

Pension death benefits under the Malawi Pension Bill 14 of 2010: reflections from South Africa and Australia

Ntombizuko Dyani^{*} and *Mtendeweka Mhango*^{**}

Abstract

Pension regulation in Malawi has been uncertain and inadequate until recently when parliament introduced the Pension Bill 14 of 2010. This Bill heralds important changes in the pension law landscape, such as expanding the categories of beneficiaries of death benefits. The Bill is progressive in its attempts to regulate the pension funds industry comprehensively and should be welcomed. Reflections on South African and Australian law are needed in order to learn from the mistakes and best practices of these countries, in order to ensure the efficacy of Malawi's pension system.

INTRODUCTION

On 11 June 2010, the Minister of Finance in the government of Malawi, Mr Ken Kandodo, tabled the Pension Bill 14 of 2010 (the Bill) in parliament.¹ The preamble to the Bill provides that its objectives are, among other things, to ensure that every employee in Malawi receives retirement and supplementary benefits as and when due; to promote the safety, soundness and prudent management of pension funds that provide retirement and death benefits to members and beneficiaries; and to foster agglomeration of national savings in support of the economic growth and development of the

* LLB, LLM (UWC). Senior Lecturer: School of Law, University of the Witwatersrand.

** BA (Morehead), JD (MSU College of Law), LLM (Wayne), Associate Professor, School of Law, University of the Witwatersrand. The author is also the current Vice-Chairperson of the University of the Witwatersrand Retirement Fund. An earlier draft of this paper was presented at a workshop organised by the Malawi Law Society in August 2010. Parts of the contents of the paper were submitted to the Business & Finance Committee of the Parliament of Malawi. We should like to thank Advocate Sandile Khumalo for his useful comments on an earlier draft of this article.

¹ Munthanli & Namangale 'Pension law to punish employers' 1 July 2010 available at: <http://www.mwnation.com/> (last accessed 13 June 2012); and 'Malawi workers push for early retirement' *Flash News* 9 December 2010 available at: <http://www.globalaging.org.pernsion/world/2010/malawiret.htm>; (last accessed 13 June 2012).

country.² It is clear from these objectives that the Bill seeks the comprehensive regulation of the business of pension funds for the first time in the history of Malawi. Currently, the pension funds industry is governed by the Third Schedule to the Taxation Act³ and a few of the directives issued by the Reserve Bank of Malawi. These legal instruments have proved inadequate as they offer no comprehensive regulation of the pension industry. For example, no law requires registration of pension funds, which provides the basis for modern pension regulation, and as a result the legislature has no enforcement mechanism for ensuring that each pension fund organised to provide pension benefits meets set minimum standards for benefits, funding and administration that are typically found in modern pension legislation.⁴ This has created the need for comprehensive regulation.

The Bill contains provisions regulating conditions for and payments of death benefits. Under clause 70, every member of a fund has the right to give the trustees of the fund a written nomination directing them to pay benefits to his widow (widower), children, or close relations, upon his death. This clause also regulates how a valid nomination is made. On the other hand, clause 71 regulates the payment of death benefits in accordance with a valid nomination. In the absence of a valid nomination, it gives trustees complete discretion to pay all death benefits to a person or persons who were financially dependent on the deceased. These provisions (clauses 70 and 71) are very important in that every pension fund will be confronted with a death benefit distribution question whenever a member dies, as clause 15 makes it compulsory for every employer to maintain a life insurance policy in favour of each employee, and requires the proceeds of this policy to be paid into the member's account and distributed in accordance with clause 71.

This article examines the above clauses that will regulate the payment of death benefits in the Bill. While it argues that these clauses are progressive and should be welcomed, the paper highlights some of the potential problems that are likely to emerge from the implementation of those clauses if the Bill is passed in its current form. We argue that while the Bill appears to have avoided some of the problems that have emerged elsewhere⁵ by adopting an expansive and progressive definition of a spouse, a number of other problems are likely to emerge. However, these problems can be addressed by reliance

² Clause 4(c) and (d) of the Bill.

³ Third Schedule of the Taxation Act 14 of 1998.

⁴ Seller, *Ontario pension law handbook* (2006) at 3 (discussing the Canadian pension legislation)

⁵ For example, in South Africa and Australia.

on relevant South African and Australian legal developments and best practices.

Furthermore, we argue that the progressive definition of a spouse in the Bill, which is adopted from section 22(5) of the Constitution of Malawi,⁶ should be welcomed as it will enhance the protection of dependants, particularly women, who survive the death of a pension member. This will ensure that the stated objectives are met. In addition, we argue for the relevance of the decision by the South African Pension Funds Adjudicator (adjudicator) in *Hlathi v University of Fort Hare Retirement Fund*⁷ in the interpretation of who qualifies as a financial dependant under the Bill. We maintain that it is relevant to reflect on South African law because the social security objective of the Bill in regard to the conditions of payment of death benefits, accords with those contained in section 37C of the South African Pension Funds Act 24 of 1956, namely to prefer the needs of the dependants of deceased pension members, and ensure that dependants are not left destitute upon the death of a deceased member.⁸

ANALYSIS OF THE PROPOSED LEGAL FRAMEWORK UNDER THE MALAWI PENSION BILL

Conditions of a valid nomination

In terms of clause 70 of the Bill, which deals with the conditions for creating a valid nomination, a person who becomes a member of a pension fund shall have the right to give the trustee of the fund a signed or thumb printed written nomination directing the trustee to pay the death benefits due to his widow (widower), child or close relations.⁹ The clause also requires that the member must set out the amounts or proportions of the benefits to be paid to each of the persons named in the nomination. On a plain reading of clause 70, it is evident that there are four requirements for a valid nomination. These are: first, the nomination must be in writing;¹⁰ second, it must be

⁶ Section 22 provides that the right to marry and found a family and not to be forced to enter into a marriage shall apply to all marriages at law, custom and marriages by repute or by permanent cohabitation.

⁷ *Hlathi v University of Fort Hare Retirement Fund* [2009] 1 BPLR 37 (PFA) (hereafter referred to as *Hlathi*).

⁸ *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) 3705–3706 (discussing the social protection policy behind s 37C of the Pension Funds Act). See also the provisions of s 3(2) of Australia's Superannuation (Resolution of Complaints) Act 1993.

⁹ Clause 70(1).

