



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**  
**JUDGMENT**

**Reportable**

Case No: 1163/2024

In the matter between:

**SOUTH AFRICAN RETIREMENT  
ANNUITY FUND**

**APPELLANT**

and

**PENSION FUNDS ADJUDICATOR  
S E M VILJOEN**

**FIRST RESPONDENT  
SECOND RESPONDENT**

**Neutral citation:** *South African Retirement Annuity Fund v Pension Funds Adjudicator and Another* (1163/2024) [2026] ZASCA 79 (28 May 2026)

**Coram:** ZONDI DP and MBATHA and HUGHES JJA and MAMOSEBO and GOVINDJEE AJJA

**Heard:** 3 March 2026

**Delivered:** 28 May 2026

**Summary:** Pension Law – interpretation of s 37C(1) of the Pension Funds Act 24 of 1956 (the Act) – interpretation of the phrase - within 12 months of the death of the member becomes aware of or traces a dependant or dependants of the member -

ss 37C(1)(a) and 37C(1)(c) – the South African Retirement Annuity Fund (the Fund) seeks relief – on the basis that the payment to dependants to be strictly made within a period of 12 months from the date of death of the member – the Fund’s interpretation incorrect – contrary to the purpose of the Act.

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## ORDER

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**On appeal from:** Mpumalanga Division of the High Court, Mbombela (Ratshibvumo DJP sitting as court of first instance):

The appeal is dismissed with costs, including costs of two counsel where so employed.

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## JUDGMENT

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**Mbatha JA (Zondi DP and Hughes JA and Mamosebo and Govindjee AJJA Concurring):**

### Introduction

[1] This is an appeal against the judgment and order of the Mpumalanga Division of the High Court, Mbombela, per Ratshibvumo DJP (the high court). The high court dismissed the appellant's application, the South African Retirement Annuity Fund (the Fund), in which it sought an order declaring invalid and incorrect the decision of the first respondent, the Pension Funds Adjudicator (the Adjudicator). On 23 June 2023, the Adjudicator, acting in terms of s 30P of the Pension Funds Act 24 of 1956 (the Act), found in favour of the second respondent, Mrs Sophia Viljoen (Mrs Viljoen). The appeal is with leave of the high court. I will interchangeably use the word beneficiary to denote the dependants or nominees where the context requires.

[2] The appeal concerns the interpretation of the phrase 'within twelve months of the death of the member' appearing in s 37C of the Act. The question is whether s 37C, properly interpreted, permitted the Fund to pay the death benefit to the

deceased's estate before establishing the identity of the deceased member's dependants.

[3] Section 37C, which regulates the payment of any benefit payable by the Fund upon the demise of a member, provides as follows:

‘(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund, within twelve months of the death of the member, becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.

(b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

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

on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund or unclaimed benefit fund.'(Emphasis added.)

### **Background facts**

[4] The deceased, Mr Marius Viljoen (Mr Viljoen), died on 26 December 2019. He was a member of the Fund, which is underwritten by Old Mutual Life Assurance Company (South Africa) Limited. He left a retirement annuity benefit in the sum of R52 120.53. Mr Viljoen had not nominated a beneficiary for the aforesaid death benefit. He died intestate, and as the value of his estate was below the statutory limit of R250 000 no executor was appointed.

[5] Mr Viljoen is survived by his wife, Mrs Viljoen, who relies solely on the state-funded old-age social relief grant. Before Mr Viljoen's demise, Mrs Viljoen was unaware of the existence of the retirement annuity benefit. The existence of the benefit was brought to Mrs Viljoen's attention by a broker. It was only on 28 March 2022, with the assistance of the aforesaid broker, that she submitted a claim to the Fund. This was approximately two years and three months following the demise of Mr Viljoen.

[6] The Fund repudiated Mrs Viljoen's claim. On 18 July 2022, it resolved to pay the death benefit to Mr Viljoen's estate. This was done despite the estate not having been reported to the relevant Master of the High Court.

[7] Aggrieved by this decision, Mrs Viljoen lodged a complaint with the Adjudicator. On 23 June 2023, the Adjudicator set aside the decision of the Fund and made the following determination:

‘6.1.1 The decision by the Fund to pay the death benefit into the deceased's estate is hereby set aside.

