



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 228/23

In the matter between:

TSHIFHIWA SHEMBRY MUTSILA

Applicant

and

MUNICIPAL GRATUITY FUND

First Respondent

PENSION FUNDS ADJUDICATOR

Second Respondent

and

PENSION JUSTICE NPC

Amicus Curiae

Neutral citation: *Mutsila v Municipal Gratuity Fund and Others* [2025] ZACC 17

Coram: Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ, Theron J and Tolmay AJ

Judgment: Theron J (unanimous)

Heard on: 12 November 2024

Decided on: 8 August 2025

Summary: Section 37C – Pension Funds Act 24 of 1956 – Dependants – Equitable distribution

ORDER

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders made by the High Court, the Full Court and the Supreme Court of Appeal are set aside and replaced with the following:
 - “(a) The determination of the Adjudicator dated 8 September 2014 is set aside.
 - (b) The determination of the Municipal Gratuity Fund dated 9 April 2014 is set aside.
 - (c) The matter is remitted to the Municipal Gratuity Fund to make a fresh determination, within three months from the date of this judgment, of dependency and determine an equitable allocation and distribution of the deceased’s death benefit having regard to the circumstances as at 9 April 2014.”
4. The first respondent is directed to pay the applicant’s costs, including the costs of two counsel, where so employed, in the High Court, the Full Court, the Supreme Court of Appeal and in this Court.

JUDGMENT

THERON J (Madlanga ADCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Rogers J, Seegobin AJ and Tolmay AJ concurring):

Introduction

[1] Every year, South African retirement funds distribute billions of rands¹ upon the death of their in-service² members to persons who were “dependants” of a deceased member. These benefits are distributed in terms of section 37C of the Pension Funds Act³ (the Act) – a far-reaching and relatively unique statutory provision.

[2] This application relates to the equitable allocation and distribution of death benefits held within a pension fund. It is particularly important in the context of South Africa’s high incidence of employment precariousness and dependency on a single breadwinner. Pension fund benefits provide much needed assistance to those left vulnerable in the event of the death of their primary supporter.

Background facts

[3] The applicant is Ms Tshifhiwa Shembry Mutsila. The first respondent is the Municipal Gratuity Fund (Fund), a defined contribution pension fund established and registered in terms of section 4 of the Act. The second respondent is the Pension Funds Adjudicator (Adjudicator). Pension Justice NPC, a public interest non-profit company, registered under section 21 of the Companies Act,⁴ was admitted as amicus curiae (friend of the court) in these proceedings.

[4] The applicant was married to Mr Takalani Emmanuel Mutsila (the deceased) in terms of a civil marriage on 8 December 2003. The deceased died in a workplace accident on 15 December 2012. The applicant and the deceased had five children,

¹ In 2014 about R8.8 billion in death benefits was distributed by pension funds regulated by the Financial Sector Conduct Authority (the then Financial Services Board). This increased to about R9.3 billion in 2015. See Financial Services Board *2015 Annual Report of the Registrar of Pension Funds* (report 57, December 2016) at 36, available at: <https://www.fsca.co.za/Annual%20Reports/Registrar%20of%20Pension%20Funds%20Annual%20Report%202015.pdf>. Later reports often do not distinguish between death benefits and certain other benefits paid, but it is reasonable to assume that this amount increases over time.

² Meaning, typically, members who have not yet reached retirement age and who are still contributing to the fund.

³ 24 of 1956.

⁴ 71 of 2008.

whose ages as at April 2014 ranged from nine to 23, and all of whom were learners and dependent on their parents when the deceased died.

[5] At the time of his death, the deceased had been employed by the Ba-Phalaborwa Municipality. By virtue of his employment, he was a member of the first respondent and a death benefit to the value of R1 614 434.86 became available for distribution to his dependants in accordance with section 37C of the Act. The applicant submitted a claim to the Fund on behalf of herself and their five children. Ms Dipuo Masete (Ms Masete) also submitted a claim to the Fund, in both her personal and representative capacity. In an affidavit filed with the Fund, Ms Masete submitted documentary proof that she and her two children had been listed by the deceased as beneficiaries of a life policy of the deceased and that the deceased had made regular payments into her bank account.

[6] On 7 March 2014, the Fund sent a proposed distribution report to the applicant which included, as beneficiaries, not only the applicant and her five children but also Ms Masete and her two children. In terms of the proposed distribution, Ms Masete and her children were listed as beneficiaries of the death benefit because she was allegedly married to the deceased in terms of customary law and Mr Mutsila was responsible for the two children as a result of the customary marriage. The applicant objected to the inclusion of Ms Masete and her two children as beneficiaries of the death benefit.

[7] The Fund recognised both the applicant and Ms Masete (as well as their respective children) as dependants of the deceased. On 9 April 2014, the trustees of the board of the Fund resolved to distribute the pension benefit of the deceased in the following manner: 22.5% to Ms Mutsila and 27.5% to Ms Masete, whilst the children's benefits varied between 2.5% and 14% of the total benefits, depending on their respective ages. It allocated to Ms Masete, together with her two children, 52.5% of the death benefit; 22.5% of the death benefit was allocated to the applicant, with the applicant's five children together being allocated the balance of 25%.

[8] The applicant employed the services of a private investigator who discovered that Ms Masete was married to Mr Malema Joseph Mphafudi in terms of customary law and that he was the biological father of Ms Masete's two children. The investigation triggered a custody battle brought by Mr Mphafudi against Ms Masete before the High Court of South Africa, Limpopo Division, Polokwane. In the custody proceedings, Ms Masete did not dispute her relationship with Mr Mphafudi and confirmed that he was the biological father of her children. Ms Masete alleged that Mr Mphafudi had failed to make meaningful contributions towards the maintenance of the children.

Litigation history

[9] On or about 9 May 2014, the applicant, aggrieved by the decision of the Fund, lodged a complaint with the Adjudicator in terms of section 30A of the Act. In her complaint, the applicant made it clear that her objection was that Ms Masete was not married to the deceased and also that she was not a factual dependant. She also denied that Ms Masete's children were fathered by the deceased or that they depended on him.

[10] The Adjudicator invited both the Fund and Ms Masete to respond to the complaint. The Fund responded on 30 May 2014, suggesting that the evidence in the custody application might have a direct impact on the consideration of the applicant's complaint and the distribution of the death benefit. It suggested that the complaint be held in abeyance until the conclusion of the custody application, and that the Fund be allowed to submit its response to the applicant's complaint within 30 days after conclusion of the custody dispute.

[11] The Adjudicator nevertheless finalised the complaint and issued a determination on 8 September 2014. The Adjudicator found that the Fund had not conducted a proper investigation as required by section 37C of the Act to identify the beneficiaries of the deceased and set aside its decision regarding the allocation of the death benefit. The Adjudicator directed the Fund to properly investigate and effect an equitable

distribution of the balance of the proceeds of the death benefit to all the deceased's dependants within three weeks after a decision in the custody case was handed down.

[12] On 24 October 2014, the Fund launched a section 30P⁵ application in the High Court of South Africa, Gauteng Division, Pretoria. In its notice of motion, the Fund sought a declaratory order that pursuant to the death of the deceased, it had conducted a thorough investigation to determine the deceased's beneficiaries to enable it to make an equitable distribution of the deceased's death benefits in accordance with section 30C(1)(a)⁶ of the Act. It also sought to have the determination made by the Adjudicator, dated 8 September 2014, set aside.

[13] On 14 April 2015, the applicant was joined in the proceedings before the High Court. The High Court dismissed the Fund's application with costs on a punitive scale on 18 June 2018. The High Court held that the Fund had a duty to ensure that the information it received was diligently investigated. According to the High Court, the Fund ignored the applicant and her children's factual dependency on the deceased insofar as they relied on the deceased for housing because the deceased had assumed responsibility for paying their home loan. That Court held that Ms Masete's factual dependence on the deceased had not been proven. The Court held that Ms Masete was neither a spouse of the deceased nor was the deceased the father of her children.

⁵ Section 30P, titled "Access to court", provides:

- “(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
- (2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A(3) and on which the Adjudicator's determination was based, and may make any order it deems fit.
- (3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.”

⁶ Section 30C(1)(a) reads:

- “(1) The Minister shall appoint—
 - (a) a person to the office of Adjudicator.”

[14] The High Court concluded that the Fund had failed to conduct a diligent investigation. It said:

“It is apparent from the report of the CEO upon which the decision of the board of the Applicant was dependent that there was no diligent investigation. The investigation was insufficient, lacked particularity, vigour, openness and therefore the outcome of their deliberation [was] improper. As conceded by the Applicant, the allegations by [Ms] Mutsila have a direct impact on the consideration of the complaint she lodged with the Applicant prior [to] the [Adjudicator]’s determination as well as on the distribution of the deceased’s pension benefit. A situation that could have been avoided with the exercise of fairness, openness and prudence.”⁷

[15] The Fund appealed to the Full Court, with leave from the Supreme Court of Appeal, the High Court having refused leave. The Full Court dismissed the Fund’s appeal with a punitive costs order on 9 November 2021. The Full Court held that the Fund had made a distribution before it had properly identified the dependants. According to the Full Court, it was the Fund’s obligation to keep itself abreast of the situation, especially because there was an objection to Ms Masete and her children’s dependency. The Full Court concluded that the Fund was derelict in its failure to conduct a thorough investigation. Thus, the Fund’s decision regarding the distribution of the deceased’s death benefit was not in accordance with the provisions of section 37C(1)(a) of the Act.