¹⁰ *Id* at (1)(a).

signed by the member;¹¹ third, it must set out the amount or proportion of the benefits to be paid to each nominee;¹² and finally, the nomination must be addressed to the trustee of the fund.¹³

In addition, clause 70(3) permits a member to amend a nomination by written notice to the trustee once every twelve months, or to revoke such nomination by notice to the trustee. In clause 70(5) it provides that a nomination shall automatically be revoked by a subsequent marriage of the member. While the Bill provides a vague definition for nomination, a nominee (a person who is nominated) is not defined.¹⁴ The Bill also empowers a trustee to reject a written nomination or revocation of a nomination if it appears that such nomination or revocation was not made voluntarily. It is difficult to prove a nomination that is not made voluntarily because in all cases the member is not available to testify in this regard. A possible solution would be to provide that a written nomination made by someone on their death bed, or by a member who was murdered, triggers an investigation by the trustee.¹⁵

There are a number of problems that could arise under clause 70. While the general proposed legislative scheme in clause 70 is progressive, clause 70(3) is problematic in that it restricts a member's freedom of testation. It does this by restricting a member's ability to amend at any time, the decision on how his property (i.e. pension benefits) should be disposed of after death by providing that amendment of nomination is permitted only once in any period of twelve months.¹⁶ We believe that to avoid an unjustifiable limitation of a member's common law right to freedom of testation, he should have the right to decide at any time whom he wishes to receive the benefits when he dies.¹⁷

¹¹ *Id* at (6).

¹² *Id* at (2).

¹³ *Id* at (1)(a).

¹⁴ The definition section defines a nomination to mean a nomination under clause 70.

¹⁵ *Makhanya v Minister of Finance* [2004] 3 BPLR 5514 (D) (where the court considered the Roman-Dutch principle that says a person who kills another is disqualified from benefiting from them, and ruled that this principle should be extended to the pension benefits of a deceased member. However, see Marx & Hanekom Manual on South African retirement funds and other employee benefits (2007) 214 (noting that it is doubtful whether the Roman-Dutch principle can be automatically applied to s 37C given the opening words to this section).

¹⁶ Clause 70(3).

¹⁷ For a discussion on the freedom of testation under South African law, see Wood-Bodley 'Freedom of testation and the Bill of Rights: *Minister of Education v Syfrets Trust Ltd*' (2007) 124 *South African Law Journal* 687–702.

In Malawi, the right to testation arises from section 28 of the Constitution.¹⁸ The scope of this right includes the right of an individual to decide, at any time, how his property should be disposed of upon his death. It is not clear what the legislature seeks to achieve by restricting the exercise of such nomination to once every twelve months.

Another potential problem with this limitation is that it could unfairly prevent a member from amending a nomination where a member's personal circumstances have changed more than once during a period of twelve months. For example, imagine that a member, who practises polygamy, bears two children within a period of twelve months. If such member exercises his right to amend the nomination in regards to the first child, he would be precluded from making a further amendment to the potential prejudice of the second child in the event that the member dies before the twelve month period has lapsed. Assuming that the existing nomination was valid in the sense that it met all the conditions in the Bill, the trustee would be bound to pay according to its direction to the exclusion of the second child who could have been added had the restriction in clause 70(3) not existed. It is submitted that pension members and their beneficiaries could benefit from the ability of members to amend nominations freely.¹⁹

One other potential problem arises where a complainant (and potential beneficiary) asserts that the deceased was unduly influenced in making a particular nomination. Clause 70(8) attempts to address this problem by empowering a trustee to reject a nomination or revocation that appears not to have been made voluntarily. In this determination, South African authorities are relevant. In *Kruger v Central Retirement Annuity Fund*,²⁰ the adjudicator had to address a similar problem and decide whether the deceased member had properly completed a nomination. The adjudicator adopted the view that a nomination is similar to a contract, and as a result, the ordinary contractual principles apply. In this regard, the adjudicator found that in order for a complainant to succeed in an action based on the principle of undue influence, the following elements had to be proved: that the one contracting party obtained influence over the other; that this influence diluted his/her powers of resistance and made him pliable; and

¹⁸ Section 28 of the Malawi Constitution, 1994 provides that: 'Every person shall be able to acquire property alone or in association with others. No person shall be arbitrarily deprived of property.'

¹⁹ *Gowing v Lifestyle Retirement Annuity* [2007] 2 BPLR 212 (PFA) (demonstrating the benefits of updating nominations).

²⁰ *Kruger v Central Retirement Annuity Fund* [2002] 7 BPLR 3634 (PFA).

finally that the contracting party used this influence in an unlawful manner to persuade the other into a contract which he would otherwise not have concluded had his freedom of will not been subjected to this undue influence.²¹ In applying these elements to the facts of *Kruger v Central Retirement Annuity Fund*, the adjudicator found that the complainant had failed to meet the burden of proof and as a result, the nomination was deemed valid.

In the context of the Bill, in the determination of whether or not a nomination or revocation of a nomination was made voluntarily under undue influence, or that it incorrectly identifies a nominee, a trustee will likely use the above and other contractual principles to resolve the issue.²² We submit that in appropriate circumstances, a potential beneficiary relying on a disputed nomination should be permitted by the trustee (at the fund adjudication level) to present evidence to demonstrate the member's exact intention.

Another possible issue that could arise under the Bill is whether an estate or an artificial person can be nominated to receive death benefits under clause 70. While a reading of the relevant clauses appears to suggest that an artificial person or estate can be nominated as a beneficiary – bearing in mind the social protection policy behind clauses 70 and 71 – it is doubtful whether the legislator had this in mind. This view is supported by the fact that clause 70 recognises only three classes of natural persons that may be nominated to receive death benefits, namely a spouse, a child, and close relations. It remains an open question whether the language in clause 70 can be interpreted to permit a nomination of a deceased's estate, or a letter from a member in which he states that the nominee will be indicated in his will. This view is supported by two further clauses. The first is clause 73(2), which provides that a member's entitlement to benefits under a pension fund does not form part of his estate. The second, clause 85, provides that the Deceased Estate (Wills, Intestate and Protection) Act 2010 shall not apply to a member's entitlement to benefits under a pension fund. Therefore, a provision in a will may not be sufficient to govern death benefits.

²¹ *Id* at par 15, citing *Preller v Jordaan* 1956 1 SA 483 at 492.

²² See for example, *Zulu v Illovo Sugar Provident Fund* [2002] 2 PBLR 312 (PFA) (where the deceased mis-identified the nominee's name and date of birth. The adjudicator referred to the parol evidence rule, but allowed the complainant to introduce extrinsic evidence to show that he was the intended nominee).

Payment of the death benefits

Clause 71 deals with the payment of death benefits either under a valid nomination or otherwise. Under clause 71(1), a member's written nomination to the trustees, which is current at the time of death, is binding on the trustees and requires them to pay out benefits as directed by it. In addition to the conditions for a valid nomination in clause 70, clause 71 introduces another condition which is that a nomination must be current at the time of death in order for the trustee to be bound by it. While the Bill does not provide any guidance as to what constitutes a current written nomination, leaving this to the fund rules, this requirement is similar to that in Australian legislation which renders case law from Australia relevant in determining the meaning of a 'current nomination'.

