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# Death benefit provisions in the Pension Funds Act 5 of 2019 of Lesotho: Contradictions or deliberate policy choices?

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## SUMMARY

This article discusses the provisions in the Pension Funds Act 5 of 2019 (PFA 2019) that regulate the payment of death benefits after a member of a pension fund has died. While the article welcomes the death benefit provisions in the PFA 2019, it discusses two potential problems that will likely confront Lesotho as it implements those provisions. The first problem is the possible contradiction between sections 32 and 35(1) of the PFA 2019. The article suggests ways to avoid this potential contradiction short of amending the PFA 2019. The second problem is the absence of a definition of a “dependant” in the PFA 2019 and the constitutional implications of this. The article recommends reliance on the common-law definition of dependency or the inclusion of such a definition in the regulations to the PFA 2019.

## 1 Introduction

Universally, one of the most controversial aspects of the law that governs pension funds is how it controls the distribution of death benefits – the benefits that become payable to beneficiaries when a member of a pension fund passes away. Most countries in the Southern African Development Community (“SADC”), notably Botswana, Malawi, South Africa, Eswatini, and Lesotho, have adopted a social security policy<sup>1</sup> and have included it in their pension legislation. Based on this policy, a framework has developed in these countries to govern how death benefits should be distributed and paid to intended beneficiaries.<sup>2</sup> In the absence of a comprehensive social security system in most of these countries, pension funds have become the preferred institutional vehicle through which death benefits or survivors’ benefits are channelled to protect families against the loss of income that follows the death of a member.

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1 For some countries, like Lesotho, this has happened because of domestic constitutional obligations. See *Thahane v Specified Offices Defined Contribution Pension Fund* [2017] LSCA 10. But for all countries this has happened because of their obligations in terms of the Treaty of the Southern African Development Community and its subsidiary instruments.

With the exception of Lesotho, the normative standard in the framework of the above countries is that death benefits are required to be distributed as part of a social security policy that prioritizes the interests of financial dependants (survivors who were financially dependent on the deceased member) over the wishes of the deceased member.<sup>3</sup> Under this framework, the wishes of the members are deliberately restricted in law by ensuring that they do not bind the board of a pension fund when it distributes the benefits to those dependants or

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- 2 See ss 32, 34 and 35 of Lesotho's Pension Funds Act 5 of 2019; ss 50 and 50 of Botswana's Retirement Funds Act 38 of 2022; ss 94, 95, 96, 97, 98 and 148 of Malawi's Pension Act 6 of 2023; s 37C of South Africa's Pension Funds Act 24 of 1956; and s 33 of Eswatini's Retirement Funds Act 5 of 2005. For a comprehensive of some discussion of these legislative frameworks, see Dyani and Mhango "Pension Death Benefits under the Malawi Pension Bill No 14 of 2010: Reflections from South Africa and Australia" 2012 45(1) *CILSA* 18; Mhango "The Emergence of a Comprehensive Regulatory Framework for Pension Death Benefits in Botswana" 2012 *Statute Law Review* 152; Mhango and Thejane "The Malawi Pension Act: A General Commentary on Some of its Core Mandatory Provisions With Specific Reference to Sections 9, 10 and 15" 2012 129(4) *South African Law Journal* 773; Sigwadi The distribution of retirement fund death benefits in South African law (LLD Thesis 2021 UNISA); Lehman The Distribution of Retirement Fund Death Benefits: An Analysis of the Equitability and Constitutionality of Section 37C of the Pension Funds Act 24 of 1956 (PhD Thesis 2021 UCT); and Mhango, Dyani-Mhango and Ndumo *Pension Law and Death Benefits: Law, Practice and Policy Harmonisation in the Southern African Development Community* (2022) 165 (discussing Lesotho death benefit provisions).
- 3 See, e.g., s 37C(1)(a) of the Pension Funds Act 1956 providing that "any benefit .... payable by such a fund upon the death of a member, shall ... shall be dealt with in the following manner:... 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" (my emphasis); s 50 of the Retirement Funds Act 2022 providing that "any benefit payable by a fund upon the death of a member shall not form part of the assets in the estate of the member, but shall be paid to dependents and nominees designated in writing to the fund by that member before the member's death, *in such proportions as the board of trustees may deem equitable*" (my emphasis); s 33(1)(a) of the Retirement Funds Act 2005 provides that "Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund in respect of a deceased member, shall, not form part of the assets in the estate of such a member, but shall be dealt with as in this section... If ... the fund becomes aware of a dependant or dependants of the member, the benefit shall be paid to such dependant or dependants *in a manner that is deemed equitable by the management board*" (my emphasis); and s 97 of the Pension Act 2023 provides that "where a member's nomination ... is valid at the death of the member, then ... benefits payable out of the fund on the member's death shall be paid as directed in the nomination...the nomination is invalid ... then, subject to this act and notwithstanding any other written law to the contrary, the benefits, or that part of the benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee, being a person or persons who, *the trustee is satisfied*, was or were financially dependent on the member at the time of the death of the member." (my emphasis).

survivors.<sup>4</sup> Instead, the board of a pension fund is generally bestowed with a wide discretion to implement the social security policy<sup>5</sup> by deciding who must financially benefit; what amount each beneficiary will receive; and the manner in which those amounts will be paid to them. This is what characterises the frameworks in South Africa, Eswatini, and, to some extent, Botswana, and Malawi.<sup>6</sup>

In November 2019, Lesotho published the Pension Funds Act<sup>7</sup> (“the PFA 2019”) in the *Gazette*.<sup>8</sup> Like the legislation of Lesotho’s neighbors, the PFA 2019 has provisions that regulate death benefits based on a social security policy that gives the member the freedom to nominate who must receive death benefits. Unlike her neighbors, Lesotho’s PFA 2019 does not restrict the freedom of testation or confer the board of the

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- 4 For examples of cases where courts in South African and Eswatini have interpreted the law to favour financial dependants in the furtherance of social security policies, see *Makume v Cape Joint Retirement Fund* [2007] 2 BPLR 174 (C) (where the court rejected the interpretation that a spouse married in community of property is entitled to 50% of the death benefits, and awarded benefits to the deceased’s girlfriend and child who were found to be financial dependants) and *Public Service Pension Fund v Mayisela* [2011] SZSC 11 (where a girlfriend and her child were found to be dependants of the deceased in terms of the broad definition of dependant, and entitled to death benefits, despite the child not being his biological child).
- 5 This is the scenario in South Africa, Botswana, Eswatini and to some extent Malawi. See *The Municipal Workers Retirement Fund v Mabula* [2017] ZAGPPHC1153 para 7 (explaining that “section 37C of the PFA is intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. Its purpose is to alleviate, in part, the financial hardship in which the deceased’s dependants might find themselves on the loss of their source of income and support”); *Van Vuuren v Central Retirement Annuity Fund* [2000] 6 BPLR 661 (PFA) para 34 (holding that “through the guise of section 37C the legislature is clearly advancing an important social protection policy which is left in the hands of trustees of pension funds to execute”); *Kim v Agri Staff Pension Fund* [2019] ZAGPJHC 156 (holding that the fund performs an important social function when making determinations in terms of section 37C of the Pension Funds Act 1956); *CG v Momentum Retirement Annuity Fund* [2022] ZAWCHC 231; and *San Giorgio v Cape Town Municipal Pension Fund* [1999] 11 BPLR 286 (PFA) (observing that pension funds, through the process of statutory registration, acquire significant powers, rights and privileges in exchange for the performance of public services. In some respects, therefore, they can be seen as an extension of the administration).
- 6 See Dyani and Mhango 2012 *CILSA* 20–28 (discussing the framework in Malawi); Mhango and Dyani-Mhango “Reform of the Death Benefit Provisions in Lesotho’s Public Sector Pension Fund: Lessons from South Africa and Swaziland” 2016 24(2) *African Journal of International and Comparative Law* 199; *Domoya v Malawi Network of Religious Leaders Living With or Personally Affected By HIV/AIDS (MANARELA)* Matter No. IRC 354 (2014)(discussing the framework in Malawi); *Mashazi v African Products Retirement Benefit Provident Fund* 2002 (8) BPLR 3703 (W)(discussing the framework in South Africa); *Public Service Pension Fund v Mayisela supra* (discussing the framework in Eswatini); Manamela “Chasing away the ghost in death benefits: A closer look at section 37C of the Pension Funds Act 24 of 1956” 2005 17(3) *SA Merc LJ* 278.
- 7 5 of 2019.

fund with discretion to distribute death benefits as it deems to be fair. In its place, members of the fund exercise or enjoy their freedom of testation via the beneficiary nomination form.

Prior to this, Lesotho's pension funds were regulated by the Income Tax (Superannuation and Assurance) Regulation, 1994 ("Superannuation Regulation"). A major shortcoming in the Superannuation Regulation was its failure to widely regulate the conditions for the nomination and payment of death benefits to dependants or other survivors of a member. Even though dependants were recognised under the Superannuation Regulation as having a special legal status, there was no clear national policy agenda directing the disbursement of death benefits to them. The payment of death benefits was subject to regulation by the rules of individual pension funds. No sufficient minimum national standards were developed to regulate this important area of pension funds and to protect the rights or interests of survivors.<sup>9</sup> These circumstances created the need for the formulation of a comprehensive regulatory framework that could protect members and their survivors in a manner consistent with international standards. On account of the above shortcomings, the death benefits provisions in the PFA 2019 were formulated and represent a major policy shift in Lesotho.