[16] The Fund was granted special leave to appeal to the Supreme Court of Appeal. It raised two principal bases for its challenge. First, it contended that the Adjudicator did not have jurisdiction to determine Ms Mutsila’s complaint in that she should have lodged her complaint with the Fund in terms of section 30A(1) of the Act before approaching the Adjudicator.

⁷ *Municipal Gratuities Fund v Pension Funds Adjudicator*, unreported judgment of the Gauteng High Court, Pretoria, Case No 78396/2014 (18 June 2018) (High Court judgment) at para 79.

[17] Second, it argued that it was not granted an opportunity to deal with the merits of the complaint, therefore, the *audi alteram partem* (hear the other side) rule was not complied with. The Fund took issue with the Adjudicator's finding that it had failed to undertake a proper investigation to determine the deceased member's beneficiaries when it had not been provided with an opportunity to place evidence before the Adjudicator about the investigation it conducted.

[18] In its judgment handed down on 31 July 2023, the Supreme Court of Appeal set aside the Adjudicator's decision and, in effect, upheld the decision taken by the Fund. In summary, the Supreme Court of Appeal held that the main objective of the Adjudicator, in terms of section 30A(3) of the Act, is to dispose of complaints such as the one lodged by the applicant in a "procedurally fair, economical and expeditious manner".⁸ In order to achieve this objective, the Adjudicator must act in accordance with the provisions of sections 30E(1)(a), 30J and 30F of the Act. In making its decision, the Adjudicator failed to afford the Fund an opportunity to respond to Ms Mutsila's complaint and had infringed the Fund's right to *audi alteram partem*. This was contrary to the principles of natural justice and, specifically, what is required of the Adjudicator by section 30F of the Act. This section provides that when the Adjudicator investigates a complaint, they "shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations".⁹

[19] The Supreme Court of Appeal held that both the High Court and the Full Court failed to recognise the essential issue in this case, namely, whether Ms Masete and her two children were factually dependent on the deceased. The Supreme Court of Appeal reasoned that this factual dependency was never challenged. Further, the Court held that the lower courts failed to consider the two bases upon which the application and subsequent appeal were brought, one of which was that the Adjudicator failed to apply

⁸ *Municipal Gratuity Fund v Pension Funds Adjudicator* [2023] ZASCA 116; [2023] 4 All SA 1 (SCA); 2024 (3) SA 439 (SCA) (Supreme Court of Appeal judgment) at para 21.

⁹ Section 30F of the Act.

the *audi alteram partem* principle. The Supreme Court of Appeal upheld the appeal and held that it would be in the interests of justice that it makes a fresh determination having regard to the lapse of time, possible unavailability of witnesses and documentary evidence, the fact that the minor beneficiaries were now adults and that the parties were entitled to finality. The Court concluded that “[t]he only equitable outcome is to accept that the Fund had complied with its legislative mandate and in its discretion made a correct distribution”.¹⁰ The Supreme Court of Appeal thus reinstated the decision of the Fund.

[20] On the issue of costs, the Supreme Court of Appeal set aside the punitive cost orders made by the High Court and the Full Court. It held, however, that this was an exceptional case where the successful party ought not to be granted costs in its favour. The Court was of the view that the dispute might have taken a totally different, much less expensive route had the Fund elected to deal with the complaint on the merits rather than suggesting that the outcome of the custody application be awaited. The Court ordered each party to pay their own costs in the appeal and in the proceedings before the High Court and the Full Court.

In this Court

Issues

[21] The following issues arise for determination in this matter:

- (a) whether this Court has jurisdiction and, if so, whether leave to appeal should be granted;
- (b) whether the Fund properly exercised its discretion in this matter;
- (c) the nature and scope of the section 30P application;
- (d) at what date should a pension fund make a determination as to who is a dependant for the purpose of distributing a death benefit; and

¹⁰ Supreme Court of Appeal judgment above n 8 at para 30.

- (e) whether the person concerned must be a dependant at the time when the distribution is made.¹¹

Jurisdiction and leave to appeal

[22] The applicant argues that this matter engages this Court’s jurisdiction because it concerns the proper interpretation of section 37C of the Act relating to what a fund is required to do when it determines dependency, the investigation it must conduct and the obligations imposed on the fund. Section 37C enjoins a fund to exercise a discretion when making an equitable allocation. The applicant contends that the manner in which a fund exercises its discretion in order to determine an equitable allocation in terms of section 37C impacts on constitutional rights and is an arguable point of law.

[23] A central question that arises in this matter is the appropriate date with reference to which a fund must make a determination as to who is a dependant for the purpose of distributing a death benefit – the date when the determination of dependency is made or the date of the death of a member. I am of the view that the matter engages our

¹¹ The issues reflected in (d) and (e) were contained in post-hearing directions issued by this Court on 12 December 2024. The parties were requested to address the following questions:

- “(a) On a proper interpretation of section 37C of the Pension Funds Act 24 of 1956, when is the appropriate stage a Pension Fund must make a determination as to who is a dependant for the purpose of distributing a death benefit – at the stage when the determination of dependency is made or at the date of death of the member.
- (b) Was the Supreme Court of Appeal decision in *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019] ZASCA 78 at paragraph 25 correct in holding that: ‘Given all these considerations of language, purpose and practicality, in my view, the proper construction of section 37C(1)(a) is that *the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made*, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.’ (Emphasis added.)
- (c) What would be the legal basis for the proposition in this quotation that ‘the person concerned must still be a beneficiary at the time when the distribution is made’?
- (d) Having regard to the definition of ‘dependant’ in section 1 of the Pension Fund Act, does the test for factual dependency only apply to persons falling under section 1(b)(i) and not to persons falling under section 1(a) and (b)(ii) or to persons falling under section 1(b)(i), 1(a) and 1(b)(ii)?
- (e) If dependency in respect of persons falling under section 1(a) and (b)(ii) must be determined, at which stage must this determination be made?”

general jurisdiction as it raises arguable points of law of general public importance that ought to be determined by this Court.

[24] This is the first time that this Court is seized with the interpretation and application of section 37C. This matter raises issues that transcend the narrow interests of the parties. Any judgment handed down by this Court will impact other funds and beneficiaries, and the industry at large. Moreover, pension fund statutes similar to this Act have analogous or comparable death benefit provisions to section 37C and these may also be impacted by any interpretation by this Court.¹²

[25] Section 37C reflects a legislative decision that pension fund benefits becoming available upon the death of a member should be available to be used for the benefit of the deceased's dependants so that they are less likely to require and depend on the State's resources. This serves the social purpose of providing for dependants.¹³ This matter involves legislation that has a social security purpose¹⁴ affecting a large section of the population, many of whom are vulnerable and dependent on support from pension fund members.

[26] As mentioned,¹⁵ South African retirement funds distribute billions of rands upon the death of their in-service members to "dependants". For reasons that will become clear later in the judgment, I am of the view that there are prospects of success in this matter. Therefore, it is in the interests of justice that leave to appeal should be granted.

¹² A number of statutes create self-standing pension funds which are regulated by those statutes and not this Act. These include, for example, the Government Employees Pension Fund which is created by the Government Employees Pension Law Proclamation 21 of 1996 and the rules thereto. Rule 14.5 deals with death benefits payable to "beneficiaries". A comparable provision is in section 15 of the Members of Parliament and Political Office-Bearers Pension Scheme Act 112 of 1984. Many current or former state-owned entities, such as the Post Office, have their pension funds established and regulated separately in this manner.

¹³ *Mashazi v African Products Retirement Benefit Provident Fund* 2003 (1) SA 629 (W) (*Mashazi*) at 632I-J.

¹⁴ *Municipal Workers Retirement Fund v Mabula* [2017] ZAGPPHC 1153 at para 7.

¹⁵ Above at [1].

Section 37C

Legislative history

[27] Section 37C was first enacted in 1976 as part of the Financial Institutions Amendment Act¹⁶ (1976 Amendment Act). The preamble of the 1976 Amendment Act included among its objects to “provide for the protection of pension benefits”. Under the heading “How pension benefits [are] to be dealt with on death of [a] member”, section 24 of the 1976 Amendment Act provided for the insertion into the Pension Funds Act of a new section 37C reading thus:

“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 paid to any one or more of the dependants of the member, if there is such a dependant or are such dependants, or to a guardian or trustee for the benefit of such dependant or dependants: Provided that if such dependant or dependants cannot be traced by the fund concerned within a period of six months after the death of the member, or if no claim is received by that fund from such dependant or dependants within the said period, the benefit may be paid over to the estate of the member.”

[28] The concern expressed at that time was that the Act, as it stood pre-amendment, did not sufficiently (or at all) ensure that pension benefits were allocated to dependants. The then Minister of Finance explained, at a second reading of the Bill, the purpose of these amendments:

“The object of a pension fund is to provide pension benefits to members and their dependants. The Act does not protect the benefits from alienation and attachment, nor does it exclude them from the insolvent and deceased estates of members in order to ensure that they do in fact accrue to members or their dependants. This deficiency is now being remedied.”¹⁷

¹⁶ 101 of 1976.