Under the Australian Superannuation Industrial Supervisory Act of 1993, if the fund rules permit payment of death benefit based on a written nomination, such nomination becomes binding on the trustee²³ provided certain requirements have been met. One of these requirements is that the nomination must be current, namely it must have been made no more than three years from the date on which it was first signed, or last confirmed or amended.²⁴ If this and other requirements have not been met, the written nomination will not bind the trustee. However, while a trustee is not bound by a nomination that is no longer current, Australian courts have ruled that the member's preference shown in a written nomination remains a relevant consideration to be considered along with any other relevant information,

²³ *Collins v AMP Superannuation Ltd* (1997) 75 FCR 565 where the deceased member left a binding beneficiary nomination under which his two adult sons from a previous marriage were nominated as the beneficiaries. At the time of his death, there were two other minor daughters from a subsequent relationship. Justice Merkel held that as the nomination was a valid binding nomination, the trustee did not have any discretion to not abide by that nomination. In remanding the matter to the SCT, Merkel, reasoned that absent a discretion on the part of the trustee, unfairness in the result is not to be equated with unfairness in the decision.

²⁴ Other requirements include the following: (a) the fund rules must permit such nominations to be made by members; (b) the trustee must give to fund members sufficient information to enable them to understand their right to require the trustee to provide the benefits; (c) the nomination is made in writing, and is declared to be signed and dated by the member in the presence of two adult witnesses who are not nominated beneficiaries; (d) each nominated beneficiary is a dependant, or the legal personal representative, of the member; (e) the proportion of the benefit to be given to each nominated beneficiary is certain or readily ascertainable, and, if the nomination is unclear in this regard, the trustee has sought further clarification; and (f) there is no court order, or a family law agreement or order relating to the splitting of the benefit, that prevents the trustee from complying with the nomination. See s 59(1A) of the Australian Superannuation Industrial Supervisory Act of 1993 and also SIS Regulations 6.17A, 6.17AA and 6.17B (1994).

such as the degree of dependency of the potential beneficiaries, when the trustee makes a death benefit distribution.²⁵ Moreover, the Bill provides that a trustee is not bound and will not pay death benefits, if it appears that the nomination was not made voluntarily, which implies a duty on the trustee to investigate a nomination before executing payment.

Another provision which may operate to prevent a trustee from paying out benefits as directed, is clause 71(3). According to this clause, a trustee shall only pay benefits to a close relation of a deceased member as directed in a nomination, if the trustee is satisfied that the close relation was financially dependent on the member at the time of death.²⁶ Our interpretation of clause 71(3) is that at face value it appears to create a distinction between a dependant and a close relation, with a dependant (this is a person whom the deceased member was legally obliged to maintain under the common or statutory law)²⁷ enjoying preference over a close relation. This is because, unlike a dependant, a close relation who is nominated to receive benefits can only receive them if he can demonstrate financial dependence. A dependant, on the other hand, can receive benefits if nominated regardless of whether he was financially dependent on the deceased. If the drafters of the Bill intended to express this distinction, we submit that it should be welcomed as it is consistent with the social policy of ensuring that dependants of the deceased are not left destitute upon his death.

On the other hand, the distinction contemplated above is frustrated by the conflicting definitions of a dependant and close relation. The Bill defines

²⁵ Superannuation Complaints Tribunal 'Key consideration that apply to death benefit claims' (2006) at 20 available at <http://www.sct.gov.au/downloads/KeyConsiderations-DeathBenClaim.pdf> (last accessed 13 June 2012).

²⁶ See for example a discussion of some determinations that could be persuasive authority in Malawi on what constitutes financial dependency at the time of death. Mhango 'The duty to investigate factual dependants: a comment on *De Beers & Others v Hosaf Fibre Provident Fund*' (2008) 29 *Industrial Law Journal* 2439, and Mhango 'An examination of the accurate application of the dependency test under the Pension Funds Act' (2008) 20 *South African Mercantile Law Journal* 126 (discussing South African case law). For some relevant Australian case law see *Noel v Cook* (2004) FCA 479 (holding that the question whether there is in fact dependence at the date of death is not to be answered by looking only to the circumstances as they existed at that date, past events and future probabilities have to be considered as well); *Faull v Superannuation Complaints Tribunal* (1999) NSWSC 1137 (where the Federal Court held that partial dependency was sufficient for the purposes of dependency); and *Aaffes v Kearney*, (1975) 180 CLR 199 (FCHCA) (holding that in determining financial dependency, the whole of the relationship between the parties that existed at the time of the death needs to be considered).

²⁷ See *Reyneke v Reyneke* 1990 3 SA 927 (E)).

these terms as follows: ‘dependant of a member includes a spouse and a child of the member’, while a ‘close relation means spouse, brother, sister, parent, child, child of the spouse, and the spouse of any of these’.²⁸ In the context of death benefits, these definitions entail that a child or spouse of a deceased will be required to show financial dependency whether or not nominated to receive benefits. If this were not the case, the distinction contemplated in clause 71(3) is rendered meaningless because, like a close relation, a dependant (*ie* spouse and child) will also be required to show financial dependency before they can qualify for death benefits, as they are also included in the definition of a close relation. In other words, under the current version of the Bill, both a dependant and a close relation must establish financial dependency to qualify for benefits despite the fact that clause 71(3) expressly restricts this burden to a close relation.

It is our view that the inclusion of ‘spouse’ and ‘child’ in the definition of a close relation is problematic and should be reconsidered because it affects the distinction described above. A dependant should not have to demonstrate financial dependence in order to qualify for death benefits, as her status as a dependant arises by operation of law, and as a result should receive preference over close relations.²⁹ A member is legally liable to maintain his spouse³⁰ and children.³¹ Unlike with children, there always exists a reciprocal duty of support between spouses as a direct consequence of marriage. The duty of support between spouses can continue after the marriage has been dissolved by divorce, and typically, the order of divorce will specify the extent of support.³²

²⁸ See definition section in the Bill.

²⁹ See *Van Der Merwe v Southern Life Association and Another* [2000] 3 BPLR 321 (PFA) at 330 where Murphy states that there is no obligation upon a spouse to prove that she was in fact dependant on the deceased for maintenance.

³⁰ *Lekhozi v Auto Worker’s Pension Fund* [2004] 5 BPLR 5714 (PFA).

³¹ Section 18 of the South African Children’s Act 38 of 2005 and s 15(2) of the South African Maintenance Act 99 of 1998.