In brief, there are at least five fundamental policy shifts in relation to death benefits in the PFA 2019: (1) death benefits do not form part of the assets of the member's estate;<sup>10</sup> (2) the board of a pension fund is required to distribute death benefits in accordance with the most recent beneficiary nomination form and the country's inheritance laws or any other applicable laws;<sup>11</sup> (3) employees are required to complete and annually update their beneficiary nomination;<sup>12</sup> (4) pension funds are required to use prescribed methods of payments;<sup>13</sup> and (5) pension funds are expected to pay out death benefit claims within three months of the death of a member.<sup>14</sup>

This article discusses the provisions in the PFA 2019 that encapsulate those policy positions. While the article welcomes the death benefit provisions in the PFA 2019, and the new policy direction they introduce,

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8 S 78(5) of the Constitution of Lesotho 1993 provides that "[w]hen a bill that has been duly passed is assented to in accordance with the provisions of this Constitution it shall become law and the King shall thereupon cause it to be published in the Gazette as a law." See also *Tsang v Minister of Foreign Affairs* (CIV/APN/35/92) (NULL) [1992] LSHC 23 (explaining that publication in the *Gazette* is an important part of the law-making process).

9 This is why one of the objectives of the PFA 2019 as explained by the Minister of Finance is to "protect the interest of people who make contributions into a pension fund from which they intend to draw money when they reach retirement age". Government Notice 26 of 2019.

10 See s 32 of the PFA 2019.

11 See s 35(1) of the PFA 2019.

12 See s 34(1) of the PFA 2019.

13 See s 34(2) of the PFA 2019.

14 See s 35(1) of the PFA 2019.

it discusses two potential problems that will likely confront Lesotho as it implements those provisions. The first problem is the possible contradiction between section 32 and section 35(1) of the PFA 2019. The article suggests ways to avoid this potential contradiction short of amending the PFA 2019. The second problem is the failure to include a definition of a “dependant” in the PFA 2019 and the constitutional implications of this. In response to this problem, the article recommends reliance on the common-law definition of dependant or possibly including such a definition in the regulations to the PFA 2019.

## 2 The legal framework in Lesotho

The PFA 2019 is the default legislation that governs all pension funds in Lesotho. There are a few special pension funds, the main ones being the Public Officers’ Defined Contribution Pension Fund<sup>15</sup> and the Specified Offices Defined Contribution Pension Fund,<sup>16</sup> which are established and regulated by specific statutes as well as the PFA 2019. Section 3 of the PFA 2019 recognises these special pension funds and the potential conflict that could arise between the laws that establish them and the PFA 2019. To manage this potential conflict, section 3 entrenches a conflict resolution scheme by exempting those special pension funds from complying with certain provisions of the PFA 2019:

### Application of the Act

3(1) The Act shall apply to all pension funds in Lesotho.

(2) Where a pension fund is subject to the provisions of any other law specifically applicable to such pension fund, the provisions of this Act which would otherwise apply to such pension fund shall not apply wherever those provisions would be inconsistent with any such law.

Section 3 of the PFA 2019 is not a new feature in Lesotho’s private pension schemes. Traditionally, Lesotho has maintained parallel laws to regulate pension funds that operate in the private sector and those that operate in the public sector.<sup>17</sup> In the public sector, the Pension Proclamations Act<sup>18</sup> was, for a long time, the primary legislation that regulated public sector pension funds, until it was replaced by the Public Officers’ Defined Contribution Pension Fund Act and its sister legislation, the Specified Offices Defined Contribution Pension Fund Act. In addition to the Public Officers’ Defined Contribution Pension Act, the Constitution of Lesotho 1993 also controls some aspects of public sector pension funds.<sup>19</sup>

15 8 of 2008.

16 19 of 2011.

17 See s 48 of the Specified Offices Defined Pension Fund Act, which provides that “where there is a conflict between this Act and any other law relating to pensions, this Act shall prevail.” See also the recognition of the history of this parallel pension regime in *Motaba v Board of Trustees: Public Officers’ Defined Contribution Fund* para 16.

18 4 of 1964.

In the private sector, the Superannuation Regulation was the primary instrument that controlled how pension funds were administered until it was replaced by the PFA 2019. Section 3 of the PFA 2019 is an attempt by Parliament to ensure some uniformity whilst maintaining the tradition of the parallel nature of the private pension fund system in Lesotho.<sup>20</sup> Therefore, when examining section 3 of the PFA 2019, one must keep the above framework and history in mind.

Also, one must acknowledge that an examination of Lesotho's private pension fund system involves an analysis of at least four legal instruments – the Constitution of Lesotho, the Public Officers' Defined Contribution Pension Fund Act, the Specified Offices Defined Contribution Pension Fund Act and the PFA 2019. As the High Court of Lesotho recently stated in *Motaba v Board of Trustees: Public Officers Defined Contribution Fund*, the PFA 2019 is a default statute that governs all pension funds unless a pension law that creates a specific pension fund states otherwise.<sup>21</sup> The PFA 2019 anticipates that conflicts will arise between it and the different laws that establish and regulate special pension funds. It sets up a legislative scheme to resolve those conflicts. According to this scheme, when a conflict arises between the PFA 2019 and any other specific pension fund legislation, the latter will prevail to govern the situation. The PFA 2019 takes second place.

In relation to survivors' benefits, sections 32, 34, and 35 of the PFA 2019 are the main provisions that regulate these benefits by securing freedom of testation within the PFA 2019 and outside the framework that governs deceased estates, and by prescribing a nomination process and methods of payment. In the next two sections, these provisions and their implications are examined.

### 3 Exemption from assets of the estate

Section 32 of the PFA 2019 exempts pension benefits from constituting part of the assets of the estate of the member:

Notwithstanding anything to the contrary contained in any law or in the rules, any benefit payable by a fund shall not form part of the assets of the estate of a member.

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19 See ss 30(a), 150(12) and 151 of the Constitution of Lesotho. See also *Sechele v Public Officers' Defined Contribution Pension Fund* (6/2010) (NULL) [2010] LSHC 94 para 13, providing that "the main object of section 150 and section 151 is to entrench the rights to pension benefits due to public officers upon their retirement from public service. Their overall purpose is intended to benefit the public officers and protect the pension benefits of retired public officers."

20 I use the term "private pension fund system" to denote occupational and contributory pension schemes as opposed to the tax-funded non-contributory old age pension scheme under the Old Age Pensions Act 3 of 2005.

21 *Motaba v Board of Trustees: Public Officers' Defined Contribution Fund* para 16.

The opening sentence in section 32 contains an important principle that the PFA 2019 will enjoy a superior status over all laws in the country, including the rules of the fund. With this superior status, the section excludes all pension benefits from the pot containing the assets of the member's estate. Bearing in mind that section 37 of the PFA 2019<sup>22</sup> contemplates that a pension fund may pay other kinds of benefits not mentioned in the PFA 2019, section 32 of the PFA 2019 is an important statement of law because it covers all benefits payable by a fund, including those that the pension fund may introduce through innovation and risk assessment. One of the benefits that a pension fund pays is death benefits or survivors' benefits. This means that when a person dies and leaves their pension benefits (money in the fund otherwise known as fund credit) those benefits will not be paid to the estate of the deceased to be combined with other assets in that estate in terms of the laws governing deceased estates. The question that this article considers is what the practical effect of section 32 is on survivors' benefits.

Addressing this question requires us to examine relevant legislation and jurisprudence outside the Kingdom of Lesotho to determine the possible effect of the wording in section 32 of the PFA 2019. This is necessary because section 32 has yet to be tested by the courts in Lesotho and such a comparative assessment of foreign laws allows us to speculate about the possible meaning and implications of section 32 in the context of Lesotho.

Unlike the PFA 2019, where section 32 broadly excludes from the deceased estate any benefit payable by a pension fund, the Public Officers' Defined Contribution Pension Fund Act, as well as legislation in other jurisdictions in the region, addresses the exclusion of pension benefits from the estate differently and separately. For example, in terms of section 33 of the Public Officers' Defined Contribution Pension Fund Act, pension benefits are not considered property in the insolvent estate or the deceased estate. Specifically, the section reads as follows:

33. No benefit or right to a benefit, due and payable, in terms of this Act, to a member, beneficiary or deferred pensioner on or as a result of [the] death of that member, shall be deemed to be property, for purposes of the Insolvency Proclamation 1957 and Estates Proclamation 1937.

The above provision means that pension benefits accruing to public officers in Lesotho are protected from executors of the member's deceased estate as well as the insolvent estate.<sup>23</sup> This is distinct from

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22 S 37 provides that "all benefits not provided for under this Act by a fund shall be dealt with in accordance with the rules of the fund." See also, Regulation 8(2)(k) of the Pension Funds (Disclosure) Regulations, 2020 which requires pension funds to provide annual benefit statements which must contain at the minimum information pertaining to death, disability, funeral and any other benefit that the fund provides.

23 *Executor, Estate Late Sentje Lebona v Maliako Lebona/Mpontsheng Monaheng* [2022] LSH 309 (dismissing an application by the executor of a deceased estate of a pension member claiming the pension death benefits).

section 32 of the PFA 2019, which is only concerned with the deceased estate and not the insolvent estate.

Furthermore, in Botswana, section 50 of the Retirement Funds Act<sup>24</sup> governs the disposition of pension benefits if a member of the fund becomes insolvent. It excludes any pension benefit from the pot containing the assets of the insolvent estate. The section reads as follows:

Notwithstanding the provisions of any written law relating to insolvency, if the estate of any person entitled to a benefit payable in terms of the rules, including an annuity purchased by a fund from the insurer of the person, is sequestrated or surrendered, such benefit or any part of it which became payable, shall not be deemed to form part of the assets in the insolvent estate of the person and may not in any way be attached or appropriated by the trustee in his or her insolvent estate or by his or her creditors.

