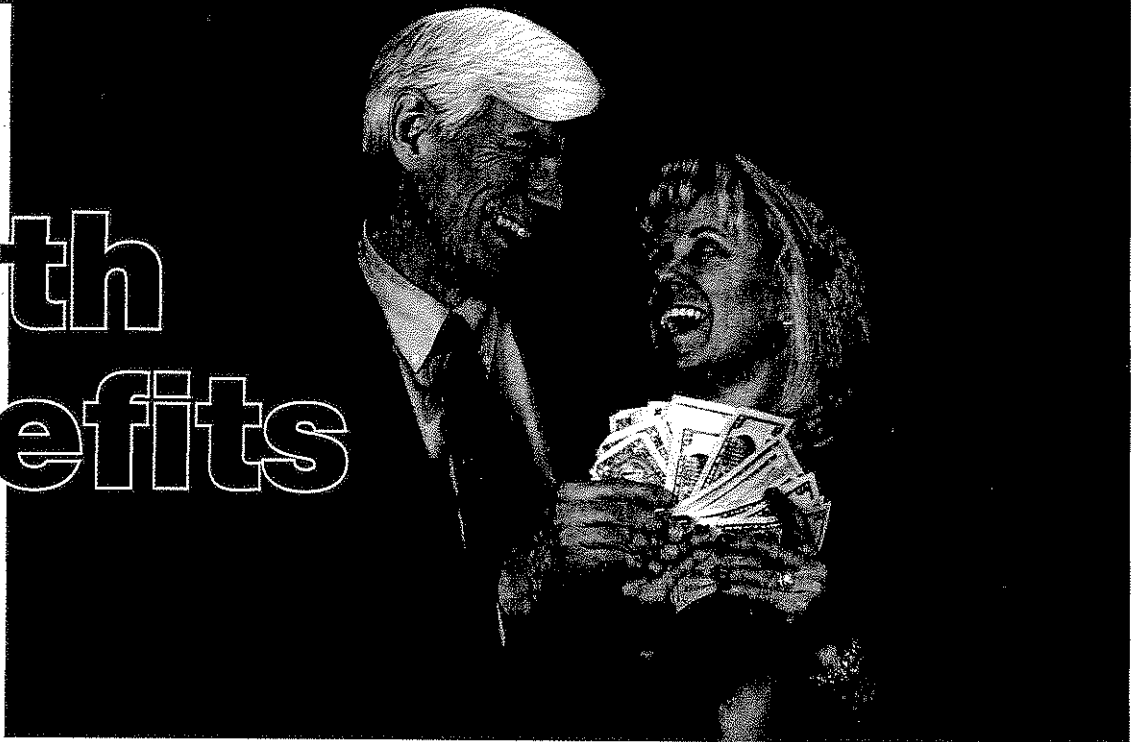
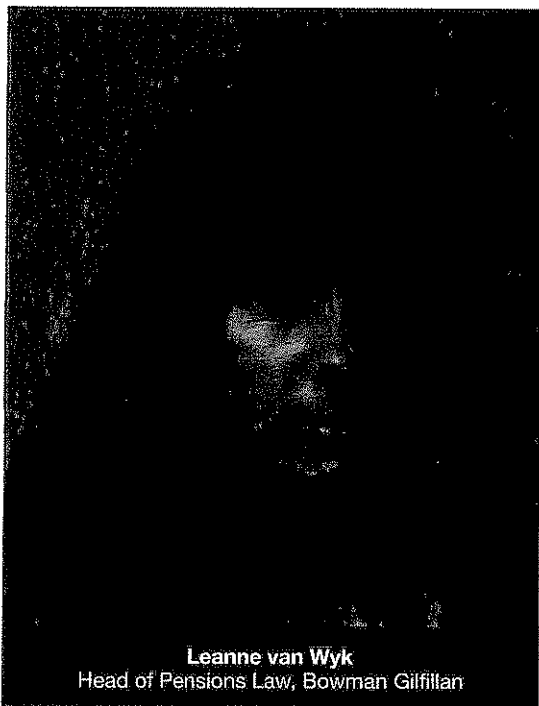