³² The right to fair maintenance upon dissolution of marriage may implicate pension benefits. See s 24(1)(b) of the Constitution of Malawi. See also, s 7(1) of the South African Divorce Act 70 of 1979; *Lombard v Central Retirement Annuity Fund* [2003] 3 BPLR 4460 (PFA), (where the complainant divorced the deceased in 1999). During the divorce proceedings the complainant did not ask for maintenance and it was so contained in the divorce order, which incorporated the settlement agreement. The settlement agreement stated at the time that the deceased member shall be liable for the complainant’s reasonable medical expenses. The Adjudicator found that although the order states that no maintenance was sought, the rest of the order clearly relates to another aspect of maintenance, namely medical expenses and consequently found that the deceased member was legally liable for the complainant’s maintenance albeit limited and that the complainant should be treated as a subs 1(a) dependant).

On the other hand, a child is not required to maintain his parents, brothers or sisters, who are also included in the definition of a close relation, unless the claimant can prove that she was indigent and in need of support and that the deceased was able, to or contributed to her maintenance during his lifetime.³³ Therefore, it makes sense to exclude spouses and children from the definition of a close relation and ensure that they are not subjected to the requirements of clause 71(3). A spouse or child, whether nominated or not, should be entitled to death benefits by virtue of the fact that the law, including common law, establishes a duty on parents to support children and a reciprocal duty of support between spouses.³⁴ The common law makes a distinction between a legal dependant and a close relation (or non-legal dependant) which the Bill fails to recognise. This could lead to operational problems when it comes to payment of benefits to all categories of beneficiaries.³⁵ We submit that the other classes of persons like brothers, sisters and others should be subjected to the stringent requirements of clause 71(3). This will ensure that there is a distinction between the concept of a dependant and a close relation in the Bill.

Another important clause is 71(4), which provides as follows:

- (4) If, in relation to all or a part of the benefits payable on the death of a member of a pension fund –
- (a) the member does not have a nomination current on his death; or
 - (b) under subsection 70(8), the trustee has not accepted a nomination from the member; then, subject to this Act and notwithstanding

³³ See *Smith v Mutual and Federal Insurance Co Ltd* 1998 4 SA 626 (C) and *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA).

³⁴ Sections 23(3) and 24 of the Constitution of Malawi. At common law a duty to maintain will arise where the following three requirements are met: (1) the relationship between the parties is such that it imposes a duty of support (2) the person claiming support is unable to maintain himself/herself, and (3) the person from whom support is requested must have capacity to support. See *Reyneke v Reyneke* 1990 (3) SA 927 (E)). See also s 18 of the South African Children's Act of 2005. See also *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) at par 33, O'Regan J (explaining that that in terms of common law, marriage creates a reciprocal and enforceable duty of financial support between spouses and a joint responsibility for the guardianship and custody of children born of the marriage).

³⁵ To illustrate the importance and effect of legislative draftsmen see *Henderson v Eskom* [1999] 12 BPLR 353 (PFA) (noting that while the 1996 amendments to the Pension Funds Act were overdue and necessary in light of the constitutional changes, they were also a source of new problems created by the legislative draftsmen. According to the Adjudicator, the legislative objectives in the amendments of 1996 have been undermined by the poor drafting of chapter VA of the Pension Benefits Funds Act, which covers ss 30A–30Y, because the amendments were tacked on to a longstanding piece of legislation without full consideration being given to other sections of the legislation).

any other law to the contrary, those benefits, or that part of those benefits, shall be paid, in such proportions as the trustee determines, to a person or persons determined by the trustee of the fund, being a person or persons who, the trustee is satisfied, was or were financially dependent on the member at the time of his death.

This clause applies in cases where there has been no valid nomination and the trustee enjoys an unfettered discretion in paying death benefits to those persons who were financially dependent on the deceased. An important aspect of this clause is that the trustee's powers take precedence over any other law.

EXAMINING THE DUTIES IMPOSED BY CLAUSES 70 AND 71

The above analysis encapsulates the proposed legal framework for the payment of death benefits under the Bill which imposes five statutory duties on the trustees. The first duty is to investigate the authenticity of a nomination or revocation of a nomination, and the currency of a nomination.³⁶ This is an important duty because its discharge has a bearing on whether or not the trustee is empowered to pay benefits to identified beneficiaries. It is important to note that the Bill empowers the trustee to pay benefits in terms of a written nomination if such nomination is signed, up to date and directed to the trustee. Given that pension funds are only empowered to act in terms of legislation and the rules of the fund,³⁷ a nomination that is not signed, up to date or addressed to the trustee will not empower the trustee pay out benefits in accordance with its directions.

The second duty, which applies where the member has nominated a close relation to receive benefits, is to investigate whether the close relation was financially dependent on the member at the time of death.³⁸ The determination of what constitutes financial dependency is one of the most difficult questions in modern pension law. However, it has been established

³⁶ Clauses 70(8) and 71(2).

³⁷ See clause 34 which provides for the binding nature of the rules of the fund on the trustees. See also *Tek Corporation Provident Fund v Lorentz* [2000] 3 BPLR 227 (SCA) (holding that pension funds are empowered to act only in terms of the rules, common law or legislation; that any actions not provided for in the rules are *ultra vires*); *Abrahamse v Connock's Pension Fund* 1963 2 SA 76 (W) at 78 D–E (holding that the rules constitute the constitution of the fund); and *Mngadi v Board of Trustees of the Motor Vehicle Accident Fund's Pension Fund and Others* 343/08 [2008] SZIC 82 (upholding the supremacy and binding nature of fund rules).

³⁸ See Mhango *Industrial Law Journal* n 26 above, (discussing the concept of determining dependency at time of death).

through case law, that to constitute financial dependency a member must have regularly contributed towards the support of a person.³⁹ Accordingly, irregular contributions, or a once off contribution by the deceased, will ordinarily not qualify a recipient as a financial dependant of the deceased.⁴⁰ It should be clear from this requirement that the Bill is concerned with protecting financial dependants of the deceased where no valid nomination exists.

The third duty calls on the trustee to identify financial dependants of the deceased at the time of death.⁴¹ This duty is broader than that in clause 71(3) because it covers every person who was financially dependent on the member.

The fourth duty is contained in clause 71(4) and calls on the trustee to make equitable or appropriate payment of benefits to any person who was financially dependent on the deceased member. The scope of this duty is not defined in the Bill which also does not offer guidance to a trustee on what would constitute an appropriate or equitable payment of benefits. In this regard, we believe that the best practices from South Africa and Australia should be considered and adopted in Malawi.⁴²

The final duty relates to the mode of payment of benefits and applies where minor beneficiaries are involved. The purpose of this duty is to protect the rights of minor beneficiaries, and essentially provides for two modes of payment. The first is a direct payment to the beneficiaries once they reach the age of majority.⁴³ If this mode of payment is preferred, the trustee is required to hold the benefit in a separate trust where the benefits no longer form part of the fund assets (whether or not the funds are invested or held together with the fund assets) until the beneficiary reaches the age of majority.⁴⁴ Finally, a trustee may make instalment payments to the parent or guardian of the

³⁹ *Govender v Alpha Group Employees Provident Fund (2)* [2001] 8 BPLR 2358 (PFA); and *Faull v Superannuation Complaints Tribunal* (1999) NSWSC 1137.