Conversely, section 51 of the Retirement Funds Act specifically and separately deals with the exclusion of death benefits from the assets in the member's estate, by providing that:

- (1) Subject to section 50, any benefit payable by a fund upon the death of a member shall not form part of the assets in the estate of the member, but shall be paid to dependants and nominees designated in writing to the fund by that member before the member's death, in such proportions as the board may deem equitable:

Provided that, within a period of 12 months after the death of a member—

- (i) the board does not become aware of any dependants of the member; and
  - (ii) the member has not designated a nominee or if the member has designated a nominee, the designation is to receive only a portion of the benefit,
  - (iii) the balance of the benefit after payment of the portion to the nominee shall form part of the estate of the member.
- (2) A benefit referred to under subsection (1) shall not include a benefit payable as a pension to a spouse or child of a member in terms of the rules, which benefit shall be dealt with in terms of the rules.

As in Botswana, the South African Pension Funds Act<sup>25</sup> separately excludes pension benefits from falling within the assets of the member's estate. Section 37B of the Pension Funds Act governs the disposition of pension benefits upon insolvency by providing as follows:

If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund ... is sequestrated or surrendered, such benefit or any part thereof ... shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by

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24 38 of 2022.

25 24 of 1956.



his creditors, notwithstanding anything to the contrary in any law relating to insolvency.<sup>26</sup>

Equally restrictive is section 37C of the Pension Funds Act, which controls the disposition of pension benefits upon the death of a member by excluding them from becoming part of the assets of the member's estate. In practice, this means that a pension member is stripped of the right to decide how their benefits should be distributed upon death.<sup>27</sup> Section 37C reads as follows:

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit ... payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
  - (a) 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.
  - (b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the

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- 26 See *M and Another v Murray and Others* 2020 (6) SA 55 (SCA) (held that "all that s 37B entails is that, while in the hands of a pension fund, the insolvent's pension interest cannot be attached by his or her trustee on the basis that it forms part of the insolvent's assets. It protects only the pension benefit of a person whose estate is sequestrated ... that if the pension benefit is received before a beneficiary's estate is sequestrated, s 37B does not find application"). See also, *Jones & Co. v Coventry* [1909] 2 KB 1029; *Gibson v Howard* 1918 TPD 185, and *Foit v FirstRand Bank Bpk* 2002 (5) SA 148 (T).
  - 27 See *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA) (holding that s 37C of the Pension Funds Act overrides the freedom of testation of the deceased. Thus, although the deceased may have articulated an intention to benefit a particular beneficiary in his nomination form, it does not necessarily imply that a benefit will in fact be awarded to him or her because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit); *Kipling v Unilever SA Pension Fund (1)* [2001] 8 BPLR 2368 (PFA) (explaining that s 37C establishes a compulsory scheme which overrides the member's freedom of testation and the provisions of the Intestate Succession Act of 1987); and *Moir v Reef Group Pension Plan* [2000] 6 BPLR 629 (PFA) (explaining that freedom of testation is curtailed by s 37C). For a discussion of the discretionary powers enjoyed by the board of trustees under s 37C, see Marumoagae, C "The Weight Accorded to the Wishes of Deceased Retirement Fund Members When Distributing Death Benefits in South Africa: Do Such Members Have Freedom of Testation" (2018) 30 South African Mercantile Law Journal 115; Marumoagae, MC, "Guarding against retirement funds' arbitrary discretion when allocating death benefits: The urgent need for statutory guidelines" (2021) 7(1) Journal of Corporate and Commercial Law & Practice 36; Sigwadi (LLD Thesis 2021 UNISA); and Lehman (PhD Thesis 2021 UCT).

benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee:

- (bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989...<sup>28</sup>

Given that Botswana's Retirement Funds Act is relatively new legislation, no cases have been reported concerning the effects of its exclusionary rules in sections 50 and 51 *vis a vis* the insolvent estate or the deceased estate, nor has section 33 of the Public Officers' Defined Contribution Fund Act been tested in the courts of Lesotho.<sup>29</sup> Nevertheless, South Africa's Pension Funds Act is one of the oldest pension statutes under which a few cases have been decided about the effect and scope of the exclusionary rule in section 37C and will help us to analyse the PFA 2019. I will focus on the jurisprudence from South Africa that has developed around the exclusionary rule in section 37C of the Pension Funds Act and highlight its relevance to the possible interpretation of section 32 of the PFA 2019.

### **3 1 Emerging jurisprudence in South Africa on exemption from assets of the estate**

#### ***3 1 1 The Supreme Court of Appeal and High Court jurisprudence***

One of the major cases that dealt with the scope of the introductory words to the exclusionary rule in section 37C of the Pension Funds Act is *Kaplan and Katz NNO v Professional and Executive Retirement Fund; Kaplan and Katz NNO v VIP Retirement Annuity Fund*.<sup>30</sup> In this case, the

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28 S 37C of the Pension Funds Act. For comparative provisions in other SADC countries, see ss 94, 95, 96, 97 and 148 of Act 6 of 2023 (Malawi) and s 33 of Act 5 of 2005 (Eswatini). See also, See *FundsAtWork Umbrella Pension Fund v Guarnieri and Others* 2019 (5) SA 68 (SCA) (where it was held that the determination of dependency must be made by the board of trustees at the point of distribution and not at the time of death).

29 One of the first cases to be decided under Act 27 of 2014 the predecessor the Retirement Funds Act 38 of 2022 was *Metropolitan Life Botswana Limited v Jokonya* CACGB-149-19, where based on s 33 of that Act, the Court of Appeal of Botswana found that the Act does envisage that a member has a right to transfer his interests of accrued benefits to another more favourable pension fund. This case is relevant to Lesotho because s 33 of Act 27 of 2014 is identical to s 51 of the PFA 2019. It follows that the interpretation by the court in *Metropolitan Life Botswana Limited v Jokonya* is likely to be persuasive in Lesotho.

30 *Kaplan and Katz NNO v Professional and Executive Retirement Fund; Kaplan and Katz NNO v VIP Retirement Annuity Fund* [1997] 2 All SA 364 (W) (*Kaplan 1*). See also *Sekwane v Chemical Industries National Provident Fund* [2015] JOL 33291 (PFA).

late Mr Kaplan was a member of two pension funds. Before his death and in terms of the rules of the funds, Mr Kaplan nominated his two minor sons as beneficiaries in respect of each pension fund. In addition, he created two trusts for the benefit of each son.

Mr Kaplan died in July 1990 and was survived by his two sons and his widow. The two pension funds ignored Mr Kaplan's beneficiary nominations and allocated the death benefits to three dependants, namely the widow and the two sons. Two trustees of the trusts created by Mr Kaplan for his minor sons challenged the decision of the pension funds, arguing that the death benefits should have been paid to the two sons and excluded the widow. The High Court found that the pension funds acted in accordance with the Pension Funds Act and dismissed the case.<sup>31</sup>

On appeal, in *Kaplan and Katz NNO v Professional and Executive Retirement Fund*,<sup>32</sup> the Supreme Court of Appeal found that the rules of both pension funds enabled a member to nominate beneficiaries to receive the benefits in the event of death. In the absence of a nomination, the rules required that a deceased member's benefits be paid to their dependants.<sup>33</sup> The term "dependant" was defined identically in the Pension Funds Act and the rules of the funds. The court found that the two sons and the widow all qualified as dependants as defined.<sup>34</sup> The court also found that, but for the Pension Funds Act, the nominations made by Mr Kaplan would have entitled the sons to all the benefits and the relief sought by the trustees of the two trusts.

Therefore, the central question before the appeal court was whether section 37C of the Pension Funds Act overrides the beneficiary nominations validly made by a pension member. The main contention by the two trustees who brought the challenge was that the Pension Funds Act does not override a validly made beneficiary nomination. In their view, section 37C aims to exclude from the member's estate only those benefits that would otherwise have fallen within it. In other words, if a member completes a beneficiary nomination form to pay all the death benefits to nominated beneficiaries, the exclusionary rule in section 37C does not apply because the benefits are committed to known beneficiaries. In this case, since the benefits were destined to be paid to the minor sons in terms of the beneficiary nomination, the argument goes, the estate would not receive anything for section 37C to exclude. In other words, section 37C applies only if there is no valid beneficiary nomination or where such nomination allocated less than 100% of the benefits. Based on this reasoning, they submitted that the benefits at issue were not the kinds of assets to which the exclusionary rule in section 37C applied. Accordingly, the beneficiary nominations must

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31 See *Kaplan 1 supra* 370.

32 *Kaplan and Katz NNO v Professional and Executive Retirement Fund* [1999] 3 All SA 1 (A) (*Kaplan 2*).

33 *Kaplan 2 supra* 3.

34 *Kaplan 2 supra* 3.

prevail because section 37C does not govern the circumstances of this case.<sup>35</sup>

The two trustees of the trusts created by Mr Kaplan advanced another argument on appeal, which was dismissed but not substantively addressed by the court. They argued that the beneficiary nominations constituted contracts for the benefit of third parties, otherwise known as *stipulatio alteri* and that their legal effect was that the benefits at issue fell outside the deceased's estate and into the hands of the nominated beneficiaries.<sup>36</sup> According to this argument, the benefits at issue should have been paid to the sons exclusively.

In dismissing the case, the court in *Kaplan 2* reasoned that section 37C of the Pension Funds Act was intended by the legislature to effectively exclude any death benefits from falling into the estate of the deceased member.<sup>37</sup> It explained that the introductory words in section 37C mean that:

[a]ll benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with in terms of one or other of the ... subparagraphs. In other words, none fall into the estate save in the circumstances stated in subparas (b) and (c).