¹⁷ House of Assembly Debates (Hansard) 16 March 1976 Vol 61 at 3253. No explanatory memorandum was published with the 1976 Amendment Act. This Court has relied exclusively on parliamentary debates per Hansard as the source of the purpose of such an amendment Act. *South African Municipal Workers' Union v Minister of*

[29] It is well-established that this Court may have regard to background evidence, such as the legislative history of an Act, to aid in its interpretation. The background evidence must be clear, not in dispute and relevant to the matter at hand. Each of those requirements is satisfied here. In *Makwanyane*, Chaskalson P held:

“Our Constitution was the product of negotiations conducted at the Multi-Party Negotiating Process. . . . background material can provide a context for the interpretation of the Constitution and, where it serves that purpose, I can see no reason why such evidence should be excluded. The precise nature of the evidence, and the purpose for which it may be tendered, will determine the weight to be given to it.”¹⁸

[30] The notion that section 37C was always intended to have a broad social security purpose in respect of “dependants”, whether familial or not, is evident from the broad definition of “dependant”. The definition was introduced by the 1976 Amendment Act into section 1 of the Pension Funds Act as including a spouse and descendants but not limited thereto.¹⁹

“‘[D]ependant’, in relation to a member, means a person considered by the person managing the business of the fund concerned as being dependent on the member for maintenance and includes the spouse or a descendant of the member who in accordance with the rules of the fund may become entitled to a benefit.”

[31] This has been the consistent position over the years since 1976 as various amendments were effected to the definition of “dependants” and section 37C itself.²⁰ It

Co-Operative Governance and Traditional Affairs [2017] ZACC 7; 2017 (5) BCLR 641 (CC) at fn 7. This Court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (*SPCA*) also placed extensive reliance on parliamentary debates in interpreting the Societies for the Prevention of Cruelty to Animals Act 169 of 1993. See *SPCA* at paras 41, 49, 51, 60 and the relevant footnotes, especially fns 65, 66, 71, 73 and 94. See also *Case v Minister of Safety and Security*; *Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617 (CC); 1996 (5) BCLR 609 (CC) at fn 18.

¹⁸ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 17.

¹⁹ Section 21(a).

²⁰ See K Lehmann *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* (DPhil thesis, University of Cape Town, 2020) at 149-50.

is not necessary to traverse these incremental historical changes in detail, save to briefly highlight the aspects of the current statutory position.

[32] Section 1 of the Act currently defines a “dependant” in the following manner:

“‘**[D]ependant**’, in relation to a member, means—

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person—
 - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

“Dependant” expressly includes both factual and legal dependants.

[33] Thus, from inception to date, and by design, it is clear that the following consequences are intended to flow from section 37C:

- (a) Death benefits do not fall in the deceased member’s estate.
- (b) The ultimate determination of dependants lies with the fund, not the member.
- (c) Spouses and “descendants” (or later, children) are included in the definition of “dependant”.
- (d) The definition of “dependant” is not limited to blood relations but includes persons “financially” dependent on the deceased member.
- (e) A fixed period is provided within which to identify dependants – generally 12 months from the date of the member’s death.

Jurisprudential development

[34] The jurisprudence²¹ has over time expanded the factors to be considered and process to be followed by trustees of funds in exercising their discretion and developed principles on how section 37C must be applied. It has been held:

“Inherently the discretionary power of the board entails choice, which is the power to identify deserving cases. The board therefore carries a very onerous responsibility to conduct a thorough and credible investigation to establish the existence of beneficiaries, thereafter determine a fair distribution and finally decide on the appropriate mode of payment of the benefit payable. Accordingly, section 37C requires an in-depth input from the board with regard to who qualifies as a dependant and the amount which is to be allocated to each beneficiary.”²²

[35] Section 37C limits the testamentary freedom of a member inasmuch as the member’s completion of a nomination form is not binding on the Fund. The Fund is only bound by the empowering provision of section 37C in distributing the death benefit.

[36] Section 37C(1) of the Act provides:

“(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 fund, to one of such dependants or in proportions to some of or all such dependants.

. . .

²¹ Predominantly by the Adjudicator, Financial Services Tribunal, High Courts and the Supreme Court of Appeal.

²² *University of Pretoria Provident Fund v Du Preeze*, unreported judgment of the Gauteng High Court, Pretoria, Case No 48755/14 (15 September 2015) at para 13. This principle was confirmed in *Snyman v Government Employees Pension Fund* [2024] ZAGPPHC 364 at para 45.

- (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.”

[37] Section 37C regulates the distribution of lump sum death benefits as a benefit typically not falling within the deceased member’s estate. It is a unique statutory provision governing an extensive process of identifying, allocating and paying portions of death benefits to legal and/or factual dependants. Unlike in the case of insurance policies, the deceased’s nomination of a beneficiary does not govern the distribution but is only a factor to be taken into account by the Fund in reaching a distribution decision.²³

[38] The application of section 37C is frequently the subject of litigation and dissatisfaction by deceased’s family members and/or beneficiaries. For example, according to the Adjudicator’s Annual Report for 2023/24,²⁴ section 37C death benefit claims are the third most frequent type of complaint finalised by the Adjudicator and exceeded 670 complaints²⁵ during that financial year. It is one of the more contentious provisions of the Act.

[39] The social security purpose and “override” of the deceased’s wishes are clear from the plain language of section 37C and case law. In *Mashazi*, it was held:

“Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. This section specifically restricts freedom of testation [so] that no dependants are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate

²³ *Fundsatwork Umbrella Pension Fund v Guarnieri* [2019] ZASCA 78; 2019 (5) SA 68 (SCA) at para 5.

²⁴ Office of the Pension Funds Adjudicator *Integrated Report 2023/2024* (2024) at 5 and 49, available at <https://www.pfa.org.za/annual-reports/>.

²⁵ According to the Adjudicator’s Annual Report, death benefit claims amounted to 6.9% of the 9719 complaints received.

of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account [several] 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.”²⁶

[40] In *Guarnieri*, the Supreme Court of Appeal considered the purpose served by section 37C of the Act and held:

“[S]ection 37C of the [Act] removes the allocation of pension benefits on the death of a pension fund member from the unfettered choice of the member, whether by will or by nomination. It reflects a legislative decision that funds becoming available in that way should be available to be used for the benefit of the deceased’s dependants so that they are less likely to be a drain on the state’s resources. This serves the social purpose of providing some protection for dependants, without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will.”²⁷

[41] It has been accepted that the aim of section 37C is to limit a pension fund member’s freedom of testation in relation to their pension benefits.²⁸ *Sithole* confirmed that “[t]hrough the guise of section 37C, the legislature is advancing an important social protection policy which is left in the hands of the board or persons managing the business of pension funds to implement”.²⁹

[42] This “social security” purpose accords with a constitutional interpretation of section 37C³⁰ which gives effect to the section 27(1)(c) constitutional right to have

²⁶ *Mashazi* above n 13 at 632H-33A. This was confirmed in *Mbatha v Transport Sector Retirement Fund* [2020] ZAGPJHC 18 at para 3 and *Skosana v Fundsatwork Umbrella Pension Fund* [2023] ZAFST 143 at para 23.

²⁷ *Guarnieri* above n 23 at para 5.

²⁸ *TWC v Rentokil Pension Fund* [2000] 2 BPLR 216 (PFA) at 223.

²⁹ *Sithole v ICS Provident Fund* [2000] 4 BPLR 430 (PFA) at para 23.

³⁰ In terms of section 39(2) of the Constitution.

access to social security³¹ in a manner not limited to familial connection but focused on factual dependency.³²

Did the Fund properly exercise its discretion in this matter?

[43] The parties dispute whether the Fund properly exercised its discretion in identifying the dependants and allocating and distributing the deceased's death benefit, as required by section 37C(1)(a). The discretionary power of the Fund lies in its determination of who is a factual dependant, in accordance with section 1 of the Act. That section provides that the board of a fund has a discretion to determine who is factually dependent on a member for maintenance.³³ Legal dependency is determined by law. A pension fund exercises discretionary powers in two respects: first, in relation to deciding whether dependants are factual dependants³⁴ and secondly, in allocating and distributing the benefits for both legal and factual dependants.³⁵

[44] Section 37C affords a pension fund a discretion in the allocation and distribution of a death benefit.³⁶ The allocation and distribution of death benefits comprise three main stages. First, the fund must "actively" investigate in order to identify and trace potential dependants, and to assess each potential dependant's degree of dependence on

³¹ The right to social security is entrenched in many international instruments. See Article 22 of the Universal Declaration of Human Rights, 10 December 1948; Article 9 of the International Covenant on Economic Social and Cultural Rights, United Nations General Assembly Resolution 2200A (XXI), 16 December 1966; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Citizens to Social Protection and Social Security, 6 February 2022 and Article 4 of the Code on Social Security in the SADC. Section 39(1)(b) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights.