⁴⁰ *Ibid.*

⁴¹ Clause 71(4).

⁴² See, eg, *Sithole v ICS Provident Fund* 2000 4 BPLR 430 (PFA) (hereafter *Sithole*); *Koekemoer v Macsteel Group Retirement Plan* [2004] 2 BPLR 5465 (PFA); *TWC v Rentokil Pension Fund and Another* [2000] 2 BPLR 216 (PFA); *Noel v Cook* (2004) FCA 479; *Northern Star Ltd v Mullen* BC8701500 S/Ct NSW (CA); and *Aaffes v Kearney*, (1975) 180 CLR 199 (FCHCA).

⁴³ Clause 71(5).

⁴⁴ *Id* at (a).

minor beneficiary from the capital or income of the trust towards the maintenance, education, or welfare of the minor beneficiary.⁴⁵

The problem with the latter mode of payment is that it sometimes entails a decision by the trustee on whether or not a parent or guardian should be deprived of the right to administer benefits on behalf of the minor beneficiary.⁴⁶ In the context of a similar provision and problems under the Pension Funds Act, the adjudicator has consistently held that a person who is labouring under a legal disability such as prodigality, insolvency, mental disability, or incapacity to manage his own affairs, may properly be deprived of the right to administer death benefits on behalf a minor beneficiary.⁴⁷ Furthermore, in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA), the adjudicator explained that the following factors need to be considered by the trustee in determining whether a guardian should administer moneys on behalf of his or her minor child: (1) the amount of the benefit; (2) the ability of the guardian to administer the moneys; (3) the qualifications (or lack thereof) of the guardian to administer the moneys; and (4) that the benefit should be utilised in such a way that it can provide for the minor until he or she attains the age of majority.⁴⁸ Moreover, in addition to the relevant factors identified in *Ramanyelo v Mine Workers Provident Fund*, the best interest of the child must be the primary consideration for the trustee. It is our view that one of the problems with clause 71(5) is that it omits the consideration of the best interest of the child despite Malawi's accession to the Convention on the Rights of the Child in January 1991.⁴⁹

REFLECTIONS ON THE SOUTH AFRICAN AND AUSTRALIAN EXPERIENCE

Clause 71(4) is a potential source of problems surrounding the payment of death benefits by a trustee. One of these problems is where a surviving beneficiary was partially dependent on the deceased. Here the issue is whether the Bill is intended to regulate the payment of death benefits only

⁴⁵ *Id* at (b).

⁴⁶ Mhango & Dyani 'The duty to effect an appropriate mode of payment to minor pension beneficiaries under scrutiny in death claims' (2009) 12/2 *Potchefstroom Electronic Law Journal* at 144.

⁴⁷ See *Moralo v Holcim South African Provident Fund* PFA/GA/5400/2005/ZC unreported; and *Mafe v Barloworld (SA) Retirement Fund Respondent* PFA/FS/13033/07/CN unreported.

⁴⁸ *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at par 16.

⁴⁹ Convention on the Rights of the Child, GA res 44/25, annex 44 UN GAOR Supp (No 49) at 167, UN Doc A/44/49 (1989), entered into force on 2 September 1990.

to persons who were wholly dependent on the deceased, or whether those who were only partially dependant are included within its ambit.

South African and Australian case law could be helpful in determining this question. So, one finds in *Hlathi* the adjudicator held, *inter alia*, that partial dependency is sufficient for purposes of qualifying as a financial dependant under the Pension Funds Act. The discussion that follows provides context and/or explains why South African and Australian law is relevant to Malawi in the determination of a financial dependant, and demonstrates how these matters have been decided in those jurisdictions.

A brief discussion of the legal framework for the distribution of death benefits in South Africa

In 1976, the South African Pension Funds Act was amended to include section 37C. This section regulates the payment of any benefit payable upon the death of a pension fund member, and places a duty on the Board of Management of a fund (the Board) to distribute the death benefit. The pertinent part of section 37C reads as follows:

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to section 19 (5) (b) (i) and 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 board, to one of such dependants or in proportions to some of or all such dependants.
- (2) (a) a payment by a registered fund to a member nominated trustee contemplated in the Trust Property Control Act, 1988, a person recognised in law or appointed by a Court as the person responsible for managing the affairs of a dependant or nominee; or a beneficiary fund, shall be deemed to be a payment to such dependant or nominee.
- (3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee.⁵⁰

⁵⁰ Section 37C of the Pension Funds Act as amended by s 15 of the Financial Services Laws General Amendment Act 22 of 2008. See also *Sithole* n 42 above, in which the adjudicator set aside the Board's decision because the Board relied on customary law

Unlike the Bill which provides that ‘if a member’s nomination to the trustee is current at the time of death, benefits payable out of the fund on the member’s death shall be paid as directed in the nomination,’⁵¹ section 37C overrides the freedom of testation in relation to the benefits payable by a pension fund in the event of death of a fund member, and gives the discretionary powers to distribute such benefits to the Board.⁵² The guiding principle is that such assets do not form part of the deceased's estate, nor do the provisions of the intestate succession legislation apply, but are required to be distributed in accordance with the statutory scheme, which gives preference to need and dependency above the fund member's choice.⁵³ In effect, in terms of section 37C, the needs of dependants override a member’s decision on the manner in which his pension savings should be distributed.

The policy underlying this social security measure is to ensure that the monies in respect of which the state allows tax concessions should, in theory, be applied to the benefit of the deceased member's surviving spouse, children and other dependants, thereby reducing the state's liability and promoting social protection.⁵⁴ The primary purpose is to prevent dependants of members from being left without financial support, and to this end, it gives the Board complete power to implement this social policy and minimise the state’s obligations to support surviving dependants.⁵⁵ Commenting on the purpose

instead of s 37C to distribute the benefits, and ruled that s 37C specifically takes precedence over any law, which includes customary law, and *Jacobs v Central Retirement Annuity Fund* 2001 1 BPLR 1488 (PFA), which held that the fact that the second respondent lodged a claim against the estate in terms of the Maintenance of Surviving Spouses Act 27 of 1990 has no bearing on the payment of death benefits arising out of the rules of a pension fund. This payment is exclusively regulated by s 37C, regardless of any other law or rules of a fund. See also *Matene v Noordberg Group Life-Assurance Scheme* 2001 2 BPLR 1604 (PFA) and *Kaplan v Professional and Executive Retirement Fund* 2001 10 BPLR 2541 (W).

⁵¹ Clause 71(1).

⁵² For a discussion on the freedom of testation under South African law see Wood-Bodley, n 17 above.

