Does the board of a pension fund in South Africa perform a public function or exercise public power when determining death claims under section 37C of the Pension Funds Act?

Ntombizozuko Dyani-Mhango
LL.B. LL.M (UWC), SJD (Wisconsin)
Professor, Department of Public Law, University of Pretoria

SUMMARY

This article examines whether a board of a pension fund performs a public function or exercises public power when it determines death claims under section 37C of the Pension Funds Act (PFA). The article considers recent jurisprudence around this question by looking at cases that deal with the application of administrative law to private companies generally and cases dealing with pension fund and death benefits specifically. The article argues that since pension funds perform a public function when deciding on death claims under section 37C of the PFA, administrative law principles apply to control how those decisions are made.

1Introduction

This article explores the question whether a board of a pension fund performs a public function or exercises public power when it determines death claims under section 37C of the Pension Funds Act (PFA). The article argues that since pension funds perform a public function when deciding on death claims under section 37C of the PFA, administrative law principles apply to control how those decisions are made. In this regard, the articles reads as follows. Firstly, the effect of the constitutional reforms of the 1990's on the pension funds industry in South Africa is scrutinised. It is noted that the application of the bill of rights to pension funds means, among other things, that administrative law applies in the administration of pension funds. Secondly, the article reflects on courts' judgments on whether private institutions perform a public or exercise a public function. Thereafter, the question is posed whether pension funds in South Africa exercise public power. It is argued that pension funds do exercise public power when they act pursuant to authority or discretion if this is expressly provided for in an Act of Parliament. Next, the legality of decisions by a board of a pension fund that is taken based on a rigid policy is assessed. This is followed by the conclusion.

How to cite: Dyani-Mhango 'Does the board of a pension fund in South Africa perform a public function or exercise public power when determining death claims under section 37C of the Pension Funds Act?' 2021 *De Jure Law Journal* 549-564
http://dx.doi.org/10.17159/2225-7160/2021/v54a32

2 Constitutional reforms and its effects on the administration of pension funds

In my conversations on constitutional law with renowned constitutional scholar, Professor Okpaluba, Okpaluba has consistently maintained that no branch of law was untouched by the constitutional reforms of the 1990s.[1] Indeed, these constitutional reforms also impacted on the way the pension funds perform their functions.[2] Murphy, the first Pension Funds Adjudicator, has argued that:

> "The trend towards democratisation within South African society … has impacted directly on pension funds … [I]n 1994 the South African legal system was fundamentally altered with the introduction of a horizontal bill of rights applicable in the private sphere. In an environment marked by increased concentration of economic power in private organisations, the new legal order, consistent with international norms, considers it in the public interest to subject pension funds to human rights standards and the requirements of reasonableness and fairness."[3]

What Murphy alludes to is that unlike before the enactment of the Constitution of the Republic of South Africa, 1996 (the Constitution), pension funds are subjected to the bill of rights.[4] What is more, the bill of rights has horizontal application, meaning direct application on individuals.[5] This is triggered by section 8(2) of the Constitution, which provides that "[a] provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right." In his major work on retirement funds and death benefits, Kobus Hanekom correctly interprets the term juristic person in section 8(2) to encompass pension funds.[6]

One of the special effects of subjecting pension fund organisations to the bill of rights is that pension funds must comply with the right to administrative action under section 33 of the Constitution[7] given effect to in the Promotion of Administrative Justice Act 3 of 2000 (the PAJA).[8]

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1 See also, Okpaluba "The Constitutional Principle of Accountability: A Study of Contemporary South African Case Law" 2018 *SAPL* 1, 8 (arguing that "[t]he guiding principle of judicial review since the coming of the democratic dispensation is premised on the principle that '[t]he exercise of all public power must comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law.'")

2 See, Author; and Murphy 2001 *JPM* "Alternative dispute resolution in the South African pension funds industry: an ombudsman or tribunal?" 28.

3 Murphy 30.

4 Murphy 30.

5 Hanekom *The Manual on Retirement Funds* 9.4.9. (Butterworths, LexisNexis 2020).

6 Hanekom 9.4.9. and 9.15.7.3.7.2.

7 S 33(1) of the Constitution provides that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair'.

8 See, s 33(3) which enjoins Parliament to enact legislation to give effect to the right to administrative action.

In this regard, PAJA defines an administrative action as 'any decision taken, or any failure to take a decision, by — (b) a natural or juristic person, other than an organ of state, *when exercising a public power or performing a public function in terms of an empowering provision*, which adversely affects the rights of any person and which has a direct, external legal effect'.[9] The Constitutional Court has established that in determining whether an entity or functionary performs a public function or exercises public power which falls under the control of the PAJA, the focus of any analysis of this sort must be on the function being performed and not the entity or functionary.[10] In the *SARFU* case, the court explained this legal proposition as follows:

> "In section 33 [of the Constitution] the adjective 'administrative' not 'executive' is used to qualify 'action'. This suggests that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."[11]

One commentator correctly observed "in South Africa … it's more accurate to regard administrative law as regulating the activities of bodies that exercise public power or perform public functions, irrespective of whether those bodies are public authorities in a strict sense."[12] It follows from this explanation that both private and public actors can perform public functions or exercise public power. It is in this regard that this article argues that from time to time pension funds, which are organised as private pension organisations under the PFA, will find themselves being regulated by the PAJA when one considers the public nature of their activities and functions. Even though not all activities of pension fund are regulated by the PAJA, the article anchors its main argument on the emerging jurisprudence that has established that decisions made by pension funds involving death benefits are controlled by the PAJA. In pursuit of that argument, it becomes important, in the right set of circumstances, to consider whether pension funds exercise public power or perform public functions. If it so, then it is argued that PAJA may apply in each situation. Before delving into this main argument, the article first investigates how courts in South Africa have resolved the general

9 See, s 1 of PAJA (emphasis added).

10 *President of the RSA v SA Rugby Football Union* 1999 10 BCLR 1059 (CC) para 141 (*SARFU*). See also, Mhango 2016 LDD "Does the South African Pension Funds Adjudicator perform an administrative or judicial function?" 20.

11 *SARFU* para 141, citing *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 12 BCLR 1458 (CC*); Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) paras 181, 230-235.

12 Hoexter *Administrative Law in South Africa* (Juta 2012) 2; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 1 SA 343 (CC); *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 3 All SA 72 (W); *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC).

question of whether administrative law applies to a private organisation in relation to certain activities or statutory functions entrusted to it. It is to this discussion that this article turns.

3 Reflecting on courts' pronouncement on whether private institutions perform a public function or exercise a public power

In *AAA Investments (Pty) Ltd* the Constitutional Court had to consider whether the Micro Finance Regulatory Council (the Council),[13] a private company that regulates micro lenders, through its rules, performs a public function. The Council is not established in terms of any legislation but performs its functions in terms of the Exemption Notice, a piece of national legislation. In a majority judgment, Justice Yacoob was convinced that the extent of control exercised by the Minister of Trade and Industry over the functioning of the Council as well as the criteria for registration of micro lenders under its rules, demonstrates that the functions of the Council are public rather than private.[14] In other words, Yacoob J found that the Minister controlled the Council and determined its functions almost exclusively.

Further, Yacoob J explained that the fundamental difference between a private company registered in terms of the Companies Act 71 of 2008 and the Council is that a private company is independent in determining its objectives, functions and how to fulfil them. The explanation by Yacoob J demonstrates that if a private company is not performing a public function, the PAJA will ordinarily not apply. Also, the PAJA will not apply when a private company determines its objective such as whether to acquire a majority or minority stake in a property development project.

However, Yacoob J found that although the Council's legal form is that of a private company, its functions as prescribed in the Exemption Notice are essentially regulatory in nature[15] and therefore the Council performs a public function.[16]

During his judgment, Justice Yacoob approved some of the pre-1994 constitutional authorities that had established the principle that private entities may exercise public power and may be subjected to judicial

13 Incorporated under s 21 of the Companies Act 71 of 2008 and authorised to operate under the Usury Act Exemption Notice 1999. The Council is recognised as the official regulator of all money lending transactions falling within the domain of the Usury Act Exemption Notice. All money lenders are required to register and comply with the rules of the Council.

14 *AAA Investments* (Pty) Ltd para 44.

15 *AAA Investments* (Pty) Ltd para 45

16 *AAA Investments* (Pty) Ltd para 43-44.

review.[17] One authority on point is *Dawnlaan*.[18] In that case, the court had to determine whether the decisions of the Johannesburg Stock Exchange (JSE) were controlled by the principle of judicial review. The question arose because the JSE is a private company and therefore ordinarily it is not subordinate to the principle of judicial review. The court found that the JSE exercises a public function. In arriving at this conclusion, the court highlighted the fact that the Stock Exchange Act 7 of 1947, under which the JSE is constituted, requires a stock exchange to be licensed only in the public interest;[19] confirm that its rules safeguard and advance the public interest;[20] and to list securities only if that was in the public interest.[21] Furthermore, the Court reasoned that:

> "Strictly speaking, a stock exchange is not a statutory body. However, unlike companies or commercial banks or building societies formed under their respective statutes, the decisions of the committee of a stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy. It is for that reason that the Act makes the public interest paramount. To regard the JSE as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act."[22]

Based on this reasoning, the court held that decisions of the JSE are subject to judicial review.[23] The Appellate Division, the predecessor of the Supreme Court of Appeal, in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd*[24] and the Constitutional Court in *AAA Investments* (Pty) Ltd [25] approved the judgment and reasoning in *Dawnlaan*.[26]