³² A right acknowledged by this Court in *Mudau v Municipal Employees Pension Fund* [2023] ZACC 26; 2023 (10) BCLR 1165 (CC); [2023] 11 BLLR 1109 (CC); (2023) 44 ILJ 2641 (CC) in respect of pension withdrawal benefits and by the Supreme Court of Appeal in *Post Office Retirement Fund v South African Post Office SOC Ltd* [2021] ZASCA 186; [2022] 2 All SA 71 (SCA) at paras 56-9 in respect of the Post Office's failure to pay required monthly contributions to its employees' pension fund.

³³ Paragraph (b)(i) of the definition of "dependant" in section 1 of the Act states that a dependant, in relation to a member, includes "a person in respect of whom the member is not legally liable for maintenance, if such person was, *in the opinion of the board*, upon the death of the member in fact dependent on the member for maintenance" (emphasis added).

³⁴ Section 1 paragraph (b)(i) of the definition of "dependant" of the Act.

³⁵ Section 1 paragraph (a) of the definition of "dependant" of the Act.

³⁶ *Collatz v Alexander Forbes Financial Services (Pty) Ltd*, unreported judgment of the Gauteng High Court, Johannesburg, Case No A5067/2020 (31 January 2022) at para 70. See also *Guarnieri* above n 23 at para 8.

the deceased.³⁷ The burden to do so falls exclusively on the board of the fund. Secondly, the fund must make an “equitable distribution” of the benefit.³⁸ The fact that a person qualifies as a dependant in principle does not mean that the person is entitled to a benefit – they are only entitled to be considered by the board in the “allocation” phase. Thirdly, the fund must decide how to effect payment. This could involve payment to a beneficiary fund for the benefit of a minor child, instead of to the child’s guardian.

[45] In *Guarnieri* the Supreme Court of Appeal said the following about the duty of a board when making an equitable allocation:

“[Section 37C] imposes upon a board an obligation to check carefully that the information it has is accurate and to ensure that when it makes distributions the intended beneficiaries will be the persons who benefit from them. As is apparent from the record in this case, the board was too inclined to accept the correctness of one-sided information.”³⁹

[46] The relevant factors that a pension fund must consider when making an equitable distribution include: the age of dependants; the relationship with the deceased; the extent of dependency; the wishes of the deceased recorded either in a nomination form or their last will; and the financial affairs of the dependants, including their future earning capacity potential.⁴⁰ In making their decision, trustees need to consider all relevant information and ignore irrelevant facts.⁴¹

[47] The Fund enjoys a wide discretion under section 37D. In *Guarnieri*, the Supreme Court of Appeal put it thus:

³⁷ *Khwela v Toyota SA Provident Fund*, unreported decision of the Financial Services Tribunal, Case No PFA46/2020 (26 February 2021) at para 6.

³⁸ *Sithole* above n 29 at para 30.

³⁹ *Guarnieri* above n 23 at para 24.

⁴⁰ *Sithole* above n 29 at paras 24-5.

⁴¹ *Id* at para 25.

“The effect of section 37C(1)(a), as read with the definition of ‘dependant’, is to require a fund, within a period of 12 months from the death of the member, to identify the dependants of the deceased who may potentially qualify for an equitable distribution from the deceased’s death benefit in terms of section 37C. Having once identified the potential class of dependants, the board of the fund is vested with a large discretion to determine, in the light of its assessment of their respective needs, in what proportions the death benefit will be distributed among the class of dependants.”⁴²

[48] While its discretion is wide, it serves an important utility as the exercise of its discretion is “heavily dependent on the factual circumstances” of a particular case.⁴³ Only if the exercise of discretion was unreasonable or improper may the decision be reviewed.⁴⁴ Section 37C(1)(a) compels the fund to distribute the benefit to a dependant or to multiple dependants “as may be deemed equitable by the fund”.

[49] Finally, as previously noted, the provisions of section 37C take precedence over any nomination of a beneficiary under the rules of a fund.⁴⁵ The consequence is that all benefits payable in respect of a deceased member, whether or not subject to a nomination, must be dealt with in terms of section 37C. This is in line with the purpose of the section: to serve a social function by protecting the interests of the dependants, who might otherwise be dependent on the resources of the State, without entirely overriding the wishes of the deceased member.⁴⁶

[50] The effect of this jurisprudence is that a fund must conduct an investigation and thereafter make an equitable allocation having regard to relevant factors. By design and purpose, section 37C does not seek to prioritise spouses over other factual dependants, whether married or not. All dependants are recognised as dependants once identified

⁴² *Guarnieri* above n 23 at para 8.

⁴³ *Minister of Defence and Military Veterans v Motau* [2014] ZACC 18; 2014 (5) SA 69 (CC); 2014 (8) BCLR 930 (CC) at para 42.

⁴⁴ See *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA) (*Mongale*) at para 5.6.

⁴⁵ *Kaplan and Katz N.N.O. v Professional and Executive Retirement Fund* [1999] ZASCA 27; [1999] 3 All SA 1 (A) at 8.

⁴⁶ *Guarnieri* above n 23 at para 5.

as such. No dependant has a “right” to a portion of the death benefit until so allocated by a fund, or a right to a larger benefit than another dependant. They have a right to an equitable allocation and such allocation must be made in a manner that is lawful, reasonable and procedurally fair.

[51] According to the Fund, Ms Masete and her children’s dependency was established in terms of paragraph (b)(i) of the definition of “dependant” in section 1 of the Act. They were persons whom the deceased was not legally liable to maintain but they were factually dependent on him for maintenance, so the Fund concluded. The applicant and her children’s dependency was determined in terms of paragraph (a) of the definition, as the deceased was legally liable for their maintenance.

[52] The then Chief Executive Officer of the Fund, Mr Marthinus Jacobus Dewald Jacobsohn, deposed to the founding affidavit filed on behalf of the Fund in the High Court. He had compiled a report detailing the death benefit available for distribution to the dependants of the deceased for the consideration of the Management Committee of the Fund. In his report, he set out the “extensive investigations” undertaken by the Fund in order to determine the potential beneficiaries of the death benefit.

[53] The report evidenced the following:

- (a) The applicant was employed as a teacher earning a gross monthly salary of R17 488.25. Her net salary was R13 087.39 and, according to her application, her monthly expenses were R13 087.39. This, in the Fund’s view, meant that she was financially independent. Ms Mutsila declared dependency on the deceased at the rate of R10 000 per month for the maintenance of their children.
- (b) The deceased and Ms Masete had entered into a customary union in 2008 and two children were born from the union. Ms Masete submitted an application form indicating that she was employed, earning R2 685 per month and declared dependency on the deceased at the rate of R2 000 per

month. The Fund relied on a *lobola* letter received from the Maungani Traditional leader, confirming a marriage between the deceased and Ms Masete, and an affidavit from the deceased's brother stating that the deceased was customarily married to Ms Masete. An affidavit was also received from an uncle of the deceased, confirming the customary marriage.

- (c) During its investigation, it came to the attention of the Fund that, on 1 October 2012, the deceased in his funeral plan with Metropolitan Life, nominated Ms Masete and her two children as beneficiaries, as well as three of his children with the applicant, his mother and Ms Betty Masete, whom he described as his mother-in-law. The Fund said that while this nomination did not necessarily serve as proof of Ms Masete's factual dependency on the deceased, it bolstered Ms Masete's claim that she and her children were financially supported by the deceased.
- (d) According to Ms Masete, the deceased frequently deposited money into her bank account as a form of support.

[54] In a letter dated 11 April 2014 from the Fund and addressed to the applicant's attorneys, it was recorded that the Fund had resolved to allocate and distribute the death benefit. It was further recorded that the Fund had regard to, inter alia, the following factors in making the distribution: (i) the earning capacity of the applicant and Ms Masete; (ii) the factual dependency of Ms Masete on the deceased; (iii) the allocation to the applicant was on the basis of her legal dependency arising out of her civil marriage to the deceased; and (iv) the allocation to Ms Masete was based on her factual dependency on the deceased. It was noted that:

“[T]he objection raised by [the applicant] to any allocation to Ms D M Masete and her two children [was] based on the [alleged] invalidity of the customary marriage falling short of the provisions of the [Act] and the factual dependency of Ms D M Masete and her two children.”

[55] In this Court, the Fund contended that on a careful analysis of the facts – both those facts which served before the Fund, as well as the facts brought to light by the applicant herself in her complaint before the Adjudicator – the finding that Ms Masete and her children had been supported by the deceased, and were so dependent, is both rational and sound. It maintained that having made the finding of dependency, it was then for the Fund to exercise its discretion in determining the most equitable distribution of the benefits between the dependants. It alleges that the discrepancy between Ms Masete and the applicant's financial independence were crucial factors in this assessment. It relied on the evidence of Ms Mutsila herself – in her application before the Fund – which indicated her dependency on the deceased as being only in respect of maintenance for the children.

[56] It is common cause that when the allocation decision was made by the Fund on 9 April 2014, the Fund did not know that Ms Masete was married to Mr Mphafudi. The Fund was not aware that he was the biological father of her children, that he was still alive, and that he could support the children financially. The only fact mentioned in the Fund's founding affidavit filed in the High Court and annexures attached thereto is that Ms Masete declared dependency on the deceased in the amount of R2 000. There is no evidence that the Fund carried out any investigations to determine for itself or confirm this declared dependency. There is no allegation in the documents attached by the Fund to its founding affidavit to the effect that the deceased either maintained Ms Masete's children, paid for their school fees and clothing, or provided them with shelter.