⁵³ *Dobie v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA); *Mthiyane v Fedsure Life Assurance Ltd* 2001 7 BPLR 2230 (PFA).

⁵⁴ *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W); *Van de Berg v Durban Pension Fund* 2003 3 BPLR 4518 (PFA); *Musgrave v Unisa Retirement Fund* [2000] 4 BPLR 415 (PFA). See also Marx & Hanekom n 15 above at 177.

⁵⁵ See *Sithole* n 42 above at par 23 and *Musgrave v Unisa Retirement Fund* for a discussion of the purpose and rationale of s 37C, see also, eg Manamela ‘Chasing away the ghost in death benefits: a closer look at s 37C of the Pension Funds Act 24 of 1956’ (2005) 15 *South African Mercantile Law Journal* 276, 278–279 and Mhango ‘What should the board of management of a pension fund consider when dealing with death claims involving surviving cohabitants?’ (2010) 13/2 *Potchefstroom Electronic Law Journal* at 185.

of section 37C, Hussain J of the South Gauteng High Court explained in *Mashazi v African Products Retirement Benefit Provident Fund*⁵⁶ that:

Section 37 of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. [It] specifically excludes the benefits from the assets in the estate of a member, [and] enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors.

To achieve this purpose, the legislature embraced a broad definition of dependant in the Pension Funds Act. This definition reads as follows:

dependant, in relation to a member, means

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person
 - (i) was, in the opinion of the Board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died ...⁵⁷

From the above definition, the Pension Funds Act creates three categories of dependants: a legal dependant under subsection (a); a financial dependant under subsection (b); and a future dependant under subsection (c). While the legislature's intentions in enacting section 37C, read together with the definition of 'dependant', are admirable, the adjudicator has critically observed that section 37C:

is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the resultant legitimate

⁵⁶ *Mashazi v African Products Retirement Benefit Provident Fund* 2002 8 BPLR 3703 (W) 3705–3706.

⁵⁷ Chapter 1 Pension Funds Act, as amended by the Pension Funds Amendment Act 11 of 2007.

anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the [Board]. One admirable aspect of the section is its worthy intention to protect dependants who do not reside in the same vicinity as the deceased member. One thinks here naturally of migrant labourers working in the urban areas with dependants in remote rural areas. By imposing a duty on the board to trace dependants the section advances such persons interests. However, there is legitimate concern about the practical difficulties of tracing such dependants. One solution may be for the section to identify more precisely the steps required to be taken, including an appropriate form of publication, and then allowing for a final distribution to known dependants and nominees at the expiry of a reasonable period culminating in indemnification of the board against further claims.⁵⁸

The above critical observations and recommendations may apply to the Bill. As under the Bill, the difficulties introduced by section 37C arise out of the statutory duties this section imposes on the Board. The first of these duties is to identify the dependants of a member; the second is to effect an equitable distribution of the benefits amongst the beneficiaries; and the third is to determine an appropriate mode of payment.⁵⁹

Determining a financial dependant under South African law

Since the adjudicator began its operations in 1998, it has, on a number of occasions, been approached with complex questions arising out of the statutory duties under section 37C. For purposes of this paper, we are concerned with questions arising from the first and second duties.⁶⁰ One of the practical difficulties under the second duty is that the Pension Funds Act (like the Bill) does not define or provide any guidelines on what constitutes equitable distribution of benefits. It simply imposes a duty on the Board to effect an equitable distribution of death benefits.

To address this difficulty, the adjudicator in *Sithole* identified and has consistently applied a number of factors that the Board must consider in order to effect an equitable distribution of benefits. These factors include the age of dependants; their relationship with the deceased; the extent of

⁵⁸ *Dobie NO v National Technikon Retirement Pension Fund* 1999 9 BPLR 29 (PFA) 41F–J.

⁵⁹ See *Mashego v SATU National Provident Fund and Another* [2007] 2 BPLR 229 (PFA) at par 5.3. See also Hunter *et al The Pension Funds Act: a commentary on the Act, Regulations, Selected Notices, Directives and Circulars* (2010) at 684.

⁶⁰ For a discussion of the third statutory duty see Mhango & Dyani n 48 above.

dependency; the wishes of the deceased placed either in the nomination and/or his last will; and the financial affairs of the dependants including their future earning capacity potential.⁶¹ Similar factors have been applied in Australia.⁶² It is our view that, as the Bill does not define or provide guidelines on what constitutes equitable payment of benefits, the above factors from South African, will be relevant for the trustee to consider when exercising its duties under clause 71(4).

In the context of the first duty, the adjudicator has addressed, on a number of occasions, the question of whether people involved in heterosexual or same-sex cohabitation relationships qualify for death benefits as financial dependants of the deceased in terms of the Pension Funds Act.⁶³ In the context of these cases, the adjudicator has adopted a two-prong test to determine a financial dependant who may be considered in the distribution of death benefits.⁶⁴ The inquiry under this test is whether the parties, i.e. the party seeking death benefits and the deceased pension member, lived in a relationship of mutual dependence or inter-dependence and shared a common household.⁶⁵ This test was recently refined and applied in *Hlathi*. In this case, the complainant had lived with the deceased for a period of seventeen years as husband and wife. Upon the deceased's death, the Board recognised Ms Hanise (the surviving cohabitant) as a financial dependant of the deceased and decided to award her sixty six percent of the death benefits. This decision was challenged by the deceased's mother, who was awarded the remainder of the benefits. In her complaint to the adjudicator, she alleged that Ms Hanise was not the deceased's dependant because she was employed, and that she (the complainant) was the sole beneficiary, as the deceased was unmarried and had no children.⁶⁶

⁶¹ *Sithole* n 42 above at par 24.

⁶² See *Noel v Cook* (2004) FCA 479; *Northern Star Ltd v Mullen* BC8701500 S/Ct NSW (CA); and *Aaffes v Kearney*, (1975) 180 CLR 199 (FCHCA).

⁶³ See *Fourie v Central Retirement Annuity* [2001] 2 BPLR 1580 (PFA); and *TWC v Rentokil Pension Fund*, [2000] 2 BPLR 216 (PFA).

⁶⁴ To illustrate how this test has been applied, see *Hlathi*; *Chittenden v Estcourt Butchery (Pty) Ltd Provident Fund* [2001] 5 BPLR 2001 (PFA); *Van der Merwe and Others v Southern Life Association Ltd* [2000] 3 BPLR 321 (PFA); *Van der Merwe v Central Retirement Annuity Fund* [2005] 5 BPLR 463 (PFA); *Swanepoel v Central Retirement Annuity Fund* [2001] 6 BPLR 2153 (PFA); *Fourie v Central Retirement Annuity* [2001] 2 BPLR 1580 (PFA); and *TWC v Rentokil Pension Fund and Another*, [2000] 2 BPLR 216 (PFA).