6.1.2 The Fund is directed to immediately commence with investigations in terms of section 37C of the Act, determine the deceased's beneficiaries and their benefit entitlement within six weeks of this determination;

6.1.3 The Fund is ordered to notify the beneficiaries of its decision in terms of the allocation of the death benefit in paragraph 6.1.2 above, within one week of completion thereof; and

6.1.4 The Fund is ordered to pay the death benefit to the deceased's beneficiaries as identified in paragraph 6.1.2 by no later than 31 August 2023.’

[8] The Fund challenged the Adjudicator's determination in the high court. It contended that s 37C(1)(a) and (c) obliges the Fund to pay the death benefit to the estate, if no dependant of the deceased member is traced within 12 months from the date of his death. The high court rejected the construction of s 37C contended for by the Fund. It held that such construction would not only defeat its purpose but would fail to ensure that the Fund carry out its statutory obligation to trace the dependants and investigate their dependency on the deceased member. It accordingly dismissed the Fund's application with costs and confirmed the Adjudicator's order.

**Before this Court:****The Fund's submissions**

[9] The Fund took issue with the findings of the high court. It submitted, first, that the proper interpretation of s 37C(1) is that the 12 month period in that provision commences on the date of the member's death. The said 12 month period referred to, automatically terminates a right or a claim to the pension benefit. Second, there is no obligation on the Fund to trace the dependants or nominees of a member if the Fund is made aware of the death of the member after a period of 12 months from the date of death of the member. Third, if the Fund becomes aware of the death of a member after a period of 12 months, the provisions of s 37C(1)(a), (b) and (bA) do not apply. Consequently, the benefit has to be paid to the estate. Fourth, that as much as it acknowledges the social security nature of s 37C(1), it submitted that, by implication, the provision also accords protection to the creditors of the deceased member's estate. It was never the intention of the legislature that the creditors should wait indefinitely, whilst the Fund is trying to trace the dependants or nominees. Consequently, the creditors should be preferred over the dependants or nominees.

[10] In amplification of its argument, the Fund submitted that there is no inconsistency between the text and the context in s 37C(1). This is clear from the literal wording of s 37C(1). In addition, it posited that the various subsections of s 37C(1) repeat a single condition, namely, the determination of the dependants or nominees, which can only be done within a period of 12 months from the date of death of the member. This Court was also urged to disregard the definition of 'unclaimed benefit' in s 1 of the Act, as it does not apply to s 37C(1). It was submitted that the said definition was contemplated to apply only to a Pension Preservation Fund (the PPF) and a Provident Preservation Fund (the Provident Fund) in terms of s 51 of the Income Tax Act 58 of 1962.

**Mrs Viljoen's submissions**

[11] Conversely, it was submitted on behalf of Mrs Viljoen that the high court was correct in confirming the Adjudicator's ruling. It was argued that the trigger for s 37C(1) arises only when the Fund learns of a member's death. The Fund's construction of this provision on a narrow and restrictive textual interpretation should be treated as flawed. Counsel for Mrs Viljoen argued further that the 12 month period stated in s 37C(1) serves as a guide, not a guillotine. In that regard, the trustees are not bound by a member's date of death. It was further submitted that the interpretation advanced by the Fund was at cross-purposes with the social security objects of the Act. The object of the Act is to make provision for the member on retirement, or to provide for the social security of his or her dependants and nominees should the member die before retirement. The payment of the pension benefit to deceased members' estates violates the rights of the dependants and nominees to equality and social security.

**The issue before this Court**

[12] The issue for determination in the appeal is whether the payment of death benefits should be made within 12 months of the date of the deceased's death or 12 months after the Fund becomes aware of the deceased's death. This requires a proper interpretation of s 37C(1).

**The applicable legal principles**

[13] The established jurisprudence of this Court provides a useful guide for interpreting statutory provisions, as confirmed by the Constitutional Court in

*Minister of Police and Others v Fidelity Security Services (Pty) Ltd*,<sup>1</sup> where the said principles were summarised as follows:

‘The interpretation of the Act must be guided by the following principles:

(a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.

(b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.

(c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a reminder that judges must guard against the temptation to substitute what they regard as reasonable, sensible, or businesslike for the words actually used.

(d) If reasonably possible, a statute should be interpreted to avoid a *lacuna* (gap) in the legislative scheme.’<sup>2</sup>

In other words, the text, context and the purpose of legislation must be considered in a unitary exercise.

[14] There is also a constitutional injunction to interpret legislation in line with s 39(2) of the Constitution. Section 39(2) requires that ‘[W]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights’. How s 39(2) finds expression in the interpretive exercise was explained by the

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<sup>1</sup> *Minister of Police and Others v Fidelity Security Services (Pty) Ltd and Others* [2022] ZACC 16; 2022 (2) SACR 519 (CC); 2023 (3) BCLR 270 (CC).