Correspondingly, pension funds are established as juristic persons in terms of the PFA through approval by the Financial Sector Conduct Authority (the FSCA)[27] of an application for registration of the fund and

17 *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (AD); *Dawnlaan Beleggings* (*Edms) Bpk v Johannesburg Stock Exchange* 1983 3 All SA 72 (W) (*Dawnlaan*).
18 *Dawnlaan* 89.
19 *Dawnlaan* 89.
20 *Dawnlaan* 89.
21 *Dawnlaan* 89.
22 *Dawnlaan 92.*
23 *Dawnlaan 92-93.*
24 *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (AD).
25 *AAA Investments* (Pty) Ltd para 31.
26 Furthermore, the Supreme Court of Appeal in *Calibre Clinical Consultants (Pty) Ltd* para 39, has endorsed English authorities that stand for the proposition that when considering whether the conduct of a private entity is subject to judicial review, courts must examine whether the conduct in question has features that might be said to be governmental in nature.
27 S 3 of the PFA reads: "The person appointed as executive officer in terms of section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), is the Registrar of Pension Funds and has the powers and duties provided for by or under this Act or any other law. (2) The person appointed as deputy

its rules.[28] And like the licensing of a stock exchange, the FSCA is enjoined to approve an application for registration of a pension fund if it is satisfied that the registration is desirable in the public interest.[29]

One could question whether it is defensible to liken the FSCA, Council and JSE in analysing whether pension funds exercise public power or perform a public function. A possible response to this question is that it is now settled law in South Africa that when considering whether a natural or juristic person exercises public power or performs a public function for which the provisions of the PAJA applies, regard must be directed to the functions being performed and not the functionary.[30] This is primarily because of the vertical and horizontal application of the bill

executive officer in terms of s 1 of the Financial Services Board Act 97 of 1990, is the Deputy Registrar of Pension Funds. (3) The Deputy Registrar of Pension Funds exercises the powers and duties of the Registrar of Pension Funds to the extent that such powers have been delegated to the deputy registrar under section 20 of the Financial Services Board Act, 1990, and to such extent that the deputy registrar has been authorised under section 20 of the Financial Services Board Act, 1990, to perform such duties." But see, the Financial Sector Regulation Act 2017, which has repealed the Financial Services Board Act in its entirety to create a new regulator known as the Financial Sector Conduct Authority in s 56 of that new Act.

28 See, ss 4 and 4B of the PFA.

29 S 4 of the PFA provides: "Every pension fund must, prior to commencing any pension fund business- (a) apply to the registrar for registration under this Act; and (b) be provisionally or finally registered under this Act… (3) The registrar must, if the fund has complied with the prescribed requirements and the registrar is satisfied that *the registration of the fund is desirable in the public interest*, register the fund provisionally and forward to the applicant a certificate of provisional registration, which provisional registration takes effect on the date determined by the fund or, if no such date has been determined by the fund, on the date of registration by the registrar." See also s 13B of the PFA (providing that If the registrar deems it desirable in the public interest the registrar may on such conditions, to such extent and in such manner as it is deemed fit, exempt any person or category of persons from the provisions of subsections (1) and (3), and may at any time revoke or amend any such exemption in a similar manner." S 33A of the PFA provides that "the registrar may, in order to ensure compliance with or to prevent a contravention of this Act, issue a directive to a pension fund, an administrator or any other person in which practices or actions that are required or prohibited are set out….the registrar must, where a directive is issued to ensure the protection of the members and the public in general, publish the directive on the official web site and any other media that the registrar deems appropriate, in order to ensure that the public may easily and reliably access the directive." See, *eJoburg Retirement Fund v Registrar of Pension Funds* (FSB Appeal Board 2002) unreported; Mhango and Thejane 2012 *AJLS* 45. See also, *Pepcor Retirement Fund v Financial Services Board* 2003 3 All SA 21 (SCA) para 14, where the Supreme Court of Appeal held that: "the general public interest requires that pension funds be operated fairly, properly and successfully and that the pension fund industry be regulated to achieve these objects. That is the whole purpose which underlies the [Pension Funds] Act".

30 *Sidumo v Rustenburg Platinum Mines Ltd* paras 234-235 (noting that "this Court recognised that functionaries may perform functions that are normally performed by other bodies such as legislative and adjudicative functions. In determining whether a function is administrative action or

of rights but also the broad definition of administrative action in the PAJA. The reference to the FSCA, JSE and Council is not intended to equate their status to the institution of a pension fund. Rather, it is consistent with the proposition in *SARFU*, which teaches us to direct our analysis to the actual functions being performed to determine whether the PAJA applies, and, if so, the appropriate pathway to judicial review.[31] To do otherwise and focus on who the functionary is goes against the grain of established jurisprudential trends that enjoin us to concentrate on the functions and not the functionary.