In addition, despite the fact that the beneficiary nominations were made by Mr Kaplan in terms of the rules and that the rules required the benefits

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35 *Kaplan 2 supra* 3.

36 *Kaplan 2 supra* 4. For cases discussing the *stipulatio alteri*, see Oosthuizen N.O v B and Others [2023] ZAGPPHC 30 (where the court rejected to enforce a divorce settlement agreement, as a *stipulatio alteri*, in relation to a purported distribution of death benefits under s 37C of the Pension Funds Act); *Pieterse v Shrosbree*; *Shrosbree NO v Love* [2004] JOL 12995 (SCA); 2005 (1) SA 309 (SCA) para 9 (noting that in a contract for the benefit of a third person “in such a case the policy holder (the ‘*stipulans*’) contracts with the insurer (the ‘*promittens*’) that an agreed offer would be made by the insurer to a third party (the ‘*beneficiary*’) with the intention that, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the ‘very heart of the *stipulatio alteri*’ ... thus the beneficiary, by adopting the benefit, becomes a party to the contract”); *McCullough v Fernwood Estate Ltd* 1920 AD 204 (describing a *stipulatio alteri* as an agreement for the benefit of a third person); *Crookes NO v Watson* 1956 (1) SA 277 (A).

37 *Kaplan 2 supra* 4. For a look at cases developing this point, see, *Brummelkamp v Babcock Africa (1997) Pension Fund and another* [2001] 4 BPLR 1811 (PFA) 1815 (held that the purpose of section 37C is to restrict a deceased member's freedom of testation in relation to the benefits payable by the fund in the event of death. The guiding principle is that such assets do not form part of the deceased's estate and are required to be distributed in accordance with a statutory scheme which gives preference to need and dependency above the member's choice); *Mogale NO v Municipal Gratuity Fund and another* [2018] 2 BPLR 425 (PFA) (A death benefit does not form part of a deceased's estate and must be distributed as prescribed by section 37C of the Pension Funds Act 24 of 1956).

to be paid to the nominated beneficiaries, the court emphasised that the introductory words to section 37C make it clear that the legislature intended for the benefits to be disposed of according to the statutory arrangement in that section, which gives preference to dependants.<sup>38</sup> Strictly speaking, the intention was to override the rules as well as any other law, including the common law. Therefore, the beneficiary nominations, which are a construct of the rules, could not be applied in the circumstances of this case.

The legal position in *Kaplan 1* and *Kaplan 2* was endorsed and applied by the High Court in *Makume v Cape Joint Retirement Fund*.<sup>39</sup> In *Makume*, a large sum of money became available for distribution after a member of the fund died. The deceased was married in community of property and had three children from this marriage. He also had a female partner outside his marriage, and one child was born from the relationship. Following his death, the board of the fund decided to distribute 60% of the benefit to the surviving spouse and her three children, and the remaining 40% to the partner and her child.

The surviving spouse challenged the decision of the board on several grounds. One of the grounds for her challenge, which concerns us the most, was that since she was married to the deceased in community of property, she was entitled to 50% of the death benefit. Her argument was that, following the death of the deceased, the joint estate ceased, and two distinct estates remained: one estate comprising the surviving

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38 *Kaplan 2 supra* 4. See also, *Brummelkamp v Babcock Africa (1997) Pension Fund and another* [2001] 4 BPLR 1811 (PFA) 1816 (noting that “it cannot be argued, therefore, that a community of property in marriage entitled the surviving spouse to 50% of a death benefit as the whole of the death benefit clearly falls outside of the assets of the estate. The whole of the death benefit is therefore available for distribution at the discretion of the trustees to such dependants as they are able to trace within a twelve month period and in such manner as they deem equitable in accordance with section 37C(1)(a)”; *Koekemoer v Macsteel Group Retirement Plan and others* [2004] 2 BPLR 5465 (PFA)(preference for dependency over freedom of testation); *TWC and Others v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA)(explaining that “the aim of section 37C is to limit a pension fund member’s freedom of testation in relation to his pension benefits. Pension benefits accumulate favourably as a consequence of advantageous tax treatment of contributions to the fund. In return the State hopes to ensure that there are fewer persons dependent on it for social security. For this reason the legislature has given preference to dependency over freedom of testation. Therefore, pension benefits are excluded from the estate of a deceased and are applied to provide for the deceased’s dependants”).

39 *Makume v Cape Joint Retirement Fund* [2007] 2 BPLR 174 (C). See also, *Collatz and Another v Alexander Forbes Financial Services (Pty) Ltd and Others* [2022] ZAGPJHC 93 para 67, 71 and 97 (affirming the legal positions in *Kaplan 2* and *Makume*); *Letsoalo and Others v Lukhaimane NO and Others* [2017] ZAGPPHC 1246 para 18 (endorsing the legal position in *Makume* and *Kaplan 2*).

spouse's half-share and the other estate comprising the deceased's estate.<sup>40</sup> Accordingly, the assets in the deceased's estate, and not the survivor's half-estate, fell to be distributed by the pension fund in terms of section 37C.<sup>41</sup>

Therefore, she sought an order from the High Court to declare that the proceeds of the death benefit formed part of her joint estate established by the marriage between her and the deceased and that the provisions of section 37C of the Pension Funds Act should apply only to the deceased's half-share in the joint estate. She asked the court to order that she be awarded 50% of the death benefit as her share in the joint estate.<sup>42</sup>

In resolving the dispute, the court found that the words "estate of such member" in section 37C(1) refer to the joint estate, thereby rejecting the argument advanced by the surviving spouse that those words refer to the deceased's estate to the exclusion of her share in the estate.<sup>43</sup> In addition, the court, citing *Kaplan 1* and *Kaplan 2*, explained that the words "notwithstanding anything ... in any law" clearly override all other laws and legislation, including the common law.<sup>44</sup> It emphasised that not even the common-law rules of proprietary rights of spouses married in community of property can override those statutory words and intentions.<sup>45</sup> The court also dismissed an interpretation that there are two half benefits contemplated in section 37C – one half accruing to the surviving spouse based on their marriage and the other half to the deceased. It reasoned that upon the death of a party married in community of property, the estate of such party is the joint estate. There is no estate other than the joint estate.<sup>46</sup> The court observed that:

In fact, the benefit has nothing to do with whether the deceased was married in or out of community of property – it is simply one benefit that becomes payable upon death and that single benefit has to be distributed in accordance with section 37C.<sup>47</sup>

Based on this reasoning, the court held that the surviving spouse was not entitled to 50% of the death benefit as a priority entitlement.<sup>48</sup>

### ***3 1 2 The Pension Funds Adjudicator jurisprudence***

Apart from the courts, the Pension Funds Adjudicator has decided several cases that hinged on the interpretation of the words "notwithstanding anything to the contrary contained in any law" in relation to death

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40 *Makume v Cape Joint Retirement Fund supra* par 43.

41 *Makume v Cape Joint Retirement Fund supra* par 43.

42 *Makume v Cape Joint Retirement Fund supra* par 5.

43 *Makume v Cape Joint Retirement Fund supra* par 44.

44 *Makume v Cape Joint Retirement Fund supra* par 49.

45 *Makume v Cape Joint Retirement Fund supra* par 50.

46 *Makume v Cape Joint Retirement Fund supra* par 44.

47 *Makume v Cape Joint Retirement Fund supra* par 52.

48 *Makume v Cape Joint Retirement Fund supra* par 53.

benefits and their exemption from assets of the estate. One of these cases is *Ellis NO v Lifestyle Retirement Annuity Fund*,<sup>49</sup> where the late member died without any dependants. He was survived by someone he had nominated to receive the death benefits. In terms of section 37C(1)(b) of the Pension Funds Act, the board of the pension fund decided to pay the benefits to the surviving nominee.

An issue arose as to how the benefit was calculated by the fund. The fund calculated the benefit in accordance with the Income Tax Act<sup>50</sup> and the rules of the fund. According to the calculation, the beneficiary was only paid a refund of the pension contributions made by the member, plus interest. The executor of the late member's estate complained to the Adjudicator, contending that the benefit ought to have been determined in terms of section 37C(1)(c) of the Pension Funds Act because this section provides for the payment of a benefit to the member's estate in the absence of any dependants or nominees. There was nothing in this section, according to the complainant, that indicated that the word "benefit" meant anything other than the full benefit that would have been paid to a dependant or nominee. He further contended that the use of the words "notwithstanding anything to the contrary contained in any other law" in section 37C(1) implied that the value of the benefit could not be limited by a contradictory provision in any other statute – including the Income Tax Act or the rules.

In resolving the dispute, the Adjudicator found that the use of the words "notwithstanding anything to the contrary contained in any law" in section 37C(1) of the Pension Funds Act clearly reflected the legislature's objective to make the Pension Funds Act the overriding provision to be applied, regardless of any other contrary legal provision. It found that the provisions of the Income Tax Act, insofar as they are inconsistent with the provisions of section 37C, were not applicable to the case. Thus, the executor, in terms of section 37C(1)(c) of the Pension Funds Act, was entitled to the full death benefits and this entitlement could not be overridden by the Income Tax Act.<sup>51</sup>

Another important case where the overriding words in section 37C were considered is *Matlakane v Royal Paraffin Provident Fund*.<sup>52</sup> The complainant in this case contested the inclusion of the deceased's mother as one of the recipients of a death benefit that became available for distribution. Her contention was that she was married in community of property to the deceased during his lifetime, and was nominated as the representative of his estate, and there being no other nominated beneficiaries, she was entitled to the whole benefit amount.<sup>53</sup> Consequently, the complainant sought an order from the Adjudicator to direct the fund to award her the entire death benefit.

