adviser dies, survived by his mother and girlfriend. The mother is not indigent, but she is only able to enjoy some of the luxuries of life, such as occasional holidays, thanks to the support given to her by her son. The adviser's girlfriend, with whom he cohabited, is also a financial adviser. Thanks to the fact that they cohabited and pooled their resources, both the financial adviser and his girlfriend were able to afford luxuries they would not have otherwise been able to afford, such as occasional holidays abroad. Both the mother and girlfriend would require a 50 per cent share of the financial adviser's death benefits in order to maintain the lifestyle they had enjoyed before the financial adviser's death. On the present approach to legal and factual dependency as established in the *Thene* and *Hlathi* cases, could trustees apportion the benefit equally amongst the two of them? The answer must be 'no'. The financial adviser's mother would not qualify as a legal dependent since she is not indigent, but his girlfriend would qualify as a factual dependent since she has suffered a dip in lifestyle, and, in the absence of a nomination by the financial adviser, trustees would be required to give 100 per cent of the death benefit to the girlfriend.

A third example is one that does not involve a cohabiting life partner. But in this example, the beneficiary is the more financially needy without it being clear, on the equities, that the beneficiary should receive payment of the full death benefit. It is as follows. An accountant dies at the age of 55, and is survived by his sister and mother. At the time of his death the accountant was unmarried, and was not involved in a relationship. He left a will, in which he nominated his sister and his mother as his heirs. He had also completed a nomination of beneficiary form in respect of his death benefits, in which he nominated his estate as his beneficiary. The accountant did not realise that this was an ineffective nomination under the Pension Funds Act, in that the nominee must be a natural person (see *Muir v Mutual & Federal Pension Fund* [2002] 9 BPLR 3864 (PFA)). The accountant's death benefits amount to R6 million, while the assets in his estate are worth R2 million. His mother is in receipt of a pension of R6000 per month, and his sister is employed as a secretary and earns R10 000 per month. Neither his mother nor sister are indigent, nor are they likely to become so, although both need to budget carefully to make ends meet. The accountant sought to improve his mother

and sister's life by treating them to holidays and dinners and the like, but did not make payments that would be construed as necessary to meet their 'maintenance' needs. As such, neither would qualify as a factual or legal dependent. At the time of his death the accountant employed a domestic worker, whom he had been employing for five years, and who worked for him once a week. In addition to paying the domestic's weekly wage, a generous wage in excess of the average wage paid in his neighbourhood, the accountant paid for her child's schooling and had done so for the past five years. The domestic worker's child is eleven years' old at the time of the accountant's death. Under the current approach to factual dependency, would the domestic worker and/or her child qualify as factual dependents? The position regarding the domestic worker is not at all clear. I suggest that it is not impossible that the domestic worker herself could mount an argument that she was factually dependent on the accountant at the time of his death. There is no precedent to suggest that the domestic worker would qualify, but equally there is no precedent to suggest that she would not. The payments made to the domestic worker meet the criterion of regularity laid down by the adjudicator in various cases (*Govender v Alpha Group Employees Provident Fund* [2001] 4 BPLR 1843 (PFA) and *Govender v Alpha Group Employees Provident Fund (2)* [2001] 8 BPLR 2358 (PFA)), and the only argument that could be made to exclude the domestic worker from consideration is that payments made in the context of a relationship of employment mean that the domestic worker was not dependent on her employer so much as on her own earnings, which are the fruits of her own labour. There are a number of other arguments that could be made for and against the inclusion of the domestic worker within the pool of dependents, but there are also arguments that could be made for including the domestic worker amongst the pool of factual dependents. The point, in relation to the domestic worker, is that the issue is not necessarily as clear-cut as might often be supposed, and the broader the pool of prospective dependents, the more complex and difficult the issues, from the perspective of both principle and policy. Notwithstanding the uncertainty surrounding a potential claim by the domestic worker, what is clear, under the current approach to factual dependence, is that the domestic worker's child would definitely qualify as a factual dependent. (see *Govender v Alpha Group Employees Provident Fund* (supra) and *Govender v Alpha Group Employees Provident Fund (2)* (supra)). In and of itself that would not be problematic if the trustees had a discretion to apportion some of the death benefits to the child that are sufficient to cover her schooling needs and if they were permitted to allocate the balance to the accountant's mother and sister in accordance with his wishes as expressed in his will. However, the trustees are not permitted to do so. Only dependents and nominees qualify to be considered. His mother and sister do not qualify as nominees, since they have not been specifically nominated in a nomination of beneficiary form. Furthermore, they do not qualify as dependents since they are not indigent, and the support they were receiving was not support related to their maintenance needs. As such, the only person who qualifies as a dependent is