4 Do pension funds exercise public power or perform public function when exercising their powers under section 37C of the PFA?

The principles of administrative law have developed to apply in circumstances involving the performance of a public function or the exercise of public power. The question that preoccupies this article is whether the latter proposition applies to pension funds. Specifically, it is examined whether boards of pension funds perform a public function or exercise public power as contemplated under the PAJA when they

not, *Fedsure* teaches us that in such a case we must pay attention to the process by which the function is performed and not on the functionary performing the function"); *SARFU* para 141 (reasoning that "[w]hat matters is not so much the functionary as the function. The question is whether the task itself is administrative or not."); and *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1998 (12) BCLR 1458 (CC) at para 27.

31 Hoexter Administrative Law 131; Hoexter *The transformation of South African administrative law since 1994 with particular reference to the Promotion of Administrative Justice Act 3 of 2000* (PhD dissertation 2010 Wits University) 195 (arguing that "this proliferation of pathways means that judicial review is effectively guaranteed in relation to exercises of both public and private power). Kohn and Corder "Judicial regulation of administrative action" in Murray and Kirkby (eds) *South Africa Constitutional Law* in *International Encyclopaedia of Laws*—Suppl. 108 (2014) 6.42- 6.43 (observing that "today, every exercise of public power is to some extent justiciable under the Constitution even if it falls short of the PAJA definition of administrative action. The definition nonetheless has as its touchstone the 'public' element of a power or function ... Administrative law principles apply whenever there is action involving the use of public power or the performance of public functions – even when exercised by private entities, which are explicitly included in the purview of the PAJA. The litmus test for reviewability in South African law is thus whether the power or function in question has a 'public nature'. Precisely what this entails is being incrementally determined by South African courts. It suffices to note that they have moved away from the narrow 'governmental control' test which emerged from Directory *Advertising Cost Cutters v Minister of Posts, Telecommunications and Broadcasting* 1996 (3) SA 800 (T) to a broader enquiry stated in *AAA Investments*… Once action is found to fall within this broad class, it will be subject to judicial review via one of five possible 'pathways' to relief which have emerged over the past twenty years").

dispose of death benefit claims pursuant to section 37C of the PFA. By way of explanation, if pension funds exercise public power or perform a public function, it follows that they are expected to comply with the strictures of administrative law such as reasons giving and consultation to mention just a few. To address these questions one has to begin by engaging the provisions of section 37C of the PFA.

Few South African cases have considered this question.[32] One of those cases is *San Giorgio*,[33] where the Adjudicator held that section 33 of the Constitution applies to decisions of pension funds. The holding was handed down before the promulgation of the PAJA. However, its reasoning continues to offer a useful basis for the proposition that pension funds exercise public power or perform a public function in relation to death benefits. In justifying his holding, the Adjudicator reasoned that pension funds are repositories of social power and are akin to administrative bodies in the governmental sense of things. He observed that through the process of statutory registration under the PFA, pension funds acquire some powers, rights, and privileges from the state in exchange for their performance of public services.[34] In his view, pension funds are an extension of the government administrator, hence subjecting them to the strictures of administrative law review.[35] Fundamentally, *San Giorgio* established a view that pension funds are subject to section 33 of the Constitution and PAJA because of the public nature of some of the functions they perform.[36] The performance of

32 *Titi v Funds at Work Umbrella Provident Fund* 2011 ZAECMHC 22.

33 *San Giorgio v Cape Town Municipal Pension Fund* [1999] 11 BPLR 286 (PFA).

34 *San Giorgio v Cape Town Municipal Pension Fund* 292. See also, *Aherne v Hortors Group Pension Fund* [2002] 1 BPLR 2920 (PFA) endorsing *San Giorgio* at para 19 (stating that "[i]n previous determinations, I have held that the boards of pension funds, as repositories of social power, are akin to administrative bodies. As such, a decision by a pension fund or the board of trustees which is unreasonable or procedurally unfair will either constitute an improper exercise of power, or maladministration as contemplated in the definition of a complaint in section 1 of the Pension Funds Act").

35 However, see, Jonathan Barret "The Application of the Constitutional Right to Just Administrative Action to Registered Pension Funds" *Pensions World* (March 2002), who has criticised the Adjudicator's reasoning as not persuasive enough. Barret notes that

> "the Adjudicator's approach to just administrative action introduced in the *San Giorgio* determination is inappropriate but cannot be considered perverse. Clearly, in importing this right, he sought a way "to promote the spirit, purport and objects of the Bill of Rights" in the way the complaints are adjudicated, as he is required to do by the Constitution. … Certainly, in the light of recent judicial decisions on the application of section 33 of the Constitution, it seems highly unlikely to me that a court would concur with the Adjudicator in this regard. Nevertheless, my basic concern in this regard lies not in opposing the application of the principles of just administrative action to pension funds, indeed, I believe that this would be greatly beneficial, rather, I am concerned that they have been imported without basis."