<sup>2</sup> *Ibid* para 34.

Constitutional Court in *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd (Hyundai)*.<sup>3</sup> Langa DP said that ‘[t]he purport and objects of the Constitution find expression in section 1 which lays out the fundamental values which the Constitution is designed to achieve’. In simpler terms, the Constitutional Court found that s 39(2) does not demand judicial attention only when a constitutional issue is to be considered, but whenever the court interprets legislation.

[15] I point out that the interpretative exercise, which ‘involves a consideration of the language, context and purpose of the statute’, has to be aligned with the objectives of s 39(2).<sup>4</sup> The Constitutional Court, in *Chisuse v Director-General, Department of Home Affairs (Chisuse)*, established that language, context and purpose are interpreted and require simultaneous consideration in statutory interpretation. They are not isolated, sequential steps. Courts must interpret texts by reading the literal wording alongside the historical background and constitutional values all at once.<sup>5</sup>

[16] The Act is the primary legislation regulating pension and retirement fund benefits in South Africa. It ensures that the funds are registered, managed responsibly, and that the trustees act in the member’s best interests. Section 37C governs death benefits, requiring trustees to allocate funds to dependants rather than unthinkingly following nominations. This is designed to ensure financial protection for the deceased member's family. The Act applies mostly to private pension funds.

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<sup>3</sup> *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* [2000] ZACC 12; 2000 (10) BCLR 1079 (CC); 2001 (1) SA 545 (CC); 2000 (2) SACR 349 (CC) para 22.

<sup>4</sup> *Chisuse v Director-General, Department of Home Affairs* [2020] ZACC 20; 2020 (10) BCLR 1173 (CC); 2020 (6) SA 14 (CC) para 48-50.

<sup>5</sup> *Ibid* para 51-52.

The core objective of the Fund, as set out in the preamble, is to ensure the sound financial management of funds, protect members' interests, and govern the payment of benefits upon death or retirement. These funds are managed by a Board of Trustees, which owes a fiduciary duty to the members.

[17] Section 7A of the Act places the governance and oversight of the Fund's retirement benefits on the Fund's Board (the Board). The Board's role, as regulated by s 7A, is to control and oversee the Fund's operations, in accordance with the law and the Fund's rules. The Board also acts in a fiduciary capacity, as its trustees must act with diligence, care, and good faith, ensuring that they act at all times in the best interests of the members and the Fund.<sup>6</sup> This ethos is embodied in s 7C(1) of the Act which provides that the 'object of a board shall be to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund'.

[18] The Act's purpose is to regulate the registration, incorporation, management, and dissolution of private pension funds. Most importantly, it protects members' rights and enforces strict compliance for protecting members' benefits. Sections 37A and 37B of the Act regulate the protection of benefits. Section 37C governs the distribution of benefits upon a member's death, ensuring that money is paid to the dependants and nominees. It is indisputable that this provision prioritises the financial security of the deceased members' dependants. Section 37B operates alongside s 37C. It provides that if a member's estate is sequestrated, their pension fund interest does not form part of the insolvent estate. By operation of the law, these benefits are excluded from the *concursum creditorum* in an insolvent estate. This is also in line with the purpose of the Act.

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<sup>6</sup> Section 7C(2)(a) of the Pension Funds Act 24 of 1956.

## Discussion

[19] In applying the aforementioned principles to the interpretation of the phrase ‘within twelve months of the death’, it is clear that what triggers the identification and verification of the dependency process is the knowledge of the death of the member. This is an unequivocal and verifiable event, explicitly stipulated in the provision. Section 37C commences with a significant disclaimer stating that any benefits payable by the registered fund upon the death of a member shall not form part of the assets in the estate of the member and shall be dealt with as prescribed in sub-paragraphs (a), (b), and (c).

[20] The Fund is called upon, once it becomes aware of or traces a dependant or dependants, to make payment of such benefit to such dependant or dependants proportionally or as it may deem equitable to one, some, or all such dependants. That process, in practical terms, presupposes prior awareness of the member’s death.<sup>7</sup> The subsection could thus be interpreted to mean either within 12 months from the date of death or within 12 months of becoming aware of the member’s death.