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49 *Ellis NO v Lifestyle Retirement Annuity Fund* [2001] 5 BPLR 2021 (PFA).

50 Act 90 of 1962.

51 *Ellis NO v Lifestyle Retirement Annuity Fund supra* par 16.

52 *Matlakane v Royal Paraffin Provident Fund* (2003) 6 BPLR 4785 (PFA).

53 *Matlakane v Royal Paraffin Provident Fund supra* par 7.

In dismissing the complaint, the Adjudicator offered the following rationale, which will be useful in understanding Lesotho's PFA 2019:

Section 37C of the Act establishes a mandatory scheme in terms of which a death benefit has to be distributed. Hence, the use of the words "notwithstanding anything to the contrary contained in any law or in the rules of a registered fund ..." is a clear indication of the legislature's intention that other than the exceptional circumstances by this section itself, the benefit may not form part of the estate of the deceased member and therefore the member's freedom of testation or the provisions of the Intestate Succession Act of 1987, where the member dies intestate, are overridden in all its forms.<sup>54</sup>

Based on this reasoning, the Adjudicator held that the fact that the complainant was married in community of property to the deceased and was nominated as the representative of his estate did not in law entitle her to receive the death benefit. The Adjudicator concluded that there were no grounds to interfere with the board's decision and dismissed the complaint.

In the context of Lesotho, the above case authorities and their interpretation indicate that section 32 of the PFA 2019 applies to any benefit payable by a pension fund. Hypothetically, there are several types of benefits paid by a pension fund in Lesotho. These include withdrawal benefits,<sup>55</sup> maintenance benefits,<sup>56</sup> housing benefits,<sup>57</sup> retirement benefits, and death benefits – the latter is a point of emphasis in this article. In addition, these case authorities show that, similarly, the introductory words in section 32 of the PFA 2019 override all other laws, including customary and common law, and imply that no other law can dictate how a pension fund in Lesotho should dispose of death benefits.

The law in Lesotho on this matter can be summarised as follows: death benefits do not form part of the assets of the member's estate, and the member's freedom of testation is realized through the beneficiary nomination, which a member must complete annually to express their wishes. Except for the PFA 2019, no other law in Lesotho governs how and to whom death benefits should be paid if a pension member dies. In the next section, I discuss sections 34 and 35, which regulate the actual distribution of survivor's benefits.

## 4 Distribution of death benefits

Section 32 of the PFA 2019 does not function independently. It must be construed and applied together with sections 34 and 35 of the PFA 2019, which control the method by which death benefits are distributed and eventually paid to survivors. In relation to the distribution of death

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54 *Matlakane v Royal Paraffin Provident Fund supra* par 10.

55 Governed by s 36 of the PFA 2019.

56 Governed by s 33(a) of the PFA 2019.

57 Governed by s 33(b) and (c) of the PFA 2019.



benefits, section 34 sets out the minimum standard to be followed by pension funds. It requires pension funds to put in place a beneficiary nomination form as the basis for distributing benefits to survivors. The section reads as follows:

Death benefit nomination

34.(1) A fund shall–

- (a) require a member to fill out a death benefit nomination form detailing the nominated beneficiaries in the event of the deaths of the member; and
  - (b) on an annual basis, request the members to update the death benefit nomination form.
- (2) Where a member fails to update the death benefit nomination form as required in subsection (1)(b), the most recent benefit nomination form will be used in the event of the death of a member.

It is not difficult to ascertain the scope and obligations imposed by section 34. Subsection (1)(a) confers a power and imposes an obligation on the fund to require a member to supply the fund with a complete beneficiary nomination form where all the nominated beneficiaries are listed. As one scholar has stated, the distinction between power and obligation can be simplified by saying that a power enables things to be done, while an obligation requires them to be done.<sup>58</sup> When a functionary has a statutory obligation, they are obliged to perform it.<sup>59</sup>

The board of trustees of a pension fund has certain powers and obligations under section 34 of the PFA 2019. To give effect to its powers and obligations under subsection (1)(a), the board of the fund is expected to craft rules for the fund that make it a requirement for members to complete a beneficiary nomination form.<sup>60</sup> Through these rules, the board will be able to comply with its statutory and fiduciary obligations under the PFA 2019<sup>61</sup> and at the same time assist members to comply with their responsibilities. It would be unlawful for a member not to comply with a rule that practicalises section 34 of the PFA 2019. Even though the PFA 2019 is silent, it is submitted that there is an implicit authority on the fund to come up with rules that practicalise section 34, such as requiring a member to apportion the percentage of the benefit to which each beneficiary should be entitled or that a member's signature on a beneficiary nomination form must be witnessed by two individuals

58 Hoexter *Administrative Law in South Africa* 2ed (2012) 43.

59 Hoexter *Administrative Law in South Africa* 43.

60 *Tek Corporation Provident Fund v Lorentz* [1999] ZASCA 54 par 15, 28 (which held that “the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of the fund, relevant legislation and the common law” and that “what the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it”).

61 Section 17(1) and (2)(a) of the PFA 2019 imposes an obligation on the board “to manage a fund in the best interest of its members, and in the terms of this Act, the regulations and the rules” and a fiduciary “duty to act with due care, diligence and good faith”).

to prevent fraud.<sup>62</sup> It is also submitted that pension funds should permit members whose circumstances have changed to update their beneficiary nomination forms at any time during the year.

In Malawi, before the enactment of the Pension Act,<sup>63</sup> the Pension Bill<sup>64</sup> had proposed restricting a member's ability to amend their beneficiary nomination form once in a period of 12 months. This proposal was criticised by some commentators on the basis that it would unjustifiably limit a member's constitutional and common-law right to freedom of testation.<sup>65</sup> There were no cogent reasons offered to justify the restriction on a member to amend a beneficiary nomination form once a year. Eventually, Parliament removed the restriction and allowed members to freely amend their beneficiary nomination form or revoke it by written notification to the fund in line with the rules of the fund. It is commendable that Lesotho has followed this progressive trend of not imposing unreasonable restrictions on members of the fund in relation to beneficiary nomination forms.

Another piece of the puzzle to the mandatory scheme governing death benefits in the PFA 2019 is section 35. Once a beneficiary nomination form is in place, section 35(1) of the PFA 2019 compels the board to pay the benefits according to the wishes and directions contained in that nomination form. Section 35(1) provides:

On the death of a member, the board shall distribute the death benefits within three months in accordance with the death benefit nomination form subject to the rules of the fund, the inheritance laws of Lesotho and any applicable law.

The inclusion of sections 32, 34, and 35 of the PFA 2019 in the regulation of death benefits should be commended for reasons already stated, namely that it fills the gap that existed for so long. Under the previous regulatory framework, the pension funds in Lesotho used beneficiary nominations as a guide in the payment of death benefits. The board of a pension fund was not bound to pay death benefits to the named individuals in a beneficiary nomination.<sup>66</sup> Due to the Superannuation Regulation's failure to widely regulate death benefits, most pension funds in Lesotho exercised legal borrowing by incorporating the provisions of section 37C of the Pension Fund Act into their rules. These rules were subsequently registered with the Lesotho Revenue Authority and became legally enforceable in Lesotho. The most glaring effect of section 37C of

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62 This is something that flows from the fiduciary duty of care, diligence and good faith in s 17(2)(a) of the PFA 2019.

63 6 of 2011.

64 14 of 2010.

65 See Dyani and Mhango 2012 *CILSA* 21–22; and also National Assembly of Malawi, Report of the Budget and Finance Committee on Its Analysis of Bill No 14 of 2010: Pension, Report No 2 October 2010; *Gowing v Lifestyle Retirement Annuity* (demonstrating the benefits of updating beneficiary nominations).

66 See *Nkama v Master of the High Court* [2003] LSHC 15.

the Pension Funds Act is this – it is unambiguous that a beneficiary nomination is not binding on the board of a pension fund but serves as a guide or as one of the relevant considerations on how the death benefits should be distributed.<sup>67</sup> This is because section 37C expressly provides that death benefits must be paid to dependants “as may be deemed equitable by the board.”<sup>68</sup> This discretion has been interpreted to grant the board of trustees the authority to disregard a beneficiary nomination form in favour of a fair decision being made based on the circumstance.<sup>69</sup>

67 See *Municipal Workers Retirement Fund v Mabula and Another* [2017] ZAGPPHC 1153 para 8 (where in dismissing failure to strictly follow a beneficiary nomination as a ground for review, the court explained that that “the contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion. Section 37C(1)(bA) in particular does not oblige the fund to give a nominee the portion of the benefit stipulated by the member when making the nomination. Nominees are to be treated as if they were dependants when the board determines what it regards as an equitable allocation of shares of the benefit. This means that, while they must be considered as potential beneficiaries, they are not entitled to be allocated any share of the benefit if it is apparent that there are other potential beneficiaries with greater financial needs. Therefore, the fact that the distribution does not strictly follow the nomination form is not a ground for review”); *Sithole v ICS Provident Fund* [2000] 4 BPLR 430 (PFA) (holding that one of the considerations in the distribution of the death benefits that the board must bring to the equation is the wishes of the deceased expressed in either their nomination form and/or their last will); *Mashazi v African Products Retirement Benefit Provident Fund supra* (holding that “[s]ection 37 of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testament in order that no dependants are left without support”); *Public Service Pension Fund v Mayisela supra* (holding that the death benefit provisions in the Retirement Funds Act 2005 were intended to fulfil a social function by protecting dependants over the well-defined wishes of the deceased member and that beneficiary nominations are not binding on the board).