[57] It is clear that a proper investigation to determine dependency in relation to Ms Masete and her children was not carried out by the Fund. It is evident from the report that Ms Masete and her children were treated by the Fund as the wife and children of the deceased, respectively. However, their status was determined as factual dependants, no doubt to avoid dealing with doubts about the marriage and paternity. The reality is that they were simply allocated the same benefits as if they were the wife and children of the deceased without the Fund carrying out a proper investigation.

[58] The High Court correctly held that the investigation by the Fund was “insufficient”, leading to an outcome which was “improper”. On appeal to the Full Court, that Court also found:

“It was not [Ms] Mutsila’s responsibility to keep the [Fund] informed of the situation with [Ms] Masete and her children. It was the [Fund]’s obligation to keep itself abreast of the situation, especially as it was well aware that there was an objection to her dependency.”⁴⁷

Further, the Full Court held that the Fund was derelict in its failure to conduct a thorough investigation.

[59] The Fund conceded, in its response to the Adjudicator, that the new evidence (that Ms Masete was in a customary marriage with Mr Mphafudi and he was the father of their children) discovered as a result of the investigation done by the applicant, could have a “direct impact on the consideration of the complaint as well as the distribution of the death benefits”. It is common cause that this new evidence was brought to light *after* the Fund had made its distribution decision on the death benefit. This concession by the Fund supports a conclusion that it had failed to conduct a proper investigation to determine the deceased’s beneficiaries in order to enable it to make an equitable distribution of the deceased’s death benefits.

[60] The Fund failed to conduct a proper investigation in this matter. It failed to investigate and verify the claims made by Ms Masete that she and the deceased were married to each other in terms of customary law. It simply relied on the information that had been supplied to it (a *lobola* letter and an affidavit from the brother of the deceased confirming the existence of a customary marriage). It would appear that when the Fund was confronted with evidence that cast doubt on the status of Ms Masete as a spouse of the deceased, it identified her as a factual dependant without further

⁴⁷ *Municipal Gratuity Fund v Pension Funds Adjudicator*, unreported judgment of the Gauteng High Court, Pretoria, Case No A164/2019 (9 November 2021) (Full Court judgment) at para 57.

investigation. The Fund's identification of Ms Masete and her children as factual dependants was flawed in that it was not supported by credible evidence demonstrating that they were dependent on the deceased for maintenance. It is noteworthy that the Fund did not establish the nature of the relationship between the deceased and Ms Masete or her children.

[61] In these circumstances, it is clear that the Fund failed to establish the extent of the factual dependency of Ms Masete and her children. The extent of factual dependency is crucial when the Fund makes an equitable allocation and distribution. An equitable allocation and distribution is discretionary, subject to the discretion being exercised in a judicially compliant manner, as explained above.⁴⁸ It must be noted that the first stage of the process does not always entail a purely factual determination by a fund, as it may also be called upon to make a decision regarding legal dependants whose status is determined by law. The inadequate investigation regarding the extent of the factual dependency of Ms Masete and her children tainted the allocation and distribution decision. It must follow that the Fund failed to properly exercise its discretion in this matter.

Supreme Court of Appeal

Section 30P application

[62] Section 30P of the Act is not an issue requiring this Court's consideration and is of limited relevance. The only question is whether the Supreme Court of Appeal was correct in law in concluding that the only dispute the High Court was required to determine was whether the Adjudicator had complied with the *audi alteram partem* principle; or whether the issues before the High Court included whether the Fund had conducted a proper investigation as required by section 37C before making its distribution decision.

⁴⁸ Above at [43] to [53].

[63] The applicant submits that the Supreme Court of Appeal's approach to the section 30P application was fundamentally wrong in law, as that Court treated the section 30P application as a review, not an appeal. According to the applicant, a section 30P application is a hearing *de novo* (anew) involving a rehearing of the merits of a complaint in the sense that the High Court exercises jurisdiction akin to original jurisdiction over the complaint. As it is a hearing *de novo*, the applicant argues that the *audi alteram partem* issue should have fallen away because there was a full hearing in the High Court. The Fund submits that it approached the High Court challenging the procedure of the Adjudicator's decision as it did not comply with the *audi alteram partem* principle, and it sought relief in the form of judicial review. The Fund had also raised, at the hearing in the High Court, a jurisdictional challenge, arguing that the Adjudicator lacked jurisdiction to determine the complaint and that, instead, Ms Mutsila should first have lodged a complaint with the Fund under section 30A(1) of the Act.

[64] A section 30P application is an appeal in a wide sense. Relying on *Tikly*,⁴⁹ the Court in *Meyer*⁵⁰ held:

“From the wording of section 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the Adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the Adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by section 30P(2) to a consideration of ‘the merits of the complaint in question’. The dispute submitted to the High Court for adjudication must therefore still be a ‘complaint’ as defined. Moreover, it must be substantially the same ‘complaint’ as the one determined by the Adjudicator.”⁵¹

⁴⁹ In *Tikly v Johannes N.O.* 1963 (2) SA 588 (T); [1963] 3 All SA 91 (T) at 590G, it was held that: “an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information”.

⁵⁰ *Meyer v Iscor Pension Fund* [2002] ZASCA 148; 2003 (2) SA 715 (SCA); [2003] 5 BLLR 439 (SCA).

⁵¹ *Id* at para 8.

[65] Recently, in *Richards Bay Coal Terminal*,⁵² this Court considered whether the existence of a wide appeal ousts a court's power of review. It held that a power of review is not ousted by a wide appeal. However, a court may exercise its discretion to decide whether to exercise its inherent review jurisdiction.⁵³ This Court held that a wide appeal grants an adjudicative appeal body the power to rehear a matter entirely and does not bind that body to the evidence presented at the initial forum.⁵⁴ A litigant is compelled to pursue an appeal on the merits, instead of a review, because the Act has indicated a preference that the litigant should prosecute an appeal first before a review. This Court referred to this as the subsidiarity principle.⁵⁵ To the extent that a party wishes to seek judicial review relief, it would have to satisfy the court that the special relief afforded to it in the legislative scheme (i.e., the wide appeal) would not provide the party with the appropriate relief.⁵⁶

[66] Although section 30P(2) clearly permits the court to engage in a wide appeal, the way in which it is formulated suggests that it is not exhaustive. In terms of section 30P(2), the High Court “*may* consider the merits of the complaint made to the Adjudicator” and “*may* make any order it deems fit”.⁵⁷ The language of section 30P(2) is not peremptory. It provides that the High Court “*may*” consider the merits of the case, not “*must*” consider the merits of the case. The language of the section suggests that, depending on the nature of the case, the court may deal with the merits, but that it is not obliged to do so, so that it may additionally consider review attacks upon the decision. Where a dispute concerns the merits of the Adjudicator's decision, and is

⁵² *Commissioner for the South African Revenue Service v Richards Bay Coal Terminal (Pty) Ltd* [2025] ZACC 3; 2025 (6) BCLR 639 (CC) at para 63.

⁵³ *Id* at para 123.

⁵⁴ *Id* at para 104. It was held that:

“In a wide appeal, the empowering statute grants a court, tribunal or forum the power to re-hear the matter entirely. This means that the dispute is heard ‘afresh’ or ‘from the beginning’ or ‘anew’ in the sense that the appellate body is not bound by the evidence, information or reasons which arose at the time the first instance decision was made.”

⁵⁵ *Id* at paras 130-1.

⁵⁶ *Id* at para 77.

⁵⁷ Emphasis added.

capable of being adjudicated in a wide appeal before the High Court, that ought to be the preferred course. Thus, the reference to “merits” in section 30P is a clear indication that a litigant seeking to challenge a determination ideally ought to challenge the merits.

[67] Since the High Court in any event has review powers, quite apart from section 30P, in principle a court to which such an application is made under section 30P can adjudicate review grounds, but not under the guise of section 30P. It can do so under the Promotion of Administrative Justice Act⁵⁸ or the principle of legality. Whether it should do so, or rather decide the merits, depends on whether a party has demonstrated that appeal proceedings would not provide appropriate relief.

[68] In this case, the Fund approached the High Court and sought relief in the form of judicial review, in that it asked the Court to “set aside” the determination of the Adjudicator and for declaratory relief flowing from an order of illegality of the decision by the Adjudicator. The Fund’s main contention was that the adjudication process was fatally flawed, because the Adjudicator “failed to comply with the *audi alteram partem* rule as she did not grant the Applicant a further opportunity to submit a response”. This language falls squarely within the realm of a review in that it is clear that the Fund sought to challenge the legality of the decision taken by the Adjudicator.

[69] In these circumstances, the High Court would have been entitled to decide the complaint of the alleged non-compliance with *audi alteram partem*. The High Court failed to consider this complaint by the Fund. It was thus open to the Supreme Court of Appeal to consider this issue.