[21] It is common cause that the Fund did not become aware of Mr Viljoen’s death within twelve months of his passing. However, the process of tracing and determining the dependants can only commence once the Fund becomes aware of the member’s death. This accords with the established approach that the phrase must be interpreted in the light of the text, context and purpose of s 37C, considered together.

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<sup>7</sup>Section 37C(1)(a) provides:

‘(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.’

[22] The listing of the subsections in s 37C(1) is instructive. The sequence of the subsections indicates the order of events, as stated in (a) - (c). The subsections commence with the word 'if'. The word 'if' is always used to introduce a supposition, hypothesis, or uncertain possibility. It establishes a condition under which a specific result or scenario will occur. It signifies that the outcome depends on a factor that is not yet certain. The result is that after the Fund has not traced any dependant, and in the absence of a nominee, may it proceed in terms of subsection 37C(1)(c).

[23] This aligns with the nature of the pension benefit. A pension benefit is a highly regulated statutory mechanism designed for social protection. The trustees have the ultimate responsibility for allocating the benefit. This is so because whilst you may nominate beneficiaries, the trustees are not legally bound by your nomination and can choose or accept other beneficiaries to ensure that the dependants are not left destitute. This is a social security legislation designed to protect a member's dependants, spouses, nominees, children, or anyone who was financially supported by the deceased. Therefore, the precursor to making payment to the Guardian's Fund or the Unclaimed Benefit Fund should be to trace and identify the persons mentioned in subsections 37C(1)(a) and (b). The failure to do so defeats the purpose of s 37C(1).

[24] The aforementioned goals are buttressed by the definition of 'unclaimed' benefits in s 1 of the Act. Section 1 includes 'a death benefit to a beneficiary under s 37C not paid within 24 months from the date on which the Fund becomes aware of the death of a member, or within such longer period as may be reasonably justified by the board of the Fund in writing'. One can infer from this definition that if the benefit is not paid within the period of 12 months, it can be paid to the Unclaimed

Benefit Fund within 24 months from the date on which the Fund became aware of the death of a member or such a longer period as may be reasonably justified. This can only mean that the Fund is given this period to identify and determine the dependants or nominees of the deceased member before transferring the funds to the unclaimed benefit fund. In addition, the 24 months can be extended where it is reasonably justified. The purpose of this definition was not to accord protection to the Fund, but to the dependants and nominees of the deceased member.

[25] The phrase ‘within twelve months of the death of a member’ in s 37C(1) of the Act is repeated in all the subsections. Subsection (a) thereof obliges the Fund to make payments to dependants if the Fund, within 12 months of the death of a member, becomes aware of or traces a dependant or dependants of the member. Subsection (bA) requires that payments to dependants and nominees be made ‘within twelve months of the death of such a member’. The common thread across all the subsections is 12 months. It refers to the death of a member.

[26] The interpretation which should be accorded to s 37C(1) of the Act is that it imposes a legal duty upon the Fund to identify any dependants and nominees of the deceased member. Having identified those persons of interest, the Fund has to effect an equitable distribution of the death benefit amongst the dependants and/or nominees. The definition of dependants in s 1 in relation to a member refers to:

- ‘(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 dependant 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.’

[27] The purpose of s 37C was aptly described in *Mashazi v African Products Retirement Benefit Provident Fund*<sup>8</sup> (*Mashazi*) as follows:

‘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 in order that no dependants are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors.’

[28] To achieve the objective of the Act, the Fund has to identify the dependants, make an equitable distribution and choose a method of payment to them. The Fund cannot carry out these objectives without identifying the dependants. Identification, in a legal context, means a specific process of establishing the specific identity of the dependants. Tracing is the evidentiary process of identifying the dependants. Tracing is not finding itself, but rather a precondition to the identification of the dependants. This view is supported by the wording of s 37C of the Act, which requires the Fund to trace the dependants. It is therefore imperative that the tracing alternative be operative if the Fund has not otherwise become aware of any dependant. In that case, I find that, if the Fund became aware of the death of Mr Viljoen after two years, nothing precluded it from investigating and tracing his dependants.

[29] The Fund’s interpretation incorrectly postulates that the text specifically envisages a situation in which if the Fund was not advised of a member’s death

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<sup>8</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2003 (1) SA 629 (W); 2002 8 BPLR 3703 (W) at 3705-3706.

within the 12 months, such funds should be paid into the estate. The absurdity of this argument is that the advocated interpretation is out of context and against the purpose of the Act. The opening words of s 37C(1) underscore the legislature's intention to override all conflicting laws and fund rules, to exclude death benefits from the deceased's estate, and to subject their distribution to the statutory framework of the Act.