68 S 37C(1)(a) of the Pension Funds Act.

69 See, e.g., *Hamnca v Alexander Forbes Core Plan (Provident Section) & others* [2011] JOL 28026 (PFA) para 5.4 (noting that “although the deceased may have expressed an intention to benefit a nominated beneficiary, it does not necessarily follow that a benefit will in fact be awarded to the nominee because the deceased’s intentions as contained in the nomination form are only one of the factors taken into consideration when allocating a death benefit .... It is the trustees’ responsibility when dealing with payment of death benefits to conduct a thorough investigation to determine the potential beneficiaries, to thereafter decide on an equitable distribution.”); *Taljaard v Corporate Selection Umbrella Retirement Fund and another* [2016] 2 BPLR 271 (PFA) para 5.11 (held that “37C determines how a death benefit from a pension fund is distributed. Even if the complainant’s son is nominated as a beneficiary, the board of the first respondent is not bound by the nomination form completed by the deceased. Instead the nomination form serves merely as a guide to assist them in the exercise of their discretion.”); *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) 37051 – 3706C (the fund is expressly not bound by a will, nor is it bound by a nomination form. The contents of the nomination form are there merely as guide to the trustees in the exercise of their discretion); *Kirsten v Allan Gray Retirement Annuity Fund and another* [2017] JOL 38738 (PFA).

Based on my reading of section 35(1) of the PFA 2019, there is a clear policy shift in Lesotho, which directs boards of pension funds to pay death benefits within a specific time period and in accordance with the wishes in the beneficiary nomination form.<sup>70</sup> The previous practices adopted from South Africa, especially the equitable distribution of benefits, will no longer apply in Lesotho due to the peremptory wording in section 35(1). It is important for pension fund members in Lesotho to always have an updated beneficiary nomination form on record with their pension fund office, and for pension funds to make sure that a beneficiary nomination form is always in place in relation to every member. Given that section 34 of the PFA 2019 contemplates the existence of a beneficiary nomination form at the pension fund office, it would probably raise possible breaches of sections 17(1), 17(2)(a)(i), 18(6)(a) and 18(6)(d) of the PFA 2019 for a board of the fund to fail to have in place a beneficiary nomination form in the records of the fund.

## 5 Method of payment of benefits

For the sake of completeness, the remaining parts of section 35 of the PFA 2019 govern the methods by which to pay the benefits to those identified in the beneficiary nomination form. Section 35(2) contemplates three methods by which death benefits can be paid: (1) direct payment to a dependant;<sup>71</sup> (2) payment to a registered beneficiary fund;<sup>72</sup> and (3) payment to a trust account for the dependant.<sup>73</sup> In addition to prescribing these methods of payment, section 35 imposes other requirements concerning payments to a beneficiary fund and installment payments.

In the context of a beneficiary fund, section 35(3) provides the following:

- (3) Subject to subsection (1), where a payment is made to beneficiary fund in terms of subsection (2)(a)–
  - (a) any assets held for the benefit of a deceased beneficiary in a beneficiary fund shall be paid into the estate of such beneficiary;
  - (b) any benefit payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interest of such dependant or nominee; and
  - (c) a board of the beneficiary fund shall pay to a dependant or nominee any balance owing to such a dependant or nominee at the date on which he attains the age of majority.

The above provision places conditions on the board of a pension fund if it chooses to deliver death benefits using the institution of the beneficiary fund. Beneficiary funds have gained prominence in the last decade as a

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70 S 35(1) of the PFA 2019.

71 S 35(2) of the PFA 2019.

72 S 35(2)(a) of the PFAS 2019.

73 S 35(2)(b) of the PFA 2019.

vehicle through which to deliver benefits to minor survivors. These funds provide protection and a tax-efficient way of delivering benefits to minor survivors.<sup>74</sup> And, in relation to instalment payments, section 35(4), (5) and (6) of the PFA 2019 goes on to provide that:

- (4) A benefit dealt with in terms of this section, payable to a major dependant or a major nominee, may be paid in more than one payment if the dependant or nominee has consented in writing.
- (5) The amount of the payments, payment intervals, interest to be added and other terms and conditions shall be disclosed in written agreement which may be either party on written notice not exceeding ninety days.
- (6) If the agreement contemplated in subsection (5) is cancelled, the balance of the benefit shall be paid in full to the dependent or nominee.

As one can gather from the death benefit provisions in the PFA 2019, the process of distributing death benefits involves three broad aspects: the development of a valid beneficiary nomination form; a decision about the manner of payment of benefits; and the payment of benefits within three months. Despite the commendable legal provisions in the PFA 2019 concerning death benefits, there are two potential difficulties that lie ahead for Lesotho in the implementation of these provisions. It is to those potential difficulties that I now turn my attention.

## 6 The two potential problems with the PFA 2019

Experience elsewhere in the region, such as in Botswana, South Africa, Malawi, and Eswatini, where modern pension legislation has been implemented for several years, shows us that two potential problems might arise in Lesotho in relation to its implementation of the above legal framework. The first problem is the possible contradiction between section 32 and section 35(1) of the PFA 2019. The second problem is that the PFA 2019 does not define a dependant. This section examines these problems in the context of the experience of a few SADC countries.

### 6.1 Is a beneficiary nomination form binding in Lesotho?

The first likely problem to arise from the death benefits provisions in the PFA 2019 is the apparent contradiction between section 32 and section 35(1) of the PFA 2019. The contradiction is apparent from the following explanation. Section 32 of the PFA 2019 provides that benefits payable by a fund, which include death benefits, shall not form part of the assets of the member's estate. At a practical level, this means death benefits cannot be disposed of by a pension fund member through their last will and testament or succession laws, because they do not form part of the assets in their estate.<sup>75</sup> In short, a member is precluded from instructing

<sup>74</sup> Mhango, Dyani-Mhango and Ndumo (2022) 205.

<sup>75</sup> See *Kaplan 2 supra*; *Bushula v Satawu National Provident Fund* [2009] 2 BPLR 161 (PFA).

the board of a pension fund, through their last will and testament, to distribute their death benefits upon death.<sup>76</sup>

As mentioned earlier, section 32 of the PFA 2019 broadly excludes from the estate any benefit payable by a pension fund. Like her neighbours, Lesotho adopted a social security policy to exclude pension benefits from the estate to advance social protection objectives. This is a common policy that has been widely implemented across the SADC member states. In South Africa, where the policy has been incorporated into section 37C of the Pension Funds Act, the High Court in *Mashazi v African Products Retirement Benefit Provident Fund* explained that the policy:

was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37(c)(i) specifically excludes the benefits from the assets in the estate of a member. Section 37(c) enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.<sup>77</sup>

The above sentiments in *Mashazi* were fully endorsed in *Public Service Pension Fund v Mayisela*, a judgment of the Supreme Court in Eswatini, which held that “these remarks are also equally applicable in Swaziland.”<sup>78</sup>

In Lesotho, the Court of Appeal has yet to deal with a pension death benefit case under the PFA 2019. What we do know about the courts’ attitude towards private pensions is reflected in *Thahane v Specified Offices Defined Contribution Pension Fund*.<sup>79</sup> This case concerned pension benefits under the Specified Offices Defined Contribution Pension Fund Act. The Court of Appeal described the Specified Offices Defined Contribution Pension Fund Act in constitutional terms by referring to it as “a noble legislative intervention to practicalize the principles of state policy in section 30(a)(i) of the Constitution of providing pension or retirement to all workers.”<sup>80</sup> In addition, the court also described the

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76 The Master of the High Court is also stripped of his authority over pension death benefits. See s 38 of the Children’s Welfare and Protection Act 7 of 2011.

77 *Mashazi v African Products Retirement Benefit Provident Fund supra* 3706; *The Municipal Workers Retirement Fund v Mabula supra* para 7 (affirming the position in *Mashazi v African Products Retirement Benefit Provident Fund*); *CG v Momentum Retirement Annuity Fund* [2022] ZAWCHC 231 (affirming the social purposes served by s 37C of the Pension Funds Act). See also Olivier “Death and Survivors’ Benefits” in Olivier (ed) *Introduction to Social Security* (2004) 394–397 (discussing death benefits in the Pension Funds Act).

78 *Public Service Pension Fund v Mayisela NO supra* para 14.

79 *Thahane v Specified Offices Defined Contribution Pension Fund* (C of A (CIV) 4/2016) [2017] LSCA 10.

80 *Thahane v Specified Offices Defined Contribution Pension Fund supra* par 29.

Specified Offices Defined Contribution Pension Fund Act in treaty terms, as constituting “the implementation of Lesotho’s treaty obligations under Article 18 of the 1981 African Charter on Human and Peoples’ Rights to make special measures to assist the family and protect the aged and disabled”.<sup>81</sup>

The objectives of the PFA 2019 are no different from those in the Specified Offices Defined Contribution Pension Fund Act in terms of the social security and constitutional objectives contemplated by the legislature. This can be demonstrated in at least two ways. Firstly, in terms of the statement of objects and reasons for the PFA 2019, one of the two main aims of PFA 2019 is “to protect the interests of people who make contributions into a pension fund from which they intend to draw money when they reach retirement age”. This objective falls squarely within the intention of section 30(a)(i) of the Constitution of Lesotho of providing pension benefits to all workers. Secondly, the PFA 2019, at least in relation to its death benefits provisions discussed in this article, also constitutes the implementation of Lesotho’s treaty obligations under article 5 of the Treaty of the Southern African Development Community to guarantee the right to social security in terms of the Code on Social Security, the Charter of Fundamental Social Rights in SADC, and under the African Charter on Human and Peoples’ Rights to ensure the adoption of special measures to assist the family and to protect the aged and the disabled.<sup>82</sup>

One of the questions to explore in Lesotho is what persuaded Parliament to adopt section 32 of the PFA 2019. I submit that Parliament was mindful of the fact that if death benefits were to fall within the assets of the member’s estate, they may be subjected to the lengthy and slow processes associated with the administration of deceased estates, where even some non-traditional dependants are excluded from receiving death benefits, thus affecting the social security goals of the country and the region.<sup>83</sup> The difference in approach is that Lesotho opted to incorporate this limitation in one provision (section 32 of the PFA 2019),

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81 *Thahane v Specified Offices Defined Contribution Pension Fund supra* par 29.