the domestic worker's child, and that trustees are accordingly obliged to allocate the entire R6 million death benefit to her. This outcome, necessitated by the current interpretation of factual and legal dependents, is an outcome that, I suggest, accords neither with the accountant's wishes, nor with the equities, nor with the legislature's intention to protect those who were financially dependent on the deceased. The accountant's death has resulted in an unanticipated windfall for the domestic's child, and the legislature's intention was manifestly not to create opportunities for windfalls, but was rather to protect certain relatives of the deceased against disinheritance, and to protect those in relationships against the lack of recognition historically accorded their relationships under the common law. The legislature intention was not to interfere with the deceased's wishes in respect of those who do not fall within one or the other category.

A NARROW INTERPRETATION

Various factors militate against a broad or generous interpretation of 'dependent'. The first is the practicalities — trustees could quite possibly be faced with a myriad of potential claimants, ranging from employees to colleagues and friends, as long as the deceased was providing some form of financial support to each of them. If the definition of dependent does include any- and everyone to whom the deceased was giving money on a regular basis, the prospective pool of claimants could be so large as to make the definition and requirement of dependency virtually meaningless. In most situations, trustees are already required to distribute a relatively small sum of money amongst a relatively large pool of competing claimants. The sum available is rarely large enough to meet the needs of each of the claimants, and it is rarely large enough to prevent a dip in the fortunes of the claimants, however even-handed and equitable the trustees seek to be.

More importantly, though, is the approach to dependency in both common and statutory law, and what is implied by the term 'maintenance'. The common law duty of support arises only where the person claiming support demonstrates that he is indigent, ie unable to meet his own basic needs in respect of the necessities of life (food, shelter, clothing, medical care and the like). Similarly, in the Maintenance of Surviving Spouses Act the surviving spouse has a right to claim his 'reasonable maintenance' needs, which are determined having regard to various factors. Since a member is only obliged to provide such support to legal dependents that enables them to maintain themselves (to obtain, in other words, the minimum essentials having regard to their general status and standard of living, and not to improve their situation or station in life) the same should hold true of persons claiming support under the head of factual dependence. After all, it would be peculiar if the provisions of the Act were interpreted in such a way that a member could have a more extensive duty of support towards persons the member is not obliged to support in law, and a lesser duty of support towards relatives in respect of whom a legal duty of support does exist. This surely could not have been the intention of the legislature

I would therefore argue that if indigency is a threshold requirement in relation to legal dependents, it must be a threshold requirement in relation to factual dependents too. If this is not the case, the anomalous situation could arise that a relative who is within one of the eligible degrees, and who is in straitened circumstances but who is not desperately impoverished, would not qualify as a legal dependent, while a person whom the deceased has voluntarily chosen to assist financially would for that reason alone qualify as a factual dependent, irrespective of the degree of financial support given and irrespective of the purpose for which it has been given.

FOLLOWING THE EQUITIES

Could this be much ado about nothing? Could trustees not be entirely outcome-driven? Might the better approach not simply be that they identify all the close relatives of the deceased and assess their respective financial needs, identify all other persons to whom the deceased was providing financial support and assess the level of support provided, and then apportion the death benefits amongst them, having regard to the relative financial standing and need of each of the parties? This is one possible solution, and it is one that may in some cases yield more equitable results than an approach that requires that certain financial-needs thresholds be met in order to qualify as either a factual or legal dependent. The problem, however, is that legal dependency has a particular meaning under the common law, and the adjudicator has applied that meaning in determinations of dependency. The Act, after all, does not require that trustees allocate the death benefits in whatever way and to whomever they deem equitable, but that they do so to the dependents and nominees of the member. In the absence of a clear definition of factual dependent in the Act, trustees and the adjudicator's office should be guided by the approach to legal dependency in law. Various adjudicators have expressed concern that factual dependents, and in particular cohabiting partners, not be discriminated against (see for example *Van der Merwe v Southern Life Association Ltd* (supra)). In seeking to protect the interests of factual dependents, however, the reverse has arguably resulted. The adoption of different threshold for establishing the existence of legal and factual dependency is inherently inequitable. Whatever approach is ultimately adopted, equity demands that the same yardstick be used for assessing dependence.