[70] It must be noted that the Adjudicator’s powers to interfere with a fund’s management of its affairs are governed by the provisions of Chapter VA of the Act.⁵⁹ As a creature of statute, the Adjudicator has no inherent jurisdiction. The Adjudicator’s

⁵⁸ 3 of 2000.

⁵⁹ *Meyer* above n 50 at para 6.

powers and functions are confined to those conferred upon her by the provisions of Chapter VA.⁶⁰

[71] Section 30A(3) read with section 30D of the Act are the relevant empowering provisions. Section 30D(2) of the Act provides that, in determining a complaint, the Adjudicator must (i) apply, where appropriate, principles of equity; (ii) have regard to the contractual arrangement or other legal arrangement between the complainant and any financial institution; (iii) have regard to the provisions of the Act; and (iv) act in a procedurally fair, economical and expeditious manner.⁶¹

[72] It is clear from the wording of section 30D(2) that the Adjudicator was required to, inter alia, apply the principles of procedural fairness, natural justice and equity. When a fund exercises its powers improperly by failing to comply with its duties under section 7C(2), the Adjudicator is empowered to determine whether a fund indeed breached its duty to comply with the Act.⁶²

[73] The Act explicitly provides that the Fund must be a party to a complaint before the Adjudicator.⁶³ This, of course, is an imperative prerequisite because, in essence, what the Adjudicator is doing when she considers a complaint is assessing and determining the Fund's management of its own affairs.⁶⁴ To do so absent the Fund being afforded a reasonable opportunity to make representations, would be to commit a fundamental breach of the Fund's procedural rights, in the form of *audi alteram partem*.

[74] Consistently with these principles, the Legislature reiterates the Adjudicator's procedural duties in section 30F of the Act, where it provides that when the Adjudicator intends to conduct an investigation into a complaint they "shall afford the fund or person

⁶⁰ Id at para 7.

⁶¹ Section 30D(2) of the Act.

⁶² *Mongale* above n 44 at para 5.6.

⁶³ Section 30G(b) of the Act.

⁶⁴ *Meyer* above n 50 at para 6.

against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations”.

[75] In this matter, albeit that the Adjudicator informed the Fund of the complaint lodged by the applicant, it did not do so adequately. The Adjudicator did not inform the Fund that it would proceed with a determination of the complaint without giving the Fund an opportunity to respond to the substance of the complaint. Most startlingly, the Adjudicator’s determination related directly to the Fund’s investigation: the Adjudicator made negative findings regarding the Fund’s investigation in circumstances where it had not afforded the Fund an opportunity to substantively respond to the complaint, nor was it afforded an opportunity to place any evidence before the Adjudicator about its investigation. This was a fatal irregularity on the part of the Adjudicator and one which the Supreme Court of Appeal recognised as sufficient reason to set aside the Adjudicator’s determination. The Court explained, “[i]n [these] circumstances, the Fund was not allowed an opportunity to respond fully as provided in section 30F before its award was set aside. I agree with the sentiment that the *audi*-principle was not adhered to.”⁶⁵ I agree with the Supreme Court of Appeal that the Adjudicator’s decision must be set aside.

[76] The reasoning and conclusion of the Supreme Court of Appeal on this aspect cannot be faulted. In making its decision, the Adjudicator failed to afford the Fund an opportunity to respond fully to the applicant’s complaint, this despite the Adjudicator’s duty to act in terms of the principles of natural justice and, specifically, in terms of what is required of the Adjudicator by section 30F of the Act. The Fund’s right to *audi alteram partem* was infringed.

Misdirection by the Supreme Court of Appeal

[77] The Supreme Court of Appeal, somewhat surprisingly, found that the factual dependency of Ms Masete and her children was “never properly challenged” and that

⁶⁵ Supreme Court of Appeal judgment above n 8 at para 22.

the Adjudicator and the High Court “failed to recognise this”. That Court held that the Adjudicator had not complied with the *audi alteram partem* principle, and because the dependency of Ms Masete and her children had not been challenged, the appeal had to succeed. The finding by that Court that the factual dependency of Ms Masete and her children was never challenged is a serious misdirection, entitling this Court to interfere with the order it made.

[78] The factual dependency of Ms Masete and her children was at the heart of the complaint lodged by the applicant with the Adjudicator. Factual dependency had been disputed in both the complaint and the answering affidavit of the applicant in the section 30P application in the High Court. In an affidavit filed in support of her complaint lodged with the Adjudicator, the applicant said:

“My concern has always been that [Ms] Masete is not the customary wife of my husband nor was she dependent on him. I also deny that her children are children of the deceased or that they were dependent on him.”

[79] The applicant could not have made it clearer that her complaint to the Adjudicator related to Ms Masete being regarded as the customary wife of the deceased and her children’s alleged factual dependency on the deceased when she said the following in her complaint affidavit to the Adjudicator:

“The issue I am complaining of is the inclusion and/or the consideration of [Ms] Masete as the customary wife as well as a factual dependant of the deceased. Another complaint is the consideration of the two children of [Ms] Masete, . . . as children or dependants of the deceased.”

[80] In her answering affidavit filed in the section 30P application in the High Court, the applicant made clear that she disputed the factual dependency of Ms Masete and her children. After having detailed the results of her own independent investigation, she said:

“I submit that had the applicant done a thorough investigation it would have come to the conclusion that [Ms] Masete and her two children were not factually dependent on the deceased as they claimed.”

[81] It would appear that the Supreme Court of Appeal did not appreciate what the applicant’s complaint was. The Court appears to have decided that the Adjudicator’s determination had to be set aside because of procedural defects in the Adjudicator’s process and that, due to the time that has passed, it was in the interests of justice that it determine the matter itself instead of referring it back to the Adjudicator. The Supreme Court of Appeal then proceeded to find that Ms Masete had factually proven that the deceased maintained her and her children. In arriving at this conclusion, the Supreme Court of Appeal relied on information contained in the custody dispute that came to light after the distribution decision was taken by the Fund.

[82] Having regard to the legal nature of section 30P proceedings discussed above, and the facts of this matter, the Supreme Court of Appeal was wrong, both in law and in fact, in concluding that the only dispute the High Court was required to determine was whether the Adjudicator had complied with the *audi alteram partem* principle.

At which stage must dependency be determined?

[83] After the hearing of this matter, the Chief Justice issued directions requiring the parties to address, inter alia, the following question: on a proper interpretation of section 37C of the Act, when is the appropriate stage a pension fund must make a determination as to who is a dependant for the purpose of distributing a death benefit – at the stage when the determination of dependency is made or at the date of death of the member?

[84] According to the applicant, the decision as to who is a dependant must be made at the same time as the distribution decision. She says that following the investigation conducted by a pension fund, it makes a determination as to who is a dependant and what an equitable allocation to the dependants would be. The Fund contends that it has

a discretion to determine factual dependency as well as the proportion of death benefits to each class of dependants. The Fund agrees with the finding in *Guarnieri* that it is required to identify dependants within 12 months of the member's passing. Once having identified the dependants, the board of a fund is required to determine the extent of dependency. This is the first stage of the process. In the next stage of the process, a fund must make an equitable distribution of the death benefits among the identified dependants.

[85] The amicus curiae contends that, although section 37C does not specify the date on which dependency must be determined, it can only be the date of a member's death; otherwise there would be different dates of dependency for different dependants. Namely, that the date of death would apply in respect of factual dependants to determine dependency, but a later date of dependency would potentially apply in respect of dependants such as spouses and children who are found to have been dependent on the member after their death.

[86] The current position is reflected in *Guarnieri*, where the Supreme Court of Appeal answered this question as follows:

“Given all these considerations of language, purpose and practicality, in my view, the proper construction of section 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.”⁶⁶

[87] Prior to *Guarnieri* (High Court)⁶⁷ and *Guarnieri*⁶⁸ in 2018 and 2019, respectively, the question of which date was the operative date on which the fund must consider dependency and the other factors set out above, was not clear. Many funds

⁶⁶ *Guarnieri* above n 23 at para 25.

⁶⁷ *Guarnieri v Fundsatwork Umbrella Pension Fund* [2018] ZAGPPHC 579.

⁶⁸ *Guarnieri* above n 23.

took the view that the key date is date of death of the member, and disregarded subsequent changes in dependency considerations. This also meant that, if a section 37C decision was reviewed, set aside and remitted to the board for decision afresh, the board again considered the extent of dependency as of date of death, and not at a later date.

[88] *Guarnieri* changed this position. The Supreme Court of Appeal dismissed the Fund's argument that the correct point in time at which to consider the extent of dependency is the member's date of death. It found that this interpretation is not sensible and was contrary to the purpose of section 37C – “to provide maintenance to those who have need of it”.⁶⁹ In that case the deceased member's mother died after the member, but unbeknownst to the Fund, four days before it made its distribution decision. Upon remittal to the Fund, it took the same distribution decision with reference to the position as at the member's date of death, despite now being aware of the subsequent death of the deceased's mother.

[89] On appeal, the Supreme Court of Appeal confirmed that a fund must assess dependency at the date of its distribution decision – usually a much later date:

“The purpose of section 37C is to provide some protection for dependants, both existing and potential. The obvious time at which decisions should be taken in that regard is when the determination is made. At that stage the board should have completed its enquiries and be in a position to assess the relative present and future needs of the members of the class of dependants it has identified. Those such as the posthumously born child, or the person who has fallen on hard times, can then be assisted, and those whose fortunes have improved, so that they no longer need to be maintained, can drop out of the picture.