[30] In *Mutsila v Municipal Gratuity Fund and Another (Mutsila)*,<sup>9</sup> the Constitutional Court provided a conclusive interpretation of s 37C of the Act as follows:

'The question posed must be considered in light of the purpose of section 37C of the Act as enunciated in *Mashazi* where it was held, as mentioned, 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. 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.'<sup>10</sup>

[31] I accentuate that, in the aforementioned paragraph, the Constitutional Court<sup>11</sup> emphasised that it is only upon the conclusion of the investigation that a decision can be made as to who is a dependant; it further confirmed that the date of death of

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<sup>9</sup> *Mutsila v Municipal Gratuity Fund and Another* [2025] ZACC 17; 2025 (10) BCLR 1139 (CC); 2026 (1) SA 1 (CC)

<sup>10</sup> *Ibid* at para 90.

<sup>11</sup> *Op cit* fn 9.

a member is relevant in determining who relied on the member for financial support while the member was still alive, and added that the objective facts relevant to determining factual dependency must therefore have existed at the time of the member's death, a finding which effectively overruled the position of this Court in *Fundsatwork Umbrella Pension Fund v Guarnieri and Others (Guarnieri)*<sup>12</sup> that the determination of dependency can merely be determined at the time of allocation of the funds.

[32] The *dictum* in *Mutsila* can only mean that the pension benefit does not form part of the deceased estate, nor do the provisions of intestate succession law apply to such benefit. In fact, s 37C of the Act requires that such a benefit be distributed in line with the statutory scheme, which gives preference to need and dependency above the member's choice. It is only when the requirements of the statutory provision in s 37C(1) of the Act above have not been satisfied that payment shall be made to the estate.

[33] The Fund's interpretation treats the payment to the estate as the default position. This is contrary to the position affirmed by this Court in *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others*,<sup>13</sup> similarly in *Guarnieri*,<sup>14</sup> where it specifically noted the social purpose of protecting dependants, without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will. The Constitutional Court in *Mudau v Municipal Employees Pension Fund and Others (Institute for Retirement Funds Africa NPC as*

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<sup>12</sup> *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019] ZASCA 78; 2019 (5) SA 68 (SCA).

<sup>13</sup> *Kaplan and Another NNO v Professional and Executive Retirement Fund and Another* [1999] ZASCA 27; [1999] 3 All SA 1 (A); 1999 (3) SA 798 (SCA) at 803.

<sup>14</sup> Op cit fn 12, para 5.

*Amicus Curiae*) (*Mudau*),<sup>15</sup> also recognised the social function of pension funds in the context of our racially divided past, the developing economy, and the extensive reliance on government social grants. *Mudau*<sup>16</sup> found that the availability of the pension benefit ensures financial stability for the deceased member's family.

[34] The drafters of the legislation used the period of 12 months as a guideline, mostly to prevent the delays that would be occasioned on the part of the Fund. It is so because the administration and winding up of an estate generally takes longer than 12 months in most cases. The death of the deceased only serves as a trigger for the determination of who was a dependant at the time of death of the deceased, as confirmed by the Constitutional Court in *Mutsila*,<sup>17</sup> where the court found that a dependant's status is fixed at the time of death of the member.

[35] The restrictive interpretation to the period of 12 months advanced by the Fund leads to absurdity, as it strips the beneficiaries of the protection accorded to them by the Act. Many beneficiaries are unsophisticated people who live in rural areas and have no idea that such a benefit exists. In general, it takes the intervention of a third party for them to become aware of the existence of such benefits. By then the period of 12 months may have elapsed.

[36] Payment to the estate can only be made once all the statutory avenues for tracing and identifying dependants and nominees have been exhausted. Under s 37C(1)(c), if no dependants or nominees are found, the benefit is paid to the estate. However, the legislature provides a further safeguard: if the estate has not been

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<sup>15</sup> *Mudau v Municipal Employees Pension Fund and Others (Institute for Retirement Funds Africa NPC as Amicus Curiae)* [2023] ZACC 26; 2023 (10) BCLR 1165 (CC); [2023] 11 BLLR 1109 (CC); (2023) 44 ILJ 2641 (CC).

<sup>16</sup>Ibid.