36 See, *Van Vuuren v Central Retirement Annuity Fund and another* [2000] 6 BPLR 661 (PFA) at 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").

these functions constitutes an exercise of public power such that they fall within the jurisdiction of section 33.

A case, which was decided after the enactment of PAJA is *Titi v Funds at Work Umbrella Provident Fund*. In this case, the plaintiff challenged the validity of the decision by the Funds at Work Umbrella Provident Fund (Provident Fund) to allocate the death benefits available in that case contrary to the written wishes of plaintiff's deceased brother. The plaintiff's brother, Mr Nceba Titi, was a member of the Provident Fund. In 2009, the deceased completed a beneficiary nomination in which he nominated his two children and the plaintiff as beneficiaries of his pension benefits that became available upon his death. While the nomination did not stipulate the proportions in which the funds were to be paid to the beneficiaries, the High Court observed that the nomination contained an important qualification that said that:

> "Section 37C of the PFA governs the distribution and payment of benefits on a member's death. You may nominate any person to receive any part of the benefit payable; however, the board of trustees have a duty in terms of the Act to apportion benefits equitably between your beneficiary at their discretion. Your nomination will serve to assist the board of trustees in making these decisions."[37]

The deceased passed away on 13 September 2009, and during March 2010, the board of the Provident Fund, without notice to the plaintiff, allocated an amount of R61,589.50 representing the entire death benefit that became available for distribution as follows: Yanga Qina (minor son) 39 percent: R24 020.02; and Esinako Qina (minor daughter) 61 percent: R37 569. 78. The board resolved not to allocate any benefits to the plaintiff because "there is no evidence that she was dependent on the deceased and the benefit is too small to make a reasonable allocation."[38]

In making this decision, the board acted in terms of section 37C of the PFA. This section provides, in pertinent part, that:

> "37C Disposition of pension benefits upon death of member
>
> 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… *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 board,* to one of such dependants or in proportions to some of or all such dependants.[39] (Emphasis added)."

37 *Titi v Funds at Work Umbrella Provident Fund* para 4.
38 *Titi v Funds at Work Umbrella Provident Fund* para 6.
39 There are two cardinal principles about the scope of s 37C. The first principle is that a beneficiary nomination is not binding on the board because the board has discretion. A nomination merely serves as a guide.

The plaintiff's main contention was that the decision of the board was reviewable under the PAJA because it was taken unilaterally and without giving her notice or affording her a hearing.[40] In essence, the plaintiff alleged that the board had breached the *audi alteram partem* rule.[41] Furthermore, the plaintiff submitted that the decision by the board fell within the definition of administrative action in PAJA and therefore governed under it. To substantiate the allegation, the plaintiff argued that when deciding whether or not to override the wishes of a deceased member contained in a beneficiary nomination, the board derives its powers solely from the provisions of section 37C(1) of the PFA. Therefore, being an entity established in terms of the provisions of the PFA, the pension fund exercises a public function when it distributes death benefits of members.[42]

The court agreed the plaintiff's argument. It reasoned that a pension fund exercises public power when it overrides the express wishes of its members as contained in a beneficiary nomination. It remarked that any decision taken in terms of section 37C of the PFA could negatively impact members of the public and would, therefore, be subject to judicial scrutiny under the PAJA.[43] Based on this reasoning, the court held that

39 See *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) reasoning that "[s]ection 37C [of the PFA] 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." See, too, *Kirsten v Allan Gray Retirement Annuity Fund* 2017 3 BPLR 566 (PFA) in which it was held that the duty to make equitable distribution resting with board of fund. Also see, *Tsele v Bidvest South Africa Retirement Fund* 2016 1 BPLR 146 (PFA); *Van Zelser v Sanlam Marketers Retirement Fund* 2003 2 BPLR 4420 (PFA) in which it was decided that s 37C of the PFA is aimed at protecting dependency over wishes of deceased. In *Matlakane v Royal Paraffin Provident Fund* 2003 6 BPLR 4785 (PFA) it was held that a beneficiary nomination form does not in law entitle the nominee to *ipso facto* receive death benefit. The second principle is that since s 37C of the PFA does not prescribe to the board what factors should or may be considered in order to make an equitable payment of benefits to the identified dependants, the board must consider the following factors: (1) the age of dependants, (2) the relationship with the deceased, (3) the extent of dependency, (4) the wishes of the deceased placed either in the nomination and/or his last will, and (5) financial affairs of the dependants including their future earning capacity potential. See *Sithole v ICS Provident Fund* 2000 4 BPLR 430 (PFA).

40 *Titi v Funds at Work Umbrella Provident Fund* para 8.