# Death benefits

and the  
**test**



## of **dependency** – **the *Thene* case**



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*For those of us who are trustees, and part of a death benefit sub-committee, the distribution of death benefits is an endless source of incredulity as well as dead of night awakenings: “did I do the right thing?” The distribution of death benefits under section 37C of the Pension Funds Act (the “Act”) is not an exact science and no one should pretend that it is – it’s all about making decisions that fall within a range of reasonableness.*

**T**hat said, the Adjudicator faces the unenviable task of reviewing section 37C decisions. On the whole one trusts that the Adjudicator's Office will get it right most of the time.

So we turn to a discussion of what constitutes "dependency" for purposes of the Act and in particular a recent determination by the Adjudicator, *Thene v Bidcorp Group Provident Fund & Others*.

The deceased, who was a member of the Fund, completed a nomination form nominating his daughter and son to each receive 50% of the benefit, which was about R209 000. The trustees resolved to distribute the death benefit as follows:

Girlfriend – 50%

Daughter (24) – 10%

Son (6) – 20%

Mother – 20%

The Fund made an allocation to the girlfriend and the deceased's mother on the basis that they were factual dependants of the deceased. The deceased's daughter complained to the Adjudicator that only she and her brother should have received any portion of the benefit.

The determination is fairly short but from what is stated it appears that the Adjudicator accepts that the girlfriend is a factual dependant and, thus, falls within the definition of dependant. However, here the determination takes a confusing turn. The Adjudicator states the following in respect of the deceased's mother:

*"... the Principal Officer contends that the deceased also had an obligation to support his girlfriend, his mother and the complainant who were his **factual dependants** as they received financial support from him."*

*(Own emphasis.)*

*The first respondent distributed 20% of the benefit to the deceased's mother. The first respondent submits that the basis of such distribution to her is that she submitted an affidavit wherein she contended that as at the deceased's date of death he was supporting her. The deceased had a duty to support his mother. **The means test in finding whether he indeed had such duty is whether his mother was indigent and that the deceased had the necessary means to maintain her.** The onus rests with the deceased's mother to prove the necessity for such support. The deceased's mother's affidavit merely declares that the deceased supported her financially and on the strength of this affidavit the first respondent found her be falling within the definition of a dependant of the deceased. In terms of the Oxford dictionary to be indigent means to be very poor. Further, in terms of our case law to be indigent means to be in extreme need*

*or want. In her affidavit, the deceased's mother states that she is a pensioner, therefore, confirming that she does have income which will support her for the rest of her life. She has failed to prove to the first respondent that on a balance of probabilities she is indigent and cannot support herself. Further, the respondent failed to investigate the deceased's mother's status of being indigent and her ability to support herself. Had the first respondent properly and comprehensively investigated whether she was indigent and could not support herself it would have found **that as she was in receipt of a pension therefore it could not in its opinion upon the deceased's death declare her to be a factual dependant.**"*

*(Own emphasis.)*

For me, this requires scrutiny. The statement looks, on the face of it, like a conflation of factual and legal dependency. So let us examine who is a dependant in terms of the definition in the Act and then ask whether the test set out in *Thene* is correct.

### **1. A person in respect of whom the member is legally liable for maintenance**

The first part of the definition of dependant refers to "... a person in respect of whom the member is legally liable for maintenance".

Such legal liability could arise by way of legislation or common law. The test the Adjudicator applied in *Thene* derives from our common law. If one examines the case law it is clear that our Courts have applied a fairly consistent test when determining whether a child is under a legal duty to support his/her parent. This reciprocal duty of support that arises between parent and child arises from what the Courts describe as a sense of dutifulness, or filial support. The source of the filial duty between parent and child is broken down into the following components:

- a. the parent must prove his need for maintenance; and
- b. the child must be able to maintain his/her parent.