82 See the Code on Social Security in the SADC; Art 18(4) of the African Charter on Human and Peoples’ Rights. See also, *Mahlangu and Another v Minister of Labour and Others* 2021 (2) SA 54 (CC) para 38 (where citing article 10 of the Charter of Fundamental Social Rights in SADC, the court confirms that the Southern African Development Community requires states parties to recognise the provision of social security as a human right).

83 Art 9 of the Code on Social Security in the SADC provides that:

- 9.1 Member States should ensure that social insurance schemes provide protection against the contingency of death.
- 9.2 The benefits payable in the event of death of a breadwinner should include a death grant, to assist with funeral costs and – subject to qualifying conditions – survivors’ benefits, which should be in the form of periodical payments, aimed at the upkeep of survivors.
- 9.3 Member States should ensure that legal dependants and, where justified, factual dependants, qualify as survivors.

unlike South Africa and Botswana, which have separate limitation provisions.<sup>84</sup>

Whilst section 32 sounds controversial, it is not unique to Lesotho. The pension legislation in Botswana, Eswatini, Malawi, and South Africa includes the same protections and limitations as section 32 of the PFA 2019. Besides, section 33 of the Public Officers' Defined Contribution Pension Fund Act in Lesotho also restricts the application of the Estates Proclamation and the Insolvency Proclamation in relation to public officers.<sup>85</sup>

The problem with section 32 of the PFA 2019 is that it may contradict the cardinal principle in section 35(1) that the board must distribute death benefits in accordance with the beneficiary nomination form completed by the member, subject to the inheritance laws of Lesotho and other applicable laws. This might be contradictory because if benefits under section 32 do not form part of the assets of the deceased's estate, the board should not be preoccupied with inheritance laws when paying benefits. As we have seen in *Kaplan 1*, *Kaplan 2*, and other cases, when section 32 of the PFA 2019 declared that benefits are not part of the assets of the member's estate, it meant that the inheritance laws were excluded from the application. This contradiction and uncertainty may cause problems for administrators of pension funds and increase the number of disputes between executors of estates and beneficiaries named in a beneficiary nomination form. The net effect is that this may hinder compliance with the prescribed three-month period of payment and frustrate the policy goals set by the legislation.

The question that arises is whether this problem necessitates an amendment to the PFA 2019. In my view, this is not necessary because there is a possible non-legislative remedy for this problem. The remedy is to interpret section 35(1) as creating a two-pronged approach to the payment of death benefits. The first approach is that pension funds are required to pay death benefits as stipulated in the beneficiary nomination form if the nomination is validly made in terms of the PFA 2019 and the rules of the fund. This approach is endorsed by the wording

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84 *Foit v First Rand Bank* [2007] 1 BPLR 88 (T) (where a court ruled that pension benefits that were paid into the member's bank account were no longer considered pension funds once they left the pension fund, and, as a result, were no longer protected by the pension legislation. After being paid by the fund, the benefits became part of the joint estate and could be attached by the creditors of the member while sitting in his personal bank account); *Makume v Cape Joint Retirement Fund supra* par 42–53 (rejecting the argument that death benefits form part of the joint estate).

85 S 33 of the Public Officers' Defined Contribution Pension Fund Act provides that "no benefit or right to a benefit, due and payable, in terms of this Act, to a member, beneficiary or deferred pensioner or as a result of death of that member, shall be deemed to be property, for the purposes of the Insolvency Proclamation 1957 and Estates Proclamation 1935."



in the first part of section 35(1) read together with sections 34<sup>86</sup> and 32 of the PFA 2019. Under this approach, inheritance laws or other applicable laws will not be applied. The beneficiary nomination form will dictate the outcome.

The second approach is that, in the absence of a validly created beneficiary nomination form, the payment of death benefits must be carried out in accordance with the inheritance laws of the country or any other applicable laws, including the common law.<sup>87</sup> In other words, the second approach must be viewed as a default position to cater to those rare instances where a member dies without having made a valid beneficiary nomination. These instances are rare because the scheme in section 34(1) of the PFA 2019 contemplates (by imposing a responsibility on the fund) that there should always be a beneficiary nomination form on record.

The interpretation offered above supports the proposition that Parliament was deliberate in enacting sections 32 and 35(1) of the PFA 2019. Parliament understood that not all members of pension funds will submit beneficiary nominations. There will be instances where there is no beneficiary nomination and, if the law is silent about how to deal with benefits under those circumstances, the uncertainty created could undermine social security imperatives. To address this risk of uncertainty that could arise due to the absence of a beneficiary nomination, Parliament made a deliberate policy choice to close the gap by prescribing the use of inheritance laws and other applicable laws.

A similar legislative arrangement was adopted in Malawi in 2023, where section 97(1) of the Pension Act requires the trustees to pay death benefits in line with a valid beneficiary nomination.<sup>88</sup> If a beneficiary nomination is not valid or is revoked by the member and not replaced, the Pension Act gives the board the discretion to pay benefits as it deems equitable.<sup>89</sup> The only difference between Lesotho and Malawi is that instead of giving trustees full discretion to decide based on equity in those rare instances where no beneficiary nomination is in place, the PFA 2019 directs that inheritance laws or other applicable laws must be

86 S 34 provides as follows:

“(1) A fund shall—  
 require a member to fill out a death benefit nomination form detailing the nominated beneficiaries in the event of the death of the member; and  
 on an annual basis, require the members to update the death benefit nomination form.  
 (2) Where a member fails to update the death benefit nomination form as required in subsection (1)(b), the most recent benefit nomination form will be used in the event of the death of a member.”

87 See, *Makume v Cape Joint Retirement Fund supra* par 46–50.

88 Act 6 of 2023.

89 See s 97(2) of Act 6 of 2023. The latter Act has repealed the Pension Act 6 of 2011. For a discussion of the provisions in the repealed Act which have been saved see Dyani and Mhango 2012 *CILSA* 19, 28. In Botswana, a similar statutory design is provided for under s 50 of Act 38 of 2022. For a discussion of the provisions in the repealed Retirement Funds Act 27 of 2014, which have been saved, see Mhango 2012 *Statute Law Review*.

employed by the board to distribute death benefits. To put it differently, in the absence of a beneficiary nomination, the PFA 2019, unlike the Pension Act in Malawi, does not grant the board of the fund discretion to distribute death benefits based on what it deems to be fair. If one accepts the above interpretative approach, the first problem identified in this article becomes less of a concern. In the alternative, the judiciary will need to clarify the matter through adjudication. Parliament, through regulations, may also consider clarifying the role of inheritance laws and other applicable laws in the distribution of death benefits under the PFA 2019.

## 6.2 Defining a dependant

The second possible problem in relation to the distribution of death benefits is that the PFA 2019 does not include a definition of a dependant. Section 35 of the PFA 2019 is replete with references to the term “dependant” in relation to the payment of benefits, yet the term is not defined anywhere in the legislation. This is a problem because central to the implementation of the death benefit provisions is the need for a uniform understanding of the term. It should be clear to all stakeholders who qualify as a dependant. It is not a good policy to leave this to be defined in the rules of the individual pension funds. Instead, it will be helpful for Parliament to address this in the PFA 2019 or in its regulations. Otherwise, this could take the Kingdom back to the old dispensation where pension funds adopted distinct definitions of a dependant or engaged in legal borrowing.<sup>90</sup>

Besides, defining a dependant is an integral part of the social security policy contained in sections 34 and 35 of the PFA 2019 because it entrenches benefit entitlement. The pension legislation in South Africa, Botswana, Eswatini, and Malawi contains broad definitions of dependant as part of their statutory scheme. What is more, even the much criticised and outdated Superannuation Regulation had a definition of a dependant. This is a clear demonstration of how important it is to define who is a dependant in the pension legislation.

Even though the PFA 2019 does not define a dependant as a mechanism for benefit entitlement, in the Public Officers’ Defined Contribution Pension Fund Act, Parliament incorporated a broad definition of a dependant adopted from South Africa, which is the basis for benefit entitlement and limitation.<sup>91</sup> This definition reads as follows:

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90 The concept of legal borrowing has been described as the process of importing legal doctrines or rationales from other legal sources or domains in order to persuade someone to adopt a certain reading of a constitution. See Tebe and Tsai “Constitutional Borrowing” 2009 108(4) *Michigan Law Review* 463.

91 For a discussion of this definition and its implications in Lesotho see Dyani-Mhango 2012 *CILSA* 40–41.

“dependant” means –

- (a) a person in respect of whom a member, pensioner or deferred pensioner is legally liable for maintenance;
- (b) a person in respect of whom the member, pensioner or deferred pensioner is not legally liable for maintenance, if such person –
  - (i) was, at the time of death of the member, pensioner or deferred pensioner, in fact dependant upon such a member, pensioner or deferred pensioner for maintenance;
  - (ii) is the spouse of a member, pensioner or deferred pensioner;

This definition only applies to public officers in Lesotho. It gives dependants of public officers legal entitlement to death benefits, unlike dependants of members of pension funds operating in the private sector, whose entitlement to benefits is primarily predicated on the wishes contained in the beneficiary nomination, or inheritance law in the alternative. In interpreting an identical definition in Eswatini, the Supreme Court in *Mayisela* found that a minor child of a girlfriend, who was cohabiting with the deceased member, was a dependant in terms of subparagraph (b) of the definition of a dependant in the Retirement Funds Act<sup>92</sup> and was entitled to death benefits. Under the common-law approach, which is what would apply in the absence of a statutory definition, this minor child would not have qualified as a dependant and neither would many other individuals. The result is that there is no equal protection of the law between Basotho dependants whose rights are governed by the PFA 2019 and those whose rights are governed by the Public Officers’ Defined Contribution Pension Fund Act.