<sup>17</sup> Op cit fn 9.para 101.

reported to the Master (and thus no inventory is received), the funds are paid into the Guardian's Fund or the Unclaimed Benefit Fund. This ensures that the benefits remain protected and regulated even when the formal administration of an estate has not yet commenced. The Fund's decision to pay Mrs Viljoen's benefit to the estate, was wrong when as a legal dependant, she was available. The Fund should not have paid the benefit to the Unclaimed Benefit Fund too, as it had been already claimed by Mrs Viljoen. It was incumbent upon the Fund to investigate whether she was the sole dependant or if there were other dependants as at the date of death of Mr Viljoen. The prioritisation of possible estate creditors in the estate of Mr Viljoen, without first exhausting the statutory enquiry into dependants, was irregular. The decision was taken despite the fact that no estate had been reported to the Master.

### **Costs**

[37] An award of costs is a matter wholly within the discretion of a trial court, an appeal court will not generally interfere with a court of first instance's decision on costs. In *Sublime Technologies (Pty) Ltd v Jonker and Another*,<sup>18</sup> this Court held that 'an appeal court will only interfere with discretionary orders granted by a lower court where it is shown that the lower court had not exercised its discretion judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles'.<sup>19</sup> In this matter, I find that the high court correctly dismissed the application with costs.

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<sup>18</sup> *Sublime Technologies (Pty) Ltd v Jonker and Another* [2009] ZASCA 149; 2010 (2) SA 522 (SCA); [2010] 2 All SA 267 (SCA) para 2.

<sup>19</sup> *Ibid.*

[38] Mrs Viljoen is impecunious. The impecunity of Mrs Viljoen is apparent as her litigation was pursued with the assistance of a *pro bono* counsel. Mrs Viljoen *bona fide* pursued the protection of her constitutional rights in terms of the law, in all the avenues opened to her. Before this Court, as the respondent, she was still legally represented by *pro bono* counsel.

[39] In general, the purpose of an award of costs is to indemnify the successful litigant for the expenses to which he or she was put through having been unjustly compelled to initiate or defend the litigation as the case may be, as stated in *Texas Co (SA) Ltd v Cape Town Municipality*.<sup>20</sup> In as much as the Fund did not seek an order for costs against Mrs Viljoen in the event that it was successful in the appeal, this Court holds the view that the successful party should be awarded costs. Mrs Viljoen has been successful before the Adjudicator, the high court and this Court. It was only through defending this matter that the desired outcome of enforcing her statutory and constitutional rights were obtained. In awarding Mrs Viljoen costs, I have taken these factors into account.

[40] Though represented by a *pro bono* counsel, I hold the view that Mrs Viljoen's legal representatives should be awarded costs. I recognise that they acted in the public interest and promoted access to justice. The recovery of costs and disbursements would encourage her legal team to re-invest into future *pro bono* litigation. The complexity and novelty of the issues raised in the matter, which have led to the appeal before this Court must have been very costly to them. At the same time, I have considered the conduct of the Fund, which had an opportunity to investigate and determine the dependants of their deceased member, but failed to do so. The decision to appeal a decision where there is a pittance of pension benefit

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<sup>20</sup> *Texas Co (SA) Ltd v Cape Town Municipality* 1926 AD 467.

payout was also insensitive. A mere R52 120,53 (before tax). The Fund could have used another matter as a test case. In conclusion, I find that the costs should follow the result.

[41] In support of my findings, I rely on the proposition adopted by the Constitutional Court in *Mudau* where it said:

‘We were informed that counsel for Mr Mudau, Mr S Khumalo SC, Mr K Magan, Ms L Mbatha and Mr B Letuka represented Mr Mudau *pro bono*. They did so with aplomb and commendable ability. This act of public service is recognised and acknowledged as an important contribution to advancing the objective of access to justice for all. Section 92(1) of the Legal Practice Act provides that, even when legal services are rendered for free, when costs become payable to a litigant, the award of costs that this court makes in favour of that litigant is deemed to have been ceded to the legal practitioner. This provision finds application in these proceedings insofar as it relates to the costs of counsel and the costs award should therefore include these costs, with the costs of two counsel being warranted.’<sup>21</sup>

[42] Accordingly, I make the following order:

The appeal is dismissed with costs, including costs of two counsel where so employed.

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YT MBATHA  
JUDGE OF APPEAL

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<sup>21</sup> Op cit fn 15 para 78.

**Appearances:**

For appellant: E Fagan SC with E Cohen  
Instructed by: Walkers Incorporated, Cape Town  
Claude Reid Incorporated, Bloemfontein

For respondent: S Khumalo SC with N Sibanyoni  
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