⁶⁵ *Hlathi*.

⁶⁶ *Id* at par 5.

In resolving the complaint, the adjudicator had to consider whether Ms Hanise qualified as a financial dependant as defined in subsection (b)(i) of the definition of a dependant.⁶⁷ The adjudicator reasoned that the evidence before her (in the form of receipts of shared household expenses between the deceased and Ms Hanise) was sufficient to bring Ms Hanise within the meaning of a financial dependant, and concluded that the Fund was correct in considering her in the distribution of the benefits. According to the adjudicator's reasoning, the legislature did not include the terms 'totally' or 'wholly' dependent in subsection (b)(i), there was no exhaustive list of degree or levels of dependency.⁶⁸ Contrary to the suggestion in *Van der Merwe and Another v Central Retirement Annuity Fund and Another*, total dependency is consequently not the sole measure by which to determine dependency for purposes of subsection (b)(i).⁶⁹

Accordingly, it would be contrary to the legislative intent to exclude a party for purposes of subsection (b)(i) of the definition of a dependant, on the basis that he or she had an inter-dependent financial relationship with a deceased member as opposed to one of full dependence. Based on this rationale, the adjudicator ruled that in cases arising under subsection (b)(i) involving a surviving cohabitant it is sufficient to prove that the party seeking benefits was in a permanent relationship of mutual dependence or interdependence and ran a shared and common household with the deceased, and as a consequence of the other party's death he or she was financially disadvantaged.⁷⁰

On the facts of the case, the adjudicator also found it significant that the parties mutually supported each other towards the mortgage payments and other household expenses in a relationship that lasted for a period of seventeen years, and that Ms Hanise's was financially disadvantaged since the deceased's death. Based on these findings, the adjudicator ruled that Ms Hanise fell within the scope of the definition of a financial dependant as set out in subsection (b)(i), and had correctly been regarded as a dependant by the Board.⁷¹

⁶⁷ *Id* at par 31.

⁶⁸ *Faull v Superannuation Complaints Tribunal* (1999) NSWSC 1137 (rejecting a narrow reading of the term dependant).

⁶⁹ *Hlathi* at par 34.

⁷⁰ *Ibid.*

⁷¹ *Hlathi* at par 35.

It is important to highlight that the adjudicator decided *Hlathi* against the backdrop of a period of uncertainty in the law of death benefits resulting from different decisions. According to a decision by the first adjudicator, Professor John Murphy, in *Van der Merwe v Southern Life Association and Another*, the Board had a discretion to accord to same-sex couples and cohabitants or life partners the same rights as are accorded to heterosexual married couples.⁷² It has been argued elsewhere that Murphy's decision was motivated by the desire to prevent pension funds from discriminating based on marital status, as provided by section 9 of the Constitution of the Republic of South Africa, 1996.⁷³ Furthermore, Murphy's decision was designed to comply with the instruction in section 39(1) of the Constitution.⁷⁴ This section provides that 'when interpreting the Bill of Rights, a court, tribunal or forum, must promote the values that underlie an open and democratic society based on human dignity, equality and freedom'.⁷⁵ As a result, in *Van der Merwe v Southern Life Association and Another*, Murphy interpreted the Pension Funds Act to promote the rights of members and their beneficiaries not to be discriminated against based on marital status as contained in section 9(3) of the Constitution.⁷⁶

However, Murphy's decision differed from that of the subsequent adjudicator, Advocate Vuyani Ngalwana, who, following the decision of the South African Constitutional Court in *Volks NO v Robinson and Others*,⁷⁷ (which held that it was permissible for the Maintenance of Surviving Spouses Act to discriminate on the basis of marital status in the provision of maintenance benefits by not recognising the plaintiff, who could have married the deceased but chose not to, as a spouse), held in *Van der Merwe and Another v Central Retirement Annuity Fund and Another* that a person who could have married a deceased pension fund member but chose not to, should not be accorded the benefits of a spouse of a deceased member under the Pension Funds Act.⁷⁸ In addition, Ngalwana decided that in order to qualify as a financial dependant, a surviving cohabitant had to prove that the

⁷² See *Martin v Beka Provident Fund* [2000] 2 BPLR 196 (PFA) at 213; *Van der Merwe v Southern Life Association* at 330.

⁷³ Mhango n 55 above at 194.

⁷⁴ *Id* at 195.

⁷⁵ Section 39(1) of the Constitution.

⁷⁶ Section 9(3) of the Constitution.

⁷⁷ *Volks NO v Robinson* 2005 5 BCLR 446 (CC)

⁷⁸ *Van der Merwe v Central Retirement Annuity Fund* [2005] 5 BPLR 463 (PFA).

deceased was the dominant financial provider in their relationship.⁷⁹ In his ruling, Ngalwana explained that:

In interpreting the provisions of [subsection (b)(ii) of the Pension Funds Act] I am enjoined to have regard to the constitutional background against which such provisions must be interpreted. It must therefore be evaluated, in the light of the recent challenges to the interpretation of the word ‘spouse’ as it appears in several pieces of legislation, whether it is constitutionally defensible to exclude a co-habitee from the meaning of ‘spouse’ for purposes of [subsection (b)(ii)]. In [*Volks*], the Constitutional Court has now given an unequivocal answer to this question by holding that the different treatment of formally married spouses, on the one hand, and co-habitees in a permanent life partnership, on the other, for purposes of maintenance claims against a deceased estate is not unconstitutional. There can be no difference in principle between that situation and the treatment of a co-habitee for purposes of qualifying as a spouse as defined in [subsection (b)(ii) of the Pension Funds Act]. In both cases the parties would be relying on a statutorily conferred right of maintenance after death where none lay in life. Also, in both cases, the deceased may still provide for such co-habitee, subject to the limitations of other laws, by testamentary disposition, or, in the case of a pension fund, by nominating the partner as a beneficiary.⁸⁰

Based on this rationale, a potential beneficiary, who was not married to the deceased member, but had a relationship of mutual dependence and ran a shared and common household, does not qualify as a dependant by virtue of being regarded as a spouse for purposes of subsection b(ii) as previously held by Murphy in *Van der Merwe v Southern Life Association and Another*. Instead, such potential beneficiary would only qualify as a dependant under the provisions of subsection b(i) of the definition of a dependant in the Pension Funds Act,⁸¹ if they could demonstrate full financial dependence on

⁷⁹ See *Maritz v Absa Groep Pensioenfondse* PFA/GA/1387/00/KM on refusing to grant benefits to surviving life partners or cohabitant on the basis of the precedent established in *Van der Merwe and Another v Central Retirement Annuity Fund*.