41 The principle of *audi alteram partem* or hear the other side, is an aspect of procedural fairness. It is preoccupied with affording people an opportunity to participate in the decisions that will affect their lives and a chance to influence those decisions. For a discussion of this principle and its development see, Hoexter *Administrative Law* 361- 420.

42 *Titi v Funds at Work Umbrella Provident Fund* para 11.

43 *Titi v Funds at Work Umbrella Provident Fund* para 14. It is a well-established principle that decisions taken by private entities in the public interest; with an impact on the public; woven into a system of governmental control or which takes the place of government or involve the privatisation of the

the plaintiff was entitled to fair administrative action pursuant to section 3(2)(b) of the PAJA, particularly the right to "adequate notice of the nature and purpose of the proposed administrative action; and a reasonable opportunity to make representations."[44] There is another important component of the judgment in *Titi v Funds at Work Umbrella Provident Fund* and that is: it endorsed the frequently cited reasoning by the High Court in *Mashazi v African Products Retirement Benefit Provident Fund* about the purpose of section 37C: The court said that

> "[s]ection 37C of the [PFA] 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 37C(1) specifically excludes the benefits from the assets in the estate of a member."[45]

In addition, in *Kim v Agri Staff Pension Fund and Others* the high court accepted submissions by both parties that a decision of a pension fund taken in terms of section 37C of the PFA constitutes administrative action.[46] Nonetheless, the court dismissed the review application because it did not comply with the duty imposed by the PAJA to exhaust internal remedies. Part of the court's reasoning was that the "Fund is

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business of government are subject to administrative law scrutiny. See, *Calibre Clinical Consultants (Pty) Ltd and Another v National Bargaining Council for the Road Freight Industry and Another* [2010] ZASCA 94; 2010 (5) SA 457 (SCA); [2010] 4 All SA 561 (SCA) para 39 (where after perusing English authorities the court reasoned and held that "while curial pronouncements from other jurisdictions are not necessarily transferrable to this country they can nonetheless be instructive. I do not find it surprising that courts both abroad and in this country – including the Constitutional Court in *AAA Investments* [*(Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC)] – have almost always sought out features that are governmental in kind when interrogating whether conduct is subject to public law review. Powers or functions that are public in nature, in the ordinary meaning of the word, contemplates that they pertain to the people as a whole or that they are exercised or performed on behalf of the community as a whole …, which is pre-eminently the terrain of government"); *Regina v Chief Rabbi of the United Hebrew Congregations of Great Britain and the Commonwealth, Ex parte Wachmann* [1992] 1 WLR 1036 (QB) at 1041C-E (held that where non-governmental bodies have hitherto been held reviewable, they have generally been operating as an integral part of a regulatory system which, although itself non-statutory, is nevertheless supported by statutory powers and penalties clearly indicative of government concern); *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546. para 12 (where in acknowledging that there is no single universal test for deciding whether a function is public, "[fa]ctors to be taken into account include the extent to which in carrying out the relevant function the body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.")

44 *Titi v Funds at Work Umbrella Provident Fund* para 14. See also, *Buitendag and others v Government Employees Pension Fund and others* [2006] 4 BPLR 297 (T) (where the court endorsed the proposition that a decision by the fund to distribute death benefits fell to be reviewed under the PAJA).

45 See *Mashazi v African Products Retirement Benefit Provident Fund* at 632I-J.

46 *Kim v Agri Staff Pension Fund and Others* [2019] ZAGPJHC 156 para 12-15.

performing an important social function when making determinations in terms of section 37C of the Act. When dealing with challenges to its decisions it is appropriate that a … Fund should … be diligent in its dealings with persons aggrieved by its decisions and in the usual course."[47]

Most recently in February 2020, the high court in *Mbatha*[48] expressly endorsed the proposition in *Titi v Funds At Work Umbrella Provident Fund* and *Kim v Agri Staff Pension Fund and Others*. The high court held that:

> "I subscribe to the generally accepted view that a decision of the board of a pension fund taken in terms of s 37C of the PFA constitutes administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that PAJA applies to such a review."[49]

Whilst not every decision made by pension funds constitutes administrative action under PAJA, it is easy to see how the determination of death benefits falls within the reasoning of the cases discussed above. The power to distribute death benefits arises out of an Act of Parliament – section 37C. The courts have repeatedly held that section 37C was designed to fulfil a social function[50] or, to use the language of *San Giorgio*, offer a public service. In other words, the courts have accepted that when distributing death benefits in terms of section 37C, pension funds perform a public function or exercise public power. In his analysis of *Titi v Funds At Work Umbrella Provident Fund* and other relevant cases, Hanekom accedes to the proposition that pension funds perform a public function or exercise public power when they determine death benefits, and, hence, PAJA applies to them.[51] Hanekom concludes that based on "…the above rulings, funds must ensure that all their actions under section 37C do not fall foul of the provisions of the PAJA. One of the effects of death benefit decisions being regulated by the PAJA is that beneficiaries cannot challenge these decisions, unless they have first

47 *Kim v Agri Staff Pension Fund and Others* para 39.