A potential constitutional problem will arise in Lesotho because the PFA 2019 and the Public Officers’ Defined Contribution Act do not provide the same protections or entitlements to Basotho and their beneficiaries. Section 19 of the Constitution of Lesotho could be vitiated if the provisions of the Public Officers’ Defined Contribution Pension Fund Act and the PFA 2019 do not provide equal protection and the benefit of the law to Basotho, because the Constitution guarantees equality and equal protection of the law for those Basotho whose pension funds are governed by the Public Officers’ Defined Contribution Pension Fund Act versus those whose pension funds are governed by the PFA 2019. In the current circumstances, one group of Basotho, public

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92 See s 2 of the Retirement Funds Act, which defines a dependant as follows: “‘dependant’ means in relation to a member:
 

- (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 management board dependent on the member for maintenance;
  - (ii) is the spouse of the member and shall include a spouse as a result of any customary or religious union;
  - (iii) is a child of the member and shall include a posthumous child, an adopted child and an illegitimate child;
  - (iv) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

officers, and their beneficiaries, have greater protection and certainty under the law than those who are employed in the private sector.

In South Africa, the judiciary and Parliament have considered several disputes involving the equal protection and benefit of the law for private and public pension fund members.<sup>93</sup> One of these disputes sought to address an anomaly arising from the failure to afford certain benefits to members of special pension funds governed by the Post Office Act<sup>94</sup> and the Government Employees Pension Law.<sup>95</sup> Similar benefits and advantages were afforded to similarly situated members of funds governed by the Pension Funds Act. The problem was that divorced spouses of members of the funds regulated by the Pension Funds Act could claim their share of their former spouses' pension benefits at the time of divorce. However, divorcees of members of the Post Office Retirement Fund and the Government Employees Pension Fund could not claim the same benefits to which they were entitled at the time of divorce. In both disputes, the Constitutional Court ordered Parliament to remedy the anomaly within several months. Failure to comply would automatically result in the court reading words into the statute to ensure constitutional compliance. In all these disputes, the courts found no proper justification for treating pension fund members differently and declared the laws being challenged unconstitutional. I submit that these disputes from South Africa are soon likely to visit Lesotho and attract similar consequences.

It could be argued that the problem in Lesotho is not a matter of mere differentiation that was found constitutionally permissible by the Court of Appeal in *Thahane*. In that case, the court found no constitutional breach when section 6(2) of the Specified Offices Defined Contribution Pension Fund Act drew a distinction between the benefit entitlements of a Member of Parliament who retires and one who resigns. A member who retires was entitled to a withdrawal benefit of no more than 25% of the fund credit in cash and could take the balance of 75% in the form of a monthly income. In contrast, a Member of Parliament who resigned from office was entitled to receive the full amount of his fund credit in cash.<sup>96</sup>

Members of Parliament who retired challenged this differentiation on constitutional grounds. One of the main arguments against the Specified Offices Defined Contribution Pension Fund Act was that section 6(2) (as amended) amounted to "arbitrary differentiation", contrary to section

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93 See *Wiese v Government Employees Pension Fund* [2012] ZACC 5; 2012 (6) BCLR 599 (CC) (Parliament was ordered to amend the laws within 18 months); *Ngewu v Post Office Retirement Fund* [2013] ZACC 4; 2013 (4) BCLR 421 (CC).

94 44 of 1958.

95 Act 21 of 1996.

96 But see s 31 of the Specified Offices Defined Contribution Pension Fund (Amendment) Act 17 of 2022, which gives a member the option to have access to 50% lump-sum of their benefits upon retirement, as opposed to the previous 25% lump-sum benefit.

19(3) of the Constitution because it treats members who retire from office differently from members who resign from office.

The court dismissed the argument. It reasoned that “section 19 does not require all persons to be treated equally at all times. It only prohibits differentiation when it is not rationally related to a legitimate government purpose.”<sup>97</sup> The court found that there was a legitimate government purpose in the impugned provisions in this case, namely to create a social security system for the holders of the offices specified in the Specified Offices Contribution Pension Fund Act, to provide them with security of income, particularly in old age, and to prevent members from being left destitute at the end of their working lives.<sup>98</sup>

In relation to the omission of a definition of a dependant in the PFA 2019 and given Lesotho’s social security obligations in the Constitution and the treaties ratified by it, I submit that there is no legitimate government purpose to be served in restricting the application of a broad definition of a dependant to public sector pension funds and precluding the same from applying to members of private sector pension funds. There is a much deeper and potentially widespread constitutional problem presented by the omission of a definition of a dependant in the PFA 2019 that cannot be sanctioned by the *Thahane* judgment. This problem highlights one of the disadvantages of having two separate laws that govern pension funds in a country.<sup>99</sup>

What do I make of Parliament’s failure to define a dependant in the PFA 2019? I submit that since Parliament was aware of the statutory scheme prevailing in the Public Officers’ Defined Contribution Pension Fund Act and the Specified Offices Defined Contribution Pension Fund Act, as well as the legislative experience in the neighbouring countries, its failure to define a dependant in the PFA 2019 could be a deliberate signal of an intention for pension funds to use the common-law definition of a dependant. Thus, in the absence of a definition of a dependant in the

97 *Thahane v Specified Offices Defined Contribution Pension Fund supra* para 27, citing *Lesotho National Insurance Company Ltd v Nkuebe* (2000–2004) par 17–18, where the court (per Melunsky JA) held that “the difference in treatment becomes unfair, however, when there is no rational connection between the differentiation and the purpose for which it appears in legislation.”

98 *Thahane v Specified Offices Defined Contribution Pension Fund supra* par 29.

99 A recent case that highlighted the kind of problems that Lesotho could experience, based on the parallel pension regime, is *Government of Eswatini v Lucky Mhlanga* [2020] SZSC 3. For a comparative discussion of the latter case with Lesotho, see Mhango and Mosito “The constitutional implications of pension deductions under the Pension Funds Act of Lesotho: A comparative analysis” 2023 27(1) *Law, Democracy and Development* 183. See also Mhango and Dyani-Mhango 2016 *African Journal* 199–214; Mhango “Reflections on the Right to Equality and Access to Courts for Government Employees in South Africa: Time to Amend the Government Employees Pension Law” 2019 19(1) *African Human Rights Law Journal* 337–360 (discussing the effects of having a parallel pension regime in the South African context).

PFA 2019, it is submitted that pension funds in Lesotho should rely on the common-law definition until such time Parliament decides to legislate the area.<sup>100</sup>

## 7 Conclusion

There is no doubt that pension reforms have arrived in Lesotho. These reforms should be welcomed. However, potential problems lie ahead. A considerable amount of time should be spent addressing these problems before they materialise. It is suggested that a definition of a dependant should be included in the legislative framework to level the playing field between pension funds governed by the PFA 2019 and those governed by special legislation, thereby preventing the possible constitutional problems identified in this article.

Two relevant policy developments involving the definition of a dependant are being debated in neighbouring countries. In Malawi, the recently enacted Pension Act<sup>101</sup> has expanded the definition of a dependant to include extended family members.<sup>102</sup> According to these recent reforms, a beneficiary, whether a dependant or a close relation, must have been financially dependent on the member at the time of death. These reforms have removed the distinction in the previous Pension Act<sup>103</sup> between a dependant and a close relation, by focusing the board of trustees' analysis on financial dependency. These reforms are commendable.

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100 In the United Kingdom, pension funds pay pensions to a member's spouse or civil partner and/or dependants. According to Derbyshire and Hardy, dependants generally refer to children and adults dependent upon the member by reason of disability or for financial reasons. See Derbyshire and Hardy *Pensions and Employment Law: Issues at the Interface* (2008) 40 (noting that pension death benefits are generally paid to spouses and children of members of pension schemes in the United Kingdom).

101 6 of 2023.

102 The Pension Act 6 of 2023 has amended the definition of a dependant as follows:

“‘dependant’ in relation to a member, means a close relation who was financially dependent on the member at the time of the member’s death.”

In addition, Act 6 of 2023 has amended the definition of a close relations to provide that “close relation” means

(a) spouse of the member;

(b) child of the member or a child of the spouse of the member;

(c) brother, sister, parent, aunt, uncle, nephew, niece, grandparent, or grandchild of the member; and

(d) the spouse of any of those mentioned in (b) above.”

103 6 of 2011.

On the other hand, in Eswatini, the Retirement Funds Bill proposes to narrow the definition of a dependant by ensuring that only the spouse and children of a deceased member qualify for death benefits.<sup>104</sup> It is submitted that Lesotho should enter this policy debate and take a position that addresses its local circumstances. The question of section 32 of the PFA 2019 and its relationship with section 35 of the PFA 2019 must also be addressed. I hope that the interpretative recommendations made in this article offer possible solutions to resolve the problems discussed above.

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104 The proposed definition of a dependant in the Retirement Funds Bill reads as follows:

“‘dependant’ means in relation to a member a person in respect of whom the member is legally liable for maintenance and includes:  
a spouse as a result of a marriage in terms of the Marriage Act 1964, the common law or any customary or religious union;  
a child of the member, including a posthumous child; and  
an adopted child.”