⁸⁰ *Van der Merwe v Central Retirement Annuity Fund*, 5 BPLR at par 13. See also *Kotiah v Toyota SA Provident Fund* (PFA) Case No PFA/KZN/3283/05/KM dated 9 June 2006 (unreported).

⁸¹ *Van der Merwe v Central Retirement Annuity Fund* at par 14. Numerous Pension Fund rules in South Africa including the University of Witwatersrand Retirement Fund specifically define the term spouse to clarify the matter for its members and potential beneficiaries. See also the Pension Funds Amendment Act 11 of 2007 which amended term dependant by defining a spouse to include a spouse as ‘a person who is the spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act 68 of 1998, or the Civil Union Act 17 of 2006’.

the deceased.⁸² These conflicting decisions created uncertainty in the law.⁸³ According to some commentators, the ruling in *Van der Merwe and Another v Central Retirement Annuity Fund and Another* left pension funds uncertain on whether to consider surviving cohabitants as financial dependants, or accord them same rights as those attaching to a spouse.⁸⁴ Many pension funds either sought clarity from the adjudicator, or refused to consider surviving cohabitants, particularly women, as financial dependants on the authority of *Volks* and *Van der Merwe and Another v Central Retirement Annuity Fund and Another*.⁸⁵

Determining a financial dependant under Australian law

The concept of mutual interdependence or partial dependency has long been recognised by Australian courts.⁸⁶ Depending on the language of the rules of the fund, a person does not have to be fully financially dependent on the deceased member to qualify as a financial dependant. A financial dependency that is partial can also be sufficient.⁸⁷ In *Noel v Cook*,⁸⁸ the deceased member's wife (from whom the deceased was separated but not divorced) appealed against the Superannuation Complaints Tribunal's (SCT)⁸⁹ determination to affirm the trustee's decision to pay the entire death

⁸² *Van der Merwe v Central Retirement Annuity Fund* at par 16.

⁸³ For a discussion of some of the uncertainties, see Mhango & Dyani n 46 above; Dyani and Mhango 'How could the pension funds adjudicator get it so wrong? A critique of *Smith v Eskom Pension And Provident Fund*' (2010) 13/2 *Potchefstroom Electronic Law Journal* at 162; Dyani 'Distribution of death benefits in terms of section 37C of the pension funds act: rejecting the dominant-servient test in cases of cohabitation' (2010) (24) *Speculum Juris* 28; and Lehmann 'Death and dependency: the meaning of dependent under section 37C of the Pension Funds Act 24 of 1956' *South African Law Journal* (2009) 651.

⁸⁴ For comments and discussion of these issues see Mhango n 57 above; Mhango 'Examining the provision of pension death benefits to cohabitants or life partners under the South African Pension Funds Act of 1956' (2010) 15/2 *Pensions: An International Journal* 226–237; and Mhango 'An examination of the accurate application of the dependency test under the Pension Funds Act' (2008) 20 *South African Mercantile Law Journal* (2008) at 126–135.

⁸⁵ See *Maritz v Absa Groep Pensioenfondse* PFA/GA/1387/00/KM.

⁸⁶ See *Faull v Superannuation Complaints Tribunal* (1999) NSWSC 1137 (where the federal court held that partial dependency was sufficient for the purposes of dependency. The court rejected the argument that the deceased's mother must have a necessity for the money received in order to qualify as a dependant. In the court's view, this was attributing too narrow a meaning to the word dependant).

⁸⁷ See *Northern Star Ltd v Mullen* BC8701500 S/Ct NSW (CA), CA 168 of 1986 CC 15317 of 1983 holding that even minimal financial support evidenced by gifts may warrant a finding of partial financial dependency.

⁸⁸ *Noel v Cook* (2004) FCA 479.

⁸⁹ A statutory tribunal, similar to the Adjudicator, established under the Superannuation (Resolution of Complaints) Act 1993, and mandated to inquire into and resolve superannuation related complaints in a manner that is fair, economical, informal, and

benefit to the deceased's long-term friend, with whom he had resided until the time of his death. On the evidence before it, the SCT found partial financial dependency, as there was financial interdependency and mutual commitment and support between the deceased member and his long-term friend at the time of his death. Relying on the decision in *Faull v Superannuation Complaints Tribunal*,⁹⁰ the Federal Court held that partial dependency was sufficient for the purposes of establishing financial dependency and therefore, the SCT had not erred in law by affirming the trustee's decision to pay the entire death benefit to the deceased's long-term friend.

The decision in *Faull v Superannuation Complaints Tribunal*, laid a foundation for establishing the principle of partial financial dependence in death benefits. In this case, the mother was partially financially dependent on her deceased son, who paid her \$30 per week board. The mother worked full-time and earned a comfortable wage. She did not rely on the board paid by the deceased son to live. By contrast, the father (who challenged the SCT determination) was in poor health, unemployed, and on a disability support pension. However, the father presented no evidence to show any form of financial dependency upon his deceased son at the date of death, with whom he had been estranged for some time prior to the son's death. The Federal Court found that the SCT's determination to affirm the trustee's decision to pay the death benefit to the mother, who was partially dependent on the deceased member, should be upheld. Since then, Australian courts have consistently upheld the principle of partial financial dependence in death benefit cases.⁹¹

Therefore, despite the progressive definition of a spouse in the Bill, there is a potential temptation amongst trustees to interpret clause 71(4) strictly and exclude those who may not have been fully dependent on the deceased member. In our view, the Bill is a public policy legislative proposal designed to benefit, protect and expand the interests of members and beneficiaries, and trustees must interpret its provisions dealing with death benefits generously

quick. See also <http://www.sct.gov.au> (last accessed 15 on November 2010).

⁹⁰ *Faull v Superannuation Complaints Tribunal* (1999) NSWSC 1137.

⁹¹ See for example, *Hourn v Farm Plan Pty Ltd* (2003) FCA 1122 where the Federal Court dismissed an application made by the deceased member's father against the SCT's determination to affirm the trustee decision to pay the entire death benefit to the deceased's companion. The Federal Court held that it was open to the SCT to reach the decision, on the evidence available to it, that there was partial financial dependency at the time of death, even if the de facto relationship may have to some extent broken down prior to the death.

and extend the category of dependants who may share in the death benefits to include persons who may otherwise not be considered as legal dependants. This view is clearly supported by the broad definitions of a spouse and a close relation in the Bill and by the broad objective it seeks to achieve.

CONCLUSION

The paper has provided an overview and descriptive analysis of the proposed legislative framework on death benefits in the Bill. While expressing general support for the proposed legal framework, the paper highlights potential problem areas within the proposed framework. To address some of these problems, the paper suggests that Malawian practitioners should look to best practices in South Africa and Australia for guidance. Despite the potential problems highlighted in the paper, the authors generally welcome the Bill as an important piece of legislation with commendable intentions.