This does not impose too great a practical burden on the board. It will continue to make its determinations on the evidence to hand when it comes to take the decision. It imposes upon a board an obligation to check carefully that the information it has is

⁶⁹ *Guarnieri* above n 23 at paras 22-3.

accurate and to ensure that when it makes distributions the intended beneficiaries will be the persons who benefit from them.”⁷⁰ (Footnotes omitted.)

[90] The question posed must be considered in light of the purpose of section 37C of the Act as enunciated in *Mashazi*⁷¹ where it was held, as mentioned,⁷² that the purpose of that section is to protect dependants and to ensure that no dependants are left without support following the death of a member. Upon notification of death, the fund is required to conduct an investigation as contemplated in section 37C, read with subsection 1, for the purposes of determining whether there are beneficiaries (dependants and nominees) and to determine the equitable allocation of the benefit in line with the *Sithole* guidelines.⁷³ It is only upon the conclusion of the investigation that a decision can be made as to who is a dependant. The date of death of a member is relevant to determine who relied on the member for financial support while the member was still alive. In other words, who was in fact dependent on the member for maintenance during their lifetime. The objective facts relevant to determine the factual dependency must therefore have existed at the time of the member’s death.

[91] It is important to note that the test for factual dependency only applies to factual dependants and not spouses and children.⁷⁴ Section 1 paragraph (b)(ii) of the definition of “dependant” lists a “spouse” as one of the dependants. The term “spouse” is defined in section 1 of the Act as follows:

“‘[S]pouse’ means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the

⁷⁰ Id at paras 23-4.

⁷¹ *Mashazi* above n 13 at 632I-J.

⁷² Above at [39].

⁷³ See, for example, *South African Retirement Annuity Fund v Pension Funds Adjudicator* [2024] ZAMPMBHC 52 at paras 14-19 and *Sithole* above n 29 at paras 24-5.

⁷⁴ See *Wasserman v Central Retirement Annuity Fund (1)* [2001] 6 BPLR 2160 (PFA) (*Wasserman*) at paras 10-11.

Recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006), or the tenets of a religion.”

[92] The inclusion of a customary spouse in terms of subsection (b)(ii) is provided for without prima facie evidence of the marriage such as a marriage certificate, if the board is able to establish that a customary union was celebrated and continued to subsist at the time of death of the deceased member.⁷⁵

[93] Whether someone qualifies as a spouse is in essence a matter of fact. Once it has been shown on the facts that someone is married to the member, that spouse of the deceased automatically qualifies as a dependant, even if they were estranged.⁷⁶ A pension fund and its board have no discretion in that regard. This is consistent with the legislative purpose to ensure that those people whom the member was liable to maintain are not left without support.⁷⁷

[94] Section 1 paragraph (b)(iii) of the definition of “dependant” lists a “child” of the deceased member, including a posthumous child, an adopted child and a child born out of wedlock, as dependants. The board has no discretion in this regard. Whether someone is a child of the deceased is a factual enquiry, but once a child is identified, their status as a dependant is a matter of law. A child of the deceased cannot be excluded on the basis that they were not factually dependent on the deceased, as that would mean that children who are neglected by their absent parents would suffer a penalty.

[95] Section 1 paragraph (a) of the definition of “dependant” lists a person in respect of whom the member is legally liable for maintenance. Again, it is irrelevant whether the person was in fact dependent on the deceased member. The question is whether there was a legal obligation on the deceased to maintain the person.

⁷⁵ See *Moshidi v Kimberley-Clark Provident Fund* [2003] 7 BPLR 4947 (PFA) at paras 23-4.

⁷⁶ *Momentum Retirement Annuity Fund v V R Krzus*, unreported decision of the Financial Services Tribunal, Case No PFA53/2019 (9 March 2020) at paras 22-5, 28 and 39.

⁷⁷ *Mashazi* above n 13 at 632I-J.

[96] Spouses and children of the deceased members can correctly be classified as legal dependants. They qualify as dependants automatically, as of right. There is no discretion to be exercised by the board on that score.⁷⁸ This does not necessarily mean that they will be included in the equitable distribution, but they have to be recognised as dependants when the board considers an equitable distribution.

[97] To sum up: the definition of “dependant” in section 1 of the Act encompasses three types of dependants: legal dependants,⁷⁹ factual dependants⁸⁰ and future legal dependants.⁸¹ A spouse could be catered for either in subsection (a) or (b) of the definition of “dependant” in section 1 of the Act. Subsection (a) refers to dependants where there is a legal duty of support which arises when the law imposes a duty of support due to the relationship between parties. A spouse and children are legal dependants whose status is defined in the Act itself. The test for factual dependency only applies to persons falling under section 1(b)(i) of the Act.

[98] Section 1 paragraph (b)(i) of the definition of “dependant” lists a category of people in respect of whom the member is not legally liable for maintenance. The definition says that such a person can qualify as a dependant if the person was in the opinion of the board, upon the death of the member, in fact dependent on the member for maintenance.⁸² The threshold to qualify as a factual dependant is twofold: the dependant required the support of the member and the member regularly provided the

⁷⁸ *Momentum Retirement Annuity Fund vs V R Krzus* above n 76 at para 22.

⁷⁹ Section 1 paragraph (a) of the definition of “dependant” of the Act.

⁸⁰ Section 1 paragraph (b) of the definition of “dependant” of the Act.

⁸¹ Section 1 paragraph (c) of the definition of “dependant” of the Act.

⁸² The term “maintenance” must be given its ordinary meaning having regard to context and purpose of section 37C. It means “the action of providing oneself, one’s family, etc., with means of subsistence or the necessities of life”, such as shelter, schooling, food and clothing. See *Shorter Oxford English Dictionary* 5 ed (Oxford University Press, 2002) at 1674.

required support.⁸³ The word “was” in paragraph (b)(i) denotes the past tense.⁸⁴ It refers to a period when the member was alive. This is buttressed by the following words “upon the death of the member”, which can only mean as at the date the member died.

[99] The fact that the definition also requires proof of dependency on the member for maintenance is a clear indication that the dependency referred to here is historical rather than one existing at the date of the distribution decision. It would be absurd that someone who was not factually dependant on the member while they were alive can suddenly become a factual dependant after the member’s death. The opposite would also be absurd: that someone who depended on the member for maintenance at the time of the member’s death became disqualified after the member’s death. Changed circumstances do not affect the status of a dependant, but may affect the equitable distribution.

[100] The *Guarnieri* interpretation is a departure from the settled interpretation that the date for determining dependency is the date of the member’s death. There are several cases⁸⁵ wherein the Adjudicator held that one’s factual dependency must be determined at the time of the member’s death. For instance, in *Magongo*,⁸⁶ the Adjudicator considered the factual dependency of a child on the deceased member, because there was no clear evidence of paternity as to render the child a legal dependant. The Adjudicator held that “[f]or the complainant’s child to qualify as a factual dependant,

⁸³ See *Govender v Alpha* [2001] 4 BPLR 1843 (PFA) at para 19 and *Gunpath v Momentum*, unreported decision of the Financial Services Tribunal, Case No PFA55/2019 (8 October 2019) at para 29. In both these cases, the Adjudicator and Financial Services Tribunal, respectively, found that payments must be made sufficiently regularly to meet the threshold of “maintenance”. Sporadic or gratuitous payments would not necessarily qualify as “maintenance” payments.

⁸⁴ See *Guarnieri* above n 23 at para 14. See also *Shorter Oxford English Dictionary* 5 ed (Oxford University Press, 2002) at 3585.

⁸⁵ See *Wasserman* above n 74 at para 13 and *Boonzaier v Allan Gray Retirement Annuity Fund* [2018] JOL 40350 (PFA) at para 4.7.

⁸⁶ *Magongo v Municipal Councillors Pension Fund* [2011] JOL 27020 (PFA) at para 5.6.

the complainant must prove that the child was dependent on the deceased at the time of the member's death".⁸⁷

[101] The Supreme Court of Appeal's interpretation could lead to the untenable situation of introducing new dependants who were not legally or factually dependent on the deceased at the time of their death. The interpretation is contrary to the plain language contained in the definition of "dependant" in section 1 of the Act, which refers to the "death of the member"⁸⁸ and includes wording such as "had the member not died".⁸⁹ This textual reading suggests that the determination of dependency is made at the time of death of the member, while giving a fund a 12-month period to conduct a proper investigation.

[102] This interpretation also accords with the social security purpose of section 37C. The purpose of the provision is to protect those who were dependent on the member at the time of their death. But for the proceeds from a fund, the dependants of the deceased would face significant financial strain and, in some cases, may have to resort to reliance on the State for support. In any event, because the date of death is to be used to determine dependency, this does not mean that changed circumstances cannot be taken into account when the equitable allocation is made.