The test applied to a parent in need appears to be stricter than the test applied to a child in need. The Courts have required that a parent demonstrate *indigence*. What constitutes indigence has been deliberated upon by the Courts. Indigence requires extreme need or want of the basic necessities of life, for example, food, clothing and shelter. However, the Courts have also stated that indigence must be considered in light of the parent's station in life. That is, as I understand it, that the actual provision of the basic necessities of life may differ from one person to another. For example, basic food for one person may mean samp and mielie-meal, but for another may mean chicken, eggs and milk.

Thus, for our *Thene* case, it may not be enough, if legal dependency and the duty of support is the consideration, to state that because the mother was receiving a state pension, she is not indigent. It would be necessary to consider her station in life as well as whether the state pension covered her basic necessities.

So much for the first part of the definition of dependant, and we can conclude that the mother in the *Thene* case may or may not have fallen within the definition of dependant as a "legal dependant".

## 2. Factual dependency

So what then of (b) of the definition of dependant?

(b) provides that a dependant is:

"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) [a spouse];
- (iii) [a child].

From this we can distil four components:

1. the member is not legally liable for maintenance of the person; and
2. on the death of the member;
3. the person was in fact dependant on the member;
4. for maintenance.

I won't deal with each component in depth as that would be a new topic on its own.

What strikes me immediately is that when considering factual or dependency under (b), it is a requirement of the Act that such person is *not* a legal dependant of the deceased. The Act explicitly requires this. Furthermore, if more is needed, the wording of (b) and (c) of the definition of dependant clearly highlights an intention by the Legislature to include persons who would not fall within the test of legal dependency, such as persons to whom the member would have become legally liable for maintenance but to whom he owes no legal duty on the date of death.

It is submitted that this is the intention behind (b) and (c) – to include persons within the net of dependency who may otherwise have fallen outside of the net if a strict test of legal dependency or duty of support was to be applied. At the same time, the definition of dependant narrows down the range of person to include those with whom the deceased has a relationship of affinity or blood and excludes a bare contractual interest in the deceased.

I submit that it is incorrect to apply the test of a legal duty of support to (b) and (c) of the definition of dependant. It cannot be required if one simply looks at the ordinary, literal grammatical meaning of the words, as required by the rules of interpretation of statutes or, alternatively, if one looks at what the Legislature intended.

The purpose of prioritising dependant's needs is not served by requiring trustees to establish a legal duty of support in the stringent sense necessary to claim maintenance from the deceased had she/he lived as a condition precedent to consideration by the Fund of apportioning part of the death benefit to such person.

If I have misconstrued the determination, then I no doubt will be set to rights, but the reality of, and harm in, applying the test for a legal duty of support in the factual dependency environment requires emphasis. Those of us that are involved in making section 37C decisions have an extremely important task – it is one of the areas of our work where we can have a significant positive effect on the beneficiaries to whom the Fund owes a duty. In my view, applying the test of a legal duty of support within factual dependency would exclude many people who desperately require financial support and who should be supported. It would not result in an equitable distribution of benefits, which in essence is the trustees' legislative duty.

## Judging trustees by the right test

The complexity of a trustee's duty to equitably distribute death benefits to dependants and nominees should not be underestimated. It is easy to sit on the sidelines and decide that a decision is not reasonable.

In my view, insufficient attention has been given to the test that should be applied in evaluating whether the extent of trustees' death benefit investigation is sufficient. Are trustees required to perform the best investigation that can possibly be done? I doubt it. It is more likely that they are required to undertake a reasonable investigation – the investigation a reasonable person, in the position of the trustees, would have undertaken in the circumstances. If this is the test then in considering the circumstances one needs surely to consider such factors as the resources available to the Fund and to trustees to allocate death benefits, which would include an analysis of time, expertise, resources (financial, people and other) as well as the quality of death claims being processed by funds, many of which have membership split across the country and inaccessible areas.

I have not seen a legal analysis of whether this consideration of the Fund's circumstances forms part of the test when one is testing whether trustees have reasonably undertaken the task assigned to them. Are the right questions being asked? I raise a question as to whether trustees are being judged fairly on a correct test?