48 *Mbatha v Transport Sector Retirement Fund and Another* [2020] ZAGPJHC 18

49 *Mbatha v Transport Sector Retirement Fund and Another* para 9-10, citing *Mashazi v African Products Retirement Fund and another* at 635C; *Titi v Funds at Work Umbrella Provident Fund* (1728/2010 [2011] ZAECMHC para 14; *Themba and another v Retail Provident Fund (Shoprite) and others* ((unreported) WCHC case no 9647/13 (6 May 2014) para 21; *Guarnierie v Funds At Work Umbrella Pension Fund and others* (47754/2016) [2018] ZAGPPHC 579 para 39; *Moshoshoe v Sentinel Retirement Fund and others* (unreported) GPJ case no 2506/19 (13 September 2019) paras 11-13.

50 See, *Mashazi v African Products Retirement Benefit Provident Fund*; *Van Vuuren v Central Retirement Annuity Fund and another*; and *Kaplan and another v Professional and Executive Retirement Fund and others* [2001] 10 BPLR 2537 (SCA) (holding that the wishes of the deceased member are not binding on the fund).

51 Hanekom 9.15.7.3.7.2. See also, Manamela "Deductions from Pension Benefits for Purposes of Section 37D of the PFA 24 of 1956: Employers Forced to Tow the Line" 2007 *SA Merc LJ* 189, 192-193 (arguing that pension funds are bound by section 33 of the Constitution as administrative functionaries).

exhausted internal remedies, which include referral to the Adjudicator's office or other dispute resolution mechanisms provided in the fund rules."[52]

Now that it has been established that the boards of pension funds exercise public power or perform a public function when determining pension death claims, the legality of a decision by a board that is predicated on a rigid policy is considered next.

5 The Legality of decisions of the boards of pension funds based on rigid policies

One of the cardinal principles of administrative law is that a decision maker is not permitted to inhibit their own discretion from being exercised, such as by operating under the behest of prescriptive policies.[53] The current legal position in South Africa was well encapsulated in *Kemp v Van Wyk* where in his opening paragraph of the judgment, Nugent JA pronounced that:

> "A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all."[54]

Nugent made the above statement of law in the context of determining the validity of a decision by the Director of Animal Health to refuse the plaintiff in that case permission to import animals from Zimbabwe to South Africa. Without that permit, the importation of animals was prohibited in terms of the Animals Disease Act, 1984.[55] That Act granted discretion to the Director to grant or refuse a permit for the importation of animals into South Africa. An important factor to the case is that the plaintiff's application for a permit was made one year after the Director decided to impose an embargo on the importation of cloven-hoofed animals from Zimbabwe.[56]

In the course of adjudication, the court found that the general embargo upon the importation of animals from Zimbabwe was instrumental to the Director's decision to refuse the permit. The plaintiff sued the Director to have his decision set aside. The High Court dismissed that suit. The issue

52 Hanekom 9.15.7.3.7.2.
53 Hoexter *Administrative Law* 218-319.
54 *Kemp v Van Wyk* [2008] 1 All SA 17 (SCA) para 1.
55 *Kemp v Van Wyk* para 2.
56 *Kemp v Van Wyk* para 3.

on appeal was whether the Director's dependence on the embargo prevented him from properly exercising his discretion.[57]

The plaintiff advanced the argument that the Director was required to make an individualised assessment of his application for a permit in isolation of the existing embargo. In his application, the plaintiff had made a proposal on how to obviate the risk of the disease being introduced into South Africa.[58] The court rejected this argument and reasoned that if the decision to impose the embargo was itself lawful, the Director was not required to re-evaluate its imposition simply because he was presented with an alternative proposal that might have been equally effective.[59] Instead, the Director was entitled to evaluate the application in the light of the existing policy of the directorate provided that he was independently satisfied that the policy was appropriate to the particular case and did not consider it to be a rule to which he was bound.[60] On the facts of the case, the court found that the Director did not fail to exercise his discretion through his dependence on the embargo nor did he consider himself bound to refuse the permit because of the existence of the embargo. Furthermore, the court found that the Director had indeed evaluated the application and concluded independently that the embargo was appropriate to the plaintiff's case.