[103] To the extent that the Supreme Court of Appeal in *Guarnieri* held that factual dependency is determined based on the objective facts existing on the date of the distribution decision and not the facts that prevailed on the date of the member's death, it erred. The determination of dependency is based on the facts at the date of the member's death (this accords with section 1 paragraph (b)(i) of the definition of "dependant" of the Act). An equitable distribution is usually made some time later. An equitable distribution may consider changed circumstances, if any, after death.

⁸⁷ Id at para 5.5.

⁸⁸ Section 1 paragraph (b)(i) of the definition of "dependant" of the Act.

⁸⁹ Section 1 paragraph (c) of the definition of "dependant" of the Act.

Must the person be a “beneficiary” when the distribution is made?

[104] Under this heading, the Court must consider the second part of the finding of the Supreme Court of Appeal in *Guarnieri*⁹⁰ that—

“the time at which to determine who is a dependant for the purpose of distributing a death benefit is when *that* determination is made, *and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made*”.

(Emphasis added.)

[105] The applicant submits that there is no legal basis for the proposition that the person must be a “beneficiary” when the distribution is made. A change in circumstances should affect only the allocation of funds and not whether someone was a factual dependant. The applicant notes *Guarnieri*’s use of the word “beneficiary” – beneficiary is a separately defined term under the Act and it would appear that *Guarnieri* meant to refer to a dependant.

[106] The use of the word “beneficiary” in *Guarnieri* is confusing. That is because beneficiary is defined in the Act as “a nominee of a member or a dependant who is entitled to a benefit, as provided for in the rules of the relevant fund”. The term dependant means both a legal and factual dependant. A nominee, on the other hand, is a person that a member nominates to receive a death benefit upon their death. “Beneficiary” therefore appears to be used as an umbrella term that may include dependants and nominees.

[107] The Fund is of the view that the statement by the Supreme Court of Appeal is *obiter dictum* (made in passing), because that Court was not required to consider what would happen after a decision was made as to who is a dependant but before a determination on the equitable allocation of funds. The amicus curiae submits that there is no legal basis to support the decision of the Supreme Court of Appeal on this aspect.

⁹⁰ *Guarnieri* above n 23 at para 25.

[108] There is consensus among the parties that there is no legal basis for the proposition by the Supreme Court of Appeal that one must still be a “beneficiary” at the time distribution is made. Section 37C gives funds up to 12 months to conduct investigations. Circumstances can change in that period. This militates against the proposition made by the Supreme Court of Appeal. The longer the investigation period, the more scope there is for potential changed circumstances. The changed circumstances should only impact the distribution decision and not the identification of who was a dependant at the date of the member’s death (i.e., determination of dependency).

[109] This is supported by the definition of “dependant” because legal dependency is determined as a matter of law. Secondly, whether someone was in fact dependent on the member for maintenance can more accurately be determined through the facts that prevailed at the date of death of the member.

[110] To hold a fund to a particular date of decision could have arbitrary results. In simple cases a fund may complete its investigations in a short period, while in other cases it may take a much longer period. It could also result in dependants who were dependent on the deceased at the time of death being deprived of support if the test in *Guarnieri* was applied. The applicant also points to the following possible untenable results that could follow:

- (a) A live-in partner of the deceased, who was factually dependent on the deceased when the deceased was alive, is ejected from the deceased’s house by the deceased’s family immediately after the funeral and is thereafter supported by the ejected partner’s family. It could be that 12 months later when the distribution decision is made, the second part of paragraph 25 of *Guarnieri* may serve to disqualify them since they would no longer be factually dependent at the date of the distribution.
- (b) If relatives (such as nieces and nephews) of the deceased lived with the deceased while he was alive and after the funeral, they went on to live

with other relatives and were taken care of by those other relatives, the second part of the *Guarnieri* test may serve to disqualify them since they would no longer be factually dependent on the date of the distribution.

[111] There is no basis to conclude that someone must be a “beneficiary” at the time the distribution is made. In effect, that requires a separate dependency determination. Whether someone is a legal dependant is a matter of status which does not change over time. Factual dependency, however, is determined at the time of the member’s death, according to the Act. Indeed, circumstances may change between the time of the member’s death and the time of distribution of the benefit. Once an individual is identified as a dependant, whether legal or factual, that status as a dependant does not change. If, at the distribution stage, there are changed circumstances that alter the needs of the dependant – for instance, if they inherited or won a large sum of money that rendered them no longer reliant on the deceased member, or passed away, as was the case in *Guarnieri* – the fund may have regard to these circumstances when determining an equitable distribution.

Relief

[112] This Court will only grant an order of substitution in exceptional circumstances. The applicant, while urging this Court to grant a substitution order in respect of the Fund’s decision, placed no exceptional circumstances before this Court. In *Trencon*,⁹¹ this Court emphasised that substitution is an extraordinary remedy and remittal is the prudent and proper course.⁹² It also said that “[u]ltimately, the appropriateness of a substitution order must depend on the consideration of fairness to the implicated parties”.⁹³ The determination of who qualifies as a dependant and what benefit they ought to receive is a highly fact sensitive one, best answered with reference to the current circumstances of the parties. This Court is not appropriately positioned, without

⁹¹ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC).

⁹² *Id* at para 42.

⁹³ *Id* at para 53.

a proper case being made, to place itself in the shoes of the Fund and to make a determination as the Fund would. It is on this basis that substitution of the Fund's decision is not tenable.

[113] The question of remittal then becomes: to which forum does the matter return? In my view, remittal to the Adjudicator would not be in the interests of justice. The most compelling factor in favour of remittal to the Adjudicator would be that the Fund's right to be heard, as per the *audi alteram partem* principle, was breached and remittal to the Adjudicator would cure this breach. In this case, the Fund sought an order from the High Court declaring that it had conducted a proper investigation and tendered the relevant evidence in that respect. I am not convinced that the breach was not already remedied by subsequent proceedings. I am not satisfied that a remittal to the Adjudicator would be sufficient in this case, as they would likely arrive at the conclusion that the Fund failed to conduct a proper investigation and therefore remit to the Fund. This foregone conclusion militates against remitting to the Adjudicator, to avoid further wasted costs and protraction of the matter.

[114] In my view, and in line with standard practice, it is necessary to remit the matter to the Fund. In a line of cases⁹⁴ where the Adjudicator has found that a fund has failed to conduct a proper investigation, whether that dealt with the thoroughness of the investigation or its timeliness, the Adjudicator has remitted to the fund. Thus, the case law supports that in the ordinary course, when a fund errs in a matter that results in an improper investigation, contrary to section 37C, the appropriate remedy is remittal to the fund to re-investigate the facts and make a fresh determination. The Fund must therefore conduct its investigation afresh, considering all relevant facts, to identify dependants and determine an equitable allocation. It is important to note that the outcome of the custody proceedings between Ms Masete and Mr Mphafudi have no bearing on the order of this Court. As explained, dependency as at the date of the

⁹⁴ See *Msomi v Rennie's Group Provident Fund* [2018] 2 BPLR 467 (PFA) at paras 5.15 and 6.1.2 and *Van der Merwe v Corporate Selection Retirement Fund* [2014] 2 BPLR 296 (PFA) at paras 5.9 and 6.1.2 where the Adjudicator remitted to the Fund for a fresh investigation, determination of dependants and equitable allocation because the Fund had initially failed to conduct a proper investigation.

member's death is decisive and the Fund must consider the relevant facts at the time of Mr Mutsila's death to determine his dependants. Any order made in relation to the custody proceedings is of no moment to this enquiry.

[115] There has been a significant lapse of time since the Fund's decision on 9 April 2014. Much water has flowed under the bridge and in order that there be an equitable outcome (equitable in particular for the correctly identified dependants), the dependants should not be denied the death benefit to which they were equitably entitled when the initial flawed decision was taken, namely 9 April 2014. In the interests of justice, taking into account the prejudice and hardship faced by the dependants during the protracted review and litigation proceedings, the Fund should be required to conclude its investigation within three months from the date of this judgment. This balances the Fund's obligation to conduct a thorough investigation and the dependants' right to an expeditious, equitable order.

Costs

[116] Counsel for the applicant acted pro bono (voluntarily without payment) and requested that this Court award only the costs of the counsel who appeared at the Supreme Court of Appeal. This Court notes its appreciation for the pro bono services of the applicant's counsel.

[117] While the Fund enjoys partial success in this Court, in relation to the *audi alteram partem* violation, the ultimate finding that it failed to conduct a proper investigation, justifies an award of costs in favour of Ms Mutsila.

Order

[118] The following order is made:

1. Leave to appeal is granted.
2. The appeal is upheld.

3. The orders made by the High Court, the Full Court and the Supreme Court of Appeal are set aside and replaced with the following:
 - “(a) The determination of the Adjudicator dated 8 September 2014 is set aside.
 - (b) The determination of the Municipal Gratuity Fund dated 9 April 2014 is set aside.
 - (c) The matter is remitted to the Municipal Gratuity Fund to make a fresh determination, within three months from the date of this judgment, of dependency and determine an equitable allocation and distribution of the deceased’s death benefit having regard to the circumstances as at 9 April 2014.”
4. The first respondent is directed to pay the applicant’s costs, including the costs of two counsel, where so employed, in the High Court, the Full Court, the Supreme Court of Appeal and in this Court.

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