The rule that emerged from the judgment in *Kemp v Van Wyk* is this: a decision maker acts lawfully when she is independently satisfied that a policy or guideline, which she is required to consider, is appropriate to the specific case at hand, and does not consider herself bound by that policy or guideline. Whilst a decision maker is expected to develop and apply policies or guidelines in decision making processes, what the law prohibits is the rigid or blind adherence to policies or guidelines because this may prevent the decision maker from exercising her discretion by independently applying her mind to the circumstance of each case.[61]

South African courts have found that it is permissible and desirable for administrative decision makers to develop and apply guidelines to ensure that decisions are consistent and fair. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism,*[62] the Constitutional Court's approach to the adoption or application of guidelines was that "where the decision-maker is seeking to evaluate a large number of applications against similar criteria … it will be permissible, and indeed will often be desirable, for administrative decision-makers to adopt and

57 *Kemp v Van Wyk* para 2.
58 *Kemp v Van Wyk* para 10.
59 *Kemp v Van Wyk* para 10.
60 *Kemp v Van Wyk* para 10.
61 *Minister of Justice and Constitutional Development v South African Restructuring and Insolvency Practitioners Association* 2017 3 SA 95 (SCA); *Sweleyi v Minister of Home Affairs* case no 1479/16 (2016) unreported; *Oceana Group Ltd v Minister of Water & Environmental Affairs* 2012 2 All SA 602 (SCA); *Laingville Fisheries (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2008 ZAWCHC 28.
62 2004 4 SA 490 (CC).

apply general criteria evenly to each application in order to ensure that the decision subsequently made is fair and consistent."[63] Similarly, in *Sasol Oil (Pty) Ltd v Metcalfe NO*,[64] the High Court approved of the use of guidelines or policies by administrative decision makers and reasoned that:

> "… there is nothing inherently wrong in the issue of departmental guidelines. On the contrary, they can be of enormous assistance… they facilitate the expedition of applications but they can also assist in ensuring consistency and predictability in the application of policy. Therefore, I do not consider that the applicants can succeed in their first prayer to have the guidelines declared to be *ultra vires*."[65]

On appeal, the Supreme Court of Appeal[66] confirmed the correctness of the High Court's approach in *Sasol Oil (Pty) Ltd v Metcalfe* when it reasoned that:

> "The adoption of policy guidelines by … to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one requiring the balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker. … a court should in these circumstances give due weight to the policy decisions and findings of fact of such a decision-maker. Once it is established that the policy is compatible with the enabling legislation, as here, the only limitation to its application is that it must not be applied rigidly and inflexibly, and that those affected by it should be aware of it. An affected party would then have to demonstrate that there is something exceptional in his or her case that warrants a departure from the policy."[67]

The legal position in South Africa on this issue prior to the democratic dispensation was not distinct from the above position. In his concurring judgment in *Britten v Pope*,[68] Justice De Villiers recognised and approved of the importance of guidelines or policies in decision making and held:

> "To insist that a person who has often before had to exercise his discretion in a similar class of case should wholly disregard his experience when approaching a new case and decide it as if it were the first of its kind he has ever dealt with is not only to insist upon the impossible, but invites inefficiency and caprice. Experience usually must be a most valuable help, and no objection can be taken to a person making full use of it. And that the appellants in arriving at a decision were influenced to a very great extent by

63 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* above para 57; *South African Reserve Bank v Shuttleworth* 2015 5 SA 146 (CC) para 81.
64 *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (W); 2006 2 All SA 329 (W).
65 *Sasol Oil (Pty) Ltd v Metcalfe* 2004 5 SA 161 (W); 2006 2 All SA 329 (W) paras 13-14.
66 *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty)Ltd* 2006 2 All SA 17 (SCA).
67 *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd* para 19.
68 *Britten v Pope* 1916 AD 150.

> the rule laid down by the full Licensing Court as also by the findings of the Liquor Commission appointed in 1908 is quite legitimate."[69]

It should be clear from the above analysis that boards of pension funds must consider each death benefit case independently with an open mind. Therefore, it is submitted that whilst a board of a pension fund may adopt policies to guide its decisions on death benefits, such policies should not be seen to preclude the exercise of discretion or be deemed as a rule that binds the board. This is particularly important in the light of the social policy underneath section 37C of the PFA, which seeks to promote and protect financial dependants of the deceased.[70]

6 Conclusion

The PFA entrusts the board of a pension fund with the objective to "direct, control and oversee the operations of a fund".[71] As demonstrated in this article, some of the decisions made by the board involve the exercise of public power or performance of public functions. In particular, this article confirms that pension funds may sometimes exercise public power or perform a public function. One such case is when pension funds exercise a discretion in distributing death benefits pursuant to section 37C of the PFA. But this is not all. It was shown further that it is permissible for a board to adopt policies or guidelines as basis of decision making. However, the law prohibits such policies from being elevated into rules that are binding such that it prevents the board from exercising their discretion at all. Pension funds must always remain flexible when exercising discretion even in the face of a validly adopted policy or guidelines.

69 *Britten v Pope* above 174.
70 *Mashazi v African Products Retirement Benefit Provident Fund* 3705-3706.
71 S 7C(1) of the PFA states that "The object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund".