



# A Review of Children's Access to Employment-based Contributory Social Insurance Benefits



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**A Review of Children's Access to Employment-based Contributory Social Insurance Benefits**

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# A REVIEW OF CHILDREN'S ACCESS TO EMPLOYMENT-BASED CONTRIBUTORY SOCIAL INSURANCE BENEFITS

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## **Abstract**

The review assesses the obstacles to accessing the death benefits due to orphans from statutory insurance schemes and pension funds in South Africa. The operation of eight major registered pension funds and three major statutory insurance funds are described. A socio-economic and legal analysis of the appointment of guardians suggests risks to the rights of children in accessing benefits. Foster children are not consistently covered. Anomalies arise from limitations in coverage of workers out of employment, and unlawful workers. Significant obstacles to accessing benefits include unjustified and cumbersome claims procedures, a failure to properly investigate claims in certain funds, inappropriate payment methods, poor governance, inappropriate trust arrangements and a lack of adequate monitoring and reporting on unclaimed monies. The review concludes with recommendations for reform.

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## Introduction

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There is a high rate of orphaning in South Africa<sup>1</sup>. In South Africa, 19% of the child population has lost one or both parents. Rates of orphaning are highest in predominantly rural provinces. There are approximately 630,000 double orphans, 500,000 maternal orphans and 2,000,000 paternal orphans. High rates of paternal orphaning are particularly significant given that men are more likely to be income earners than women<sup>2</sup>.

Employed parents typically provide for their children through a pension or provident fund. Membership is compulsory and the funds are industry or employer specific. The formal sector<sup>3</sup> employs 66.4% of the workforce and most of these employees will be members of a pension or provident fund. At least 9.27 million breadwinners are members of such a fund<sup>4</sup>.

It is compulsory for the 13.2 million persons employed in South Africa to contribute to unemployment insurance and workers' compensation schemes, which provide a death benefit to their children<sup>5</sup>.

South Africa is further characterised by its diversity: different languages, legal systems and social and familial practices bedevil the administration of social insurance and the investigation of claims, particularly when coupled with poverty and high levels of illiteracy.

This review considers the administration of the three social insurance schemes and eight major pension funds from the perspective of the children who ought to benefit from them. It describes the operation of these schemes, as well as the socio-legal context in which the schemes operate. The review identifies a range of obstacles to accessing benefits, and concludes with recommendations for reform.

## Scope and method of the review

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The statutory insurance funds are:

- ▶ The Compensation Fund ("CF") established by the Compensation for Injuries and Occupational Diseases Act ("the COIDA");
- ▶ the Mines and Works Compensation Fund ("MWCF") established under the Occupational Diseases in Mines and Works Act ("the ODIMWA")<sup>6</sup>; and
- ▶ the Unemployment Insurance Fund ("UIF") established in terms of the Unemployment Insurance Act ("the UIA").

The retirement funds that were considered are:

- ▶ the Government Employees Pension Fund ("GEPF") established under the Government Employees Pension Law ("GEPL");
- ▶ the Mineworkers Provident Fund ("MWPF");
- ▶ the SASOL Pension Fund;
- ▶ the Telkom Retirement Fund;
- ▶ the Standard Bank Group Retirement Fund;
- ▶ the Metropolitan Employee Benefit Umbrella Funds;

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1. Only the principal references are included in this section of the review. The source data is set out in more detail in Appendix 1.

2. Meintjes, H., Leatt, A., Berry, L., (2006) *Child Gauge*, Children's Institute, UCT. **Data sources:** Statistics South Africa (2005; 2006) *General Household Survey (2004); General Household Survey (2005)*. Pretoria, Cape Town: Statistics South Africa. Analysis by Debbie Budlender, Centre for Actuarial Research, UCT.

3. Defined as a business that is registered in any way and identified by the surveyed respondents. (*ibid* at xxvi). The figure quoted excludes the agricultural sector.

4. Financial Services Board, Annual Report of the Registrar of Pension Funds (2005).

5. Statistics SA, Labour Force Survey, (September 2007), Pretoria.

6. The MWCF is more in the nature of a compensation scheme than an insurance scheme, but for present purposes its administration and function are sufficiently close to an insurance scheme for it to be treated as one.

- ▶ the Metal and Engineering Industries Pension and Provident Funds (“MIBFA”); and
- ▶ the AMPLAT Group Provident Fund.

There are some 12,500 retirement funds registered in terms of the Pension Funds Act (“registered fund” and “PFA”) and approximately 10 statutory retirement funds that cater mainly for state or parastatal functionaries. The largest pension funds were selected to provide a broad spectrum, and include funds historically based in the labour movement and in financial services, public and private sector funds, defined contribution and defined benefit funds, in-house and sub-contracted administration services, various structures for individual beneficiary trusts, and members who are rural, urban, blue-collar and white-collar.

Using published secondary materials and judgements, as well as interviews with advice offices, a range of obstacles to access for children was identified. This was supplemented by case studies of individual claimants<sup>7</sup>.

Interviews were then conducted with the principal officer or a senior management officer and various levels of employees of the funds to obtain data to explain or understand these obstacles. Each fund was also provided with an opportunity to comment on a draft of the review. All funds made generous time available to consult and also provided input on the draft report.

The operation, scope and effectiveness of the various institutions that regulate the funds or provide recourse to claimants were also analysed and assessed. These are divided into the safeguards on the funds managed by the state (the CF, MWCF, UIF and GEPF)<sup>8</sup> and the safeguards on the registered funds that are privately managed<sup>9</sup>. The Guardian’s Fund (“GF”) is considered in Appendix 9.

The main body of the review discusses the findings. The appendices provide a description of the funds’ processes and form the basis of the findings.

## Limitations on the review

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No primary research was done and no data was obtained on the extent of the obstacles.

There is a limited assessment of the economic, governance, management and general administrative features of the funds. Instead, the review focuses on issues that apply particularly to children’s benefits.

Only the larger registered retirement funds were investigated. Smaller funds will in all likelihood be more expensive to administer, and less likely to obtain expert services or provide extensive customer care. The private life insurance industry was not covered, and nor were disability schemes, including the disability schemes of the funds that were reviewed.

The issues of management and the use of monies once in the hands of guardians were also not covered, and there is reason to believe that monies may often not be used for the child’s benefit.

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7. Case studies were kindly provided by the Citizen’s Advice Bureau in Pretoria, the Durban, Pietermaritzburg, Cape Town and Gauteng offices of the Black Sash, Paula Howell and the Wilo-Mqanduli Community Advice Office in the Eastern Cape.

8. Appendix 2.

9. Appendix 3.

## The Constitutional standard

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Social insurance is a form of social security<sup>10</sup> and everybody, including children, has the right to have access to it<sup>11</sup>. Access to social insurance means<sup>12</sup>:

- › the preservation and growth of the member's interest until the insured eventuality arises;
- › the ability to apply for the benefit without unjustifiable obstacles;
- › the payment of the benefit in a reasonable manner; and
- › the ability to utilise any safeguards to ensure the lawful and equitable payment of the benefit.

To give effect to this, each fund must establish and maintain the following core functions to these standards:

- › an efficient method of collecting the contributions that make up the fund;
- › the prudent growth of the assets of the fund;
- › the proper management of the fund in accordance with generally accepted principles;
- › an administrative procedure for claiming benefits that is efficient and provides the necessary information in order to make a proper decision on whether or not the claimant qualifies for benefits;
- › lawful, reasonable and procedurally fair decision-making on claims for benefits;
- › the lawful and equitable calculation of benefits;
- › the prompt and reasonable payment of benefits; and
- › compliance with appropriate safeguards, including an accurate system of financial reporting to statutory control mechanisms and beneficiaries.

These obligations are mirrored in the Convention on the Rights of the Child<sup>13</sup>.

## The socio-legal context

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### The legal capacity of children

Age determines basal legal capacity<sup>14</sup>. From birth to the age of seven years the child is known legally as an infant and has no capacity to perform any juristic act<sup>15</sup> or to litigate. The infant is entitled to various rights, but these rights can only be enforced by a parent or guardian or the Master of the High Court<sup>16</sup>. So, for example, the guardian may enter into a contract on behalf of the infant.

From the ages of seven to 18 years, the child has limited capacity to perform juristic acts, particularly enter into contracts. Any contract must either be concluded by the parent or guardian on behalf of the minor, or be concluded by the minor with the consent or assistance of the parent or guardian. If concluded by the minor, a contract may also be subsequently ratified by the parent or guardian. If the minor enters into any contract without such representation, assistance, consent or ratification, the contract can be set aside. Even where a minor is duly supported, the contract may be set aside and the parties restored to their prior position if the minor or

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10. Olivier, M.P. et al, *Social Security: A Legal Analysis*, LexisNexis Butterworths, 2003 at para 2.2.1 and the references cited there.

11. Section 27(1)(c) of the Constitution of the Republic of South Africa, 1996 ("the Constitution").

12. There are no decided principles on this issue in South Africa or elsewhere, and the courts will typically resolve any claim on the terms of the applicable statutory framework or the rules of the fund. These standards are a distillation of statutory standards and industry practice.

13. Article 26 provides that "(1) States Parties shall recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realization of this right in accordance with their national law. (2) The benefits should, where appropriate, be granted, taking into account the resources and the circumstances of the child and persons having responsibility for the maintenance of the child as well as any other consideration relevant to an application for benefits made by or on behalf the child."

14. See generally for a discussion on the legal rights of the child: Davel, J. (2000). *Introduction to Child Law in South Africa*, Juta & Co., page 14 and further, and Kruger, J.M., and Robinson, J.A., (1997) in Robinson J.A. (ed). *The Law of Children and Young Persons in South Africa*, Butterworths, at pages 13 and further.

15. A juristic act is "an act that is intended to create, transfer or extinguish a right and that is effective in law for that purpose; the exercise of legal power". (*Blacks Law Dictionary* [1999], West Group, page 25).

16. *Slabber's Trustee v Neezer's Executor* (1885) 12 SC 163; *Butler v Ault* 1950 (4) SA 229 (T); *Ex parte Hulton* 1954 (1) SA 460, pages 466 to 467.

his or her guardian subsequently decides that the contract was prejudicial<sup>17</sup>. A minor has no capacity to litigate unless assisted by a parent or guardian.

When 18 years of age or older, the person is known as a major and is fully capable of acting and litigating.

## Guardianship

Guardianship is the sum total of the rights and duties of the parent in relation to the child. It thus includes the custody and maintenance of the child. Guardianship is often understood in a more narrow sense as the capacity to act on behalf of the child, to administer his or her property and to supplement any deficiencies in his or her capacities to act or litigate<sup>18</sup>.

The natural guardian of a child born out of wedlock is the mother<sup>19</sup>. If the mother is a minor herself, her guardian is her child's guardian<sup>20</sup>. If the child's parents were married under any system of marriage, both parents share guardianship<sup>21</sup>. The adopted child is likewise placed under the guardianship of the adoptive parent.

On the death of one parent, and provided that the parents were married, the surviving parent becomes the sole guardian. This occurs by operation of the common law, and is the only instance in which it does. In all other instances, a guardian is only appointed by will or by the High Court.

The child's last surviving parent may die subject to a will that places the child under the control of a guardian, known as a tutor. If it is only the minor's estate that needs to be controlled, a curator may be appointed through the parent's will. If the parents have not made provision for it, the Master of the High Court has the power to appoint a tutor or curator where "any minor is the owner of any property in the Republic which is not under the care of any guardian, tutor or curator ... and he is satisfied that the said property should be cared for or administered on behalf of such minor ..."<sup>22</sup>.

Historically, two systems of law regulated guardianship in South Africa, namely African customary law and Roman-Dutch common law. Customary law applies to African people who are living in a customary context, such as in a tribal area, or who have chosen to be regulated by customary law, such as by choosing a customary marriage. Common law applies otherwise. To the extent that an issue is regulated by statute, these legal systems are unified, and statutory law is presumed to apply the common law. (Unless indicated expressly in the discussion that follows, the relevant law is the same and applies the common law.)

The common law does not provide for the guardianship of the child beyond his or her parents. Once they both die, the child has no guardian. Apart from by will or through the Master, the only other way of appointing a guardian after the death of the remaining parent is by application to the High Court. At common law, the High Court is the upper guardian of all minors<sup>23</sup>. In the event of the death of a parent, or in the event of the incapacity or undesirability of a parent to be a guardian, the High Court may award guardianship to any other person on the basis of the best interests of the child.

One fundamental difference between the common law and customary law systems is that common law is premised on individual property rights, while customary law regards the family as the legal subject and the owner of all property. The head of the family is thus the guardian of all minors within the family. Under customary law, a child therefore belongs to the house of his or her father, and their father is their sole guardian. Upon the death of the father, his house with its children is passed to an heir in the father's male line. Unlike common

17. Davel *op. cit.*, page 25.

18. Section 18(2)(c) of the Children's Act 38 of 2005, Davel (2000), 33.

19. The High Court may modify this in the best interests of the child. It may also grant guardianship rights, either jointly or exclusively, to the father in terms of the Natural Fathers of Children Born out of Wedlock Act 86 of 1997.

20. Section 3(1)(a) of the Children's Status Act 82 of 1987.

21. Section 1(1) of the Guardianship Act 192 of 1993.

22. Section 73(1)(a)(i) of the Administration of Estates Act 66 of 1965.

23. The High Court's power as upper guardian of all children in its jurisdiction derives from common law, under which all children and *miserables* could petition the king for relief. This power was delegated to the courts (see Davel [2000], 70). Although the power will be sparingly exercised where the parents are capable of performing this function and have not done so in an unreasonable manner, the parental power is always subject to the right of the court to establish what is in the child's best interests and to make corresponding orders. See *Nugent v Nugent* (1978) (2) 690 (R); *Girdwood v Girdwood* (1995) (4) SA 698 (C) and *Coetzee v Meintjies* (1976) (1) SA 257 (T).

law, the child under customary law is accordingly never without a guardian, as whoever becomes the head of the house becomes the guardian.

Customary law has been extensively modified by statute and time, and there is little remaining of it in relation to children. Firstly, the basic principles of customary law have been modified by the courts to exclude the “inheritance” of children<sup>24</sup> and the Constitution requires the best interests of the child to be the paramount standard in determining all such issues<sup>25</sup>. Secondly, statute has altered a range of fundamental relationships: a customary law wife has equal legal capacity with her husband<sup>26</sup>, the female line may inherit equally to the male<sup>27</sup> and the unmarried mother is the guardian of her child, not her father<sup>28</sup>. Thirdly, the urbanisation of the African population and the impact of a labour economy on the movement and living arrangements of people, as well as widespread poverty, have changed social practices.

However, it remains unclear if the result of these changes is that the customary law relating to guardianship has been excluded in favour of common law, and so whether guardianship is still inherited by the heir of the deceased parent, albeit now subject to the “best interests of the child” rule. If the latter applies, then orphans under African customary law are never without a guardian, and may have two guardians: one from their father’s side and another from their mother’s side<sup>29</sup>. It also means that a range of children whom the common law would regard as no more than “foster children” may be under customary law guardianship. The guardian thus appointed by customary law is designated by law and not by the discretion of any party. The effect of the erosion of the authority of the head of the house and the equality of women will, in all likelihood, be held to mean that customary law rule as to guardianship is no more than a factor to be considered in the determining who should be appointed by the High Court as guardian in the best interests of the child.

## The duty of support

During their lifetimes, both parents are equally liable to support their children to the extent of their ability<sup>30</sup>. This duty extends equally to marital and extra-marital children.

Even though they have no power over the child’s estate, at common law a grandparent has a corresponding duty to support his or her grandchild and between ascendants and descendants *ad infinitum*<sup>31</sup>. The nearest relative is first liable. At customary law, this duty of support extends to all relatives of the same blood and those related by marriage<sup>32</sup>. These duties are recognised in the constitutional right of the child to the support of his or her family<sup>33</sup>.

The duty of support between parent and child does not end on the child becoming a major, but continues until the child is able to support him or herself and revives if the child later becomes unable to do so<sup>34</sup>, even while being a major<sup>35</sup>.

The extent of the duty of support is assessed on the living standard of the family, the resources of the person liable for support and the extent to which the child is self-supporting. It extends beyond the bare necessities of food, housing, clothing, medical care and education and may include the cost of litigation<sup>36</sup>, tertiary education<sup>37</sup>, electricity, cutlery, linen and laundering<sup>38</sup>. These benefits may be required immediately and on an ongoing basis, such as to provide for the food and clothing of the child, or they may need to be conserved and invested to

24. *Hlope v Mahlalela* (1998) (1) SA 409 (T); Davel (2000), 146.

25. Section 28(2).

26. Section 6 of the Recognition of Customary Marriages Act 120 of 1998.

27. Amendment of Customary Law of Succession Act.

28. Section 1 of the Guardianship Act.

29. See section 18(4) of the Children’s Act on the resolution of conflicts in this regard.

30. Robinson (1997), 193.

31. *Barnard v Miller* 1963 (4) SA 426 (C).

32. Robinson (1997), 192.

33. Section 28(1)(c) provides that “Every child has the right to ... family care or parental care ...”.

34. Van Zyl, L. (2000), Handbook of the South African Law of Maintenance, NDB, 10.

35. *Hoffman v Herdan* (1982) (2) SA 274 (T).

36. Boberg, P.Q.R. (1977), *The Law of Persons and the Family*, Juta & Co, 259.

37. *Mentz v Simpson* (1990) (4) SA 455 (A).

38. *Vedovato v Vedovato* (1980) (1) SA 772 (T).

provide for longer term needs, such as tertiary education. Certain of these needs are obviously more pressing and enjoy a higher priority than others. These needs may vary from case to case and will depend on the age and other circumstances of the child.

If the parent dies, the child has a claim for support against the estate of the deceased parent<sup>39</sup>. There are conflicting judgements on whether the claim for support is first to be enforced against the estate of any surviving parent before the deceased parent's estate<sup>40</sup>, but if the surviving parent's estate is inadequate to maintain the child, the deceased parent's estate will be held liable<sup>41</sup>. There is conflicting case law on whether or not similar principles apply to the estates of grandparents<sup>42</sup>.

A guardian appointed after the death of both parents takes over the parent's obligation to maintain the child. Unless the child has an estate, more usually only a custodian steps forward as foster parent to take the child into his or her custody and care for the child. The foster parent, whether formally appointed by a children's court in terms of section 15 of the Child Care Act or not, is then liable to maintain the child. The child in foster care is merely in the custody of the foster parent, and the foster parent enjoys none of the powers of the guardian over the child's estate<sup>43</sup>.

The illegitimacy of children is foreign to customary law, and all children are accepted as part of the house into which they are born. A range of children – born out of wedlock, in adulterous circumstances or otherwise members of the deceased's house – were recognised and accepted as part of the family and entitled to equal maintenance, although they did not enjoy equal rights in other regards<sup>44</sup>. In particular, these included children conceived as part of customary pre-nuptial rites, where the prospective wife demonstrated her fertility. This practice has endured, although with modern nuances. This wide range of legal obligations is not recognised by the common law or the Children's Act and, where the parents later die, it has become the practice to see such children as "foster" children.

The social practices surrounding these children, the legal obligations under customary law and the frequency with which these relationships arise are potentially recognised by the individualised application of the "best interests" standard. In the realm of social insurance law, a similarly individualised proof of "factual dependency" on the deceased is often<sup>45</sup> sufficient to establish a right to benefits. However, individualised standards present difficulties in identifying and proving the relationships and in articulating the complexities of family life to decision-makers across cultural divisions.

Where parents make provision for the maintenance of their children in the event of death, the estate's liability for the support of minor dependants is correspondingly reduced. The legislation governing these schemes typically protects these monies from being reduced by the debts of the employee. Benefits are excluded from the deceased's estate, or the circumstances and extent to which they can form part of the deceased's estate are limited<sup>46</sup>. Pension monies are not assets in any insolvent estate<sup>47</sup>. Social insurance benefits can generally not be attached or ceded in such a way as to reduce the benefit payable to dependants<sup>48</sup>.

## Can caregivers claim social insurance for a child?

Social insurance benefits that are payable on the death of the member are payable to the person designated by the various statutes regulating compulsory social insurance. The COIDA, ODIMWA, UIA and PFA all make

39. *Carelse v Estate de Vries* 1906 SC 532, discussed in Van Zyl (2000), 18 and further.

40. Hahlo, H.R., (1985), *The South African Law of Husband and Wife*, 5th ed., Juta & Co, 409; Van Zyl (2000) 19.

41. *Christie v Estate Christie* (1956) (3) SA 659 (N); *Davis' Tutor v Estate Davis* (1925) WLD 168.

42. *Lloyd v Menzies* (1956) (2) SA 97 (D&CLD) extends the principle to grandparents but *Glazer v Glazer* (1963) (4) SA 426 (C) does not.

43. Section 53 of the Child Care Act 74 of 1983.

44. See Bekker (1989), 236 and further.

45. But not always – see the rules of the GEPE.

46. See section 37C(1) of the PFA and section 59(3)(a) and (b) of the COIDA. The ODIMWA has provisions that have a similar effect, as section 96(1) provides that the right to a benefit lapses on the death of the mineworker and section 96(2) then provides that the benefit or unpaid balance of the benefit is payable to the dependants of the deceased. The UIA does not contain similar provisions, and so any benefits that are due and payable at the time of death of the contributor fall into the deceased contributor's estate.

47. Section 3 of the General Pensions Act 29 of 1979 and section 37A of the PFA. Benefits under the UIA, COIDA and ODIMWA are not so exempted.

48. Section 37A of the PFA, section 131 of the ODIMWA, section 33 of the UIA.

provision for benefits to be paid to “dependants”. These include the minor children of the deceased worker, contributor or member. Where the dependant is a minor, the benefits are receivable by the guardian.

Guardians are seldom appointed over orphans at common law. Most often, minor children are cared for by the extended family of the deceased parents, who act as caregivers. This arrangement is sometimes formalised to the extent that a formal foster care placement will be made by the children’s court. Unless the minor has property, in which event there is a simple and cheap process by which the Master appoints a tutor or curator, or the minor has a claim at law, in which event there is a simple process for the High Court to appoint a curator *ad litem* to attend to the litigation, there is generally no necessity for a guardian to be appointed.

If not appointed by will or by the Master, the process for appointing a guardian is to approach the High Court on application<sup>49</sup>. This is a costly procedure – the simplest application probably costs at least R15,000, which is mainly devoted to the cost of employing an attorney to bring such an application and to advertise the application in the press.

The upshot is that there is little incentive to appoint a guardian to receive social insurance monies on behalf of a minor child. In the case of social insurance benefits, the amount of the benefit is usually too small to justify a special appointment as a guardian. Instead, what emerges from the review of the practices of the funds is that all the funds do little more than call the caregiver a “guardian”. If the benefit in question is no more than what is needed to care for the child, or the caregiver is the most appropriate person to be appointed as a guardian, this is not a problem because these benefits are payable in the first instance for the maintenance of the child, and are required by the custodian. This arrangement is problematic where more than maintenance is paid. The balance is the child’s property. The caregiver who is appointed to look after the child by virtue of his or her relationship with the child is sometimes not in the best position to care for the child’s assets. Difficult family circumstances may easily incline a caregiver to use the child’s monies for other more pressing needs. This tendency is aggravated under the customary law tradition, where the benefits are treated as the family’s property.

A guardian is liable to the child for the mismanagement of monies placed in trust with him or her, and in theory the child can enforce such a claim on becoming a major, and a caregiver who claims benefits from a pension or social insurance fund as a guardian is likely to be similarly liable. In the face of widespread poverty, this is an impractical remedy to enforce *ex post facto*.

It has been suggested<sup>50</sup> that section 32(1) of the Children’s Act supplements the caregiver’s powers and enables him or her to claim for the child’s social insurance benefits. It states that “a person without parental responsibilities must, while a child is in his or her care,... safeguard the child’s health, well-being and development and protect the child from ... neglect ... and any other physical, emotional or mental harm of hazards.” The argument is that, since the absence of access to social insurance poses a risk to the child’s health, well-being and development, the fund is entitled to pay the benefits to the caregiver.

There are at least two reasons why this section cannot entitle caregivers to access monies owing to the child. Firstly, parental responsibilities are set out in the Children’s Act. They include the duty to care for and support the child<sup>51</sup>. The grandparent who is caring for a child after the death of the child’s parent is not a person “without parental responsibilities” in relation to the child, as he or she is obliged as an ancestor to perform various common law or customary law duties in caring for and supporting the child. The grandparent is accordingly not a person whose rights are defined by section 23. Secondly, the intention of section 23 is merely to ensure that the child receives care from people who would not otherwise have any legal duty to do so. It is certainly not to change the scheme of common or customary law duties and now entitle a caregiver to claim the child’s money.

The issue may not be a problem for many children, but where decisions are required on how to invest the child’s money, what percentage of monies should be held in trust or paid to the caregiver, or what standard of living the child can expect, then the guardian’s role has been forgotten and in effect replaced by the institution responsible for the administration of the money.

49. The power derives from the High Court’s authority as upper guardian of all minors. No other court is competent to make such orders.

50. Jithoo, T., *How Does the Notion of a ‘Caregiver’ in the Children’s Act Interact with Section 37C of the Pension Funds Act?*, paper presented at Pension Lawyer’s Association conference, 2007 and accessed at <http://hunterlaw.co.za/papers.aspx> on 13 February 2008.

51. Section 18(2)(a) and (d).

This issue has confronted the Pension Funds Adjudicator. In *Kowa v Corporate Selection Retirement Fund and another*<sup>52</sup>, a grandmother claimed benefits on behalf of the only child of her son<sup>53</sup>. The child's mother was also deceased. The Fund paid the benefits into trust, reasoning that the grandmother was the child's caregiver and was therefore entitled to maintenance, not a lump sum.

The Pension Funds Adjudicator found that "the complainant is acting as the minor child's guardian as she is taking care of his daily needs<sup>54</sup>." Noting that section 18(2)(c) of the Children's Act provides that a person may have parental responsibilities "to act as guardian of the child", and that, under section 18(3), a parent "or other person who acts as guardian of a child" must administer and safeguard the child's property interests, the Adjudicator ruled that any person who administers and safeguards a minor's property and property interests "should be regarded as a guardian. However, this should depend on the nature of the relationship between the person concerned and the minor child<sup>55</sup>."

The effect of this is to allow practice to determine guardianship. It is quite contrary to the words and intention of section 18(3) of the Children's Act, which intends the law to designate who the guardian should be. It effectively allows a fund administrator or the Pension Funds Adjudicator to designate a guardian to a child.

The judgement continued with an evaluation of the best interests of the child – hardly the domain of the Pension Funds Adjudicator – concluding that "the complainant is in the same position as that of a natural guardian" and that the Fund was obliged to consider not merely the legal rights of the guardian but also what was the most cost-efficient and prudent course of action in the child's best interests. Factors the Fund was obliged to consider included:

- ▶ the amount of the benefit;
- ▶ the ability of the guardian to administer the moneys;
- ▶ the qualification (or lack thereof) of the guardian to administer the moneys;
- ▶ that the benefit should be utilised in such a manner that it can provide for the minor until he or she attains the age of majority; and
- ▶ the cost of placing the benefit in trust<sup>56</sup>.

The benefit in question was R62,000 and the child was four years old. This entire sum would in all likelihood be used to maintain the child during the course of his childhood, so the judgement makes economic sense in the current regulatory environment. But the judgement is questionable in law, and a more correct formulation of the issues would have been to recognise the right of a caregiver to claim social insurance benefits – provided it was for the child's maintenance and was otherwise in his best interests. It points to a shortcoming in the framework legislation regulating children's rights, but there is no easy answer in practice because if the caregiver is not to be the guardian, then who is, and at what cost<sup>57</sup>?

## Obstacles to children's access to social insurance benefits

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It is against this context and legal backdrop that the various funds are assessed. The following features of each fund are considered in detail in Appendices 4 to 8:

- ▶ the nature of the scheme;
- ▶ governance and administration;
- ▶ benefits payable for children;
- ▶ definitions of beneficiaries;
- ▶ points of contact with claimants;

52. Case number PFA/GA/14151/2007.

53. It is not clear from the judgement how the son was married.

54. Para 20.

55. Paras 21 and 22.

56. Paras 23 and 24.

57. The answer recommended below is a properly administered Guardian's Fund controlled by the magistrate at the child's place of residence.

- › claims procedures;
- › the verification of information;
- › dispute procedures;
- › payment processes;
- › communication between the fund and claimants;
- › pension stoppages;
- › unclaimed or unpaid benefits; and
- › gaps in coverage.

Common themes were identified, and these are now discussed below. The themes are loosely grouped into those addressing:

- › the definitions of child beneficiaries and gaps in coverage;
- › the benefits payable;
- › the administration of the funds;
- › factors protecting the child's benefit once in the hands of his or her guardian; and
- › dispute procedures.

### The definitions of "child" and "qualifying child"

Each statute defines a "dependant", and each requires both legal and factual dependency. The statutory definitions are substantially similar, and include children born out of any type of marital relationship, legitimate and illegitimate children, and adopted children. The CF includes posthumous children and stepchildren. There is no such definition in the ODIMWA, but the MWCF pays out on the same basis, and will pay non-legal dependants, such as informal foster children, if there are no legal dependants. Usually payments are made to the surviving spouse on the assumption that he or she cares for the children of the deceased. This may not be a valid assumption, and the MWCF does not investigate it but relies upon claimants to come forward. If there are multiple claimants, a division will be made based on the numbers of legal and factual dependants. Stepchildren and foster children are excluded from the UIF and the GEPEF.

Although the PFA defines a "dependant" as a person who is either legally or factually dependent, and thus includes posthumous children, stepchildren and foster children, each fund determines who its beneficiaries are. Accordingly, there is no uniformity in definition. All the registered funds under review excluded foster children from the definition of "qualifying child", and it is likely that this tendency will also prevail amongst the smaller registered funds.

Orphans are typically cared for by extended family. This is obviously an essential social mechanism to care for such children, particularly in the face of HIV/AIDS. These children are seldom placed in formal foster care: this requires a report by a social worker to the children's court, and it is a time-consuming and often delayed process, with huge backlogs reported. While a grandchild will qualify as a legal dependant of a deceased grandparent, many orphans are in informal foster care with family members who owe them no legal duty and are excluded from benefits from the registered pension funds, the UIF, the MWCF and the GEPEF. These are often long-term relationships akin to adoption.

Where the benefit is defined by statute or the employee's contributions, as it is in the UIF, CF, MWCF and most of the registered funds, and paid to a single surviving spouse on behalf of all the qualifying children, the exclusion of foster and stepchildren has little or no effect on the benefit. Since, by their nature, foster and stepchildren reside in the deceased's household, it is unlikely that there will be competing claims by different families in this regard. The exclusion of stepchildren and foster children is only relevant in polygamous marriages, where the benefit is pro-rated between claimants and in risk cover by a registered fund.

### The effect of multiple benefits

A multiplicity of funds produces multiple benefits. An orphan whose parent dies at work will often be entitled to compensation from the CF, dependant's benefits from the UIF and a death benefit from one or more pension

funds. Unless there is a properly designated guardian, each fund decides who qualifies to claim the benefit on behalf of the child, and in what percentage and manner it is paid out. There is no overarching discretion on what monies should be preserved for the child's later development as opposed to his or her current needs.

### Employees who die out of service

Because benefits depend upon employment, the parent's circumstances determine whether the child is covered. The child's cover accordingly depends to some extent on the circumstances surrounding the parent's death, and cover is not as predictable as the parent may have hoped. Under the COIDA, the parent must die in an accident in the course and scope of his or her employment or from a disease contracted in this manner. Under the ODIMWA, death must be by compensatable disease. Under the UIF, the deceased must have been in employment in the four years preceding death. Benefits from the registered retirement funds are sharply reduced, if available at all, once the employee has left service and then dies. This typically occurs when the employee is dismissed owing to a protracted illness. Although no data was collected on the numbers of employees who die in service as opposed to out of service, it is likely that a substantial number die out of service and their children are then unable to access benefits that have been put aside for them.

Since these benefits are essentially risk cover, there are sound economic and policy reasons for limiting the funds' liability, but it does not advance the social security intentions of the underlying legislation in relation to the affected children if benefits are dependent upon accident and circumstance.

The same considerations apply to employees who are unlawfully employed, particularly foreigners working unlawfully in South Africa.

### Cumbersome or unjustifiable claims procedures

All the funds require an initial claim with supporting documentation. Once all the required information is provided, claims then typically follow a process of administration before coming before a decision-maker for approval, and thereafter enter a payment phase. Claim procedures vary depending on the nature of the claim, with the UIF having the simplest procedures.

Interviewees cited supporting documents as the most common barrier to processing applications. According to fund administrators, potential beneficiaries were either slow in bringing the necessary documents or brought incorrect or incomplete documents. Many of the case studies show the difficulties that claimants experience in obtaining these documents and communicating with the funds regarding outstanding information (the case study of Nomonde Diyamani<sup>58</sup> is not uncommon but will still surprise most administrators).

A balance needs to be struck between information that the claimant should provide, and information that the fund is duty-bound to obtain in the course of investigating the claim.

Official birth and death documentation is essential. Completeness of birth registration varies considerably across provinces, with only 62% of births in KwaZulu-Natal being registered in the year of birth, compared to almost 97% in the Western Cape. Rates of birth registration also vary with age and appear to be inversely correlated with levels of poverty: the provinces with the highest proportion of poor children are characterised by low rates of birth registration and access to death certificates is correspondingly limited<sup>59</sup>. The delays in this regard cannot, however, be held against the funds.

The list of documents required for a claim against a pension fund is considerable. In many instances, this information is available from the employer and it is unjustifiable to require the claimant to provide it merely in order to spare the employer the inconvenience, or to safeguard against fraud. One claim form, for example, required the claimant to obtain the name, signature and address of the medical officer who certified the deceased as dead; an unnecessary and difficult task in a busy provincial hospital. Requiring the claimant to prove the absence of fraud unjustifiably shifts the fund's duty to investigate the claim onto the claimant. Likewise, requiring the

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58. Appendix 8, para 5.3.

59. Giese, S., and Smith, L., (2007), *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children*.

claimant to provide multiple certified photocopies of documentation appears to be an unjustifiable requirement. A documented 20-year employment history for a claim under the ODIMWA is not justifiable.

In relation to registered retirement funds, claims procedures are adopted by the board of the fund. Children are not represented on any of the boards of the funds reviewed. Pensioners are seldom represented. Few of the funds have women trustees. There is concern about the quality of control exercised by the boards of pension funds, particularly where the management of the fund has been handed over to a pension fund administration company. Communication with widows and children is generally poor. It is logistically difficult to do this, and it is made all the more difficult by the diversity of procedures and limited contact points. The result is that the administrative and financial considerations, and the concerns of employers and active members, are likely to be better articulated and viewed more seriously than the difficulties of child beneficiaries and their guardians.

The registered retirement funds considered here are the larger ones. The smaller funds are unlikely to be as rigorous in their investigations. From the brief list of case studies<sup>60</sup>, there is anecdotal evidence of suspect practices in some registered funds, such as rejecting claims if all documents are not provided within six months, and then requiring claimants to start the claim again<sup>61</sup>. The practices of registered retirement funds need closer scrutiny, particularly as there may be an economic incentive for a fund or its administration company to frustrate claims.

A common theme through all the funds is a need for information held by the employer, relating either to periods of service, dependants, payments of contributions, salary levels, the nature of service, the reasons for termination of service or the circumstances of an accident or disease. This information is in any event requested by the fund from the employer, and can often be more conveniently obtained by the fund, which has a close relationship with the employer, than by the claimant. It appears unjustifiable to regard the claim as defective if this information is not provided if there is nonetheless sufficient information available for the fund to obtain it.

The effect of the 2002 amendments to the ODIMWA is to make miners dependent upon provincial hospital staff to diagnose and report on their medical conditions before they can qualify for compensation in the second degree, or their children can obtain the benefits intended for dependants under the ODIMWA. The provincial hospital staff are often not equipped to do so. Children are then unable to prove that the breadwinner was suffering in the second degree, or that he or she died as a result of the disease, and so lose their claim for benefits from the MWPF.

In the case of the UIF, the six-month delay before children can claim death benefits is confusing because it is conditional upon a fact that the guardian is not likely to be aware of. The 14-day time period for the child's claim is prohibitively short. There is no provision for the condoning of any resultant delay. This may be an unjustifiable limitation on the right of access to social security<sup>62</sup>. That claims may be submitted beforehand and be held at the labour centre may not be a reliable process because such claims have not been entered onto the control systems of the UIF. Although the UIF asserted that children were entitled to lodge a provisional claim beforehand, this is not statutorily or otherwise regulated and the available case studies suggest that these files were then lost or not processed.

### The failure to investigate claims

A related balance must be struck where there is a duty on the fund to investigate. This duty commences once a valid claim has been lodged, and funds refuse to treat claims as duly lodged unless all outstanding information is provided, including information that the fund is obliged to investigate.

Most disputes that require investigation are between the claimant and the employer (on the reason for termination, the length of service or cause and circumstances of an accident), or between co-claimants (on their status as guardians or the proportion of benefits payable to each). Unless there is some form of investigation, which

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60. Appendix 8, paragraph 5.3.

61. Compare section 2(3) of the Social Assistance Act 13 of 2004, which obliges the staff of the South African Social Security Agency to offer all reasonable assistance to illiterate claimants to exercise their rights.

62. Section 27(1)(c) of the Constitution.

may (but need not necessarily be) a hearing, the fund does not perform its duty to administer the claim. The same holds true for other funds.

This is nowhere more clearly demonstrated than in the completion of employer's reports on an accident for COIDA claims. The CF is under an express statutory duty to "investigate" claims<sup>63</sup>. Since the completion of the employer's report is not a prerequisite for a valid claim, this would include obtaining an employer's report. Until recently, the CF adopted the attitude that, until the employer's report was provided, the claim was not properly before it and it had no duty to investigate. It would register the claim for record purposes but would then pend it indefinitely and without notice to the worker until the worker provided the employer's report. The employer often, in breach of the statutory obligations in terms of the COIDA, refused to do so because of a dispute with the employee over the circumstances of the accident, or because the employer wished to avoid a negative assessment that may impact upon his or her contributions onto the CF. A lack of infrastructure, policy and inspectors meant that the CF did not enforce this duty. The result was a considerable backlog of claims, which has now been substantially resolved following a revision of the policy of the CF<sup>64</sup>. The CF now uses the services of the Inspectorate of the Department of Labour to follow up on recalcitrant employers.

A less stark example exists in relation to the employee's employment history required by the MWCF: although not under an express statutory duty to investigate, the MWCF has powers to obtain documents under the ODIMWA, but it seldom exercises them and instead relies upon the claimant to obtain the necessary information.

A related and equally unjustifiable practice by the GEPF is to shift the duty to obtain and verify information onto an employer. The Board of the GEPF is under an obligation to take steps to ensure the effective and efficient administration of the GEPF<sup>65</sup>, which by implication means that it must communicate with claimants and take such steps, including investigation, to satisfy itself that their claims are valid. Rule 22 of the GEPF provides that the Fund shall communicate only with state departments in regard to the payment of monies by members and employers to the Fund, although the member remains entitled to communicate with the Fund. This rule has been tacitly extended beyond communications regarding the payment of contributions to include all communication regarding claims, so that the Fund requires the employer department to obtain the information it needs to decide a claim. The Fund then becomes the passive recipient of information and it delays determining the claim until it has the desired information.

The employer cannot perform this function efficiently for three reasons. Firstly, a state department has no power to investigate a pension claim by the dependant of a deceased employee. Secondly, it typically has no infrastructure to investigate and resolve factual disputes, and in practice turns to the benevolence of some other agency, often the South African Police Services, to assist. Thirdly, the department may be biased, having often already decided a disputed issue, such as a dismissal. The case studies demonstrate the consequences, sometimes requiring third-party intervention or compromise on the part of the beneficiary<sup>66</sup>.

The failure of the GEPF to investigate claims is in all likelihood unlawful, either as:

- ▶ a breach of the empowering statute; or
- ▶ because it has no power under the GEPL to enter into this arrangement with the employer; or
- ▶ as a failure of administrative justice<sup>67</sup>; or
- ▶ as a failure to allow access to social security under the Constitution.

### The hidden cost of claiming benefits

The case studies set out in the appendices indicate that claimants often had to travel on multiple occasions over a protracted period of time to try to interact with the employer, the fund or some third party. Usually this entailed the submission of documents, where a fear of losing documents disinclines people to rely on the postal

63. Section 41 of the COIDA.

64. See the discussion in Appendix 4, paragraph 7.1.

65. Section 6 of the GEPL.

66. See the case study of Mr Ratladi in Appendix 7, paragraph 7. Despite being provided with a draft of this review, the GEPF had still taken no steps to resolve this case.

67. It is not clear if the GEPF is bound by the PAJA, but even if it is not, its failure to determine the claim and resolve disputes is a breach of a duty implied by its duty to administer.

service. The staff of the MWCF speak of often doing an office collection to enable an impoverished claimant to return after a costly visit from a rural area to Johannesburg. Of the statutory funds, until recently only the UIF has a local interface with claimants. The CF is developing a provincial interface. Only the larger registered funds (or funds in which the employer has a national presence, such as Telkom or the financial institutions) have a local interface. The labour-based registered funds in particular have developed extensive regional networks to gather information, train members and assist claimants. Their support in this regard appears to be the best available practice.

### The failure to properly monitor unclaimed benefits

None of the funds correlated claims with deaths or stoppages in contributions, and there was a general lack of detail on unclaimed monies. The GEPF referred to its “S:” claims, but failed to thereafter provide any data on these. The concerns of the Registrar of Pension Funds over the management of unclaimed monies held by registered funds all indicate that many members and potential beneficiaries do not know that benefits lie waiting for them to claim, and the funds are not disposed to take steps that will increase the claims against them.

### Children who lose their guardians

Although most funds allow a pension benefit to continue to the child when the guardian dies, the continued pension is dependent upon the new guardian coming forward to claim it. It is also dependent on the new guardian knowing sufficient details of the benefit to be able to claim it. If the guardian is no longer the surviving spouse, the funds have no knowledge of him or her and a fresh claim will be required. There is, however, no duty on the fund at this point to investigate the claim. None of the funds interviewed actively establish who the child’s new guardian is. The take-up of the benefit available to the new guardian is reported by the CF to be low, and this tendency probably applies to all the funds.

### Inappropriate trust arrangements

Trusts for poor children’s benefits are expensive and inappropriate vehicles to care for their funds. There is no reason why the Guardian’s Fund cannot provide this service at state cost. In addition, the poor management of the Guardian’s Fund must be addressed.

The Pension Funds Adjudicator and the FAIS Ombud are empowered to address this abuse of the discretion in terms of section 37C(2) of the PFA, which entitles funds to invest in trusts. Despite decisions by the Pension Funds Adjudicator to the effect that funds must incline to place monies with guardians wherever possible, the practice of routinely placing funds in trust continues. The Registrar of Pension Funds should address this.

### The management of monies by guardians

The funds have no control over the use of the benefits and it is not known to what extent children are denied the benefit of the funds intended to support them. But the manner of the payment can either promote the child’s interest and protect his or her assets, or invite abuse.

While there is practical justification for paying monies intended to maintain the child to the caregiver rather than the guardian, where the monies must be invested and protected for the child’s later use the monies are placed at risk if they are not under the control of a guardian as intended by the common law. All the funds under review blur the distinction between guardian and caregiver, and the Pension Funds Adjudicator has lent credibility to this in his decision in the Kowa matter.

The temptation to abuse these monies is greater where they are paid as a lump sum. The practice of the MWCF of paying a lump sum to the surviving spouse is one of administrative convenience and cannot be in the child’s best interest. In addition, monies paid into an estate account become mixed with the other monies held in the estate account. There is a risk that these monies could then be used to settle the debts of the estate, or divided

amongst heirs rather than used to support the minor children of the deceased miner. Although the MWCF claims that it provides compensation rather than social security, it fails to appreciate that the compensation is designed to replace the breadwinner's support to the child and payments to an estate account or to a caregiver are not sufficiently safeguarded for the child.

The assumption that payments to a spouse meet the needs of children is not necessarily in keeping with the range of care arrangements for children and the mobility of children. Children may be moved between households for a variety of reasons, including cultural norms, educational opportunities, the need for children to provide care to ill or elderly family members and the need for children to be cared for by others. The death of a father or mother is associated with increased child mobility and the fact that the youngest children are the most likely to move<sup>68</sup>. Whereas 35% of all children are resident with both biological parents and 42% are resident with one parent, 23% (or 4,100,000) are resident with neither parent<sup>69</sup>.

This high degree of mobility of children means that it must often happen that the child is simply not in the home to which the pension benefits are paid. If social insurance is intended to address the poverty and developmental needs of children, some form of monitoring may be needed in order to ensure that the person receiving the pension for the child remains the child's primary caregiver. While it will remain difficult to ensure that the monies are used for the benefit of a child, it ought not to be difficult to ensure that caregivers are actually living with the child. Some funds use a postal certification system but many recognise that the use of a postal certification system in verifying the child's continued presence in the home of the caregiver who is receiving the payment is not reliable.

Studies on the impact of old age-grants<sup>70</sup> on children have found that the impact of the grant on children is greatest when the person receiving the grant is a woman<sup>71</sup>. A social grant is a small, regular payment and similar to a pension or maintenance payment. There is no evidence to either prove or disprove that the same outcome will apply to larger lump-sum payments. It is likely that benefits for an orphan will be used by a poor family for whatever needs the caregiver views as immediately pressing. Until some further research on this issue can show that the child's money can be safely entrusted to the caregiver, the existing law regulating guardianship should not be eroded by convenience.

### Payments to foreign workers

Systems to pay compensation and other benefits to workers and their dependants in foreign countries are either non-existent (UIF, MWCF, GEPF and some of the registered retirement funds) or cumbersome, prone to fraud and bureaucratic delay (CF). The most efficient practices appeared to be those of the mining-based funds, acting through TEBA (MWPF).

In an era where money moves so easily across the globe, it is unacceptable that compensation and retirement payments cannot be made to workers and their child dependants in all foreign countries. Many South African banks have branches in neighbouring states. The Department of Foreign Affairs and the Southern African Development Community Forum should be urged to facilitate processes to achieve this.

### Payments to minors

All the funds excepting the UIF require a guardian over the age of 18, and only pay to the bank accounts of persons over the age of 18. A minor over the age of 16 years may deposit or withdraw money from a bank account<sup>72</sup>

68. Ford, K., and Hosegood, V., (2004), *AIDS Mortality and the Mobility of Children in KwaZulu-Natal, South Africa*. Paper prepared for the 2004 Meeting of the Population Association of America, Boston, April 1 to 3.

69. GHS 2004 data analysis by Children's Institute (2006). See Appendix 1, para 2.

70. Payable in terms of the Social Assistance Act of 2004.

71. Samson, M., Lee, U., Ndlebe, K., MacQuene, K., van Niekerk, I., Gandhi, V., Harigaya, T., and Abrahams, C., (2004). *The Social and Economic Impact of South Africa's Social Security System: Final Report*. Economic Policy Research Institute, Cape Town, South Africa.

72. Section 87(1) of the Banks Act 94 of 1990, provides that "Notwithstanding anything to the contrary contained in any law or the common law, and unless otherwise provided in the memorandum of association or articles of association of a bank, a minor over the age of 16 years or a married woman, whether or not under marital power, may be a depositor with a bank and may without the consent or assistance of his guardian or her husband as the case may be, execute all necessary documents, give all necessary acquittances and cede, pledge, borrow against, and generally deal with, his or her deposit as he or she thinks fit, and shall enjoy all the privileges and be liable to all the obligations and conditions applicable to depositors".

or from a Postbank account or National Savings Certificate issued in his or her favour<sup>73</sup>. Particularly minors without a reliable guardian, or child-headed households, could be assisted by these provisions.

### Limitations in access to independent adjudication

Only the UIF and the CF have an internal appeal or objection procedure. Only the High Court has jurisdiction to grant the necessary declaratory, review and interdict relief against an employer<sup>74</sup> or a statutory insurance fund. Few such cases are ever taken to court by complainants. Litigation is expensive and free legal services or legal aid services are often of a poor quality. The cost of litigation is prohibitive for someone who is a dependant. Legal aid is of a poor quality and erratically provided, and is seldom extended to allow for an appeal against a powerful opponent.

In regard to registered retirement funds, the Pension Funds Adjudicator is an effective dispute resolution agency. The Adjudicator requires no more than a written complaint by an affected member of a registered fund.

Lodging and pursuing a complaint demands some sophistication and, at least, literacy on the part of the complainant, but literacy rates in South Africa are notoriously low: approximately 17.8% of adults (6 to 8 million adults) are not functionally literate. The rate is highest in the Eastern Cape, where 27.7% of people were functionally illiterate<sup>75</sup>. While 65% of whites over 20 years old and 40% of Indians have a high-school or higher qualification – probably the minimum required to lodge a coherent complaint – this figure is only 14% among Africans and 17% among the coloured population.

Beneficiaries of the statutory funds are more likely to turn to a complaints procedure, such as the Public Protector, but these also require a level of literacy and skill that is not readily available to the poor. Paralegal advice offices, unless reputable and well established, are treated with suspicion owing to fraud by some of them, or because of misrepresentation by people claiming to represent community structures.

The statutory funds assessed the efficacy of external controls on delivery as follows:

	CF	MWCF	UIF	GEPP
Public Protector	Frequent and effective	Isolated and effective	Isolated and effective	Frequent and effective
Minister	Frequent and effective	Isolated and effective	Rare and effective	Occasional and effective
Interventions by attorneys	Considerable and effective	Some, effective	Some, effective	Occasional and effective
Judicial control	Isolated	None	Isolated	Isolated
Paralegals	Frequent and ineffective	No reply provided owing to past fraud	No information	Occasional and ineffective

### Delay

With the signal exception of the UIF (which keeps monthly statistics on turnaround time) and the MWPF (which makes an early initial payment to a claimant with children), none of the other funds reviewed measure the length of time it takes to process claims for children or set performance standards on this issue. The absence of data on the average time it takes to finalise a claim, or of norms for the finalisation of such claims, the lack of data on the numbers of pensions paid for children and the value of these pensions and the almost complete absence of any child-specific data available from the funds all suggest that delays in providing benefits for children are not generally seen as significant performance indicators.

73. Section 52 of the Postal Services Act 124 of 1998 provides that “Notwithstanding anything to the contrary contained in any other law, deposits in the Postbank made by or for the benefit of, or any National Savings Certificate issued in favour of, any person under 21 years of age, may be repaid to that person in the prescribed manner in respect of any particular kind of deposit or account in the Postbank”.

74. The labour courts have jurisdiction on disputes arising between employer and employee and have no jurisdiction over any of the funds considered here, excepting appeal jurisdiction in relation to the UIF. In addition, the issues between employer and employee regulated by the labour courts concern dismissals or certain types of unfair labour practices, but they have no jurisdiction to compel an employer to comply with a duty to provide information to a fund, or make a finding regarding the cause of dismissal. See generally section 186 of the Labour Relations Act 66 of 1995.

75. Central Statistical Service (1995), *Provincial Statistics*, 1995, accessed at <http://www.statssa.gov.za/publications/Report-00-90-02/Report-00-90-021995.pdf> on 25 May 2008.

## Proposals for reform

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Certain recommendations that amount to the enforcement of existing duties are included in the preceding section. This section deals with suggestions for reform, particularly in the context of the present reform of the retirement provisions in South Africa.

### A statutory duty on employers to keep information on dependants, and update it annually

It is obviously more efficient to require the employer to collect information on the names, addresses, contact details and relationships of dependants than to seek it only once the member has died, at considerable cost both to the fund and the beneficiary. Employers should be under a duty to keep this information and update it annually. Such a measure is unlikely to be implemented by the registered funds themselves, particularly since the employer representatives make up half of the board of trustees. It must be statutorily regulated. If the employer has failed to keep the prescribed and updated particulars on record, it should contribute a prescribed amount towards the cost of tracing dependants<sup>76</sup>.

Most funds supported this recommendation<sup>77</sup>.

### The available information and investigative capacity should be coordinated

Investigative capacity is one of the larger costs in any fund administration. It requires skilled staff and an infrastructure that enables field investigation. Some of the registered retirement funds have accomplished this by using and expanding existing networks, such as TEBA or the Telkom installation network. The efficient dovetailing of employer and fund functions appears to be the best practice in investigative structuring, and is likely to result in a higher level of customer care than is the case where investigation is centralised at the fund's head office.

The labour-based funds, such as the MIBFA funds and the MWPF, are more aware of the need for communication and organisation among beneficiaries. Regional structures with strong trade-union representation may provide a strongly community-based investigative and facilitative function. This too appears to be the best practice.

In addition to verifying claims, the investigative functions of registered funds include tracing potential beneficiaries and, according to the funds interviewed, in practice extend to assisting beneficiaries to obtain information and collect documents, and following up on recipients of benefits whose payments have been prematurely terminated.

The crux of investigation in the context of South Africa – characterised by high levels of illiteracy and fraud, large geographical distances and regional diversity – is fieldwork and the integration of databases. There are a range of existing systems and structures that are better placed to investigate claims than employers and private funds, including:

- ▶ community development workers;
- ▶ social auxiliary workers;
- ▶ chiefs;
- ▶ local government housing departments;
- ▶ labour inspectors;
- ▶ magistrates and social security officers; and
- ▶ agencies, such as TEBA.

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76. Even if the employer has kept records, there will nonetheless be active tracing and it is not appropriate to hold an employer liable for all such tracing.

77. Some funds report that employees often do not want to disclose such information. If the employee elects not to do so, the employer's duty ends when he or she has obtained such a response.

All of these perform functions relating to deaths or social protection, and hold relevant information or can access it<sup>78</sup>. Most of these are state functionaries and will investigate issues because of a statutory duty, not usually at the request of a private fund. Existing data is available through the Department of Home Affairs, TEBA, the estate offices of the magistrates' courts and related agencies, such as SASSA and other social insurance funds.

Central to these efficiencies are national processes or statutorily regulated processes to record and provide access to information, rather than the *ad hoc* system that presently prevails. This cannot be done effectively by non-state parties working in isolation.

Procedures to claim retirement benefits should be standardised as much as possible

For as long as there are thousands of retirement funds, each with their own claims procedures, it is a waste of time and money to train partially literate beneficiaries in claim procedures and benefits. Retirement systems and forms do not differ widely, and should be standardised as much as possible so that knowledge can be transmitted between people and a shared culture on claims can develop. Recent experience shows that this is what has occurred with social grants, where claim procedures have become common knowledge and a high-percentage take-up is reported<sup>79</sup>. A standard set of forms should then be obtained and submitted at multiple service points, such as social security offices or magistrates' courts.

### Coordinated payments for children

Benefits must be paid in a manner that promotes the best interests of the child, and protect assets for longer term use by the child. The system of payment should be structured in such a way that the risk for such abuse is minimised. Where there is no duly appointed guardian, this could best be done by consolidating all payments due to the child in an account held under the Guardian's Fund and administered by the local magistrate, paying out an amount to the caregiver for the child's maintenance on a prescribed basis under the scrutiny of a trained state official and appropriate audit controls, and investing the balance at no cost to the child. If the guardian later died, it would be easier for a new guardian to access the funds than is presently the case.

Payments to the caregiver should be called maintenance and distinguished from funds that are to be preserved for the child's later education or use. In deciding what should be allowed for maintenance and what should be set aside, all payments should be considered together with all the other forms of financial support available to the child.

At the root of this problem lies the need to distinguish between the caregiver and the guardian, and to ensure that a benefit is paid in a manner that facilitates its proper usage and is, in appropriate circumstances, preserved for the child's use later in life. It is cold comfort for the child to learn that he or she may have a claim enforceable – at great cost – against his or her caregiver once he or she turns 18 years old.

Easy access to a cheap, simple, independent dispute resolution mechanism.

Active investigation will go a long way towards resolving these disputes, particularly in regard to the CF and the GEPP. An accusatorial system<sup>80</sup>, on the other hand, is expensive, unduly technical, and alien to people who are illiterate or poor.

However, if the parties wish to take the dispute further and an accusatorial system is necessary, then it is not practical or cost effective for it to proceed to the High or Labour courts. Complaints can be made to a range of ombuds<sup>81</sup>, and the Pension Funds Adjudicator already provides this for the registered retirement funds. The

78. Social workers could also be mentioned, but the crisis in this profession is such that they are not available to address this issue, even though an income is integral to the stability of many homes.

79. Sampson, D., et al., *The Social and Economic Impact of South Africa's Social Security System*, accessed at [http://www.sarpn.org.za/documents/d0001041/sum\\_report.php](http://www.sarpn.org.za/documents/d0001041/sum_report.php) on 14 May 2008.

80. Where the parties challenge each other before an *alooof* adjudicator, as opposed to an inquisitorial system where the adjudicator investigates and decides the matter with the cooperation of the parties.

81. In addition to the FAIS Ombud, complaints can be made to the Life Assurance Ombudsman and various bodies representing professional advisors.

possibility should be investigated of a single appeal to an administrative tribunal against decisions of the statutory insurance and retirement funds<sup>82</sup>.

### Interim relief in deserving cases

All the funds, with the exception of the UIF and the MWPF, generate delay as the claim is processed and, during this time, there is no coverage for the family. The time that it takes to process claims varies, but is seldom less than one year. While the claim is being processed, the child is likely to be without support, and dependent upon social assistance. Social relief of distress ought to cater for the child in this position. Regulation 9(1)(a) of the regulations under the Social Assistance Act promulgated as R162 of 22 February 2005 provides for social relief of distress to persons who are “awaiting permanent aid”. In its *Procedural Manual on Social Relief of Distress*<sup>83</sup>, the Department of Social Development treats benefits from a registered pension fund as “permanent aid”, and so claimants ought to qualify in terms of existing policy. This provision should be uniformly applied<sup>84</sup>.

### Rights enforcement capacity

A major vulnerability of children is the inability to adequately protect their rights. The review shows that almost no use is made of the courts in such cases. Some capacity is required to address this. A vigorous engagement on a case-by-case basis provides an essential check on the exercise of public powers in any democracy.

The creation of some capacity to oversee schemes for the payment of benefits to children will assist in resolving this. The way in which this capacity is structured is important in the South African context, and it must be specifically designed to address the very particular weaknesses in the present environment.

The inherent difficulty with all complaints-driven systems of redress is that their efficiency depends upon the ability of the complainant to utilise the system. This in turn depends upon the degree of literacy of the complainant, the culture of relying on such mechanisms and the availability of funds to do so. Within the South African context, these three factors all militate against any effective control through a complaints-driven system.

Even where a complaints-driven mechanism exists, its judgements do not necessarily translate into general norm-setting for the industry. Firstly, where the only issue in dispute is payment of a sum of money, a major finance house or non-statutory fund will invariably settle an individual claim rather than allow a judgement to stand against its practices. Secondly, individual cases frequently do not generate the research necessary to determine general norms, and any judgement is limited to the particular facts. Norms can only be established once the issue is more widely researched, and often a complaints-driven system is not orientated towards doing so. Thirdly, even where a claim is decided, the practices of private entities are easily adjusted to accommodate any new norm and thereby maintain the *status quo*.

It is accordingly recommended that any rights enforcement capacity have multiple functions, including representing individual and class claims, researching delivery and making representations on law and other reforms and with:

- ▶ statutory investigative powers to call for information from any fund<sup>85</sup>;
- ▶ the power to not accept a compromise in a case if it involves an issue potentially affecting a substantial number of children, or where it is not in the public interest to do so;
- ▶ a duty to make representations to officials and legislative bodies on law reform or any other matter;
- ▶ a duty to research and report on issues affecting the delivery of social insurance benefits to children; and

82. A similar recommendation was made in para 9.2.6.5 of *Transforming The Present – Protecting the Future: Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa*, 2002.

83. 2006, Department of Social Development, 2.

84. See the papers filed in *ACCESS v the Minister of Social Development and Others*, TPD case number 5251/2005.

85. In general terms, there is no justification for a fund to withhold information in the context of such benefits, particularly where delivery by both registered retirement funds and statutory funds is an integral part of the state's compliance with its obligation to give “access to social security” in terms of section 27(1)(c) of the Constitution. Limitations on this broad principle are appropriate to protect individual privacy, the misuse of information and the use of information in criminal proceedings.

- › the power to litigate in the name of a child or group or class of children<sup>86</sup>.

There are various manners in which these functions can be structured within existing institutions, such as the Master of the High Court or the FSB.

## Monitoring and research

The review demonstrates the lack of data on actual delivery of benefits to children. It is primarily the duty of the state to monitor and research the delivery of social security, and it should establish a legislative framework to enable it to do so. Funds should be obliged to report annually on the data necessary for the state to identify and redress obstacles to the delivery of benefits to children.

This data should show:

- › the extent of deaths that do not lead to claims by dependants;
- › the extent to which funds are transferred to new caregivers after the death of a surviving spouse;
- › the extent to which benefits for minors are unclaimed or unpaid;
- › the extent to which payments to caregivers are prematurely terminated or suspended;
- › the levels at which funds are placed in trust at the beneficiary's cost; and
- › the costs of such trusts.

Research may also be needed to establish if there is a practice, since 2002, of repatriating mineworkers suffering from compensatable diseases in the first degree, and the effects of this on their ability to claim benefits.

## Conclusion

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Independent research into beneficiaries' experiences in claiming benefits (including and distinguishing between dependants of members who die in service and out of service), and of the manner in which lump-sum benefits are used, will assist in identifying problems in access and provide some accurate measure of the scale of the problems identified in this review. It will also be able to support recommendations on the best way in which to regulate the standardised payment of benefits. Research is also needed into the extent to which members lose death benefits due to extended sick leave prior to death, prematurely terminated pensions and the extent to which benefits payable to a surviving spouse are actually claimed by the guardian of minor children when the spouse dies.

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86. See, for example, section 7(1)(e) of the Human Rights Commission Act, which empowers the South African Human Rights Commission to litigate on behalf of any person or group or class of person in order to protect the rights in Chapter 2 of the Constitution.

## Appendix 1: Children in South Africa

### 1 Orphaning

The rate of orphaning in South Africa is particularly high. As of 2005, South Africa had over 500,000 maternal orphans (mother has died), over 2,000,000 paternal orphans (father has died) and approximately 630,000 double orphans<sup>1</sup> (both mother and father have died).

Nationally, 19% of the child population has lost one or both parents. Rates of orphaning are highest in predominantly rural provinces, as illustrated in the table below (data from 2005)<sup>2</sup>.

Province	Maternal orphan		Paternal orphan		Double orphan		Total % children lost one or both parents
	Number	% Child population	Number	% Child population	Number	% Child population	
Eastern Cape	118,254	3.8	561,361	18	116,909	3.7	25
Free State	38,867	3.5	161,261	14	66,722	6	24
Gauteng	40,746	1.5	195,376	7	64,475	2.4	11
KZN	137,379	3.6	527,641	14	199,623	5.2	23
Limpopo	66,404	2.5	307,974	12	55,274	2.1	16
Mpumalanga	39,558	2.9	170,440	13	37,395	2.8	18
Northern Cape	9,720	2.9	26,925	8	7,514	2.2	13
North West	41,373	2.8	171,914	12	60,732	4.2	19
Western Cape	20,686	1.3	98,264	6	17,718	1.1	9
<b>Total</b>	<b>512,987</b>	<b>3%</b>	<b>2,221,156</b>	<b>12%</b>	<b>626,362</b>	<b>3%</b>	<b>19%</b>

The leading cause of orphaning in SA is HIV/AIDS. Approximately 5.4 million people in South Africa were infected with HIV in 2006<sup>3</sup>. In the absence of adequate access to treatment, the number of orphans is expected to rise substantially, peaking at around 2016. Figures pertaining to the extent of the expected increase in the number of orphans vary so substantially depending upon the variables considered that they have not been included in any detail in this brief overview.

High rates of paternal orphaning are particularly significant given that men are more likely to be income earners than women. As at March 2007, 21.1% of men (between 15 and 65 years of age) were unemployed, versus 30.8% of women. Unemployment rates are highest among Africans (25% men and 36.4% women)<sup>4</sup>. African children are also more likely to be orphaned than children from any other population group in South Africa<sup>5</sup>.

### 2 Caregiving arrangements<sup>6</sup>

Large numbers of children (orphaned and non-orphaned) are not resident with either of their biological parents, and many are brought up in households separate from their biological siblings.

1. Meintjes, H., Leatt, A., and Berry, L., (2006), *Child Gauge*, Children's Institute, UCT. **Data sources:** Statistics South Africa (2005; 2006) *General Household Survey* (2004); *General Household Survey* (2005). Pretoria, Cape Town: Statistics South Africa. Analysis by Debbie Budlender, Centre for Actuarial Research, UCT.

2. *ibid*

3. Dorrington, R.E., Johnson, L.F., Bradshaw, D., and Daniel, T., (2006), *The Demographic Impact of HIV/AIDS in South Africa: National and Provincial Indicators for 2006*. Cape Town: Centre for Actuarial Research, Medical Research Council and Actuarial Society of South Africa.

4. Statistics South Africa (2007), *Labour Force Survey* (March 2007).

5. Meintjes, H., Leatt, A., and Berry, L., (2006), *Child Gauge*, Children's Institute, UCT. **Data sources:** Statistics South Africa (2005; 2006) *General Household Survey* (2004); *General Household Survey* (2005). Pretoria, Cape Town: Statistics South Africa. Analysis by Debbie Budlender, Centre for Actuarial Research, UCT.

6. GHS 2004 data analysis by Children's Institute (2006).

In July 2006:

Living arrangements of children (aged 0-17 years)	National average, including orphans (approx. absolute figures in brackets)	National average – children with both parents alive
Resident with both biological parents	35% (6.3 million)	44%
Resident with mother but not father	39% (7 million)	Figure not available
Resident with father but not mother	3% (0.5 million)	Figure not available
Resident with neither biological parent	23% (4.1 million)	17%

The following trends in caregiving arrangements have been documented:

*Overtime:* Between 2002 and 2006, there was a small increase of an absolute 2% in the number of children living with neither parent, and a similar decrease in the number of children living with both parents.

*Across province:* There is some provincial variation in these patterns, ranging from 11% to 12% of children resident with neither parent in the Western Cape and Gauteng to 31% of children living with neither parent in the Eastern Cape. These patterns are borne out consistently in the period 2002 to 2006.

*Across race:* The patterns of children's residence with parents are highly differentiated according to race. While less than one-third of African children were living with both their parents in July 2006, the vast majority of Indian and White children (89% and 80% respectively) were resident with both biological parents. In contrast, 26% of all African children were not living with either of their parents in July 2006, and 42% of African children were resident with their mother in the absence of their father.

*Across age:* Younger children (birth to five years) are more likely to be living with their mothers (whether their fathers are present or not) than older children (six to 18 years). As at June 2006, 15% of all children between birth and five years of age were living with neither of their parents, and 27% of all children between the ages of six and 17 were living with neither of their parents.

### 3 Child mobility

The extent of intra-household mobility of children in South Africa has not been well documented. What is known is that children may be moved between households for a variety of reasons, including cultural norms, educational opportunities, the need for children to provide care to ill or elderly family members, and the need for children to be cared for by others.

One study examining the effect of parental death on the mobility of 39,163 children aged birth to 17 in rural KwaZulu-Natal (2000 and 2001), found that the death of a father or mother was associated with increased child mobility and that the youngest children (under the age of two years) and females were the most likely to move<sup>7</sup>.

There is anecdotal evidence to suggest that child mobility may impact upon children's access to social security grants. Further research is needed to determine the extent to which child mobility impacts upon access to child pensions associated with employment-based social insurance schemes.

### 4 Birth and death registration and access to identity documentation

Birth and death registration has improved significantly over the past seven years. However, there is some evidence to suggest that the relatively high national average rates of birth registration among adults (estimated at over 80%) conceals pockets of poor registration, particularly in rural communities.

7. Ford, K., and Hosegood, V., (2004), *AIDS Mortality and the Mobility of Children in KwaZulu-Natal, South Africa*. Paper prepared for the 2004 Meeting of the Population Association of America, Boston, April 1 to 3.

Completeness of birth registration varies considerably across provinces, with only 62% of births in KwaZulu-Natal registered in the year of birth<sup>8</sup>, compared to almost 97% in the Western Cape.

Rates of birth registration also vary with age, as can be seen from death statistics analysed by Statistics SA. The figures below represent the percentage of deceased persons within each age cohort whose birth had been registered (in other words, the deceased had an identity number at the time of death):

- ▶ 96% of persons over the age of 25 years
- ▶ 80% of persons aged between 20 and 24 years
- ▶ 70% of persons aged between 15 and 19 years

Importantly, rates of birth registration appear to be inversely correlated with levels of poverty: the provinces with the highest proportion of poor children are characterised by low rates of birth registration<sup>9</sup>.

One of the reasons for poor registration is poor access to the offices of the Department of Home Affairs. An estimated 491 permanent service points are necessary in order for the Department to deliver services according to acceptable norms and standards (including consideration of travel distances for clients). By the end of 2007, the Department had only 260 service points (47% short of the target<sup>10</sup>), leaving large numbers of clients without reasonable access to enabling documents.

Apart from distances to Home Affairs offices, several other challenges prevent many people from obtaining valid birth certificates and identity documents. These include:

- ▶ a lack of uniformity in policies and processes;
- ▶ poorly trained and supervised staff at service points;
- ▶ staff corruption and client extortion;
- ▶ delayed and misplaced applications;
- ▶ duplicate and inaccurate documents; and
- ▶ challenges associated with providing maternal identity (necessary for birth registration), especially for children who are not resident with biological mothers.

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8. Statistics South Africa (2006), *Recorded Live Births*. Pretoria, South Africa.

9. Giese S., and Smith, L., (2007), *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children*.

10. *ibid*.

## Appendix 2: Safeguards on the statutory funds

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Children's access to the benefits provided by the Funds under the COIDA, ODIMWA, UIA and the statutory retirement funds such as the GEPE, are safeguarded by statutory measures that regulate their financial operation and the delivery of benefits.

### 1 Financial control framework

The Funds are public entities that are subject to the financial control framework applicable to the state. Budgeting and expenditure is regulated by the Public Finance Management Act ("PFMA") and the accompanying treasury regulations<sup>1</sup>. Income is invested through the Public Investment Commission<sup>2</sup>. Finances are overseen by the Parliamentary Select Committee on Public Affairs.

Since the administrative costs of all the Funds discussed above are borne by the state, there is little incentive or scope for the conflicts of interest seen in relation to the profit-driven funds. There is no reason to doubt that the funds are adequately protected.

### 2 Reporting

The PFMA requires the accounting officer of a listed public entity to table audited financial statements and a report on the activities of the entity to Parliament annually<sup>3</sup>. The CF and the UIF are listed as national public entities, and must report in terms of the PFMA. The COIDA and the UIA also require annual reports to the Minister of Labour.

In terms of the COIDA, the Director-General of Labour is obliged to record statistics of the occurrences and causes of accidents and occupational diseases, and the award of benefits<sup>4</sup>, and to report to the Minister of Labour at the end of each financial year on the administration of the COIDA<sup>5</sup> and the activities of the Fund<sup>6</sup>.

In terms of the UIA, the Director-General is required to provide financial statements and an annual report to the Minister<sup>7</sup>, setting out prescribed statistics<sup>8</sup> on the activity of the Fund. He is also required to report to Parliament on the performance of the board and committees set up by the UIA<sup>9</sup>.

The MWCF is not listed as a public entity. No accounting officer is accordingly designated to it<sup>10</sup>, and the reporting obligations and other financial controls of the PFMA have not been made applicable to it. The ODIMWA requires the Compensation Commissioner for Occupational Diseases to "keep such statistical records as may be necessary to enable him or her to carry out his or her duties" under the ODIMWA<sup>11</sup>. This is insufficient to ensure accountability and control over the Fund.

Since 2000, the UIF and the CF have reported annually. The MWCF did not report within the prescribed period after the 2005/6 financial year, and that year's report was included in the report for the following reporting period.

All these reports lack the details necessary to identify the payments to children or their guardians and, although a necessary safeguard, do not sufficiently protect children's access, particularly as children are not represented on the boards or governance structures of these Funds.

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1. Section of the COIDA, section 76(2) of the ODIMWA and section of the UIA.

2. In terms of the Public Investment Commission Act.

3. Section 55(3) of the PFMA.

4. Section 4(1)(o) of the COIDA.

5. Section 4(1)(n) of the COIDA.

6. Section 55(1) of the PFMA.

7. Section 55(1)(d) of the PFMA.

8. Section 11(3) of the UIA.

9. Section 58(12) and (13) of the UIA.

10. As required by section 49(2) of the PFMA.

11. Section 77(1).

### 3 Audits

All the Funds are audited annually in terms of the Public Audit Act. The audits of the CF and MWCF have been qualified for the past three years. The UIF and GEPP were given unqualified audits in the 2006/7 year.

### 4 Access to court

The courts will enforce the terms of the COIDA, ODIMWA and UIA where they are breached. Unlawful, unfair or unreasonable decisions affecting the rights of beneficiaries taken in the administration of the COIDA, ODIMWA or the UIA are administrative actions and are subject to review in terms of the PAJA. This includes the decisions of mutual associations acting in terms of the COIDA, which perform public functions when administering social security.

The High Court has jurisdiction to review any such decision in relation to the COIDA or ODIMWA and the Labour Court has corresponding jurisdiction over the UIA<sup>12</sup>.

Judicial control is effective but so expensive that few people can utilise it. Because the caregiver of an orphan will seldom be entitled to claim social insurance monies in his or her own right, a curator *ad litem* or a guardian will first need to be appointed in any such litigation.

Legal services are provided free of charge, or at a reduced cost, by various institutions, including through the *pro bono* schemes of the various Law Societies, the Justice Centres established in terms of the Legal Aid Board Act, and various public-interest law firms and paralegal advice offices.

The Legal Aid Board is the preeminent legal-aid institution in the country. It is established by the Legal Aid Act. It primarily provides legal aid to indigent persons in criminal matters, but also does so in civil matters subject to its capacity and resources and the priorities stipulated in the section 3 of the Legal Aid Act<sup>13</sup>. Applicants must qualify on a means test. A single person with a monthly income of less than R1,750 and a married person with a monthly income of less than R2,500 per month qualify for legal aid<sup>14</sup>. Assistance is provided either through its Justice Centres (which operate in all places where there is a magistrate's court) or through Judicare instructions to lawyers in private practice. Cases affecting women and children are a priority area, but claims for social insurance are not typically seen as gender issues. Judicare is not, however, provided in family law matters (which may include guardianship issues) and these are, wherever possible, dealt with by its Justice Centres<sup>15</sup>.

There are wide powers to act in the public interest or on behalf of a class or group of affected beneficiaries when the fundamental rights referred to in Chapter 2 of the Constitution are breached<sup>16</sup>. This means that the courts are well placed to intervene in systemic malpractices that limit the rights of access to social security and to administrative justice.

The Legal Aid Board prioritises children's cases and seeks out impact cases to run as class actions. None have been conducted on behalf of children in this field of law. The response to telephonic inquiries was that the Legal Aid Board provided assistance in making submissions to the Pension Funds Adjudicator, but not otherwise. Public-interest law firms, such as Lawyers for Human Rights and the Legal Resources Centre, do not assist in such cases. Neither Lawyers for Human Rights nor the Legal Resources Centre have conducted litigation on behalf of children in this field of law. Because of their limited field of operation, the fact that they only act in isolated selected cases and their own resource limitations, public interest law firms cannot be regarded as an adequate safeguard.

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12. Section 66.

13. Chapter 3, clause 3.1 of the *Legal Aid Guide*, as amended by the Legal Aid Board Circular 5 of 2004.

14. The test is set out in Chapter 2 of the *Legal Aid Guide*. It also makes provision for discretionary adjustments in clauses 2.3 and 6 of that chapter.

15. Chapter 3, clause 3.2(g) of the *Legal Aid Guide*.

16. Section 38 of the Constitution.

The Rules of the High Court make provision for proceedings in *forma pauperis*, in which a person owns less than R10,000 and is too poor to afford litigation<sup>17</sup>. Such litigants are referred to an attorney who is obliged to provide services free of charge<sup>18</sup>. This system is complemented by the *pro bono* schemes of the various Law Societies of the country, whereby attorneys provide services free of charge on a roster system in the public interest. These services are often performed by the junior members of law firms and, since they do not generate fees, are given a low status and priority in relation to fee-generating work. They are typically only pursued to a settlement.

According to the Registrar of the Pretoria High Court, Rule 40 is never used. Cases are instead referred to the law societies, or to non-profit organisations, who have taken over the obligations that the rules impose upon all attorneys and advocates. The result is that an important socio-economic provision that could have helped impoverished guardians and surviving spouses has been eroded.

A sample of the law societies and related institutes demonstrates the extent of this erosion:

The Law Society of the Northern Provinces has some 9,500 attorney members in the Gauteng, Limpopo, North West and Mpumalanga provinces. It provides a voluntary *pro bono* litigation scheme in terms of which members on a voluntary panel undertake to consult with prospective clients at the premises of various stakeholder organisations and from which they may take on cases free of charge. As at January 2008, only 88 members had volunteered to serve on the panel. The stakeholder organisations, which include the Papillion Foundation, University of Pretoria Legal Aid Clinic, Lawyers for Human Rights, Legal Resources Centre, Justice Centres and Thusanang Legal Advocacy Centre, conduct all liaison with the client and set up the appointment. No statistics were available pertaining to how many cases were dealt with, the nature of the cases or their outcomes. The interviewee had no knowledge of any claim for the appointment of a guardian or a claim against a pension or other social insurance fund that had proceeded to court.

The Papillion Foundation is one of the more active stakeholders on the scheme of the Law Society of the Northern Province. It acts as a clearing house in attempting to refer indigent clients to lawyers. It has been in operation for six years. In a telephonic interview with the director and founder of the Foundation, he indicated that he had never dealt with a request for the appointment of a guardian to a minor, and he also did not know of any such case. He agreed that this was strange. He was not aware of any case that had been taken by a *pro bono* lawyer to a court, or by the Pension Fund Adjudicator against a social insurance fund.

By way of comparison, the Cape Law Society has a compulsory *pro bono* scheme in terms of which its approximately 4,800 members, who practise in the Northern, Eastern and Western Cape provinces, are required to provide *pro bono* assistance on a rotational basis. Prospective clients are screened by the *pro bono* officer of the Law Society, subjected to a means test<sup>19</sup> and, if they qualify, are referred to an attorney on the data-base. The *pro bono* officer, who has been employed in this capacity since the inception of the scheme in 2004, indicates that the Cape Law Society has never been requested to provide assistance in the appointment of a guardian to a minor. He also indicated that the Society has never been requested to give assistance in a social insurance matter<sup>20</sup>.

Perhaps more effective than actual litigation is the interaction that civil society organisations, including lawyers, have in redressing individual claims in which the potential for litigation is not exercised but rather implied.

## 5 The Public Protector

The Compensation Fund, the Unemployment Insurance Fund and the Mines and Works Compensation Fund are subject to the oversight of the Public Protector in terms of the Public Protector Act. The functions of the Public Protector are to investigate any conduct in public administration that is alleged to be improper, or is

17. Rule 40 of the Rules regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the Supreme Court of South Africa. The Registrar of the High Court, after receiving an affidavit indicating that the person does not have property in excess of R10,000, will allocate an attorney off a roster kept by him or her, and the attorney will, once inquiring if the case is deserving, approach the local society of advocates to nominate an advocate to act. The attorney and advocate are required to act free of charge. They may not settle compromise or withdraw the case without the leave of a judge. No similar rule exists in the magistrates' courts.

18. Rule 40(2)

19. It is the same means test that is applied by the Legal Aid Board.

20. Personal email communication, 16 January 2008.

alleged to result in any impropriety or prejudice<sup>21</sup>, including maladministration, the abuse or unjustifiable use of power, unfair or improper conduct or undue delay<sup>22</sup>.

The Public Protector has the power to “take appropriate remedial action<sup>23</sup>”, but this is limited to advising, mediating and negotiating<sup>24</sup>.

Although the Public Protector is independent<sup>25</sup>, and has wide powers to search and seize<sup>26</sup>, to subpoena and to cross-examine<sup>27</sup>, it has chosen to perform its functions according to a diplomatic model, calling upon officials to submit written reports in which, when they do reply, they seldom expose themselves. The alternative of engaging with officials and proactively protecting the principles in the Constitution has largely been ignored. Since the Public Protector is obliged to render the necessary assistance in cases referred to it by the public, subject to limited exceptions, a heavy case load has developed in its office. The office has become bogged down with extensive correspondence and delayed cases, leading to a poor record of effectiveness and a loss of public confidence. Despite powers to initiate investigations<sup>28</sup> in matters of public interest and importance, the office of the Public Protector has become complaints-driven.

The powers of the Public Protector to report on any sphere of government<sup>29</sup> have also not been fully utilised, and have been limited to an annual report to Parliament and occasional reports on cases that receive publicity.

## 6 Parliamentary and Ministerial control

The performance of the statutory schemes is overseen by the Parliamentary Portfolio Committees for Labour or Health, and the respective ministers for the responsible state departments.

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21. Section 182(1) (a) of the Constitution.

22. Section 6(4) of the Public Protector Act.

23. Section 182(1)(c) of the Constitution.

24. Section 6(4)(b) of the Public Protector Act.

25. Sections 193 and 194 of the Constitution and sections 1A(3) and 2 of the Public Protector Act.

26. Section 7A of the Public Protector Act.

27. Sections 7(4) and 7(5) of the Public Protector Act.

28. Section 6(4)(a) of the Public Protector Act.

29. Sections 7(3)(b), 8(1) and 8(2) of the Public Protector Act.

## Appendix 3: Safeguards on the registered retirement funds

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### 1 The Financial Services Board and the Registrar of Pension Funds

The function of the Financial Services Board (“FSB”) is to supervise compliance with laws regulating financial institutions and the provision of financial services<sup>1</sup> and it thus enforces the PFA, the Financial Institutions (Protection of Funds) Act and the General Pensions Act. These extensive provisions set out the duties of the boards of a pensions fund<sup>2</sup> and its administrators<sup>3</sup>.

The FSB exercises its supervision through the Registrar of Pension Funds, who is the chief executive officer of the FSB<sup>4</sup>. The Registrar cannot police the multitude of pension funds, and so the Registrar exercises control over key elements of pension schemes: the Registrar approves the rules of the fund at registration<sup>5</sup> and approves amendments to the rules<sup>6</sup>, licenses the appointment of the administrators responsible for the investments of the fund<sup>7</sup>, approves critical aspects of the administration of pension funds, (such as amalgamations and transfers<sup>8</sup> and the apportionment of surpluses<sup>9</sup>), oversees the financial reports of the funds<sup>10</sup> and intervenes when he or she believes that a fund is not in a sound financial condition<sup>11</sup>. The Registrar may impose an administrative penalty if his or her directions are not complied with.

The Registrar cannot effectively enforce the provisions of the applicable laws, partially because of a lack of staff and resources, and partially because the activities of the registered funds are largely inaccessible to the public and the FSB, except to the extent to which funds are required to report to the FSB or the Registrar.

The Pension Funds Amendment Act has recently introduced minimum benefits that apply when members leave the fund prior to retirement<sup>12</sup>.

### 2 The trustees of the fund

The principal control within the retirement fund is in the hands of the trustees on the board. Their duties are complex and many. The PFA sets out the various duties of boards, and prescribes the parameters within which boards must determine benefits, particularly minimum benefits. The board has a large measure of discretion over benefits, management, administration and the investment of the assets of the fund.

The board is required to consist of equal representation on behalf of both employer and employee trustees. Employer and employee trustees act as a check on each other where their interests diverge, but both are united in saving costs to the fund and protecting the interests of their members. They may share common ground in under-protecting the interests of retired members or their dependants. Board members are almost always male, while most recipients of benefits for children are female. A lack of representation pertaining to the experiences of beneficiaries on the board may cause a board to act with bias.

Two-thirds of boards surveyed in 2002 lacked independent representation and inappropriate delegations and excessive reliance on advisers were common problems<sup>13</sup>. This particularly relates to the relationship between the board and the administrators of the fund. Many pension funds are not administered by the board or by the employees of the board, but rather by financial institutions that act in terms of a contract with the fund. These contracts often simultaneously cover administrative services, trust services and consultancy services. The blur-

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1. Section 3(a) of the Financial Services Board Act.

2. Sections 7C and 7D of the PFA.

3. Sections 2, 3 and 4 of the Financial Institutions (Protection of Funds) Act and section 13B(5) of the PFA (inserted by the Pension Funds Amendment Act, 2007).

4. Section 3 of the PFA.

5. Section 4(4) of the PFA.

6. Section 12 of the PFA.

7. Section 13B of the PFA.

8. Section 149(1) of the PFA.

9. Section 15A to 15I of the PFA.

10. Section 15 of the PFA.

11. Sections 18 and 26 of the PFA.

12. Sections 14A and 14B of the PFA.

13. Murphy, J., (the then Pension Funds Adjudicator), *A Closer Look at Pensions in South Africa*, *Juta's Business Law*, 2002 (1) 184 at 186.

ring of the administrative and advisory functions may lead to a conflict of interest, in which advice is given that brings benefits to the administration company, or is less advantageous to the fund than other options.

There are a range of common unlawful financial practices in the administration of retirement benefits. It is beyond the scope of this research to investigate these in any detail, and they are the primary concern of members rather than their children, but they reduce the benefits payable to children:

- ▶ Bulking is a negotiated reduction in banking costs when placing a large amount or number of pension deposits with a bank. Such benefits are not for the administrator, but are negotiated by it as agent for the benefit of the principal fund and ought to be passed on to the fund. Alexander Forbes, a large pension administration company, admitted in 2003 to not disclosing such benefits to its principals and not passing them on to the underlying funds, and to having done this for at least 12 years. An investigation into other companies is under way by the FSB<sup>14</sup>.
- ▶ Other secret profits come in a variety of forms similar to bulking. Large cash holdings in banks or money markets can be used by the administrator to offset other costs for its profit but that do not generate the same returns on investment for the principal. Delayed payments earn investment interest that is not accounted for to the principal. Excessive fees that do not relate to the true costs are reportedly commonplace, particularly excessive performance fees, the outsourcing of services on commission (often in the same suite of companies), and brokerage fees arising when investments are transferred to other products within the same suite of companies.
- ▶ The problem of secret profits is exacerbated by the practice of incentives within the financial industry, whereby a counter-benefit is provided to the investing company or fund. The existence of such an incentive may need to be disclosed, but disclosure is often inadequate where the line between advice and negotiation has been blurred. Such incentives may also be covered up by contractual terms that provide for incentive payments or performance payments, or that vaguely allow the other party to keep profits beyond a certain benchmark level.

The mechanism to guard against such secret profits is the board. The board is made up of employer and employee representatives and has no representation by beneficiaries. If access to benefits includes measures to preserve such benefits, then some form of safeguard in this regard for children is needed.

The lack of intervention by the board of the MWPF in the recent Fidentia scam provides a case study<sup>15</sup> in the manner in which trustees may fail to protect children's benefits. The MWPF falls under the control of the National Union of Mineworkers ("NUM") and the mining industry employers, who elect the trustees. The board contracted with Lekana Employee Benefit Solutions to administer the fund. Lekana is 70% owned by Momentum and 30% by the Mineworkers Investment Corporation (MWIC), which in turn is controlled by NUM. Lekana had a secret agreement with the Living Hands Administration Company, which managed an umbrella trust and its predecessor (that had been bought by Fidentia), in terms of which Lekana steered business to the umbrella trusts. Lekana and the MIC thereby made a secret profit. The assets in the umbrella trust were in turn invested in unprofitable projects of Fidentia's sister companies, all directing profits to the persons controlling the scheme. The consequence was that 46,000 widows and orphans lost R1,2 billion in assets in the Living Hands Umbrella Trust that belonged to them. Two NUM trustees on the MWPF board who objected to what was happening at Living Hands were dismissed or suspended as trustees by the NUM. According to a COSATU statement on the issue, one reason why the conduct of Fidentia was not noticed is that "the culture of self-enrichment is so deeply embedded in South African society... Many business proposals these days do not involve creating wealth or providing services, but persuading people to part with their cash on the basis of promises of riches to come<sup>16</sup>." There is no shortage of such condemnations of the industry, most authoritatively by the Pension Funds Adjudicator<sup>17</sup>.

14. *Business Report*, 20 June 2006, accessed at <http://www.busrep.co.za/index.php?fArticleId=32998424>, accessed on 7 November 2007.

15. *Personal Finance*, accessed at <http://www.persfin.co.za/ArticleId=4001424&f> on 20 February 2008.

16. Quoted in *Fin24*, 25 Feb 2007, accessed at <http://www.fin24.com/3EPrint%20am%20article.webarchive> on 2 Nov 2007.

17. See his condemnation of the costs charged by life insurers in *Schwartz v Central Retirement Annuity Fund and Sanlam Limited Life Insurers*, case number PFA/GA/2767/2005/RM, accessed at <http://www.pfa.org.za/sitesmart/uploads/files/83E03A20-EE6E-4D07-AB1E-3039A3CB15EB.pdf>, and *Du Plessis v Lifestyle Retirement Annuity Fund*, case number PFA/GA/2638/2005/ZC, accessed at <http://www.pfa.org.za/sitesmart/uploads/files/6913A498-9C13-4BD6-B434-CF88FCC0DE02.pdf>.

The Fidentia case is expected to result in an amendment to the PFA, anticipated early in 2008, in terms of which umbrella trusts will be brought under the PFA as “beneficiary funds”. The terms of this legislation have not yet been made public. However, it is unlikely to halt the inventive practices of administrators.

Once in the hands of a separate trust, there is no representation at all by the persons interested in the benefits, however indirect, on the board of such a trust. The intention of the proposed legislation is that the pension fund must exercise control over the beneficiary fund in the interests of its members, but in light of the prevailing culture in the industry, and without any direct membership on the beneficiary fund board, there are two reasons why it is unlikely that this will be effective. Firstly, trustees are already overburdened by their existing responsibilities and, secondly, the pension fund is unlikely to have any power to recall the money once it is handed over to the beneficiary fund.

If this is a rapacious industry with 12,500 faces, operating behind complex contracts that make it only marginally accountable to its boards (many of which are only modestly equipped to address the issues, controlling vast sums of money under little more than broadly normative and structural state supervision), then there must be doubts as to the ability of children to receive the full benefits set aside for them. If the lawful and equitable calculation of benefits cannot be effectively safeguarded, then it is not prudent to place the benefits of children in the hands of the private sector.

### 3 Umbrella trusts

Umbrella trusts are not presently subject to the regulatory framework of the retirement funds. Their trust instruments must merely be lodged with the Master of the High Court, who issues letters of trusteeship to the trustees<sup>18</sup> without inquiry or qualification. A person responsible for auditing the books of account of a trust is obliged to report material irregularities to the Master, who may call the trustee to account<sup>19</sup> and may conduct an inquiry<sup>20</sup>. If the trustee fails to perform his or her duty, or fails to comply with any request by the Master, he or she may be removed from office<sup>21</sup>.

### 4 The Pension Funds Adjudicator

Complaints against a fund may be referred to an independent Pension Funds Adjudicator, whose order has the effect of a civil judgment<sup>22</sup>. Although the process of referring a dispute to the Adjudicator is simple, the nature of pensions law and the administration of pension funds is often not understood by beneficiaries, and they are consequently not sufficiently informed to utilise a complaints-driven corrective system. In addition, despite being an efficient and cost-effective system, many poor child beneficiaries do not have the resources to do the travelling and investigations necessary to adequately enforce their claims.

There is an appeal to the High Court against the decisions of the Adjudicator<sup>23</sup>.

Whether before the Adjudicator or the High Court, such cases invariably require legal representation. The fund and its administrators have the funds to mount a substantial legal case, and to pursue it on appeal. This is seldom true of the complainant, who is typically without employment, disabled or a dependant. The financial limitations on the capacity of beneficiaries to litigate have been addressed above. Legal aid is not usually available for such representations.

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18. Section 6 of the Trust Property Control Act (“TPCA”).

19. Section 16(1) of the TPCA.

20. Section 16(2) of the TPCA.

21. Sections 19 and 20 of the TPCA.

22. Sections 30A to 30X.

23. Section 30P of the PFA, interpreted in *Meyer v Iscor Pension Fund* (2003) (2) SA 715 (SCA) at 725I to 726A, available at <http://www.pfa.org.za/sitesmart/uploads/files/4ACFA938-268D-4955-8ACD-9F0C88E57E07.pdf>.

## 5 The FAIS Ombud

The Financial Advisory and Intermediary Services Act (“the FAISA”) regulates investment advice given in the course of business and the intermediary services associated with the purchase of financial products<sup>24</sup>. In addition to the wide range of consultancy and investment services rendered by administrators, the decision to invest monies held by an umbrella trust on behalf of a beneficiary qualifies as an intermediary service and a decision not based on sound reasons may be challenged before the FAIS Ombud. Similarly, the management of the investments of the sub-trust is subject to this jurisdiction.

Financial service providers are required to be fit and proper persons licensed by the Registrar of Financial Service Providers<sup>25</sup>, who is the chief executive officer of the FSB<sup>26</sup>, and are required to adhere to a code of conduct<sup>27</sup>. Advice and intermediary services exclude the services of the administrator of a retirement fund, whose suitability is regulated by section 13B of the PFA<sup>28</sup>.

The Ombud for Financial Services Providers (“the FAIS Ombud”) is appointed to consider complaints regarding advice or services that are in breach of the FAISA<sup>29</sup>, and the Ombud’s determinations have the effect of a civil judgment<sup>30</sup>.

## 6 Access to court

The courts are available to enforce the rights of members or beneficiaries. The same comments made above in relation to the judicial control of statutory funds apply here. The basis of the liability of the pension funds will generally be a breach of either the rules of the fund or the PFA and its related legislation. It is unclear if PAJA is applicable to the decisions taken by a fund.

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24. These terms are defined in section 1 of the FAISA.

25. Chapter 2 of the FAISA.

26. Section 2 of the FAISA.

27. Section 15 of the FAISA.

28. Section 45(1)(a)(iii) of the FAISA.

29. Section 20(2) of the FAISA.

30. Section 28(5)(a) of the FAISA.

## Appendix 4: The Compensation Fund

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### 1 The scheme

The purpose of the Compensation Fund is to compensate for disability, loss of earnings, medical aid and death arising either from accidents in the course and scope of employment<sup>1</sup>, or from occupational diseases<sup>2</sup>.

Claims are dependent upon proof of an insured occurrence, namely an accident in the course and scope of employment<sup>3</sup>, or an occupational disease<sup>3</sup>. The claim does not require proof of negligence on the part of the employer<sup>4</sup>. This substantial improvement in access is offset by the reduced benefits payable.

The Fund is structured in the nature of a fully funded insurance scheme, funded by contributions payable by employers.

### 2 Governance and administration

The Fund is under the control of the Director-General of Labour, who is its accounting officer, and is administered by a Compensation Commissioner (referred to in this Chapter as “the Commissioner”). It has an advisory board comprising representatives of the state, employers, employees, licensed insurers and the medical fraternity. There is no representation by pensioners. It exercises oversight on policy and the procedures deriving from policy and comments on regulations prior to adoption by the Minister of Labour and NEDLAC<sup>5</sup>.

The Fund currently holds assets of approximately R17 billion in the Compensation Fund and the Reserve Fund. Dormant monies are invested through the Public Investment Commission. The Compensation Fund is a public entity subject to the Public Finance Management Act and treasury regulations.

Contributions are assessed on the annual earnings of all employees employed by the employer<sup>6</sup>, and may be varied to accommodate the risk associated with the business<sup>7</sup>.

At the end of the 2007/8 financial year, the Fund reported that 323,368 employers were registered as contributors and R2,887 million in contributions was collected from them. The Fund has received successive qualified audits up to and including the 2006/7 financial year owing to its inability to monitor assessments and recover revenue.

Based on the figures provided by registered employers, 5,254,459 employees are covered by the Fund. It is not clear what percentage of employers are not registered. This figure does not include state and municipal employers, whose employees are entitled to benefits in terms of the COIDA, but who are exempted from assessments and who, after processing of claims, excluding pensions, by the Fund, make payment of any COIDA claims from their own monies<sup>8</sup>.

Employers' contributions are assessed on, amongst other factors, the collective earnings of the employees employed, but the Fund has no record of the individual employees or their rates of pay. Employers are required to keep records of the earnings and other particulars of their employees, which records must be made available to any person authorised by the Director-General to investigate a claim<sup>9</sup>, or to any health and safety or trade union representative<sup>10</sup>. Records must be kept for at least four years after the date of last entry<sup>11</sup>.

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1. Section 22.

2. Section 65.

3. Section 65.

4. Section 35.

5. National Economic Development and Labour Council. See <http://www.nedlac.org.za>.

6. Section 83(1) of the COIDA.

7. See sections 83(2) and 85 of the COIDA.

8. *Compensation Fund Annual Report 2006/7*; Compensation Fund, 2007, page 14.

9. Section 81(1).

10. Section 81(4).

11. Section 81(2).

The Minister of Labour is authorized to licence a mutual association to insure employers against their liabilities in terms of the COIDA and to execute the provisions of the COIDA<sup>12</sup>. Rand Mutual Assurance and Federated Employers Mutual Assurance have been so licensed, and administer the COIDA in the mining and construction industries respectively. These employers and their employees are accordingly not included in the figures above. The governance and administration of licensed associations is subject to the controls applicable to the private insurance industry, and the Fund monitors compliance with the terms and conditions of its licence.

### 3 Benefits payable for children

The Fund pays a lump-sum benefit calculated on a prescribed tariff based on the employee's prior earnings. The amount of compensation in the event of death is a monthly pension equal to 20% of 75% of the employee's monthly earnings per child<sup>13</sup>, subject to a maximum in total of R11,865 and a minimum of R1,410.75 per month<sup>14</sup>. If there are more than three children, benefits are still only paid to their guardian up to a maximum of 60% of 75% of the employee's monthly earnings. If one of the three children ceases to qualify or dies, the benefit is allocated to another minor child so that it remains at 60% of 75% of the deceased's earnings for as long as there are three children qualifying support. For logistical reasons, benefits are accordingly allocated nominally to the youngest three children. If the deceased had more than three children, and the children are maintained by more than one guardian, the available 60% is divided *pro rata* between the guardians according to the number of children that each guardian is maintaining. If any dependant dies, the benefit payable to him or her becomes payable to his or her children or, if there are no children, to the other dependants<sup>15</sup>.

The surviving spouse is entitled to 40% of 75% of the employee's monthly earnings, subject to the same maximum and minimum amounts. If the employee had more than one spouse, the 40% is divided between the spouses in equal shares<sup>16</sup>.

If a surviving spouse in a customary union later dies, the Fund may increase the pension of the children that he or she had with the deceased contributor or, if there are no children, of any other dependant<sup>17</sup>.

The following is a table of data relevant to an assessment of the claims-processing capacity of the Fund<sup>18</sup>. It excludes exempted employers' monthly pension payments, but includes medical payments to national departments and permanent-disability lump-sum payments below 30%.

	2005/6	2006/7
Total compensation paid	R651 million	R655 million
Number of accidents reported	237,980	213,226
Number of claims paid	No figures provided	324,627
Number of claims repudiated	9,558	6,796
% of claims finalised that were older than two years	No figures provided	73%
% of pension claims finalised that were older than two years	No figures provided	64%
Number of pensions paid	23,608	21,757
Number of pensions paid following fatalities	No figures provided	No figures provided
Number of pensions paid for children	No figures provided	No figures provided
Value of pension benefits paid	R403 million	R393 million
Value of pensions paid for children	No figures provided	No figures provided
Unclaimed monies transferred to reserves	No figures available	R 2.383 million
Investment reserves and related assets (excluding property and equipment)	R 15.3 billion	R 16.6 billion

12. Section 30 of the COIDA.

13. Item 8 of Schedule 4 to the COIDA.

14. Item 4 of Schedule 4.

15. Section 54(5)(b).

16. Section 54(5).

17. Section 54(1)(c)(i).

18. *Compensation Fund Annual Report, 2006/7*.

No figures are available to show what percentage of the pension monies was paid for children or for fatal accidents, or the numbers of dependants or children who benefited. No figures are available to show how often pensions to children were increased because no widow was alive, or because the widow subsequently died. Nor are figures available of the number of child pensions that were transferred to a subsequent guardian after the original guardian died.

Since the IT systems of the Fund could not determine unfinalised claims, during the 2006/7 financial year, the Fund ring-fenced 1,216,249 claims from before 2005 and reviewed them with a view to finalising claims that could have been omitted during the previous processing. By the end of the 2006/2007 financial year, 1,013,720 claims (or 83% of them) had been finalised, compared to 267,147 in the previous financial year. A total of 17,033 (or 1% of them) were repudiated. Of the 189,496 delayed claims that were not accepted, 89% had outstanding documents and 19,086 were yet to be assessed at the time of reporting. It is not clear why the approximately one million further claims has not significantly changed the amounts of compensation paid by the Fund in that year, although some of the claims had already been paid during the previous years and had merely to be finalised.

#### 4 Beneficiaries

Only “employees” as defined<sup>19</sup> are covered by the COIDA, including casual employees, employed directors of corporate entities and employees provided by labour brokers. Self-employed persons, independent contractors, agents on commission<sup>20</sup>, piece workers<sup>21</sup>, partners and domestic workers are not covered. Members of the South African Police Services and the South African Defence Force are not covered, but separate legislation regulates their compensation in similar circumstances.

Benefits in the event of death are payable to a “dependant”, who must be both legally and factually dependent on the deceased employee<sup>22</sup>.

It includes a spouse at civil law and customary law, and parties living as husband and wife (which includes any unrecognised customary law spouse).

A child of any such relationship is included as a dependant, as well as a posthumous child<sup>23</sup>, stepchild, adopted child, extra-marital child<sup>24</sup> or a foster child. If any adult child, brother, sister, half-brother or half-sister, grandparent or grandchild of the employee is unable to earn an income owing to a mental or physical disability, he or she is also included in the division<sup>25</sup>. A very wide range of children is thus covered, including those brought into a spousal relationship with the employee by a partner to a polygamous marriage, a marriage in terms of the tenets of an Asiatic religion<sup>26</sup> or a solemnised civil union.<sup>27</sup> The practice is furthermore to include any other child, even if there is no relationship of legal dependency, if the child was living with the deceased.

Pensions lapse when the child attains 18 years of age, unless the child is unable to earn an income owing to a mental or physical defect, or complete secondary education, or complete tertiary education if the employee would have contributed to such secondary or tertiary education<sup>28</sup>.

19. Definition of “employee” in section 1 of the COIDA.

20. *Smit v Compensation Commissioner*, (1979) (1) SA 59 (A).

21. In other words, persons employed as independent contractors to complete a specified task and not subject to the control and management of an employer in regard to the detail of how this is to be done.

22. Definition of “dependant” in section 1 of the COIDA.

23. Being a child born subsequent to the death of the worker.

24. Section 1 of the COIDA.

25. Section 54(1)(c) read with the definition of “dependant” in section 1.

26. Although a “spouse” means a spouse in terms of the Marriages Act, which excludes certain unions, the underlying principle is the enforceability of the dependant’s claim, not the marriage and, as in *Amod v Multilateral Motor Vehicle Assurance Fund* (1999) (4) SA 1319 (SCA) at paragraphs 20 and 25, it is likely that a polygamous religious marriage under an Asiatic religion will be included. In addition, in *Ryland v Edros* (1997) (2) 690 (C) and *Daniels v Campbell NNO* (2003) (9) BCLR 969 (C) at 991 F to H it was held to be constitutionally unfair to treat one marriage regime as valid and another as invalid. In any event, all relevant forms of union are captured by including a spouse with whom the deceased was living as husband and wife.

27. Civil Unions Act.

28. Section 54(1)(c)(iv).

## 5 Points of contact with claimants

The day-to-day administration of the Fund is performed by the Commissioner from premises situated in Pretoria. The Fund intends to decentralise its client services to provincial offices, and is in the process of doing so.

Claims are lodged either at the Compensation Commissioner's offices in Pretoria, or at a labour centre, from where they are transmitted to the head office for registration and processing. They can also be faxed by the claimant. A pilot study in the Eastern Cape is presently investigating a decentralised registration and adjudication procedure. The intention is to decentralise all administrative and service functions to the provincial level in phases over approximately one-and-a-half years.

The Fund manages a call centre, which reportedly had handled 2,231 calls per day by the end of March 2007<sup>29</sup>.

The Fund is situated in Pretoria, and it is costly and difficult for employees, guardians and spouses to travel to Pretoria to lodge claims. This problem will be eased with the establishment of decentralised offices.

Labour centres and mobile units of the Department of Labour can access the database of the Fund to check whether a life certificate has expired, what documents are on the system, the amounts paid or to verify identity. They cannot scan documents onto the system.

## 6 Claims procedure

The COIDA sets up the following procedure to claim benefits<sup>30</sup>:

- ▶ The employee must report the accident to his or her employer<sup>31</sup>.
- ▶ The employer is obliged to give notice of the accident to the Commissioner<sup>32</sup>.
- ▶ The Director-General must, after receiving notice of an accident or otherwise learning of the accident, make such inquiry as he or she deems necessary to enable him or her to decide upon any claim for compensation<sup>33</sup>. The Director-General has accordingly been granted powers to access the records kept by the employer and, where the employer is uncooperative or has failed to keep the prescribed records, institute prosecution.
- ▶ A claim for compensation must be lodged with the Commissioner in the prescribed manner<sup>34</sup> and, if not lodged as prescribed, the claim will not be considered (unless the accident was otherwise reported to the Commissioner)<sup>35</sup>.

The Fund insists that the claimant in the case of an orphan must be the child's guardian, but it was apparent during an interview with the Fund that 'guardian' was understood to be the person who is currently looking after the child, and not the legal guardian. Proof of 'guardianship' in the form of an affidavit is required. The 'guardian' must be over the age of 18 years.

- ▶ The claim form includes a report by the employer, particulars of the employee's earnings and a medical report. Official proof of birth or identity (in the form of a birth certificate or identity document) is required for all children. If these documents are not available, an affidavit is not accepted as proof of identity. An affidavit is required that proves the dependence, as well as the relationship to the deceased. The affidavit is usually made by a local policeman or chief, but a civic organisation member, social security official, neighbour or school principal can also do so. Social workers are not typically used. A copy of the court order placing any foster child in the custody of the deceased or his or her spouse is also required. If the child has not been placed in formal foster care, but was living with the deceased, an affidavit from a policeman or a neighbour is acceptable as proof of this.
- ▶ No tax clearance is required.

29. *Compensation Fund Annual Report 2006/7*, page 9.

30. The practices set out in this section were provided by the Fund during an interview with its senior administrative staff.

31. Section 38 of the COIDA.

32. Section 39.

33. Section 40(1).

34. Section 43(1).

35. Section 43(2).

- ▶ Claimants must provide bank account details into which the benefits will be paid.
- ▶ Further medical reports are later required to enable the Commissioner to finally assess the nature of the disability.
- ▶ The Director-General shall consider and decide upon the claim and may carry out any investigation or conduct a formal hearing<sup>36</sup>. No time period is stipulated for the finalisation of a claim. The finalisation of a claim depends on the stabilisation of the medical condition of the employee and the submission of full documentation in terms of medical reports and operation reports.
- ▶ The claimant has a right to object to a tribunal, which is equivalent to a magistrate's court. There is a right of appeal and review to the High Court.

If a further dependant should come forward after the pension has been awarded, the pension is stopped and reviewed, and any overpayments are subsequently deducted once the pension is restarted.

No figures were available from the Fund pertaining to the average time that it takes to finalise a claim for a deceased worker. A fatal claim can be finalised within one month if all information is made available to the Fund. The Fund reports<sup>37</sup> that there is currently no backlog extending to two years in the Compensation Fund, as all claims for the years 2000 to 2004 had been reviewed and finalised during the past two financial years. A small percentage of cases from this period remain open due to outstanding information. The claims for 2005, 2006 and 2007 are also reviewed from time to time for any new information, particularly as the medical conditions of employees become stabilised.

## 7 Verification and investigation of the claim

With the move to decentralise operations, the Commissioner has recently started to use the staff of its provincial offices to visit guardians and obtain the outstanding documentation. Each provincial office has a representative assistant manager. According to the Fund representative interviewed, either the provincial manager investigates the issue himself, or he or she may enlist the services of the labour inspectors employed at the regional labour offices to investigate or verify information.

Labour inspectors are employed at labour centres in the major cities and towns<sup>38</sup>. There are 119 such centres throughout the country. Their duties are to enforce labour legislation, including the Basic Conditions of Employment Act and the Occupational Health and Safety Act, COIDA and others. They are unlikely to be able to devote much time to the administration of COIDA. The Fund sometimes enlists the services of members of the South African Police Service ("SAPS") to assist with the completion of affidavits, tracing of dependants and employers, but SAPS members are likely to be primarily occupied with the burden of their regular work. The system is under development and, according to the Fund, it will take some time before it is effective and less centralised. This system of investigations is unlikely to be effective unless more resources are provided to it than are presently available through SAPS and the existing labour inspectorate.

The Fund has no electronic interface with the Unemployment Insurance Fund, the social assistance system under the Social Assistance Act or the population register that is managed by the Department of Home Affairs.

The practice of the Fund is to verify all details, but until recently it has not actively investigated claims by visiting the claimants (except in cases where fraud is suspected). The Fund's Risk Management section deals with fraud cases. The Fund merely calls upon the employer, the medical provider and the claimant to provide information.

If particulars are outstanding, the Fund writes to claimants to advise them to submit the outstanding documents. These documents can be submitted to the provincial offices of the Commissioner.

According to the Fund, the biggest obstacle to access is the verification of information. Employers do not reliably keep records as prescribed, particularly when employing casual workers. Employees often do not know their employer's particulars. In the building industry, for example, an injured casual worker will only know the

36. Section 45(1) of the COIDA.

37. Interview with the Fund and written comments on a draft of this report.

38. The details of the centres appear in the chapter on the UIF, below.

construction site and not the employer's address. After being injured, he or she is taken to hospital and often does not hear from, and is unable to trace, the employer after the accident.

Often the employer is not prepared to cooperate, and although it is legally obliged<sup>39</sup> to do so, the Fund lacks the infrastructure to take any further steps to investigate claims and verify details as it only relies on labour inspectors to enforce COIDA, whereas these inspectors are controlled by the Inspection and Enforcement Services and not by the Fund. The case study that follows demonstrates the extent of the failure to investigate these issues.

### 7.1 The failure by employers to complete the claim form

Stanley Sadiki is a 41-year-old man living in Westerust, Mpumalanga. He was employed as a security guard by Nghala Guards between October 1999 and 15 April 2001, and was stationed at the Cullinan Place of Safety. He earned in the region of R1,500 per month.

On 15 April 2001, while patrolling during a night shift, he was struck by an ambulance, which had come out of the detention centre and appeared to be out of control. He reported the accident to his employer soon after he regained consciousness. When he later asked his manager to submit a report of the accident to the Compensation Commissioner, his manager refused, stating that Stanley was not an employee, but rather an independent contractor.

Mr Sadiki was patently an employee. His duties and responsibilities at work were defined and regulated by his employer. He was given a uniform to wear that had the name Nghala Guards written on it, and he was told to wear this uniform at all times. He received on-site training from a manager and supervisor, both of whom were also employees of Nghala Guards. Nghala Guards paid him his salary every month. He signed a contract when he started work, but did not know what it said and did not have a copy.

Mr Sadiki was seriously injured. His right arm was broken, his left shoulder was dislocated, his right knee and leg were broken and his left ear was badly cut. Since the accident, he has had four serious operations. During this period, and during his two-year recuperation, he was unable to work, and his employer paid him nothing during this time. He remains deeply scarred and his right hand is pulled into a permanent claw and cannot be used with any strength.

He is not married but had the custody of a six-year-old daughter called Ndamulelo. His daughter lives with his parents in Mashau village, Limpopo. His father is a farm worker and does not earn enough money to support the family. While Mr Sadiki was employed, he would send between R600 and R1,000 home to support his daughter and to buy food and clothes for his younger siblings. Without this money his family would not have been able to survive.

He first attempted to initiate the process of applying for worker's compensation in July 2001 by engaging the services of Messrs Werner Roos & Immelman, a private firm of attorneys. Due to his financial circumstances, Mr Sadiki was unable to pay their fees and he was subsequently referred to a non-profit law firm.

On 13 August 2001 he was assisted in compiling all the documentation necessary for the processing of his claim. Several attempts to contact his employer for the employer's report were unsuccessful. On 14 August 2001, his legal representative wrote to the employer to remind him of his statutory duty to report any accident involving one of his employees while the employee was on duty to the Compensation Commissioner within seven days of the accident. There was no response to this letter. On 27 August 2001, a claim was submitted to the Compensation Commissioner, together with an explanation of the employer's default and a request that the Commissioner use his statutory powers to investigate and compel the employer to report. The Commissioner failed to respond. After several telephone calls to the Commissioner's office requesting Mr Sadiki's claim number, the application was resubmitted on 14 February 2002.

The Commissioner acknowledged receipt of the initial application on 25 February 2002, and undertook to take the case up with the employer to obtain the outstanding employer's report.

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39. Sections 45(1) and (2) and 45(1) of the COIDA.

No further information was received from the Commissioner's office regarding the status of the employer's report. Several attempts to telephone the Commissioner's office were unsuccessful because the Commissioner's office was not answering its telephones.

On 15 August 2002 Mr Sadiki's attorneys wrote to the Commissioner to request an update on the status of the employer's report, and attached the final medical report together with a diagram illustrating the damage done to his broken hand.

On 5 September 2002 the Commissioner advised by letter that Nghala Guards had failed to respond to his first warning letter and that they intended to subpoena the employer to appear in their office.

Mr Sadiki received no further correspondence from the Commissioner's office in relation to the employer's report, and it was becoming apparent that the Commissioner had not taken the necessary steps. On 17 October 2003 a letter was sent to the Commissioner demanding that he finalise the claim within 14 days, failing which the High Court would be approached.

It had become apparent from the extensive dealings with the Commissioner's office that the Commissioner had created a new class of claims called "temporary claims", which were claims for which no employers' reports had been submitted and that, as a result, remained indefinitely unresolved. These problems were further compounded by the lack of adequate staff or mechanisms at the Commissioner's office to deal with these employers.

Even in the absence of the employer's report, the Commissioner could finalise Mr Sadiki's case had the Commissioner had the staff or systems to investigate such matters. All insurance firms routinely employ investigative staff for this purpose. All the necessary facts could have been obtained by investigating the claim. One contentious issue should have been the discrepancy between Mr Sadiki's version of events and the version of the ambulance driver. At no stage did the Commissioner make any attempt to contact the ambulance driver to obtain his evidence as this was the responsibility of the Inspectorate. Another contentious issue would be to register a claim as a valid claim without the employer's report of accident as the Act only accepts a claim that has been reported by the employer. There had been no policy in this regard until recently.

On 23 October 2003 the Commissioner acknowledged receipt of the previous letter and informed Mr Sadiki's attorneys that the employer had been summoned in order to obtain the required report. This letter was resent to the employer's lawyer on 12 November 2003, and again on 17 November 2003 and again on 18 November 2003. Nothing further was heard regarding the results of the subpoena.

Together with two other injured workers whose claims lacked employer's reports and who were living in extreme poverty without an income, Mr Sadiki was assisted to launch a class action on behalf of all other claimants. The Fund's position was that it was under no obligation to have registered these claims as temporary claims until the investigation process had been finalised by the Inspectorate, even though, over the past four decades, the Fund had been registering temporary claims for the sake of keeping the records while investigations were in progress. The Fund is of the opinion that it was therefore assisting employees in this regard by keeping records pending the investigations that were to be done by inspectors in the provinces<sup>40</sup>. The application listed the systemic problems relating to the Inspection and Enforcement Services' failure to investigate or take punitive action against employers who failed to file reports.

The Director-General did not oppose the application and an order of court was made by agreement requiring the relevant parties to resolve the approximately 198,000 affected temporary claims within eight months, and to develop proper procedures and policies to investigate claims. At this stage the Fund had already started, in April 2004, with a process of reviewing information in all temporary claims. It came to light that some of these temporary claims had been only registered with a medical account or a medical report, without any letter from the employee notifying the Fund about an unreported accident. Other cases were duplicates of existing claims due to different names used. Most claims had no employee's postal address or contact details, which made it very difficult to establish whether there was indeed a valid claim.

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40. *Sadiki and Others v the Director-General of Labour and Others*, Transvaal Provincial Division of the High Court, case number 22066/04.

The Fund reported that it has implemented the necessary procedures to address the temporary claims<sup>41</sup>. It conducted an advertising and educational campaign to inform claimants in temporary claims cases to come forward and has conducted *imbizos* on the issue.

Following the temporary claims problem, the Commissioner's office has adopted the stance that it will not register incomplete claims. On receipt of a notification of an unreported accident from the employee, the Fund contacts the employer, where possible, to report the accident. If the employer does not cooperate, then the employee's documentation is referred under a covering letter to the provincial office for IES to conduct investigations. Where the Fund receives a medical report only, without any notification of an accident by the employee, investigations are done to trace an existing claim. If there is no existing claim, such documents are referred back to the medical provider explaining that there is no existing claim.

The Compensation Fund has also developed an internal policy whereby certain information from the employee alone can be used to register a claim on behalf of the employer. Such information includes proof of employment, including payslips, the employee's UIF registration, bank deposits, sworn statements from eye witnesses and medical reports. This is one of the ways in which to assist the employee with his or her claim.

## 7.2 The investigation of discretionary benefits

An employee is entitled to increased compensation if the accident or disease arose as a result of the employer's negligence<sup>42</sup>. The amount of the increased compensation<sup>43</sup> is at the discretion of the Fund<sup>43</sup>. In the absence of investigative assistance, it is difficult for children to obtain increased benefits, even where the negligence is obvious, as the following case study<sup>44</sup> demonstrates.

On 19 November 2000 a fire broke out at the Esschem plant in Lenasia, which manufactured paints. It killed all 11 workers on night shift duty at the time. They had been locked into the premises by the employer to prevent them wasting time, and they could not escape. The employer acted in breach of a range of safety provisions, and was obviously negligent.

Each deceased employee had earned R1,081 per month. The Fund awarded pensions to the affected children, but it did not take into consideration the negligence of the employer, as is apparent from the particulars of the following claimants.

Deceased's name and claim number	Dependants and care arrangement	Pension awarded	Comments
Mathilda Smith, AO/299867	Five children cared for by grandmother	R486.45 per month	The resulting benefit allowed R97.29 per child per month
Ellin Francis Bock, AO/299498	Two children, one aged two, cared for by grandmother	R324.30 per month	Discretion to increase compensation not applied.
Catherine Mazibuko, AO/299798	One child, aged two, cared for by grandmother	20% of 75% of the mother's income was awarded, namely R162.15	Discretion to increase pension not applied.

The Fund commented on this case as follows: "It must be noted that the maximum permanent disablement is 100%. Thus in fatal cases 100% is awarded to the dependants – 60% to children and 40% to the widow or widower. Owing to this maximum PD granted, additional compensation cannot be granted. The employee's earnings also have a big influence on the amount of monthly pension to be paid hence the dependants mentioned above received minimal pension."

## 8 Dispute procedures

According to the Fund, disputes seldom arise in relation to dependant's claims. Most commonly, there are disputes between competing widows. However, the failure by employers to report and difficulties in verifying information is often the result of disputes between the employer and the claimant regarding whether the ac-

41. *Compensation Fund Annual Report*, page 3.

42. Section 56 of COIDA.

43. Section 56(4)(a).

44. Information obtained from Paula Howell, Pretoria.

cident was in the course and scope of employment, or whether the employee is an employee as defined, as well as whether the employee's medical condition is as a result of the accident.

If a claimant objects to the finding of the Commissioner, the matter is referred to a formal hearing on oral and written medical evidence<sup>45</sup>. Objections are heard by an independent presiding officer, assisted by suitably qualified assessors who represent the organised labour, business and medical fraternities<sup>46</sup>. Hearings have been decentralised. A hearing in the absence of proper prior investigation disadvantages child beneficiaries as guardians are unable to trace witnesses, prepare for a formal hearing or deal with the issues in such hearings, and they can often not afford legal representation.

## 9 Payment procedures

If the claim is approved, payment is made into the beneficiary's bank account if he or she is over the age of 18. If the payment is for a child, the pension is paid into the account of the child's guardian. Payments are made as electronic financial transactions. Since January 2007, payments are no longer made by cheque, owing to fraud.

Tax is not payable on either pensions or compensation. Payments are made free of deductions, and all administrative costs associated with the application are met by the Fund.

Where the injured or deceased worker is a foreign contract worker, section 60 of the COIDA allows the Director-General to pay a lump sum in lieu of a pension. Foreign migrant workers injured while in South Africa, and their dependants, thereby stand to lose their entitlements to pensions. But there is no reason why a pension cannot be paid into a bank account for a foreign worker in his or her country of origin, and section 59 allows the Director-General to invest compensation for an injured worker, or pay compensation to a trustee, the Master of the High Court or any other person. The Fund does not unilaterally decide to pay the lump sum to the employee or his or her beneficiary. Usually, the Fund receives requests for lump sum payments in lieu of pension in terms of section 52. In cases where the employee has been residing out of the country for more than six months, the employee can choose to take the full commutation of his or her pension, or part of the pension. Payments apparently take place through The Employment Bureau of Africa<sup>47</sup> in countries in which it has offices<sup>48</sup>. It is not clear how the Director-General deals with compensation payable to foreign workers and their dependants in other countries, and this will be canvassed during interviews with the Commissioner. Fraud is apparently a problem, with 70% of payments to workers in Mozambique under a scheme prior to the TEBA arrangement not reaching the beneficiaries<sup>49</sup>.

The Director-General may also make arrangements with foreign governments for the administration of the COIDA<sup>50</sup>.

The Fund confirmed that payments to foreign workers are paid in different ways depending on the relationship with the government and the different facilities available. Most such cases affect mineworkers, in which case the licensed insurers trace employees and make payment to them. For Lesotho and Mozambique, payments mostly take place through The Employment Bureau of Africa. Payments, including pensions, to people resident in Zimbabwe are done through the Zimbabwean embassy, and claims are likewise submitted through diplomatic channels. The process is bureaucratic and leads to many delays as documents must pass through the South African Department of Foreign Affairs and the foreign embassy and foreign domestic departments of state tasked with the matter.

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45. Section 45(2) of the COIDA.

46. Section 91 of the COIDA.

47. Or TEBA, the labour recruiting arm of the Chamber of Mines.

48. Fultz, E., and Pieris, B., *Employment Injury Schemes in Southern Africa: An Overview of Proposals for Future Directions* (ILO/SAMAT Policy Paper No. 7) (ILO Harare, Zimbabwe, 1998) pages 19 to 20, cited in Olivier, M., and Guthrie, R., *Extending Employment Injury and Disease Protection to Non-citizen Workers: the Quest for Developing a Rights-based Approach*, unpublished conference paper presented to Social Security and Migrant Labour conference, University of Johannesburg, Johannesburg, October 2007, pages 9 to 10

49. See Fultz, E., *Social Protection of Migrant Workers in South Africa* (ILO/SAMAT Policy Paper No. 3) (ILO Harare, Zimbabwe, 1997), cited in Olivier *et al*, *ibid*.

50. Section 94.

## 10 Communication between the Fund and claimants

The Fund communicates principally by means of letter. *Imbizos* are conducted on particular themes, and pamphlets and radio information sessions are also used. The Fund uses the provincial COIDA managers and inspectors on policy advocacy to inform claimants, but this system is new, still under development, and only partially operational with regard to communication, while enforcement is less efficient and effective. According to the Fund representative interviewed, it constitutes a major challenge to the resources and systems of the Fund.

## 11 Pension stoppages

The Commissioner previously posted life certificates to beneficiaries to determine if beneficiaries receiving a pension were still alive. Life certificates were only required for guardians, and these were distributed by post. Difficulties arising from variations in signature by partially literate beneficiaries, together with a widespread failure to complete the life certificates correctly, has meant that the provincial managers are used instead. Lists of names for verification are periodically sent to them for physical verification and beneficiaries are assisted with the completion of life certificates.

Even when they were used, life certificates were not used to verify that the child was still alive, and no other system existed to determine that the child was still alive and living with the guardian. If a guardian who was receiving a pension on behalf of a child dies, the pension benefits are simply stopped until another ‘guardian’ has come forward to claim the benefit. There is no process in place by which the child’s guardian is sought out, or an alternate is identified.

There is no automated link-up between the Compensation Commissioner’s database and the population register kept by the Minister of Home Affairs, whereby the Commissioner could rely upon statutory notification of death to update pension payments. The Commissioner is dependent upon reports of the death of beneficiaries, or so that there is no process to verify that beneficiaries are still alive. With the current re-structuring of the Fund, plans are afoot to have an IT link with Home Affairs.

## 12 Unclaimed or unpaid benefits

The claimant is notified by post of benefits payable. If repeated correspondence has not led to any claim, the provincial staff will be sent to contact the beneficiary. Regional radio broadcasts and *imbizos* are also used for this purpose.

Unpaid benefits of more than R100 that remain unclaimed for more than 12 months are advertised by the Commissioner in the *Government Gazette* and claimants are called upon to claim the sum within one month. At the expiry of that month, if the compensation is not claimed, it is paid into the reserve fund<sup>51</sup>.

Where a beneficiary dies while monies are payable, and there is no other dependant, the Director-General is given a discretion to pay such monies over to the estate of the deceased beneficiary<sup>52</sup>. The Commissioner has decided that such monies should not be paid over to estates. They are paid into the reserve fund and, if a claimant later comes to light, it is apparently “a simple process” to withdraw the money from the reserve fund and pay it over to the beneficiary. According to the Fund representative interviewed, it is rare that this happens in relation to pensions and, more often, the concept of a “dependant” is given an extended interpretation to include people who were partially dependent, so that the money is utilised wherever possible.

Where a guardian dies who was receiving a child’s pension on behalf of a child of a deceased employee covered by the COIDA, the pension is stopped and treated as unpaid. If this money is not later claimed, it is retained by the Fund in its reserve fund.

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51. Regulation 9(2)(a) of the regulations under the COIDA. The reserve fund is established and regulated by section 19.

52. As required by section 59(3)(b).

### 13 Gaps in coverage

The COIDA replaces the right to claim delictual damages from the employer at common law with a claim in the nature of an insurance claim against the Fund. The COIDA process needs no proof of negligence and no litigation costs, but in exchange for making it relatively easier to prove a claim, the benefits payable are reduced. Whereas at common law the claim would be for the full amount of the loss of support suffered by the child, it is now reduced, firstly to 75% of the employee's earnings and, secondly, through the limitations of 20% of such earnings. At common law, if there were no other children, the child would be entitled to the full extent of his or her loss.

Where the injured worker dies from a cause other than the accident while receiving an "injury-on-duty" monthly pension or, despite suffering a serious injury on duty, no claim can be received and his or her dependants receive no benefit. So, for example, the children of the injured workman who dies of AIDS, or who is stabbed to death while on sick leave, or struck by a car during lunch hour, are not covered. If the CF is to be an insurance fund and not merely a stop-gap for the common-law claim for damages against an employer, it is not clear why it does not provide the social security coverage needed in these cases. Workers who must rely on their retirement funds to provide risk cover for these eventualities are unnecessarily increasing administration and often duplicating benefits in an inefficient manner.

Foreign workers who are in the country illegally are denied compensation from the CF on the understanding that their income was illegal. The dependent children of the illegal worker suffer the consequences. There is a growing perception that this interpretation is not appropriate in the present global labour economy.

If the employee has an identity document or passport, benefits are paid, but the current challenge is with foreign workers with no form of identity. The Fund is not in a position to pay benefits since official identification documentation is a compulsory requirement.

## Appendix 5: The mines and works compensation fund

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### 1 The scheme

The office of the Compensation Commissioner for Occupational Diseases is established in terms of section 54 of ODMWA, to administer the Mines and Works Fund for the purpose of compensating persons who have acquired lung-related diseases as a result of risk work performed in connection with a controlled mine or controlled works.

The Mines and Works Compensation Fund insures workers who contract pneumoconiosis, tuberculosis, permanent obstruction of the airways, progressive sclerosis and any other permanent disease of the cardio-respiratory organs attributable to the performance of risk work<sup>1</sup>. It is operated as a fully funded insurance scheme.

Mineworkers and other employees undertaking risk work at a controlled mine or work site are required to hold certificates of fitness, issued by a certification committee. Mineworkers are periodically examined and certified as fit to perform such work<sup>2</sup>. If a worker is found to be suffering from a compensatable disease, the nature and degree of the disease is determined by a certification committee<sup>3</sup>. A certificate is valid for a period not exceeding three years<sup>1</sup>.

A compensatable disease may be either tuberculosis or a specified disease in either the first or second degree<sup>2</sup>. Compensatable diseases (other than tuberculosis) are progressive and incurable. The second degree is more serious and death from a compensatable disease results only after the worker has suffered from the disease in the second degree for some time. If disease is in the second degree, the mineworker's certificate of fitness must be revoked and he or she cannot work on a controlled mine or works<sup>3</sup>.

Controlled mines and works are required to pay levies to the Fund. There are 230 mines and 31 works that pay such levies.

### 2 Governance and administration

The Compensation for Mines and Works Fund is under the control of a Compensation Commissioner for Occupational Diseases (referred to in this chapter as "the Commissioner")<sup>4</sup> who reports to the Minister of Health<sup>5</sup> and is assisted by an advisory committee<sup>6</sup> comprised of employer and employee representatives.

The office of the Compensation Commissioner has a staff complement of 42 officials.

The size of the Fund was R976 million at the end of the 2006/7 financial year<sup>7</sup>.

### 3 Benefits payable for children

Prior to 1993, pensions were payable to dependants. These have been stopped because of the administrative burden of payments<sup>8</sup>. Most pre-1993 pension claims have worked their way through the system, although 320 pensions remain. At present, a pension of R761 per month is paid for impairment of less than 50%, R1,034 for impairment between 50% and 75% and R1,352 for impairment above 75%. These pensions are increased annually by the Minister of Finance with the increase in social grants in terms of the Social Assistance Act.

Once the widow dies, any pension ceases<sup>9</sup>. The widows who are currently receiving pensions are themselves pensioners and have no dependent children.

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1. Section 23(4).

2. Section 44.

3. Section 30(1).

4. Sections 54(a) and 61(2).

5. Sections 54 and 77(2) of the ODIMWA.

6. Section 60 of the ODIMWA.

7. *Annual Reports for the Office of the Compensation Commissioner for Occupational Diseases 2005/2006 and 2006/2007*. Compensation Commissioner, Johannesburg, page 30.

8. Occupational Diseases in Mines and Works Amendment Act 208 of 1993.

9. Section 96(1) of the ODIMWA.

Since 1993, all new claims are paid as once-off lump sum payments. Payments are made for diseases in the first degree and second degree, depending on the severity. Children's death-benefit claims only arise after the disease is in the second degree.

Different benefits are prescribed for diseases in the first and second degrees: in the first degree the annual earnings<sup>10</sup> of the worker is multiplied by a factor of 1.31, and in the second degree the factor is 2.917<sup>11</sup>. A minimum of R26,724 and a maximum of R87,510 is payable. These figures are determined by the prescribed rates of pay in the industry.

Where an employee dies<sup>12</sup> while suffering from a compensatable disease, the Fund pays a once-off lump sum benefit calculated for the disease in the second degree, less any amount already paid to the employee as compensation<sup>13</sup>. The Commissioner is required to divide the lump-sum benefit between the deceased's dependants in the proportion determined by the Commissioner<sup>14</sup>.

The following is a table of the benefits paid in the two preceding financial years:

	2005/6 financial year	2006/7 financial year
Total compensation paid	R113,569,838	R105,542,684
Compensation for diseases in the first degree	R29,593,979	R26,180,255
Compensation for diseases in the second degree	R58,984,454	R52,558,298
Amount paid in pensions	R72,266	R36,133

The Commissioner has no figures or information system to provide figures on the number of lump-sum payments to dependants, or any particulars on the turn-around time of claims. The above figures cannot be regarded as accurate, as a substantial number of figures are recorded simply as "Eastern Cape cases" without any reference to the nature of the payment.

It is clear that the Fund lacks resources and is understaffed. It has been left to struggle within a legislative framework that has regressed in the last two decades, with outdated technology and a lack of access to the information needed to administer claims efficiently and effectively. Workers' rights have been progressively eroded by the amendments of 1993 and 2002, and children have lost the protection of a monthly pension<sup>15</sup>.

#### 4 Beneficiaries

"Dependant" is not defined in the ODIMWA. The Commissioner has the discretion to designate who shall be regarded as a dependant<sup>16</sup>. The Commissioner's practice is to make payment of the lump sum exclusively to the widow, if alive. Where the children live with members of the extended family, payment is also made to them. If there are two or more wives, the benefit is divided equally between them. If one of the spouses is deceased and has left behind children of the worker, the Fund apparently, in the one case of this nature that it has handled, divided the payment between the surviving spouse and the child of the deceased spouse.

If there is no widow, it is the practice of the Fund to pay to legal dependants who were also factually dependent on the deceased, and thereafter to any other *de facto* dependants. This would include all biological and adopted children of the deceased, or children placed formally in his or her foster care, as well as any ancestral relations of the deceased. Benefits are distributed equally between these persons. Stepchildren, informal foster children, unborn children, posthumous children or any other children to whom the deceased did not owe a legal duty

10. Sections 80A and 80B set out the factors included in calculating "earnings".

11. Section 80(2) of the ODIMWA..

12. In terms of sections 79 and 83, different values apply depending on the date of death, if prior to 1993, in a range of circumstances that accommodate benefits awarded under the previous versions of the ODIMWA. Because of the lapse of time since 1993, these values will only apply in isolated cases and have not been considered for the purposes of this review.

13. Section 81.

14. Section 80(5).

15. For example, the maximum pension presently payable will exceed the maximum lump sum in value after approximately 6.9 years, even assuming that three-quarters of the lump sum is invested at 10% per annum compounded annually for that period and the pension grows at half that rate.

16. Section 80(4).

of support are not considered unless there are no legal dependants. Families typically make some practical arrangement to care for their members.

In the case of children, payment is made to the guardian. It is the practice of the Fund to regard the guardian as “the person who is looking after the children on a daily basis”. Proof of guardianship is required in the form of a letter of appointment as the executor of the deceased’s estate, or a letter from the magistrate that the guardian is going to be appointed as the executor of the deceased’s estate.

Although there has not been a case of this nature, in other countries, or where there is no guardian, payments may be made to the Master of the High Court or the Guardian’s Fund.

## 5 Points of contact with claimants

The Commissioner has a single office in Johannesburg, at which all claims are registered and processed. Employers also generally assist by receiving claims and documents and transmitting them to the Fund, and by making inquiries regarding the progress of the claim.

## 6 Claims procedure

A typical claims procedure is as follows:

- ▶ The mineworker is certified as suffering from a compensatable disease in the first or second degree. Once certified, the worker may apply for benefits in the prescribed form.
- ▶ The worker may apply for the reconsideration<sup>17</sup> of the finding by the committee or to have it reviewed before a review board<sup>18</sup>.
- ▶ The mine, the worker and the Commissioner are advised of the finding. The Commissioner sends a claim form to the mine, or to the address elected by the miner upon examination.
- ▶ If the worker does not claim, no further steps are taken. The Commissioner’s only means of communication is through the mine or the address elected by the miner on examination. Mines do not usually keep forwarding addresses for workers. The process is dependent on the worker or his or her dependant making an inquiry if the form has not been returned to the Commissioner.
- ▶ The claim form is submitted to the mine or the Commissioner.
- ▶ The practice in many mines, however, is not to continue to employ mineworkers suffering from diseases in the first degree and they are repatriated (many mineworkers are from distant regions or countries)<sup>19</sup>. The worker then no longer has access to the certification committee, and any further diagnosis is performed by the provincial health officials at his or her place of residence. As the disease progresses, if the worker is found to suffer from a disease in the second degree, he or she can apply for final compensation. The worker then also no longer has access to the employer to process information to the Commissioner, and is obliged to deal directly with the Commissioner.
- ▶ If the worker is later found to be suffering from a disease in the second degree, he or she is deemed medically unfit. A claim is processed for final compensation payable for the disease in the second degree.
- ▶ Once a final benefit is paid, the mineworker and his or her dependants have no further claim for benefits.
- ▶ Only if a final benefit is not paid to the mineworker will his or her dependants be able to claim. This typically happens only if the mineworker left employment either not suffering from any disease and developing it or being diagnosed later, or if he or she had the disease in the first degree at the time of leaving employment.
- ▶ The claim form requires the claimant to provide the full labour history of the deceased, including exact dates of service and the number of shifts worked in regard to the last and second-last places of employment. Documentary evidence is required to support these particulars and the worker’s declaration of his or her labour history is insufficient.
- ▶ A claim by a child dependant must be made by the child’s guardian. “Guardian” is understood to be the person who is caring for the child on a daily basis. The guardian must be a person over the age of 18 years.

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17. Section 47.

18. Section 50.

19. Interview with Paula Howell on 13 January 2008. The MWCF was unable to verify if this is so.

- › A social worker's report is required on who the child's guardian is and what care arrangements exist for the child.
- › A banking account must be opened into which benefits can be paid. The bank account must be either the guardian's personal banking account, or an arrangement must be made with the magistrate to receive and administer monies payable to the minor dependant. A TEBA account can also be used.
- › The claimant must provide an identity document or birth certificate. No problems are usually experienced in obtaining identity documentation from other SADC countries.

Cases are managed manually. The information technology system of the Fund is linked to that of the National Institute of Occupational Health and includes cases that have not yet been referred to the Fund. There are 117,455 cases on the database, but they accordingly include workers who have not yet been certified or who have not submitted a claim. The Fund cannot separate these cases from its own and is accordingly unable to generate summary reports on its cases, or any statistics on its performance at all. There are accordingly no figures available on how many cases had been rejected because there was no work history, or on the time it takes to process claims, or on unclaimed benefits.

The effect of the 2002 amendments is to make workers dependent upon provincial hospital staff to diagnose and report on their medical conditions before they can qualify for compensation in the second degree, or their children can obtain the benefits intended for dependants under the ODIMWA. It also makes it logistically more difficult to gather the information necessary to claim.

The report that certain mines repatriate and dismiss mineworkers who are found to be suffering from diseases in the first degree in order to avoid medical costs arising from the 2002 amendments needs further investigation.

## 7 Verification and investigation of the claim

According to the Fund representative interviewed, the biggest source of delay is in the provision of documentation by the claimant. Although it depends on any delay in providing supporting documentation, dependant's claims can usually be finalised within one month if fingerprints are not required. If fingerprints are required, claims take three months to finalise. It is quicker if claims are completed by the mine. Typical problems are difficulties in obtaining the worker's labour history, medical examinations while the worker is at home, the lack of payslips, the lack of forms verifying bank account details and delays in submitting identity documents and birth certificates. Delays in obtaining social-work reports are also a cause of long delays. State social workers are used, and the Commissioner is reluctant to accept the reports of private-sector social workers employed by non-governmental agencies.

Incomplete application forms submitted by illiterate applicants, which must then be returned for completed information, can often cause a six-month delay.

Workers seldom die at the mine. They typically die at home, and this is often in a rural area with rudimentary health services. If the worker dies and there are inadequate particulars of the cause of the death to indicate that he or she died as a result of a compensatable disease in the second degree, it is not possible to prove a claim. Diseases are often misdiagnosed, and often cause death through compromised heart functioning.

The Commissioner has extensive access to records and information<sup>20</sup> and employers are obliged to keep a register of persons performing risk work<sup>21</sup>. The regulations under the ODIMWA<sup>22</sup> set out the particulars of the records to be kept by the employer, including particulars relating to risk work and shifts worked. A failure to do so is punishable by a fine not exceeding R400. The regulations do not require any records of the dependants of the mineworker, nor do they require his or her home address.

20. Sections 5 and 6, read with section 55 of the ODIMWA.

21. Section 16.

22. Government Notice R 1813 in *Government Gazette* 4042 of 5 October 1973 and amended by Government Notice R 2222 in *Government Gazette* 5342 of 26 November 1976, Government Notice R 2176 in *Government Gazette* 5790 of 28 November 1977 and Government Notice R 2711 of 17 November 1982. These regulations still refer to and discriminate between "Bantu" and white and coloured persons.

The Commissioner also consults with TEBA to ascertain details of dependants, and the Mineworkers Provident Fund, or will ask a social worker to visit the family to report. It is an administrative nightmare for the Fund to trace beneficiaries, particularly in neighbouring countries, and so it does not do so.

## 8 Dispute procedures

The ODIMWA contains no provisions for disputes. In the event of a dispute, the Commissioner calls the parties to its offices and interviews them to establish corroborative evidence from the family. Cases are usually amicably settled. According to the senior administrative officer, parties always come, even if it involves extensive travel. The Fund makes no provision for travel in such circumstances.

There is no internal appeal. The only recourse against a decision of the Commissioner is to go to court.

According to the Fund, fraud by people who assist claimants is rife. They usually call themselves community advice offices, or financial assistants. They designate their own bank accounts into which payments are received, and the beneficiaries have little recourse. Criminal charges laid by the Fund in these cases have led to no successful prosecutions. The result is that the Fund now does not deal with any representatives other than attorneys.

## 9 Payment procedures

Payment takes place as a single payment, although the ODIMWA provides that it may take place in instalments as the beneficiary may periodically determine<sup>23</sup>. Payment to a widow may, at her election be made to an estate account or her personal account. The ODIMWA provides that payment may be made to either the beneficiary or to his or her dependants or to a person, institution, organisation or state department on behalf of the dependants<sup>24</sup>, and the Commissioner may enter into an arrangement for such benefits to be paid on behalf of the Commissioner by such a person, organisation, institution or department<sup>25</sup>. Other than the arrangements with TEBA or the magistrate, no such payments are made into trust.

Tax is not payable on compensation, payments are made free of deductions, and all administrative costs in the application are met by the Fund.

In the case of foreign payments, manual payments take place either through TEBA or the SA Embassy in the foreign country or Reserve Bank authorisation for a transfer of funds must be arranged if payments are made to a foreign banking account. More often people will come to collect their payments. Lesotho nationals are paid directly into bank accounts in Lesotho held in their names.

## 10 Unclaimed or unpaid benefits

No figures are available on unclaimed benefits and it is difficult to quantify, but, according to the Fund, it is a “considerable” that results from the families not being aware of their rights.

No benefits are unpaid, because payments are made in single lump sums.

## 11 Communication between the Fund and claimants

Communication is by individualised correspondence or telephone. A project to publish the names of unclaimed benefits is under consideration, but a lack of staff has hampered its implementation.

The Bureau and the Fund are both involved in various programmes aimed at increasing awareness among mineworkers and health-service providers<sup>26</sup>, as is the National Institute for Occupational Health<sup>27</sup>.

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23. Section 94.

24. Section 94(3).

25. Section 105 of the ODIMWA.

26. See <http://www.doh.gov.za/department/dir-mbod.html>

27. See <http://www.doh.gov.za/department/ncoh.html>

## 12 Gaps in coverage

Compensation for occupational diseases cannot be claimed under either the ODIMWA or the COIDA<sup>28</sup>.

Because compensation under the COIDA is only 75% of the worker's earnings, while the earnings under the ODIMWA are multiplied by a factor of either 1.31 or 2.917, payments under the ODIMWA may be more favourable to the claimant in certain circumstances. However, once the provisions allowing for a pension under the ODIMWA were repealed, minor children were invariably less well off under the ODIMWA, as they were left with the defined benefit of the once-off lump sum rather than the variable pension.

The effect of this is to discriminate between claimants and their children on the basis of disability. The discrimination appears to be unfair and there is no apparent rational justification for treating these classes of workers differently in relation to the same disease.

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28. Section 100(2) of the ODIMWA.

## Appendix 6: The Unemployment Insurance Fund

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### 1 The scheme

This Fund insures employees against temporary unemployment, absences from work and the loss of support. It is operated as an insurance scheme and is fully funded by employer and employee contributions<sup>1</sup>.

### 2 Governance and administration

The Fund is under the control of the Director-General of Labour, who is its accounting officer<sup>2</sup> and who reports to the Minister of Labour<sup>2</sup> and Parliament<sup>3</sup>. It is administered by an Unemployment Insurance Commissioner (referred to in this chapter as “the Commissioner<sup>4</sup>”). It has an advisory board comprising of representatives of the state, employers and employees<sup>5</sup>. It holds assets of R20.6 billion.

### 3 Beneficiaries

An “employee” excludes any independent contractor<sup>6</sup>, officers or employees in the provincial or national spheres of government<sup>7</sup> and any foreign contract worker who is required to be repatriated at the termination of his or her contract of employment<sup>8</sup>. Such foreign contract workers enter South Africa in terms of a temporary residence permit that allows the holder to perform specified work<sup>9</sup>. Where foreigners enter South Africa on permits that do not permit them to work, they do not qualify as employees as any employment in breach of their entry permit is unlawful. The result is that limited types of temporary residence permit holders can qualify as employees for purposes of the UIA<sup>10</sup>. Refugees who are recognised under the Refugees Act are permitted to work<sup>11</sup>, but asylum-seekers are not permitted to work.

Dependant’s benefits are payable to the spouse or life partner of a contributor if he or she makes application “within six months of the death of the contributor except that, on just cause show, the Commissioner may accept an application after the six-month period.<sup>12</sup>”. If there is no surviving spouse or life partner, or no application by such a person is made within six months of the contributor’s death, any dependant child of a deceased contributor is entitled to the dependant’s benefit<sup>13</sup>.

The definition of “spouse” includes a customary union partner, provided the union is proved by documentary proof from the chief or *induna*. Children only qualify if there is no spouse.

Persons living together as man and wife, including same-sex life partners, are also included provided adequate proof is provided. Children benefit before such persons.

A child is defined to mean a person under the age of 21 and includes any person under the age of 25 who is a learner and who is wholly or mainly dependant on the deceased<sup>14</sup>, and it includes a child born out of wedlock and an adopted child, but not a stepchild or unborn child.

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1. Payable in terms of the Unemployment Insurance Contributions Act 4 of 2002. Each pays 1% of the employee’s wage.

2. Sections 11(1) and 58(2).

3. Section 58(13).

4. Section 43.

5. Section 47.

6. Definition of “employee” in section 1.

7. Section 3(1)(c).

8. Section 3(1)(d).

9. A treaty permit in terms of section 14, a corporate permit in terms of section 21 or a work permit in terms of section 19 of the Immigration Act of 2002.

10. They are holders of a study permit in terms of section 13(3) for purposes of vacation work, a relative’s permit in terms of section 18 or the family of a business permit holder in terms of section 15 of the Immigration Act of 2002, if permitted by the Director-General of Home Affairs to work in terms of the regulations under the Immigration Act.

11. *Minister of Home Affairs and Others v Watchenuka and Another* (2004) (4) SA 326 (SCA)

12. Section 30(1)(b).

13. Section 30(2).

14. Section 1 of the UIA.

## 4 Benefits payable for children

One day's benefit accrues for every six completed days of employment as a contributor, subject to a maximum accrual of 238 days benefit in the four-year period preceding the date of application, less any benefits received by the contributor during this period<sup>15</sup>.

If two or more children in different families apply, the benefit is divided equally, as it is if there are multiple spouses.

The Fund's performance in delivering benefits is as follows<sup>16</sup>:

	2004/5	2005/6	2006/7
Total of all claims lodged			537,855
Total of all claims approved			524,652
Total of all claims rejected			13,136
Total number of people receiving benefits	563,000	589,000	572,000
Total amount paid in all benefits	R2.468 billion	R2.888 billion	R2.841 billion
Death claims lodged <sup>1</sup>	27,411	30,359	26,123
Number of people receiving death benefits	25,000	31,000	25,000
Number of child beneficiaries and claimants below the age of 21 <sup>2</sup>	4,197	9,256	8,091
Amount paid in death claims	R217.9 million	R199.4 million	R247.8 million

1. The figures that follow in this table are for the calendar year.

2. These figures accordingly apply to all benefits.

The Fund also provides an adoption benefit<sup>17</sup> to the adoptive parents of children and maternity benefits<sup>18</sup>. These are not considered in this review.

## 5 Points of contact with claimants

The services of the Fund are made available through the infrastructure of the Department of Labour. In addition to a provincial centre at the city indicated, service points are distributed as follows<sup>19</sup>:

Province	Provincial office	Labour centres	Satellite offices	Visiting points	Mobile units
Gauteng South	Johannesburg	14	1	3	2
Gauteng North	Pretoria	9	0	2	2
KwaZulu-Natal	Durban	16	1	51	2
Limpopo	Polokwane	12	4	33	2
North West	Mmabatho	10	0	30	2
Eastern Cape	East London	15	2	109	2
Free State	Bloemfontein	11	68	46	2
Western Cape	Cape Town	7	12	98	2
Mpumalanga	Witbank	16	1	25	2
Northern Cape	Kimberley	7	4	76	2

Applications are received at any of these offices and forwarded to the provincial offices of the UIF for capture and processing. Information on the progress of the claim can be obtained at labour centres. These centres are staffed by employees of the Department of Labour and are not under the direct control of the Fund.

15. Section 13(3).

16. *Annual Report, op.cit.*, page 21.

17. Section 24 of the UIA.

18. Section 27.

19. Annual Report of the Unemployment Insurance Fund for the Year Ended 31 March 2007; UIF Communication and Marketing, Pretoria, 2007, page 17; particulars on mobile units provided in an interview with the Fund.

There is a national call centre operated by the Department of Labour. It logs approximately 30,000 calls per month. Clients call in at the range of offices. Data access points exist at all venues, except for satellite offices and visiting points.

## 6 Claims procedure

The UIA sets out the procedure for claiming dependant's benefits:

When applicants call at a point of contact, they are given a document pack and are told how to go about completing it.

- ▶ The application must be made in the prescribed form<sup>20</sup>.
- ▶ A 13-digit identity number is essential<sup>21</sup>, either in a South African identity document or, in the case of non-residents entering South Africa on work permits or as refugees, issued by the Department of Home Affairs at the time of permitting residence in South Africa.
- ▶ In the case of an application by a dependant, it must be made within 14 days of the expiry of the six-month period within which the spouse or life partner was to apply<sup>22</sup>. Where the child submits a claim before the six months has expired, the application is held in the registry and recorded electronically on the database. The child's claim is then treated as lodged. If there is proof that there is no spouse, the child's claim is processed immediately and before the expiry of the six-month period.
- ▶ The claim is made by the guardian, who is understood by the Fund to be the person who takes care of the child, and can be any person. No proof of "guardianship" other than the declaration in the claim form is required. Payment would also be made to either a legal guardian or a caregiver.
- ▶ Benefits are only payable to employees, and their dependants, if the Commissioner is satisfied that the employee contributed to the Fund<sup>23</sup>. The Fund keeps no records of individual employees or their identity numbers. If the employer has not made contributions to the Fund, the inspectorate of the Fund is required to enforce payment.
- ▶ Proof of earnings is in the form of a contributor's record card that is given to the employee on dismissal or to his or her dependant. If such a card is not available, it is left to the claimant to pursue the employer to obtain such proof.
- ▶ The claim is only received by the Commissioner when the claim form is complete and all documentary support is available. The claim is managed as a hard file<sup>24</sup>. Documents are usually stored in the registry of each provincial office.

Upon approval, the claims officer must determine to whom the benefits must be paid and how they are to be paid<sup>25</sup>.

- ▶ If the application does not comply with the UIA, the claims officer must advise the applicant in writing, and must supply reasons why the application does not comply<sup>26</sup>.

Ninety-eight percent of all claims received are approved and 2% are rejected, usually because the legal requirements have not been met.

The Fund aims to approve or reject 95% of all applications within four weeks of receipt, but reports that it has not achieved this owing to employers not submitting declarations on time and the long distances between point of contact and processing centres<sup>27</sup>. The Fund aims to process claims within five weeks of receipt. Claims pend-

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20. Section 31(1).

21. Regulation 2 of the regulations under the UIA provides that an applicant must provide an identity document for inspection on request and Form 127 requires the applicant's identity number. Regulation 13 stipulates that an application for death benefits "shall" contain the information set out in the form, and no provision is made for alternative identification.

22. Section 31(2).

23. Definition of "contributor" in section 1.

24. The scanning of documents has commenced in the current year in two sites, but this is not yet operational.

25. Section 341(4)(b)(iii).

26. Section 31(5).

27. *Annual Report of the Unemployment Insurance Fund, op. cit.*, page 20.

ing at the moment are claims that are currently in progress and the Fund representative interviewed reported that there were no backlogs within the Fund.

The table below was provided by the UIF. It reflects the turnaround times on death claims for the 2007 calendar year. These figures apply to all death claims, and no figures are available on the delay in child-specific claims. Delay is calculated from the date of application and, in the case of claims by children, there is a further waiting period of six months before a child can access the benefit if the other parent is still alive. If proof is provided that there is no living spouse, children do not have to wait to access the benefit.

<b>Death Claims</b>			
<b>Less than six weeks</b>		<b>More than six weeks</b>	
<b>CNT</b>	<b>Average delay</b>	<b>CNT</b>	<b>Average delay</b>
311	15.00	56	128.00
409	14.00	252	181.00
699	26.00	497	204.00
314	28.00	472	131.00
356	24.00	73	215.00
15	19.00	276	95.00
106	13.00	179	106.00
386	15.00	178	224.00
69	19.00	58	192.00
17	27.00	45	163.00
412	23.00	280	165.00
693	12.00	108	196.00
335	19.00	181	158.00
148	24.00	133	102.00
<b>4,270</b>		<b>2,788</b>	

The Fund attributes these variable times to the applicant's failure to provide documentation, but it is not clear how this can be such a major factor if the Fund does not accept claims unless all documentation is provided. The delays probably also reflect a range of other factors, including the volume of other work.

## 7 The investigation and verification of claims

The UIF does not actively investigate claims or verify information.

If there is uncertainty about the guardian, information will be required from a school principal, priest or some similar person of social standing. Caregiving relationships are not generally verified, and the claims officer relies upon the declaration received from the claimant about the existence of other spouses or children. No steps are taken to trace the other beneficiaries. If there is an indication that there is a spouse, the Fund merely awaits a claim within the prescribed period. When the period lapses, the money is paid to the present claimant or claimants.

The UIF does not verify the information given to it of the rate of earnings and relies upon the contributor's record card. It is the claimant's duty to obtain this from the deceased's employer.

The task of the Fund is fairly simple and the documentation required is not usually difficult to obtain. Its delivery is attributable to case tracking information technology linked to a performance management system, its practice of not accepting claims unless all the supporting documents are provided, and its practice of not investigating or verifying claim information. These are recent innovations. By way of contrast, the following case study<sup>28</sup> gives

28. Citizen's Advice Bureau, Pretoria, case number 9N16.

some perspective on the claim process in practice shortly before the introduction of these improvements and policies, and demonstrates issues relating to the handling of claims.

Betty Boikhutso lodged a claim on 27 August 2002 at the Morula View Labour Office near Ga-Rankuwa for dependant's benefits after the death of her husband, Johannes Thopane Boikhutso on 29 June 2002. Mr Boikhutso had been the breadwinner, and Mrs Boikhutso was unemployed and she needed the money for her two minor children. She was told to return in six weeks to check on progress. She did so in October 2002, and was told that it was too soon, and that death benefits took a long time and that she must call again in three months' time. She called again in January 2003 and was told that her claim did not appear on the system yet. She thereafter checked every month, her case was referred to a supervisor and she was told that her papers had been sent to Mmabatho for processing. In July 2003 she travelled to Mmabatho to check the records there. She was told there was no record of her claim and she was told that her file had never been sent to that office. She went to the Citizen's Advice Bureau in Pretoria in February 2004. Protracted inquiries ensued as the officials tried to trace the file, compounded by the fact that computers were down at various times.

Eventually in November 2004, she was advised to complete a new application and did so. When she called in January 2005, she was told by the supervisor that they were starting to work on her application. By April 2005 she had received no response to her application. She was advised by the supervisor to appeal and (even though she had not been given any decision on her application) she did so on. By September 2006 there was still no reply. She was referred to an attorney, who demanded payment in October 2006. The claim was eventually paid in February 2007.

## 8 Dispute procedures

Disputes are referred to the appeal structures. No attempt is made to mediate.

There is an appeal to a regional appeals committee, and thereafter to a national appeals committee<sup>29</sup>. Ten regional appeal committees have been established. Appeals are disposed of on the papers and oral evidence is not heard.

Any dispute that proceeds is addressed using the procedures in the Labour Relations Act that provide for resolution through the Commission for Conciliation, Mediation and Arbitration or the Labour Court. These are accusatorial processes, either on affidavit or oral evidence.

## 9 Payment procedures

All payments are by electronic financial transaction to the bank account of the guardian or the child or, by arrangement, to the deceased's estate. Payments are also made to the child head of a child-headed household. In relation to Mzansi accounts, the requirements for proof of address are relaxed in rural or informal settlements<sup>30</sup>. By arrangement with the banks, payments up to a maximum of R15,000 are received in such accounts, and up to a maximum of R30,000 if the payment is identified as a unemployment insurance payment. Payment is made in a once-off lump sum.

There are no known cases of dependants in other countries exercising their right to payment in their home countries. Under the previous legislation, such payments would be transferred to the foreign country through the Reserve Bank. The current practice is for dependants to come to South Africa to claim and receive payment here.

## 10 Unclaimed or unpaid benefits

Approved claims where payment is not made to the claimant are paid to the estate of the deceased.

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29. Section 37(1) and (2).

30. As required by the Financial Intelligence Centre Act, 2001.

There are no statistics to indicate what percentage of dependant's benefits is claimed. Since the UIF is a genuine insurance fund, and the benefits are neither the property of the deceased and nor do they replace a common claim for damages, the issues that arise in relation to unclaimed monies in the CF, MWCF or the pension funds are not relevant to the UIF.

## 11 Communication between the Fund and claimants

The Fund communicates mostly by letter. Claims are rejected by letter, which is handed to the claimant at the larger centres or otherwise posted. If no address is available, the claimant is asked to return to the point of contact.

The Fund has spent some R12 million on a communications campaign and distributes two million brochures annually to contributors.

## 12 Gaps in coverage

People who are employed unlawfully in the country do not qualify for UIF benefits. There is no basis in law or policy for allowing unlawful immigrants or persons working unlawfully to claim, and by extension their dependants cannot claim. The issues that arise in relation to claims for compensation based on illegal income, as discussed in relation to the CF and the MWCF, are unlikely to become of relevance.

South Africa is signatory to various international treaties requiring non-citizens to be treated equally to citizens in relation to labour issues, including the payment of social security, and to ensure the maintenance of benefits, both in terms of the aggregation of insurance periods and the payment of acquired rights<sup>31</sup>. These conventions call for reciprocal agreements among governments. No such agreements are in place between South Africa and other countries<sup>32</sup>. The result is that the period worked in South Africa is not taken into consideration in accruing rights acquired for foreign contract, corporate or treaty workers. This is only an issue if the worker is dependent on social security in his or her home country and a system to access it exists. It is not an issue for most workers from the SADC countries, where no unemployment insurance or comparable social security system exists.

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31. Maintenance of Social Security Rights Convention (No 157 of 1982) and the supplementing Recommendation (No 167 of 1983).

32. Olivier, M., and Guthrie, R., *Extending Employment Injury and Disease Protection to Non-citizen Workers: the Quest for Developing a Rights-based Approach*, unpublished conference paper presented to Social Security and Migrant Labour conference, University of Johannesburg, Johannesburg, October 2007, page 8.

## Appendix 7: The Government Employees Pension Fund

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### 1 The scheme

The Government Employees Pension Fund is a defined contribution retirement fund established by the Government Employees Pension Law (“GEPL”). It provides benefits for the retirement, resignation, ill health, discharge or death of contributing members. It is funded by employee and employer contributions at 7.5% and 13% of salary respectively.

The GEPL applies to all state employees, and regulates the benefits of all the various pension funds for state employees. However, the GEPF does not administer the benefits for all these employees and those in the security forces, police force and correctional services are members of their own separate funds.

### 2 Governance and administration

The Fund is a juristic person separate from the state<sup>1</sup>. It is under the control of a board of trustees of 30 members, made up of equal numbers of employee and employer representatives<sup>1</sup>, and includes a pensioner representative elected by postal ballot<sup>2</sup> and representatives of the other pension funds for state employees. The board makes the rules of the Fund, which are promulgated as a schedule to the GEPL.

As a statutory structure, the Fund reports annually to the Minister of Finance and, through him or her, to Parliament<sup>3</sup>, but it is not an organ of state and is not subject to the PFMA. It is privately audited, not by the Auditor-General. Its funds are invested through the Public Investment Commission. It is regulated by the terms of the GEPL, its rules and the common law of trusts. It is not registered as a trust with the Master of the High Court<sup>4</sup>. The PFA is not applicable to it.

The Fund is self-administered. It holds assets of R658.5 billion and has 1.2 million members. It bears its own operational costs. The board has various subcommittees responsible for, amongst others, benefits and administration<sup>5</sup>. The state bears the administrative costs of the Fund, and these are not passed on to individual members.

The Fund has a head office in Pretoria and regional offices in Mmabatho, Polokwane and Bisho.

### 3 Benefits payable for children

Members discharged from service for reasons of efficiency or who retire with less than 10 years’ pensionable service receive a gratuity in the form of a lump-sum payment equal to 15% of the member’s average monthly salary, multiplied by his or her years of pensionable service, and increased by one-third<sup>6</sup>. If discharged for such reasons or retiring after 10 or more years of service, members receive a gratuity at 6.72% of his or her average monthly salary, multiplied by the period in years of pensionable service, as well as an annuity at one fifty-fifth of his or her average salary multiplied by the period in years of his or her pensionable service, payable monthly. An additional supplementary amount is payable to members with more than 10 years’ pensionable service who are discharged for such reasons<sup>7</sup>.

On resignation or discharge due to misconduct, a lump sum only is payable, calculated at 7.5% of the member’s average monthly salary, multiplied by the period of service in years and increased by 10% for each year of service between five and 15 years<sup>8</sup>.

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1. Section 6 of the GEPL.

2. Rule 4.1.3(a) of the Rules of the GEPF.

3. Sections 9(1) and 9(6) of the GEPL.

4. In terms of the Trust Property Control Act.

5. *Government Employees Pension Fund Annual Report 2006/7*, GEPF, Pretoria, page 19.

6. Rule 14.1 of the GEPF.

7. Rule 14.2.

8. Rule 14.4.

Members who retire with less than 10 years' pensionable service receive a lump sum equal to their actuarial interest in the Fund<sup>9</sup>.

If a member with less than 10 years' pensionable service dies while in service, a lump sum is paid that is equal to the greater of either his or her actuarial reserve in the Fund, or his or her monthly average salary multiplied by his or her years of pensionable service<sup>10</sup>. If a member with more than 10 years' pensionable service dies in service, this lump sum is paid to his or her beneficiaries, together with an annuity equal to five times the annuity that would have been payable to him or her had he or she retired at the normal retirement age<sup>11</sup>. The gratuity is paid to his or her surviving spouse, the dependants or, if the member had no beneficiaries, to the estate of the deceased member. A spouse's pension is furthermore payable to the spouse of a member who dies in service, equal to one half of the annuity that would have been payable to the member had he or she had retired on his or her normal retirement date.

An orphan's pension is payable for the orphan of members in service with more than 10 years' service, or of pensioners who left service after 1 December 2002. If the member predeceases his or her spouse, the orphan's annuity is payable on the death of the spouse who leaves eligible orphans. There is some uncertainty about the amount of the orphan's pension: according to the rules, it is equal to 10% of the member's annuity, with a minimum of R200 per month<sup>12</sup>, but the practice appears to be that, if there is one eligible orphan, the benefit payable is 40% of the benefit that the member or the deceased spouse was receiving at the time of death, and it is 60% for two and 80% for three or more eligible orphans<sup>13</sup>.

If a former employee who has become a pensioner dies within five years of leaving service following retirement or discharge for operational reasons, the remaining value of his or her annuity for the period of five years is paid to his or her beneficiaries or estate<sup>14</sup>. If the deceased employee is survived by a spouse, a spouse's pension is payable<sup>15</sup>. If there is no spouse, or the spouse subsequently dies and leaves orphans, an orphan's pension is payable<sup>16</sup>.

Pensions are increased annually in April.

In addition to these retirement benefits, if an employee is discharged as a result of injury or ill health arising in the course and scope of his or her employment, the rules of the GEPF provide an additional gratuity and annuity. If he or she dies within five years of discharge, the benefit is payable to his or her beneficiaries<sup>17</sup>.

## 4 Beneficiaries

A spouse includes a customary law marriage recognised in terms of the Recognition of Customary Marriages Act, a life partner or partner in a religious marriage<sup>18</sup>. If there is more than one spouse, the benefit is divided equally between them. Members are encouraged to register spouses, life partners or partners in a religious marriage with the Fund<sup>19</sup>.

A "child" includes a natural or adopted child of the member or pensioner under the age of 18, or a full-time student under the age of 22, or any adult child who is disabled and factually dependent on the deceased. It includes extra-marital children, but does not include foster children or stepchildren<sup>20</sup>. An orphan is a child whose parents, either natural or adopted, are deceased. If there is a spouse and orphans by a deceased spouse, the orphans are eligible for the deceased spouse's portion.

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9. Rule 14.3.2.

10. Rule 14.5.1.

11. Rule 14.5.2.

12. Rule 14.5.4.

13. *Government Employees Pension Fund Annual Report, 2006/7*, page 13.

14. Rule 14.6.1.

15. Rule 14.6.2.

16. Rule 14.6.3.

17. Rule 15. This rule is not expressly further considered. Claims are processed in the same manner as an ordinary retirement, excepting that medical evidence is required.

18. Rule 1.25.

19. Rule 1.1.5.

20. Rule 1.8.

The following pensions have been paid in the preceding two financial years:

	2005/6	2006/7
Total number of pensions paid	295,576	303,977
Total value of pension paid	No details provided	No details provided
Number of pensions to children	No details provided	No details provided
Value of pensions paid to children	No details provided	No details provided

## 5 Points of contact with claimants

The GEPF does not deal with claimants. All claims are processed and information provided to the employer, who then submits the claim, once completed, to the GEPF.

## 6 Claims procedure

While in employment, the employee completes a nomination form, and the employer is required to maintain a record of the names and addresses of his or her beneficiaries. Employees are often hesitant to provide these details to the employer. The rules of the GEPF also provide that a spouse who is registered with the employer will be *prima facie* regarded as a spouse by the Fund<sup>21</sup>.

The data kept by the employer is often incomplete, and a lack of training to human resources personnel means that the service offered by state departments varies considerably.

A claim form Z102 is obtained from the employer and completed by the member. It is submitted to the employer for processing and forwarding to the Fund. Forms are not sent to the Fund directly, as the employer is required to complete various portions of the claim and provide supporting documentation. The employer has a checklist, provided by the Fund, of the required documentation.

An identity document is required and official birth certificates for children are required. No affidavits are accepted if there has been a delay in obtaining these documents from the Department of Home Affairs. Most of the employees are South African citizens, and it is seldom that foreign workers are employed. If that occurs, officially recognised identity documentation would likewise be required. The following information is also required:

- ▶ the birth certificate or identity document of the deceased;
- ▶ the death certificate of the member;
- ▶ the identify document of the claimant;
- ▶ an affidavit explaining any discrepancy between the surnames of the member and the claimant;
- ▶ the marriage certificate or customary union certificate in relation to any spouse;
- ▶ an affidavit explaining why the claimant was not listed on the nomination form by the member (if applicable);
- ▶ proof of divorce (where applicable);
- ▶ birth certificates of all children;
- ▶ proof of parentage of the children;
- ▶ an affidavit explaining dependency;
- ▶ proof of school attendance of dependants;
- ▶ an affidavit confirming care arrangements for dependant children;
- ▶ particulars of any insolvency of the member or the claimant;
- ▶ a certificate of service or the member;
- ▶ official notification of bank account; and
- ▶ in the event of any disputes regarding guardianship, the will or a court order appointing the guardian or a report from a social worker in the employ of the state or a reputable non-profit organisation is required.

21. Rule 1.25.

Amongst other details, the employer is required to provide the reason for the termination of service, details of any outstanding debts or liabilities to the state, and to act as a gatherer of information for the Fund. The Fund has no capacity to perform this function and has no power to compel this information from the employer.

If there is any dispute between the employer and the member, the Fund does not perform any inquiry and awaits a decision from the employer or any applicable adjudicatory body, such as a ruling by an arbitrator or the Labour Court. The Fund has no adjudicatory mechanism to resolve such deadlocks. The claim will not even come to its attention until such time as the employer is in a position to advise the Fund of the necessary facts.

Payments for a child are not made to the caregiver, but to the guardian. In the case of a child, the guardian can be a member of the family. If some other adult wishes to be appointed as guardian, the Fund will require further proof of the care arrangements. If there is a dispute regarding guardianship, the Fund will not facilitate or mediate a resolution and will merely consider the applicable social work report and come to a decision.

The claimant is required to provide a bank account into which he or she will receive payment.

The GEPF is not subject to the provisions of section 37C of the PFA, and does not trace beneficiaries. If a staff member dies in service, the beneficiaries are not actively notified of the death<sup>22</sup>. The present situation is that the Fund is dependent upon the claimant to declare the existence of any other beneficiaries. If this is not done, neither the Fund nor the employer have any way of knowing of their existence, unless the employee declared the existence of a spouse or their existence can be concluded from tax or other particulars on file.

Once all the information is complete, the claim is registered by the Fund, pre-verified and sent to the operational unit of the Fund for processing. It may be that further correspondence ensues between the Fund and the employer or the Fund and the claimant in order to obtain missing information. Once completed, the processor's work is subjected to quality checks (there are two checks at differing post levels if the amount is above R750,000), signed off by the deputy director of the claims department and sent for payment. The system is not automated but it is a logged and recorded process. Statistics on how long claims take can be provided. This data is linked to a performance management process based on stipulated turn-around times.

Decisions are taken by line functionaries and not by the board or any of its committees. If all documentation is in order, it takes the Fund 15 days to process a claim. As a defined benefit fund, no discretion is exercised on the amount of the benefit payable. If information is lacking or there is no benefit payable, the claim is rejected.

Whether or not a tax clearance is required depends upon the amount payable. If the amount is less than approximately R120,000, no directive is required. The Fund has a data exchange with the South African Revenue Service, and obtains tax directives directly from it in regard to taxable payments. If the beneficiary has outstanding tax liabilities, the Fund cannot assist in resolving these.

The beneficiary is notified of the outcome of the claim by letter.

Once payment has been made, the obligation of the Fund ends and there is no process to monitor guardianship.

If payment has been made to a beneficiary and it transpires that some other beneficiary is entitled to share in that benefit, the new beneficiary is paid and an effort is made, usually unsuccessfully, to recover the overpaid benefit.

According to the Fund, the lack of information is particularly acute where the spouse later dies and the orphan has a claim for the spouse's pension. The Fund has no way of knowing about the claim until the beneficiary contacts it. Invariably, the orphan or his or her guardian is equally uninformed of the right to claim, and the benefit is lost. There are no figures on the extent of this problem.

The fund could provide no figures or estimates on delays in claims.

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22. However, a pilot study has been conducted in the first part of 2008 to assess the feasibility of doing so. If successful, the Fund intends to trace beneficiaries.

## 7 The verification of information

The problems associated with tracing the information necessary to finalise a pensions claim is demonstrated in the case study that follows.

Alfred Ratladi was employed by the Department of Public Works. He died in a fire on 11 September 2006, leaving two children. The first child's mother was a customary law wife and bore him a son, known as KB, aged 9 at the time of Mr Ratladi's death. Mr Ratladi and his wife subsequently separated, but they did not divorce, and KB lives with Mrs Ratladi.

Mr Ratladi then had a daughter, Amahle, by a common-law wife. Amahle was one year old when Mr Ratladi died. This common-law wife died in the same fire in which Mr Ratladi died, and Amahle is now being looked after by her maternal grandmother, the mother of the common-law wife, in Port Elizabeth.

The customary law wife claims all the monies due from the GEPF. Alfred Ratladi's mother, Salome Ratladi, has been trying to get some of the money paid to the maternal grandmother for Amahle. She has never met her and does not know where she lives. She has spoken to her once, and could not communicate because, where she speaks Tswana and Afrikaans, the grandmother speaks Xhosa and English. She has been assisted by the Citizen's Advice Bureau<sup>23</sup>. The members of staff of the human resources department in the Department of Public Works have politely attended to their various inquiries, but lack the resources and capacity to investigate the matter. Numerous meetings and much correspondence with the Department have ensued to try to establish whether Mrs Ratladi's claim of the existence of the other child is true, and to obtain the necessary documents and proof. The departmental staff insist that Mrs Ratladi must find Amahle's grandmother. Mrs Ratladi does not know where she is or even what she looks like. Both the departmental staff and the advice office staff are frustrated and the advice office no longer deals with the staff member who was assigned to the case, but only with her supervisor, who in turn consults the staff member. The practice of the Department is not to return phone calls, and there is no recourse to a senior officer to resolve any impasse in communication. This is not an issue that can go to court to be resolved. The case has not even been referred to the Fund yet, and will in all likelihood have to be referred to the Minister for intervention.

## 8 Dispute procedures

There are no procedures to resolve disputes, either at any department of state as employer or through the Fund. Once the employment relationship has terminated – as it always has done where a claim for dependant's benefits is in issue – the employer has no further authority to decide on a matter affecting the rights of the member of the Fund. Where the Fund merely adopts the say-so of the employer on a factual issue in dispute, the Fund fails to apply its mind to the application for benefits before it, and unlawfully delegates this function to the employer. The employer is furthermore potentially biased in the matter in which it is a party. The following case study demonstrates this.

Maria Mlangeni<sup>24</sup> was employed as a nurse in the Gauteng Department of Health. She developed epilepsy and depression, which was medically certified during 2004 as relating to her working environment. The relevant doctor also certified that she was increasingly unable to work as she had developed epilepsy. As a result, she was frequently absent from work. After an absence from work in 2004 as a result of an epileptic attack, she was treated by her employer as having absconded and she was dismissed. She maintained that she had not absconded, and that she had been unable to contact her employer to report sick. She accordingly refused to sign the form presented to her by the Department for pension purposes acknowledging that she had absconded.

She attempted to claim her pension benefits in 2004. Without an income, her bonded house was under threat of repossession. Eventually Mrs Mlangeni complained to the Citizen's Advice Bureau in March 2006 that her pension benefits from the GEPF were not forthcoming. She had received a letter from the National Treasury dated 15 August 2005 and marked "Counter Enquiries" stating that their department had received the docu-

23. Citizen's Advice Bureau, Pretoria, file number 10F93.

24. Citizen's Advice Bureau, file number 10A8.

ments pertaining to the pension benefits and that they were “currently calculating the pension benefits and payment will be made at the earliest convenient date”. There had been an extensive delay, which she could not understand.

The CAB telephoned the GEPF and established that a medical certificate was required indicating that Mrs Mlangeni had been ill at the time. The medical certificates in Mrs Mlangeni’s possession were provided.

During November 2006 the GEPF again advised that no documents had been provided to the GEPF and that the reason for non-payment of this benefit was that Mrs Mlangeni’s personal file with her employer was marked “absconded” and that Mrs Mlangeni had refused to sign it. She was advised to start a labour dispute against the employer in terms of the Labour Relations Act, but by this time the prescribed period for doing so had lapsed.

Without any forum to which to take the matter, it was eventually resolved by Mrs Mlangeni agreeing to sign both a resignation and a retirement form, neither of which acknowledged that she had absconded. She was refused a monthly pension option and on 24 April 2007 a sum of R100,000 was paid into her bank account.

Because the Fund is not subject to the PFA, no review against its decisions lies to the Pension Funds Adjudicator. According to the Fund representative interviewed, in the event of a dispute the parties are referred to the courts. There is no internal appeal.

Apart from recourse to the courts, members make use of the Public Protector to raise grievances, and the Fund has a long relationship with the Public Protector. Although it does not keep records of these queries, the Fund estimates that it receives about 20 queries per month from the Public Protector, down from the approximately 40 per month it received about two years ago. About 60% to 70% of these queries are the result of delay by the employer or delay by the beneficiaries in submitting documentation to the Fund.

## 9 Payment procedures

Payment is only by electronic financial transaction into a designated bank account. Payments cannot be made to an outside trust company for administration.

Payments of gratuities for children are made to the Guardian’s Fund in terms of an arrangement whereby the Guardian’s Fund can arrange to receive payments on behalf of minors. Thereafter the administration of the monies is subject to the law applicable to the Guardian’s Fund, and not to the GEPL. The GEPF exercises no oversight over monies once paid to the Guardian’s Fund.

No payments under any circumstances are made to children over the age of 16 years. Payments may be made to the residential care manager of an institution, but this has not happened in the knowledge of the persons interviewed.

## 10 Communication between the Fund and claimants

It is the employer’s duty to explain the application process to the claimants. If claimants are disabled or illiterate, it is the employer’s duty to assist them.

The Fund educates members through road shows, brochures and a quarterly newsletter. It has a designated department dealing with communication.

The Fund communicates with claimants by correspondence. If claimants call at its offices, the staff will consult with them. Although there are no interpreters employed by the Fund, it is easy to find a staff member to assist with language difficulties.

A call centre has operated for the past seven or eight years.

## 11 Pension stoppages

The Fund failed to respond to requests for information in this regard.

## 12 Unclaimed or unpaid benefits

Unclaimed benefits are paid into an unclaimed benefit account and they revert to the Fund after three years. If the beneficiary later surfaces, the payment is reversed. According to the Fund, the figure on unclaimed benefits is very low.

There is seldom a problem with unpaid benefits. Once payment is authorised on one occasion, all payments are typically made.

However, a related and substantial problem for the Fund is where contributions have ceased but no claim is forthcoming. In some cases, the contributions pick up again later but in many cases this does not occur. It is not clear if the claimant forgot to claim, or is deceased. These matters are referred to by the Fund as “S” claims, and the Fund itself reports that the problem is substantial. The Fund did not respond to requests for further details.

## Appendix 8: The registered retirement funds

### 1 Introduction

The private retirement funds are trusts to which employers and employees contribute in order to make provision for their old age or death. All retirement funds, other than certain funds that are statutorily regulated<sup>1</sup>, are required to register under the PFA<sup>2</sup> with the Registrar of Pension Funds<sup>3</sup>, at which time they become bodies corporate<sup>4</sup>.

All pension funds are required to adopt rules with prescribed contents<sup>5</sup>. The rules provide for the administration of the fund, and determine membership and payable benefits. The rules are binding on the fund and its members<sup>6</sup>, and the fund cannot act other than provided for in its rules<sup>7</sup>. Its rules are of paramount importance when determining the entitlement to a benefit<sup>8</sup>.

Registered pension funds are subject to various financial and management controls in order to ensure their solvency and liquidity<sup>9</sup>, as well as to protect against conflicts of interest<sup>10</sup> and the grossest forms of dissipation<sup>11</sup>. No person may administer a fund unless he or she has been approved by the Registrar and complies with the conditions imposed by the Registrar from time to time<sup>12</sup>. The fund is obliged to pay certain minimum benefits<sup>13</sup> and the interests of members to any surplus held by the fund are protected<sup>14</sup>. Funds must submit specified information to the Registrar<sup>15</sup> and members have the right to inspect and copy the rules and most recent financial statements of the fund<sup>16</sup>.

Under the Labour Relations Act (“the LRA”), statutory councils and bargaining councils may establish a provident or pension fund<sup>17</sup>. Various such funds have been established under previous labour legislation, and have not been required to register as pension funds<sup>18</sup>, but have been permitted to do so voluntarily. With effect from 1 February 1999<sup>19</sup>, all new funds have been required to register as pension funds and the existing funds have been required to comply with the PFA. With effect from 1 January 2008, all existing funds set up under the LRA will also be required to register under the PFA<sup>20</sup>. The distinction between the LRA funds and the PFA funds has accordingly become irrelevant for purposes of this review, and the LRA funds will be treated as registered funds. Because of the closer involvement of trade union and worker representatives in the management of the funds, these funds may offer best practices in customer care and communication, but are also those most represented in the available case studies, which suggests that their claims procedures are problematic.

1. These are mainly retirement funds for employees of the state or parastatal institutions, which are regulated by the terms of dedicated statutory legislation. Their exclusion from the control of the PFA is justified on the grounds that they are less vulnerable to abuses because they are underwritten by the state and managed by state officials at state cost and are subject to the same safeguards as the statutory insurance funds, which are discussed above. They include the Government Services Pension Fund, the Defence Force Retirement and Death Benefits Scheme, the Transnet Pension Fund, the Government Employees Pension Fund and the Associated Institutions Pension Fund, and the schemes set up under the Members of Statutory Bodies Pension Act 94 of 1969, Associated Institutes Provident Fund Act 11 of 1971 and the Pension and Other Benefits for Ministerial Representatives Act 154 of 1993. The Government Employees Pension Fund is considered as an example of these funds in a separate chapter.

2. Section 4(1) of the PFA.

3. Set up by section 3.

4. Section 5(1)(a) of the PFA.

5. Section 11 of the PFA.

6. Section 13 of the PFA.

7. *Gravett v Allianz Pension Fund* (2002) 11 BPLR 4033 (PFA).

8. *Ankers v Amalgam Pension Fund and Others* (2002) 2 BPLR 3046 (PFA).

9. The Financial Services Board supervises compliance with the laws regulating financial institutions in terms of section 3 of the Financial Services Board Act.

10. Section 3 of the Financial Institutions (Protection of Funds) Act.

11. Section 2 of the Financial Institutions (Protection of Funds) Act.

12. Section 13B.

13. Sections 14A and 14B.

14. Sections 15A to 15J.

15. Sections 15, 20, 21 and 24.

16. Sections 22 and 35.

17. Sections 28(1)(g) and 43(1)(c) of the LRA.

18. Section 2(1) of the PFA.

19. With the coming into operation of the Labour Relations Amendment Act of 1998.

20. Section 2(2) of the Pension Funds Amendment Act of 2007.

## 2 Governance and administration

All registered retirement funds are governed by a board of trustees, of which 50% must be elected by members of the fund<sup>21</sup>. The object of the board is to “direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund<sup>22</sup>.”

Trustees are subject to the common-law regulating trusts<sup>23</sup>. They are required to take all reasonable steps to ensure that the interests of members in terms of the rules are protected at all times, act with due care, diligence and the utmost good faith, and that they avoid conflicts of interest and act with impartiality in respect of all members and beneficiaries<sup>24</sup>.

The board of trustees is responsible for decisions on how death benefits are distributed. The volume of such claims means that the board does not decide on individual claims. Six out of the seven funds interviewed had death-benefit sub-committees or an equivalent structure that had delegated responsibility for deciding on the allocation of death benefits. The committees typically include representatives of the board of trustees and members of the administration team.

The administration team is responsible for liaising with employers and tracing and collecting all the necessary information and documents. They submit a report to the sub-committee or board of trustees on each claim, and in most instances this includes a recommendation for the allocation of the benefit.

The administrative costs of the fund are borne by the fund itself, with the employer making a contribution.

The following table provides basic governance and administration information on each fund considered in this review.

Basic governance and administration data on the funds considered:

Provision	Metropolitan Umbrella Funds	SASOL Pension Fund	MWPF	Telkom Retirement Fund	Standard Bank Group Retirement Fund	AMPLAT Group Provident Fund	Metal and Engineering Industries funds	
							Provident	Pension
Employer's contribution to member account	~5%	7.5%	Varies for different mines but averages ~14.5% member account ~6.5% risk % carried by employer vs employee is mine specific	9.55%	7.5%	9%	3%	
Employer's contribution to risk and admin	~2.5%	4.1%		3.45%	3%	5%	3.6%	
Employee's contribution to member share	~7.5%	7.5%		7.5%	7.5%	7.5%	6.6%	
Amount held in fund	Various funds	R20 billion	R15 billion	R25 billion	R2.2 Billion	R2.6 billion	~R20 billion	~R50 billion
Number of contributing members	200 employers	17,000	~150,000	~25,000	30,000	40,392	313,387	30,698
Deaths per annum	~120		~2,500	110 (2007)	50	639 (2006)	6,015 (Apr 06 –Mar 07)	1,236
Administrator	Metropolitan	Alexander Forbes	Lekana	Old Mutual	Alexander Forbes	Sanlam	Metal Industries Benefit Fund Administrator	

21. Section 7A of the PFA.

22. Section 7C(1).

23. Pension funds are exempted from the provisions of the Trust Property Management Act, as discussed below.

24. Also see section 2 of the Financial Institutions (Protection of Funds) Act.

### 3 Benefits payable for children

The rules of each fund describe the benefits payable in the event of the death of a member. There are two broad types of benefit relevant to supporting children after the death of the breadwinner, namely the member's share and risk cover. In most funds, they amount to the following.

#### 3.1 The member's share

The member's share of the fund is the money that the employer and employee have contributed to the fund, together with its investment returns and less any deductions. It is usually paid to the member on retirement, either as a pension, lump sum or both, but if the member dies:

- ▶ while in the service of the employer, the member's share is payable to the dependants or nominees of the member, either as a lump sum, pension or both;
- ▶ after leaving the service of the employer, and is in retirement, any benefit not yet paid is transferable to his or her surviving spouse, dependants or nominees,
- ▶ after leaving the service of the employer, and is not yet in retirement but dies within a prescribed time after leaving service, and the fund provides for an extended death benefit, an extended death benefit is payable to his or her dependants or nominees;
- ▶ after leaving the service of the employer, and is not yet in retirement and the fund does not provide for an extended death benefit, the dependants are entitled to a "withdrawal benefit" as defined in the rules of the fund. This can be either only the member's contributions to the fund, with the fund's rate of returns both the employer's and the member's contributions, or the member's share of the fund<sup>25</sup>.

The member's share is actuarially calculated at the time of retirement or death. The amount of the member's share will vary according to the contributions to the fund, the length of service, the investment performance of the fund and the terms of the rules that circumscribe the benefit.

#### 3.2 Risk cover

Risk life cover is a defined insurance benefit payable by the fund or a registered life insurer on death. It is funded by the monies contributed to the fund by the employer and the employee and is administered by the fund in terms of the rules of the fund. It is usually payable as a lump sum. If the member dies while in service, it is usually payable together with the member's share. It may be increased if death was caused by an accident at the workplace. In order to claim this benefit, the member must have been in active employment and contributing to the scheme at the time of death. If the member dies while out of service, no risk cover is provided.

Some funds provide an extended death benefit to accommodate members who are ill and unlikely to return to work, in order to circumvent the provision that an employee must be a contributing member. This is particularly important in the context of HIV/AIDS. In terms of the extended death benefit, an employee who is put off work (boarded) as a result of illness and who dies within 12 months of being boarded will still be eligible for risk life cover.

However, if a member fails to return to work and does not notify his or her employer of his reasons and whereabouts, the employee risks losing his or her life cover. Once a member has been dismissed, he or she is no longer eligible for risk benefits. (Some funds have a discretionary rule that, if a member leaves the job and dies within a period of six weeks, the risk life cover may be paid on consideration of evidence.) The dependants are then left with only the member's share.

According to the MWPF representative interviewed, the problem of 'absconded' employees is a fairly common one. In the event of a dependant coming forward later to claim risk life cover for a deceased member who had 'absconded', fund representatives said that there are circumstances under which they (or the insurer) might consider paying out the risk cover. However, in order to do so, the employer needs to make the necessary back payments, gather supporting documents (including detailed medical records and death certificate) and submit a report to the fund detailing the mitigating circumstances surrounding the member's 'disappearance'. Such

25. Section 14A and B of the PFA, inserted by the Pension Fund Amendment Act of 2007, requires that the fund must pay either the members and employer's contributions, together with the fund's rate of returns, or the members share of the fund, whichever is the greater.

incidents are dealt with on a case-by-case basis. However, it is likely that the deceased's dependants will have some difficulty in providing the necessary evidence, as the case studies in this review demonstrate.

### 3.3 The benefits payable by the funds under review

Benefits differ across funds. They also vary within funds, depending on:

- ▶ the type of fund (provident funds and pension funds provide different benefits);
- ▶ whether the member dies while still in service, out of service or after retirement;
- ▶ the category of worker;
- ▶ the date of joining the scheme (schemes are amended over time); and
- ▶ if the member made additional contributions over and above the stipulated minimum.

In summary though, fund provisions typically include one or more of the following:

Provident funds:

- ▶ *Risk benefit*: Lump sum payout equal to two or three times the annual pensionable salary.
- ▶ *Member share*: sum of employer and employee contributions plus interest and minus relevant deductions.

These two amounts are added and divided amongst eligible dependants and nominees.

Pension funds typically provide:

- ▶ *Risk benefit*: lump sum payout, usually of one or two times the annual pensionable salary, which is then divided amongst eligible dependants and nominees;
- ▶ *a spouse's pension*: a proportion of the pension that the member would have received had he or she survived is paid to a qualifying spouse (or divided between spouses), as defined in the rules of the fund; and
- ▶ *a child's pension*: a proportion of the annual pensionable salary per qualifying child, up to a maximum of three children. If there are more than three qualifying children, the maximum amount is divided between the qualifying children.

By way of illustration, the three tables below demonstrate the extent of the benefits payable where a member dies in or out of service. This data does not attempt to cover the full detail of the benefits provided, but gives an overview of the types of benefits, their conditions and the gaps arising.

## A comparison of benefits for dependants where the member dies in service

	Metropolitan Umbrella Funds	SASOL Pension Fund	Mineworkers Provident Fund	Telkom Retirement Fund	Standard Bank Group Retirement Fund	AMPLAT Group Provident Fund	Metal and Engineering Industries Provident Fund	Pension Fund
Member's share of the fund	<p><b>Spouse's pension:</b> monthly pension equal to one-twelfth of the member's annual pension, payable throughout his or her lifetime.</p> <p><b>Children's pension:</b> monthly pension equal to one-twelfth of the member's annual pension, payable until the child reaches 21 (or 25 if in full-time study) for a maximum of three children.</p>	For employees who joined before 1994, the benefit includes a widow and orphan's pension. This has been stopped though, because it is administratively too expensive. If the member joined since 1994: member's share paid out to dependants as a lump sum.	A lump sum equal to member's share at time of death (for a category B member). A lump sum equal to 36 times his or her deemed monthly earnings at the time of death (for a category A member).	<p><b>Spouse's pension:</b> 40% annual pensionable salary. If more than one spouse, this is divided between them.</p> <p><b>Children's pension:</b> 7.5% annual pensionable salary per qualifying child up to a maximum of three children.</p>	For members who joined on or after 1 January 1995: <b>Spouse's pension:</b> equal to 40% of member's pensionable salary at time of death. <b>Children's pension:</b> max 6% of pensionable emoluments for each child up to a maximum of three children. If no payment to qualifying spouse, payment for each child is increased by 50%.	A lump sum equal to the member's share.	A lump sum equal to the member's share	<p><b>Spouse's pension:</b> 40% of the pension that the member would have received at retirement age. No provision for a child's pension.</p>
Risk cover	This varies per employer, but on average a lump sum equal to twice the member's annual final salary.	Lump sum equal to the annual salary; three times the annual salary if death occurred in the course of work.	None	Lump sum equal to three times the annual pensionable salary.	Lump sum equal to twice the annual pensionable salary.	Lump sum equal to three times the annual pensionable salary.	Lump sum equal to three times the annual pensionable salary.	Lump sum equal to twice the annual pensionable salary.

**A comparison of benefits for dependants where the member, who is not in retirement, dies out of service**

	Metropolitan Umbrella Funds	SASOL Pension Fund	Mineworkers Provident Fund	Telkom Retirement Fund	Standard Bank Group Retirement Fund	AMPLAT Group Provident Fund	Metal and Engineering Industries Provident and Pension Fund
Member's share of the fund	Statutory minimum payable as a lump sum. The statutory minimum is the employer's and employee's contributions with the rate of interest of the fund, alternatively the member's share of the fund, whichever is the greater.				Member's share of the fund, payable as a lump sum	None, unless the member left service having been declared to be terminally ill and dies within 12 months, in which case benefits are payable as if he or she died in service.	None
Risk cover	Varies according to employer.	None	None	None	None	None	As for death in service if: <ul style="list-style-type: none"> <li>unemployed and death occurs within six weeks of leaving service.</li> <li>unemployed and on sick leave benefits and death occurs within 26 weeks of leaving employment.</li> <li>with more than '15 years' service, subject to fund's discretion.</li> </ul>

**A comparison of benefits for dependants where the member dies in retirement**

	Metropolitan Umbrella Funds	SASOL Pension Fund	Mineworkers Provident Fund	Telkom Retirement Fund	Standard Bank Group Retirement Fund	AMPLAT Group Provident Fund	Metal and Engineering Industries Provident Fund Pension Fund
Member's share of the fund	Varies according to employer		None	The remainder of the member's share paid as a spouse's pension or a child's pension as if the had member died in service.	A spouse's pension equal to 90% of the member's pension. A child's pension equal to 15% of the spouse's pension up to a maximum of 45%.	None	None
Risk cover	None	None	None	None	None	None	None

#### 4 Beneficiaries

The PFA and the rules of the particular fund determine who qualifies as a beneficiary.

Section 37C of the PFA establishes a compulsory system by which death benefits must be distributed. It amounts to a form of social security to protect benefits from the imprudence of members by restricting their testamentary capacity to deprive their dependants of continued support following death<sup>26</sup>. In exchange for the tax concessions provided to pension fund contributions, the legislature has thus required that the member contribute to reducing the state's liability for taking care of dependants<sup>27</sup>.

Section 37C(1)(a) of the PFA accordingly provides that “If a 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 or all such dependants”.

The PFA defines two categories of “dependant<sup>28</sup>”:

- (a) a person for whom a member was legally liable for maintenance at the time of his or her death; and
- (b) a person for whom the member was not legally liable for maintenance at the time of his or her death if such person was, in the opinion of the board, in fact dependent on the member for maintenance, or is the spouse or child of the member, including a posthumous, unborn or adopted child and a child born out of wedlock.

“Spouse” is defined to mean a spouse by any civil marriage, customary union or religious marriage and includes a permanent life partner or a civil union partner<sup>29</sup>. A stepchild or foster child would be embraced by the definition of dependant as he or she would have been “in fact dependent” on the deceased member.

This category of dependants has been held to include any person who was actually dependent on the deceased, including a common-law spouse<sup>30</sup>, live-in girlfriend or boyfriend<sup>31</sup>, friends and same-sex partners<sup>32</sup>.

The rules of registered retirement funds typically have clear definitions of “qualifying child”. When deciding upon an equitable payment of benefits, the board is bound by the fund's rules and these definitions accordingly have the effect of defining the extent of the trustees' discretion to equitably allocate benefits, and the extent of the benefit payable. For the most part, the provisions of the various funds were identical. All funds defined “qualifying child” as including unmarried biological children (whether born in or out of wedlock), legally adopted children, stepchildren and unborn children. There was some variability in provisions across funds when it came to:

- ▶ the cutoff age for a pension for children who are still in full-time study. There is an option to extend the child pension (even up to age 26 or 27) if the child is still attending school or some form of tertiary education. There is some variability though as to the understanding of what constitutes ‘full-time study’. In general, these provisions tend to favour children who enrol in tertiary institutions. Standard Bank mentioned that they were trying to become more flexible with this provision, so as to continue supporting dependants who wish to study further, but cannot attend a tertiary institution to do, for example, welding courses. However, the decision to extend the pension rests with the trustees and may be subject to their own biases: they may approve of a welding course, but not a beauty therapy course; and
- ▶ the cutoff age for a pension for a child with a disability.

None of the funds made provision for a child pension for a foster child (legally or informally fostered). Nor is any provision made for a child pension for children born to, adopted by or fostered by the member after the normal age of retirement. The effect of these rules is that, notwithstanding the wide terms of the PFA's definition of “dependant” to include any foster child by virtue of being in fact dependent on the member, the rules of the major funds reviewed exclude any pension benefit. Any benefit payable for a foster child is accordingly a lump sum.

26. *Kipling v Unilever SA Pension Fund* (1) (2001) 8 BPLR 2368 (PFA); *Kaplan and Katz NNO and Another v Professional and Executive Retirement Fund and Others* (1997) 2 All SA 364 (W); *Mashazi v African Products Retirement Benefit Provident Fund and Another* (2003) (1) SA 629 (W).

27. Manamela, T., *Chasing away the Ghost in Death Benefits: A Closer Look at Section 37C of the Pension Funds Act 24 of 1956*, SA Merc LJ 2005 Vol17 276 at 279.

28. Following amendment by the Pension Funds Amendment Act, of 2007. Prior to the Amendment Act, the three categories did not rank.

29. Section 1 of the PFA.

30. *Moir v Reef Group Pension Plan and Others* (2000) 6 BPLR 629 (PFA); *Ditshabe v Sanlam Marketers Retirement Fund* (2) (2001) 10 BPLR 2579 (PFA).

31. *Strassburg v Telkom Retirement Fund* (2002) 2 BPLR 3117 (PFA).

32. The wide meaning of “dependant”, the fund's equitable discretion and the nature of the factors to be considered, coupled with the PFA's limited jurisdiction to interfere with a distribution has meant that greater benefits have, for example, been paid to nephews rather than the deceased's own children. See *Mokoena v Metal Industries Provident Fund* (2003) 3 BPLR 4481 (PFA).

In terms of a spouse's pension, the provisions across funds were consistent with the PFA definition of "spouse" and recognised civil, customary, common-law and same sex partners. One of the funds<sup>33</sup> has a proviso that the relationship would only be recognised if the member notified the fund of the existence of the relationship. If there is more than one qualifying spouse, the uniform practice among the funds reviewed is to split the benefit between spouses at the discretion of the board of trustees.

The allocation of the lump sum (non-pension) payment is subject to much greater discretion (and hence delays in allocation) than the widow and child's pensions and includes a broader range of potential beneficiaries. Beneficiaries include dependants (as defined in the PFA) and nominees (persons other than a dependant who has been nominated in writing by a member to receive all or part of the death benefits provided by the fund).

## 5 Claims procedure

### 5.1 Pre-death administration

All employees who join a provident or pension fund are required to complete a nomination form that lists intended beneficiaries in the event of the member's death. These forms should ideally be updated regularly, so as to ensure that they reflect the current state of relationships and include all new dependants. Importantly, while the nomination forms assist employers to track down potential beneficiaries, nominated persons do not automatically qualify for benefits (the allocation of benefits is defined in Section 37C of the PFA). There are several difficulties with the use of nomination forms:

- ▶ The forms are seldom updated, and companies are reluctant to invest resources in ensuring that nomination forms are updated because the forms are only ever used in the event of a member's death (in other words, it affects a very small proportion of the staff complement).
- ▶ The fund has a responsibility to ensure that benefits are distributed fairly and in accordance with the law. Funds reported that, in many instances, this obligation meant that they were not able to fulfil the wishes of the member as stipulated on the nomination form. As an example, cultural norms may mean that a member nominates his brother or eldest son as sole beneficiary. In such cases, the fund will take the deceased's wishes into account but will not follow cultural norms – to the detriment of other dependants.
- ▶ In some instances, nominated beneficiaries may have seen the nomination form and expect to get their share of the benefit, as stipulated on the form. This can cause problems in cases where the board of trustees' decision does not correspond with the member's nomination.

Interviewees all reported that employers provided members with some information on how to complete the nomination form, either as part of a basic induction course, follow-up seminars, staff workshops, or on the company's website or intranet. This apparently includes information on who to list as dependants, but interviewees said that members did not necessarily understand or agree with the stipulations and so did not abide by them. A simple and standard guide for members, on Section 37C of the PFA, may assist in overcoming some of these issues.

The extent to which nomination forms are updated varied considerably across funds. The MWPF estimated that only 1% of forms were updated, compared with estimates of 50% at SASOL and 90% at Telkom. Telkom seemed to have the most advanced system for ensuring up-to-date nomination forms, with employees required to enter information directly onto an intranet interface. The interface had built-in checks to ensure that basic information was correct (as an example, ID numbers are automatically cross-checked against the birth date and gender of dependant).

Other funds reported that they send out details of current nominees with annual member benefit statements, as well as a blank nomination form, asking members to check and update nominee information as necessary. Despite these efforts, a recent survey of nomination forms by AMPLAT found that almost half the nomination forms were out of date at the time of the survey.

When asked whether employers could or should be held liable for outdated or incorrect information on nomination forms, interviewees mostly responded that they should not. They said there was no way to ensure that

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33. Sasol Pension Fund.

members were providing correct information and that employers could not be held responsible for member omissions or errors. Apart from cultural norms, the completion of nomination forms is also influenced by fear and suspicion that nominated beneficiaries would have a motive to wish the member dead (this was highlighted as an issue by two fund administrators).

## 5.2 Identifying and tracing dependants

Section 37C obliges trustees to establish if the deceased had dependants and, if necessary, to trace such dependants<sup>34</sup>. The fund must conduct a full and proper investigation to trace dependants<sup>35</sup>. It must obtain all relevant information prior to distribution<sup>36</sup>. The sources of information available to the fund to trace beneficiaries are information from the employer and interviews with the spouse or cohabiting partner, nominated beneficiaries, and colleagues of the deceased and other family members, but it cannot rely exclusively on the employer and third parties<sup>37</sup>. The cost of this investigation is borne by the fund, and is often deductible from the benefits due to the dependants in terms of the fund's rules.

In the case of members who die in service, the immediate employer is usually the first port of call. A spouse or dependant of the deceased member typically contacts the employer after the death, enquiring about benefits. Alternatively, the employer needs to take responsibility for tracing beneficiaries (this function may be outsourced) and submitting the necessary information to the fund administrator. The fund administrator will review the supporting documentation and, if necessary, request additional information or verification from the employer. Employers are not compensated for these efforts and so may be inclined towards keeping the process as simple as possible, which might prejudice certain dependants, particularly dependants about whom very little is known or who live in areas far from where the employer is based. Fund administrators commented on the fact that employers demonstrated varying degrees of commitment to tracing beneficiaries. Some felt that, once an employee had died, they were no longer their responsibility. Others, however, went out of their way to find dependants. The structure of the fund (whether either umbrella fund or in-house administrator) is likely to impact the extent to which employers invest in tracing beneficiaries.

Across the funds, interviewees reported that, in the vast majority of cases, increased awareness of death benefits has meant that family members of the deceased come forward to claim benefits soon after the death of a member. The family member will usually make contact with the immediate employers and will then be referred as necessary, depending on the structure of the fund. The key challenge seems to be ensuring that all potential beneficiaries have been identified (especially where the deceased had more than one spouse), before an allocation is made.

The extent of tracing that is attempted is subject to a 'reasonableness test'. Trustees ultimately make a decision based on the knowledge they can 'reasonably obtain' on dependants, through various tracing mechanisms. While the Act's intentions are clear, it does not provide guidance on what constitutes a reasonable effort at tracing.

The following mechanisms are reportedly in use by funds to trace dependants.

- ▶ Nomination form and personal file – this is used as the first port of call for all funds.
- ▶ Colleagues, peers and friends.
- ▶ Known relatives are asked for information on other dependants. Employers rely very much on the birth family of the deceased to verify dependency claims, which is problematic because of vested interest.
- ▶ Home visits – Telkom described how the deceased member's immediate supervisor would visit the home of the deceased to collect information on dependants and provide the family with information on how to submit a claim.
- ▶ Contacts at the Department of Home Affairs.
- ▶ The Telkom network of service points for the maintenance of Telkom installations across the country, which will be used to deliver messages and obtain information from beneficiaries, particularly in rural areas.
- ▶ Information from maintenance orders that are associated with salary deductions.
- ▶ Police and magistrates.

34. *Mthiyane v Fedsure Life Assurance and Others* (2001) 7 BPLR 2230 (PFA).

35. *Ditshabe v Sanlam Marketers Retirement Fund* (1) (2001) 10 BPLR 2574 (PFA).

36. *Jones v Natal Technikon Retirement Fund* (2002) 1 BPLR 2960 (PFA); *Calitz v Central Retirement Annuity Fund* (2005) 4 BPLR 302 (PFA).

37. *CALA Dairies CC v Orion Money Purchase Provident Fund and Another* (2001) 11 BPLR 2676 (PFA).

- ▶ Unions, using the regional and district membership forums within the union structures to obtain information and get messages to beneficiaries.
- ▶ Banking information and information from the national credit bureau.
- ▶ Information from the South African Revenue Services.
- ▶ Tracing agents (agents mentioned include Benefit Recovery Services, Data Limited and TEBA). Some funds were, however, disparaging of tracing agents. The MWPF in particular voiced concern about tracing agents, saying they were open to being bribed because they were in powerful positions – their paperwork would be used to decide how monies should be split. He said that, in his experience, “Tracing agents collude with people. It is very easy to defraud the system. You can get a government stamp selling in the street in Lesotho, which can be used to verify any information.” He explained, though, that if the family later contested the decisions taken by the fund, the trustees could show reasonable proof, as guided by the law, and the family would then be left with nothing.

The MWPF is currently reviewing the effectiveness of their tracing process and considering the use of the mine-workers’ recruitment agency, TEBA (The Employment Bureau of Africa), to help trace beneficiaries.

#### OVERVIEW OF TEBA<sup>38</sup>

TEBA was originally set up to recruit «native labour” for gold mines in the Transvaal and Free State. Following his retirement in 2000 as President of the NUM, James Motlatsi was asked by the shareholders to “transform TEBA from a club to a self-sufficient company”, whilst ensuring the ongoing service to mines, mineworkers, and their rural communities. TEBA currently operates out of 80 offices in all major labour-sending areas, has a staff of 500, and a sales budget of R190 million per annum. Roughly 260,000 mineworkers passed through the TEBA processes last year. Detailed electronic records are kept for every mineworker dating back to 1980. TEBA has also incorporated a Section 21 company called TEBA Development, which will spend roughly R35 million on rural development this year. With the reduction in mine labour over recent years, TEBA has focused increasingly on support services to rural families. In addition to the agency business it provides for TEBA Bank (a separate legal entity with a banking licence), and the Rand Mutual Assurance Company (RMA), TEBA also provides administrative support to many provident and pension funds on a commercial basis. Acting as an agent for the Employers, TEBA Bank, RMA, and other Pension and Provident funds, TEBA paid out roughly R2 billion through its rural infrastructure last year, much of which was in the form of pension and disability payments. TEBA is able to do this because of its accurate records, its ability to trace and identify rural beneficiaries, and its administrative capability in collating documentation leading to the payment of monies. In summary, TEBA represents the mining industry wherever it operates and can play the leading role in following up on all outstanding mining-industry claims.

The use of migrant labourers presents a particular set of challenges for fund administrators. The Principal Officer of the MWPF described how miners may have more than one family (who are not necessarily aware of one another) and their dependants may live some distance away in rural villages. He explained how culture prevents a widow from travelling for a period following the death of a spouse and that, in some cases, a local girlfriend will claim the benefit before the spouse is able to make the journey to town.

Similarly, another fund explained how a girlfriend may show up a year later, looking for the deceased member whom she only saw once a year and with whom she had a child. “We do the best we can (within 12 months) but often a dependant doesn’t come forward till much later,” explained one principal officer.

Section 37C of the PFA obliges funds to trace potential dependants of a deceased member within 12 months of the member’s death. Only if the trustees remain unaware of or have been unable to trace any dependant despite reasonable effort within a 12-month period after the death of the deceased, may the benefit be paid exclusively to the beneficiary nominated by the deceased. The Pension Funds Adjudicator will only interfere with a decision

38. Notes from TEBA briefing of Special Parliamentary Portfolio Committee on ex-mineworkers on 29 February 2008.

by the trustees, who have the benefit of a thorough investigation, if manifest injustice will result if the decision is not set aside<sup>39</sup>.

Interviewees all noted the predicament facing them – pay too quickly and the fund may be liable for not considering other dependants who come forward later. Pay too slowly and the family is left destitute. Given these challenges, the MWPF asserted that paying claims within 12 months was a risk because there were typically multiple dependants, some of whom may only surface after 12 months. They advocated for an extension of this period so as to provide potential beneficiaries with a longer period of grace.

According to the fund rules of the MWPF, tracing costs are deducted from benefits payable. However, with the exception of the MWPF, the other funds reported that these costs are always covered by the fund itself.

### 5.3 Lodging an application

Each fund has a range of forms that dependants have to complete. These may include:

- ▶ an interview form for guardians of minor dependants;
- ▶ a death claim advice form or notification of death;
- ▶ an affidavit of dependency;
- ▶ an interview form for parents and siblings;
- ▶ an interview form for the spouse;
- ▶ an interview form for any ex-spouse, girlfriend or boyfriend;
- ▶ a statement of monthly income and expenditure; and so on.

All forms are in English, although fund administrators noted that affidavits and supporting documents can be produced in the applicant's mother tongue.

Broadly speaking, the forms are intended to gauge the number and details of the children and spouses, the details of other dependants, the levels of dependency, the guardianship of the deceased's children, and so on. Layout and content of forms vary across the funds and some are distinctly better designed than others. As an example, some of the forms limit the space allocated for the insertion of the number of spouses and children, or they ask multiple questions – or questions about multiple dependants – with only one small space to enter a response. Some of the forms also assume that all dependant children are resident with the same caregiver, and several of the questions are ambiguously worded.

One recommendation might be to standardise forms across funds (as far as possible), learning from the better designed forms, which are user-friendly and clear, such as the Telkom forms.

Along with application forms, supporting documents are required to substantiate any claim. Standard requirements may be supplemented with additional requirements on a case-by-case basis. Supporting documents must be originally certified and might include the following.

- ▶ A printed death certificate – this is apparently always verified for authenticity with Home Affairs. Funds emphasised that this is the most important document and that, as long as there is a valid death certificate and proof of membership, there should be a successful payout.
- ▶ Marriage certificates and proof of separation or divorce, where appropriate. In the case of a traditional marriage, an affidavit from a traditional leader or a church leader is required.
- ▶ Confirmation of income of all possible beneficiaries in order to determine the level of dependency (this confirmation can be in the form of an affidavit). The affidavit should explain dependency in monetary terms.
- ▶ Confirmation of family living arrangements and proof of guardianship (this confirmation and proof can be in the form of affidavits).
- ▶ If the dependant is over the age of 18 and claims to be still at school, proof of school attendance or confirmation of full-time study is required (because, if they are, they might be entitled to a larger slice of the benefit). If the dependant is under the age of 18, he or she will be assumed to be dependant on the deceased and so does not need to prove that he or she is still at school.
- ▶ Birth certificates of all relevant people (in some cases, unabridged birth certificates are required).

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39. *Nsele v Human Rights Commission Staff Provident Fund* (2000) 7 BPLR 756 (PFA).

- ▶ Identity documents of all relevant people. A valid temporary identity document will also be accepted, as long as it hasn't expired.
- ▶ A medical certificate in the case of persons with disabilities.
- ▶ The member's latest salary statement.
- ▶ The member's latest income tax assessment.
- ▶ Information on investments, property, rights and royalties (for income tax purposes).
- ▶ The applicant does not have to have a postal address or phone number of their own, and he or she can provide any other contact details at which they can receive communications, such as a nearby shop, organisation, relative, and so on.
- ▶ All applicants must have a bank account into which benefits can be paid.

For foreign applicants, the requirements remain the same although it is often more difficult to get these documents.

In some cases, funds require multiple copies of each document – with each copy being originally certified.

Interviewees cited supporting documents as the most common barrier to processing applications. According to fund administrators, potential beneficiaries were either slow in bringing the necessary documents or brought incorrect or incomplete documents. The following case study explains why.

Three-and-a-half years after the death of her husband, widow Nomonde has still not received any of the death benefits to which she and her seven children are entitled. Her husband, Geoffrey Diyamani was employed at Amandelbult mine for many years, until his dismissal on 3 August 2004. He was dismissed for being absent from work without permission. The circumstances surrounding his dismissal are not uncommon. Mr Diyamani was extremely ill with pulmonary fibrosis and pneumonia. He was put off work for four days and hospitalised. When he did not return to work as scheduled, he was recorded as AWOP and dismissed, effectively losing his claim to life insurance.

When she approached Amandelbult mines to claim her husband's death benefit, Nomonde was given a printout from the HR register showing that her husband was AWOP at the time of death. "They took some of my papers and said I must come back to the village and wait," says Nomonde slowly, struggling to speak after a recent stroke. She explains that she's been waiting for years now and that no-one has contacted her.

In an effort to overturn the decision to record Mr Diyamani as AWOP, the District Surgeon at the local hospital wrote a long and detailed letter to the mines, explaining the reason for Mr Diyamani's failure to return to work. The letter explains that Mr Diyamani was confused and disorientated. On leaving the mine, he returned to his remote rural village to die with his family. He was seen by the local doctor in a high state of confusion and admitted to Madwaleni hospital, the nearest health facility to his village. There, he died of heart failure on 30 August 2004, about five weeks after having been put off from work.

A local NGO also tried to assist Nomonde, but it was informed by a representative of the Provident Fund that Mr Diyamani's death benefit could not be paid if he is recorded as having being dismissed. With Nomonde's health deteriorating and no income for the household, the NGO has made several attempts to contact the fund (AMPLATS) and administrator (Sanlam) to resolve this issue. In an email to AMPLATS dated 31 May 2007, the NGO representative wrote "I appeal to you to reconsider Mr Diyamani's case and recognise that he couldn't be held responsible for his actions in the month before he died – he was a very, very ill man who was very confused. He just knew that he wanted to die in his home village where he would be buried."

Apart from the fact that Mr Diyamani's absence can be justified (for his risk life cover), his widow should still be entitled to the money accumulated in her husband's member share account. However, no mention was made in correspondence with the NGO of the deceased's member share, which would not have been affected by his dismissal.

In an attempt to get clarity on this case, the researcher contacted AMPLATS. The AMPLATS principal officer investigated and found that the widow was indeed entitled to her husband's member share (a sum likely to be in excess of R50,000), but that no claim had been lodged for this money. No connection had been made on the

system between the numerous attempts to resolve the AWOP issue and the member share account – access to which is not impacted by Mr Diyamani’s AWOP status.

In order for Nomonde to access the funds, AMPLATS has now requested the following:

- › three certified copies of her ID;
- › proof of marriage – customary or civil;
- › three certified copies of all her minor children’s birth certificates (or IDs for major children over the age of 18 years);
- › an affidavit by the widow confirming whether her husband had other children. If there are such children, the fund requires certified copies of birth certificates or IDs for these children too. It is unclear whether the fund expects Nomonde to obtain these but, without these, she cannot be paid her share of the benefit; and
- › the banking details of all major dependants. All the bank statements must have an official bank stamp, and all the accounts must be ACB (electronically linked).

These documents should be submitted to the TEBA office in Umtata, to be forwarded to AMPLATS’ Johannesburg office.

Under ‘normal’ circumstances, representatives from TEBA and AMPLATS explained, TEBA field workers would have been asked to trace Nomonde (and other potential dependants) and to assist her in collecting the necessary documents and completing the claim forms. However, according to AMPLATS, the fund was never informed of the case. This highlights problems in communication between the employer (the mine) and the fund. Nomonde has a copy of correspondence that she received from the mine when she originally enquired about benefits. She also has a copy of correspondence between officials within AMPLATS (the NGO has a copy of correspondence with AMPLATS officials dating back to May 2007).

Back in the remote rural village where Nomonde lives with her seven children, the news that funds are available is well received. However, it will take Nomonde several months to accumulate the necessary documents. Three of her seven children do not have birth certificates, and she and her two adult children will have to open bank accounts. All of this requires several visits to Umtata (a trip that takes five hours each way and costs R100). In order to obtain a marriage certificate, she needs the village headman, and a senior member of her and her husband’s families, to go to Elliotdale. She will then have to arrange three certified copies of each document and submit all of these to the TEBA offices in town.

While the research was unable to quantify the scale of these problems in poor rural areas of South Africa, it is hard to imagine how most widows and orphans are able to negotiate their way through the bureaucracy and paperwork that stands between them and the money that is rightfully theirs. In general, the level and type of support provided to dependants of deceased members varied across funds. For example, the SASOL fund administrative manager explained how she monitors every application process very carefully. She diarises to follow up on each case every two weeks until the case is resolved. Family members who are unable to travel to a SASOL office are visited by an HR consultant, and an employee-wellness centre in Secunda provides intense support to families of employees there. The administrative manager is also available for families to call her directly (as they often do). Her contact details appear on member communications and anyone calling the SASOL switchboard with a death-claim query will automatically be referred to her.

The manager of the Telkom retirement fund described the lengths to which they go to assist family members of deceased employees to claim their benefits. He said that Telkom did home visits to dependants, and they also transported dependants to obtain the necessary supporting documents and open bank accounts, and so on. Beneficiaries will have a single contact person at head office who is dealing with their case. However, information on all cases is kept on a central database so that any member of the administrative team can assist if necessary. Telkom was the only fund that reported having a toll-free helpline for applicants.

The Standard Bank Principal Officer described similarly high levels of service with the Standard Bank Group Retirement Fund. She said claim forms can be obtained and lodged at any Standard Bank branch. If someone arrives at the bank to query a death benefit, the branch will automatically call a member of her team at head office and the necessary documents will be sent to the branch to assist the claimant. According to the Principal

Officer, in most instances, the family will be contacted immediately upon the death of a member and will be sent funds to cover funeral expenses. Unlike Telkom, Standard Bank does not have the capacity to assist clients to get supporting documents, but will provide advice and the services of a commissioner of oaths (available at any bank). If all goes smoothly, the payment of lump-sum benefits will take place within three months of the member's death.

The AMPLAT group provident fund have recently (in October 2006) contracted TEBA to assist in tracing dependants and obtaining the necessary documents. This arrangement has apparently assisted in reducing the backlog of unclaimed monies.

According to a TEBA representative, fieldworkers are recruited and trained to identify dependants, and to assist them in completing the necessary forms and obtaining certified documentation. The fieldworker undertakes a 'section 37C investigation' to identify all possible dependants. This includes visiting the deceased homestead and completing an 'investigation guide form' to assess the home environment, determine relationships amongst potential beneficiaries and guardianship of the deceased's children. "Most of the time, one case can lead the investigation to different areas," explains the TEBA representative. "For example, from the Eastern Cape to Lesotho, and ending in Randburg. That's where TEBA can play an important role because of offices in Lesotho, Mozambique, Botswana, Swaziland and locally." The investigator will then submit certified documentation with a summary of observation notes to complete the case. The TEBA representative added that "continuous progress reports are forwarded on a weekly or monthly basis to the requestor (the fund)". TEBA charges the fund for tracing. According to AMPLATS, these tracing costs are shared by the employer and the trustees, and are not deducted from the benefit.

For all intents and purposes, fund administrators painted a positive picture of an industry intent on ensuring that all eligible beneficiaries are able to access monies due to them. Further investigation of beneficiary experiences is necessary in order to determine whether this picture is an accurate one. The table below summarises a survey of the cases held by the Black Sash and the Citizen's Advice Bureau, and demonstrates the problems in claiming benefits from retirement funds and, although the funds were not the ones interviewed in the research, the malpractices reported are likely to be representative of the industry as a whole.

Name of fund	Details of problem
National Building Council Provident Fund	The fund refused to accept faxed documents required to support a claim, the file was lost, and then the fund rejected the claim because claim documents were not submitted within six months of death, Beneficiaries were required to claim afresh.
National Building Council Provident Fund	The claim was delayed because the name of the magisterial district was not inserted on the death notification. The fund refused to find out the name itself, pended the file and only revived the claim when the advice office intervened.
Metal Industries Provident Fund	The claim form was not signed by the employer. The fund failed to address problem itself, pended the file and only revived the claim when the advice office intervened <sup>1</sup> .
Metal Industries Provident Fund	There was a dispute among the family members about who should be the guardian, and the fund failed to determine the issue <sup>2</sup> .
Metal Industries Provident Fund	The survival certificate was posted to the beneficiary for completion, but was not received by the beneficiary, so the pension was stopped.
Electrical Industry Provident Fund	The claim was delayed because the beneficiary nomination form was not completed. The beneficiary was not advised of problem. There were difficulties and delays in obtaining the death certificate, and the file was "made dormant" by the fund. The fund refused to reopen the file without a formal request from the guardian, together with outstanding information, at which stage a reapplication with fresh documents was required.

1. Citizen's Advice Bureau case number 7V108.  
 2. Citizen's Advice Bureau case number 9F38.

Some pitfalls that were identified through the current research include the following:

- ▶ None of the funds had any special support services for elderly, sickly or disabled beneficiaries.
- ▶ None of the funds kept track of the costs to beneficiaries of lodging an application, nor of the kinds of challenges faced by applicants.
- ▶ None of the funds had money available to assist dependants to lodge an application for a death benefit. Costs associated with travel, telephone, obtaining supporting documents, photocopies, and so on, are therefore

solely borne by applicants. Interestingly, funds reported that they had never been approached by dependants for financial assistance in lodging an application.

There is also anecdotal evidence from case studies (such as the case below of Mr Maleyile<sup>40</sup>) that more support is needed to enable beneficiaries to lodge applications.

“Mr Maleyile was a highly respected member of our community,” says Dave, the manager of a small local NGO that supports families in the area. “He worked hard at the mines and sent money back monthly to care for his wife and eight kids. He contributed religiously to his Provident Fund in order that his wife and children would be cared for in his absence.”

Mr Maleyile lived, and is buried in, a remote rural village in the poorest district of the former Transkei. The village has no road, no running water, no toilets, no electricity, no functional school, and no clinic. As a result, 90% of adults in the village are illiterate, including Mr Maleyile’s widow, Nothembiso. Since the death of her husband four years ago, Nothembiso has been unable to claim any of the death benefits due to her and her children. She is terminally ill with severe epilepsy and the children have been removed from school. “She doesn’t have money to make phone calls,” says Dave, “and even if she walks six kilometres to the next village where there is a road, she has no money to pay for a taxi.”

In order for Nothembiso to apply for the money due to her in the Provident Fund, three certified photocopies of the following documents are required:

- › Nothembiso’s ID;
- › her mother’s ID (her mother was a dependant of the deceased);
- › her deceased husband’s ID;
- › her deceased husband’s death certificate;
- › their marriage certificate or, alternatively (the union was a traditional marriage), affidavits from various traditional leaders confirming the marriage; and
- › birth certificates for all eight of her children (difficult to obtain because they were born at home).

The journey to the closest Home Affairs office takes five hours and a return trip costs R100. Obtaining each one of these documents would require multiple trips.

Nothembiso also needs proof of her children’s school attendance (they can no longer afford to attend school), written confirmation from the local chief of her physical and postal address (there is no postal address), and a bank account (very difficult for someone in her position to open).

“Now,” says Dave “the above is a difficult task for someone with no money, but it is almost impossible for someone illiterate. All the time while I am working through this incredibly frustrating process, I’m aware that there must be tens of thousands of widows out there struggling to access money owed to them, and thousands more who have already given up.”

#### 5.4 Processing the application

Each fund sends all completed forms to a central location for processing. Once the necessary paperwork is in place, the fund administrator will submit a report to the board of trustees (or a delegated subcommittee) with recommendations for the allocation of funds to dependants and nominees.

Once the fund has identified and traced dependants, it must then apportion the benefit equitably between them. The factors to be considered include the ages of the beneficiaries and the likely duration of their dependency, their relationship to the deceased, the extent of their dependency, the financial position, their future earning capacity, the wishes of the deceased as expressed in the beneficiary nomination form and the amount available for distribution<sup>41</sup>. Equity may require that certain dependants benefit to the exclusion of others<sup>42</sup>. However, it is significant that none of the funds consider what other monies are payable to the child from other retirement funds or from one of the statutory insurance funds, such as the Road Accident Fund, MAAF or the CF.

40. Excerpt from Giese, S., and Smith, L., (2007) *Rapid Appraisal of Home Affairs Policy and Practice Affecting Children in South Africa*. Cape Town: ACCESS.

41. *Kruger v Central Retirement Annuity Fund* (2000) 7 BPLR 3643 (PFA); *Matlakane v Royal Parrafin Provident Fund* (2003) 6 BPLR 4785 (PFA); *Brummelkamp v Babcock Africa* (1997) *Pension Fund and Another* (2001) 4 BPLR 1811 (PFA).

42. *TWC and Others v Rentokil Pension Fund and Others* (2002) 2 BPLR 216 (PFA).

In order to expedite the payment of funds to dependants, the Pensions Fund Amendment Act 11 of 2007, expressly excludes pensions to qualifying spouses and children from the tracing provisions of section 37C. As soon as possible after the death of the member, the pension is paid to the most 'obvious' spouse and children. If, at a later stage, another spouse or other children are located, the fund suspends payment to the original spouse and children until the others have 'caught up', and then it re-apportions the monthly payments to include the extra dependants. Payment of pensions will only be reviewed by the board of trustees for resolution if there is some issue requiring a measure of discretion.

However, in the case of lump sum benefits, trustees are much more cautious in deciding on the allocation of monies. Once paid, it is not possible to reclaim the money and trustees may be held liable for poor decisions.

Various structures are involved in the decision making process regarding the allocation of lump-sum funds.

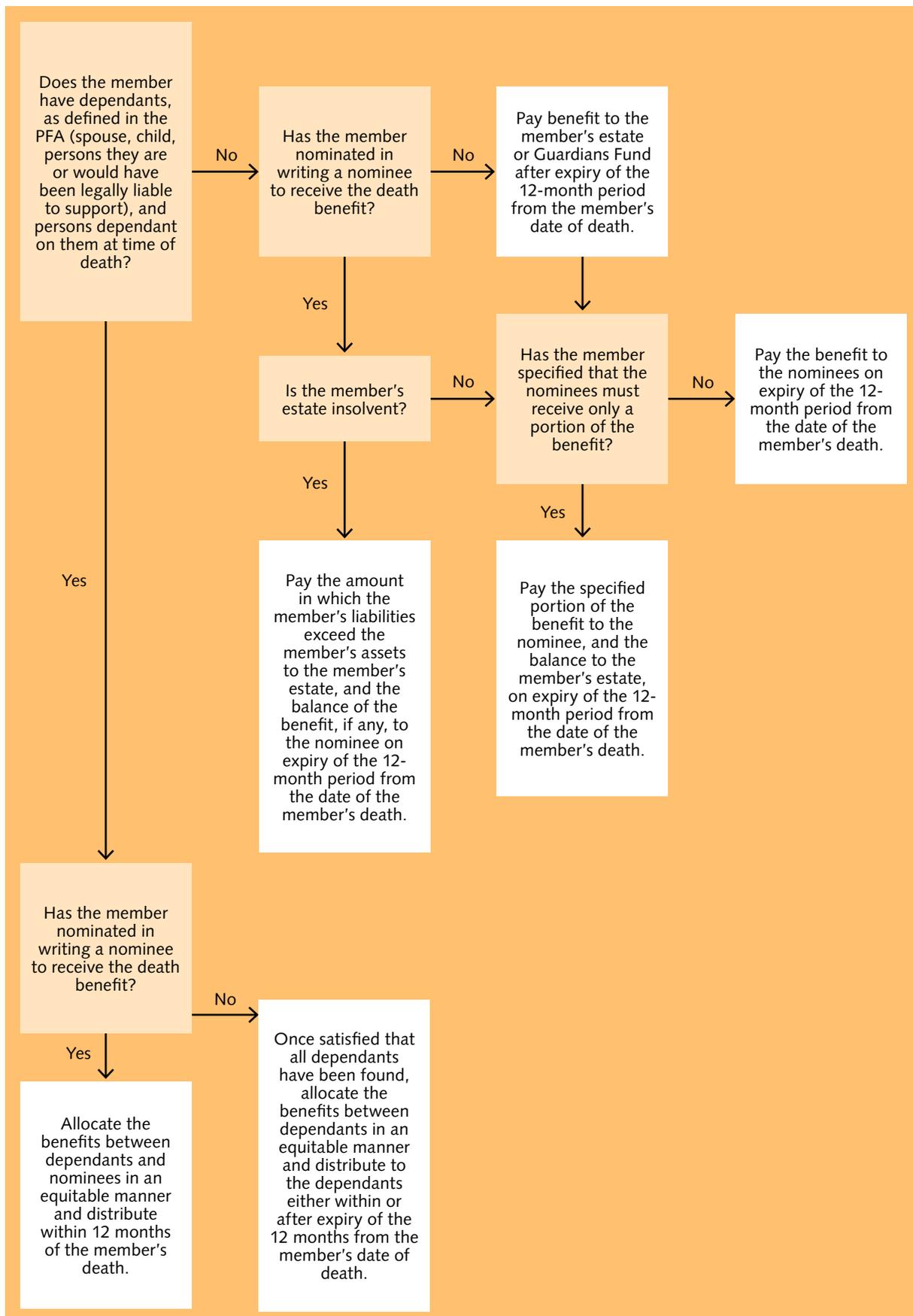
The fund administrators (either in-house or outsourced) collate the necessary information and prepare recommendations on fund distribution. In some funds (the MIBFA funds, for example) the administrative team has delegated authority to make decisions regarding allocations for clear cut-cases (98% of cases, according to the principal officer). With other funds, the administrative team simply prepares a report with recommendations, which is submitted to the death-benefits subcommittee or board of trustees for review and ratification.

In some instances, the entire process is managed by one institution. In others, several different institutions may be involved. AMPLAT, for example, has outsourced the responsibility for tracing and collecting information on potential beneficiaries to TEBA. TEBA fieldworkers do the necessary investigations and collect supporting documentation. The fund administrators (SANLAM Fund Administrators) review the information and prepare a draft resolution. The resolution is taken to the AMPLAT Group Provident Fund death subcommittee, who meets fortnightly and will make the final decision regarding the allocation of benefits.

In reality, the level of oversight of the subcommittees and Trustees varies across funds. While some simply approve all resolutions put forward by the administrators (a rubber-stamping process), others engage more critically with the evidence at hand. In the case of the MWPF for example, death subcommittee members are paired, and each pair meets three times a week to discuss cases. Approximately 40 cases are handled per day and, according to the head of fund administration, 100% of cases reviewed by the sub-committee are approved first-time round. In contrast, the Principal Officer of the Standard Bank provident fund explained that the committee ratifies approximately 80% of recommendations put to them by the administrative team. About 10% are varied prior to ratification and about 10% are referred back for further investigation.

Ultimately, the decision on how to allocate monies is informed by Section 37C of the PFA. The flowchart below was adapted from a Standard Bank product and provides a useful overview of the decision-making process, as per the provisions of the PFA.

## Overview of decision-making process in allocation of death benefits



## 6 Common problems in allocating benefits

There are a range of common administrative problems in this process, when information on some dependants is available and but information on others is missing, the procedure is not clear. The board of trustees might:

- ▶ make no allocation to any dependants until all outstanding information has been gathered;
- ▶ pay the full amount to known dependants (and make a 0% allocation to the missing dependant) on the grounds that reasonable effort has been made to trace other dependants; or
- ▶ pay known dependants and make an allocation to the missing dependants – this is only possible in instances where the known dependant’s share is fixed and not subject to change with the identification of further dependants.

Monies allocated to missing dependants may be:

- ▶ held in a suspense account for an indefinite period until the missing dependant is traced; or
- ▶ transferred to the Guardian’s Fund. While this is an option presented in law, it does not appear to be widely used in practice. Principal Officers explained their reluctance to use the Guardian’s Fund, with one describing it as a ‘black hole’. Once money is transferred into the Guardian’s Fund, the Master is required to publish the details of missing beneficiaries in the *Government Gazette* on a regular basis. Interviewees explained that this information was sometimes used by opportunists to make money through tracking down beneficiaries listed in the *Gazette*, but that beneficiaries themselves were highly unlikely to read the *Government Gazette*.

Further complications may arise where there are disputes around paternity or marital status. Examples were cited of families refusing to acknowledge the paternity of a minor child born out of wedlock, or refusing to acknowledge a traditional marriage. In such cases, administrators reported that they request affidavits from a number of different sources, and use these to determine the most likely truth. In rare instances, paternity tests may be done to resolve a dispute.

There were also examples of disputes over who is the de facto caregiver of a minor child, and hence eligible for the child’s pension or monthly maintenance payment. As part of the decision-making process, the administrator has to identify the most appropriate caregiver for minor beneficiaries. Where children are in the care of a remaining biological parent, this is a fairly straightforward process. However, an analysis of General Household Survey data for 2006<sup>43</sup> reveals that 23% (4.1 million) children in South Africa are not resident with either of their biological parents. Of these, 1.5 million are maternal orphans, and (primarily as a result of HIV/AIDS) this number is expected to increase to around 2.5 million by 2015. In addition, it is not uncommon for children to move between caregivers (particularly in the context of HIV/AIDS) and for siblings to be split between different households. These factors make it difficult for funds to trace all legitimate dependants in the first place, and to identify the caregiver or caregivers to whom pensions should be paid. In such cases, funds again rely on multiple affidavits from several different sources, which will be cross-checked for verification. Investigations may also include home visits and ‘spot check’ telephone calls to determine if the child is indeed resident with the claimant.

## 7 Payment processes

Having made its distribution, the fund has a further discretion on whom the funds for a particular child are to be paid, and how the payment is to take place.

Payments to a child are to be made to the child’s guardian, unless there are good grounds to deviate from this<sup>44</sup>. Such grounds may be the fact that the guardian is unlikely to be able to manage large sums of money<sup>45</sup>. In such an event, payment of a lump sum may be made to a trust company for the benefit of the dependant, or it may be managed by the fund itself by setting up an individualised trust for the child. Section 37C(2) of the PFA provides that payment to a trust of a death benefit for the benefit of the dependant “shall be deemed” to be payment to the beneficiary.

43. Personal communication, Helen Meintjes, Children’s Institute, UCT.

44. *Dhlamini v Smith and Another* (2003) 7 BPLR 4894 (PFA); *Malatjie v Idwala Provident Fund* (2005) 1 BPLR 45 (PFA).

45. *Maluleka and Another v NEHAWU Provident Fund* (2005) 5 BPLR 415 (PFA).

In any event, payment to the beneficiary must take place within 60 days of submission of a duly completed claim form<sup>46</sup>. This period is interpreted to mean from the time that all the information is received by the fund. According to fund administrators, once a decision is taken by the board of trustees, payment of funds to beneficiaries happens quickly (on average, within three weeks of the date of the decision). This period may be extended if there are delays in obtaining the necessary tax directives.

Monthly pension payments for a child are typically paid by electronic financial transactions. They are in a standardised amount and do not require extensive individualised administration.

Payments of a lump sum may take place periodically or in more than one payment<sup>47</sup>. Lump-sum awards to adults are typically made directly to beneficiaries in the form of a once-off payment into the beneficiary's bank account by electronic transfer.

## 8 Payments into trust

If a lump sum is paid into trust for a child, an individual trust must be created to keep the identity of the money and its increments, a decision must be taken on the amount to be paid to the caregiver for monthly maintenance, the money must be invested, growth on the money is taxable and this must be administered, and a periodic report on the administration of the trust must be made to the child's guardian. In addition, sometimes the guardian may change, or the child may have additional needs that require an alteration to the amount of the trust monies payable. Many pension funds regard the administration of individual trusts as expensive and a drain on fund resources. They are accordingly paid over to separate trust companies, which administer the monies further. The duty of the retirement ends once the payment to a trust company is made, and it has no further power over the money.

Trust companies are typically bodies corporate that manage sub-trusts on behalf of each child beneficiary. Monies placed in trust are controlled by the trustees of the company. The funds in the individual sub-trusts are pooled in an investment trust fund controlled by the trust company, and invested. These arrangements have come to be known as "umbrella trusts"<sup>48</sup>.

The table below summarises information on payments to the trusts associated with the interviewed funds.

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46. Section 9 of the General Pensions Act.

47. Section 37C(3).

48. And easily confused with "umbrella funds", which are collectively managed retirement funds, such as the Metropolitan fund considered above.

## Arrangements regarding payments through trusts by the various funds

Fund	Trust	Choice of other trusts?	Proportion minors' benefits placed in trust	Costs incurred in using trust	Who covers trust costs
Mineworkers Provident Fund	Fairheads Umbrella Trust Company	No	If less than R20,000, the money is paid to the guardian or caregiver. If greater than R20,000, the money is either put in trust or given to the child's guardian (depending on the circumstances, employment status, age of child, and so on).	Unknown	Deducted from benefits.
SASOL Pension Fund	In-house Sasol Beneficiaries Trust	No	Seldom paid to caregiver – usually put in trust.	Data not provided	SASOL
Telkom Retirement Fund	Old Mutual	No	Lump sum always placed in trust for minors.	Once-off trust acceptance fee of 1% of capital. Monthly income collection fee of 6% of income earned on capital invested. Monthly capital management fee of 1% of the value of the remaining capital in trust. Trust distribution fee of 2% of the value of the capital disbursed.	Fees paid by the Trust.
Standard Bank Group Retirement Fund	Standard Bank	No	For informal caregivers, 100% is paid into trust. In the case of legal guardians or biological parents, ~20% placed in trust.	0.57% on assets placed under management plus 0.6% per annum on values up to R5 million, with tiered structure for greater amounts. 1.14% of capital value of assets released.	Deducted from benefits.
Metropolitan Employee Benefit Umbrella Funds	Four large, well-established trusts recommended by Fund	Yes	If payout is large, the guardian will be assessed for competence (business acumen), level of education, current or previous positions held in employment, and so on, to help determine whether or not they can handle a large sum of money. If payout is small, it is automatically paid in full to the guardian.	Unsure – between 0.5-1% annually.	Deducted from benefits.
Metal and Engineering Industries Provident and Pension Funds	No external trust – use MIBFA internal trust.	No	Monies are paid to biological mothers. In the case of any other caregiver, 100% is placed in trust.	No costs (they don't put monies in external trusts because it's too expensive).	Part of the employer's monthly contribution goes to admin costs.
AMPLAT Group Provident Fund	Bophelo Trust Services	No	Automatically placed in trust if greater than R20,000.	0.5% of settlement value plus 5% annual income collection fee.	Deducted from benefits.

It is clear that, in most instances where the caregiver of the child is not the biological parent, or where the payment exceeds a certain value, the child's money is held in trust. This is in contrast to the determinations of the Pension Fund Adjudicator, who has repeatedly ruled that the payment of the minor child's benefit to his or her legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the guardian of the duty to take charge of the minor child's financial affairs and the right to decide how the benefit due to the minor should be utilised in the best interests of the child<sup>49</sup>. It is also clear that the discretion to pay lump sums to guardians is curtailed by the rules of the fund, and thus taken out of the purview of the Pension Fund Adjudicator.

Where the fund exercised discretion on payments into trust, there did not appear to be any standard or systematic way of determining the ability of the caregiver to manage finances on behalf of a child. However, the form used by the MWPF to interview guardians provides some insight into the way in which financial competence is assessed. The form advises the interviewee to explain the option of placing money into a trust for minor children. It then goes on to ask the caregiver two questions, presumably intended to determine whether he or she is capable of managing the finances. The questions are:

- (1) Do you understand what an investment is?
- (2) If yes, provide two examples of investment vehicles that you understand.

It would be interesting to see how this is translated into a caregiver's home language and whether investments of relevance to a poor rural family (such as farming utensils or cattle) would be considered appropriate. The determination of the capacity of the caregiver to manage minors' payments is an area that requires further investigation, particularly where the fund is administered by a financial institution that has an interest in the trust company.

Putting money into trusts for minors was seen by funds as a way of:

- ▶ Protecting the financial interests of the minors – either because adults may not use the money in the best interests of the child or, if the caregiver died, the monies would go into their estate and be divided amongst their dependants.
- ▶ Preventing situations in which caregivers take in children simply to obtain a lump-sum payment.

The difficulties with trusts have been expressed as follows: "Herein lies the paradox. In general experience, poorly educated, low-income earning families are by their very circumstances more likely to lack the skills and expertise required to manage the funds over a sustained period. In addition, due to their often precarious financial situations, there is a greater danger that the funds may fall into the hands of creditors and be unavailable for the ongoing support of minor children. Unfortunately, the benefits themselves, being the product of low-income contributions to the fund, are often too small to provide realistic support over any length of time. In addition, the costs of establishing a trust in respect of these insubstantial benefits can be crippling<sup>50</sup>."

Trusts typically deduct their costs from the child's benefits under their control. A recent survey of umbrella trust services and costs<sup>51</sup> showed that their costs are as follows:

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49. *Malatjie v Idwala Provident Fund* (2005) 1 BPLR 45 (PFA) at para 12 and *Dhlamini v Smith and Another* (2003) 7 BPLR 4894 (PFA) at 4901C-F.

50. MacKenzie, K., *Who Will Guard the Guards? An Appraisal of Minors' Pension Benefits Placed into Trust, Insurance and Tax*, Volume 22, no 4, December 2007, page 40.

51. Old Mutual Corporate Actuaries and Consultants, *Report on Umbrella Trusts Operated in terms of Section 37C of the Pension Funds Act*, October 2007, page 24.

## Sample of costs of umbrella trusts

	Initial fees	Income collection	Ongoing	Audit costs	Taxation	Termination	Capital withdrawal	Initial investment fee
ABSA Flexible	The greater of 0.57% and R57	None	1.73%	None	R171	2.28%	2.28%	None
ABSA Balanced	The greater of 0.57% and R57	None	0.86%	None	R171	1.14%	5.7%	2.28%
Coris Capital		None	2.00%	None	None	2.28%	2.28%	None
Fairheads Incane	Greater of 0.57% and R114	None	0.63%	0.01% <sup>1</sup>	R57 for sub-trusts less than R10,000. R114 for sub-trusts between R10 and R15,000 and R171 otherwise	1.14%	3.42%	None
Old Mutual Trust	1.14%	6.14%	1.14%	0.01%	Sliding scale between R91.20 and R342	Not available	2.28%	0.33% on equity investments
Standard Bank Executors and Trustees	1.14%	None	None	None	Not available	Not available	2.28%	None

1. Audit fees indicated for these two funds are apportioned on a pro-rata basis. These are indicative costs based on the most recent audit.

In an elementary review of what the five major trust companies<sup>52</sup> charge to manage assets of under R60,000, the initial fees ranged from R1,995 (Sanlam) to R2,918.40 (Syfrets) for the initial year of investment, excluding investment fees and commissions. The annual fees for each year thereafter, based on the same elementary assessment<sup>53</sup>, range from R1,607 and R1,311. This leaves out of reckoning all commissions and withdrawal fees<sup>54</sup>. To outperform a 32-day call account with any commercial bank in the name of the guardian, the performance of the sub-trust would have to consistently be at least 2.9% better over the period of the trust just to cover these fees. As a suitable investment vehicle, the 32-day call account wins hands down when you consider that its returns are unlikely to be subject to any tax, and it carries no risk.

Once paid over to a separate trust company, the character of the benefit changes from pension monies to the property of the beneficiary, and the fund has no further control over it. It also has no control over the trust company. However, with the exception of the Standard Bank Group Retirement Fund, the funds reported that trust companies are required to provide monthly reports to the boards of trustees or to the delegated sub-committees responsible for death claims. The reports include information on the number of payments made to beneficiaries, as well as unpaid benefits and details of 'unworkable' cases, that is, where there is insufficient information to make a payment. These reports are used to identify problem cases, which are then referred to the administrators for follow-up. The extent of this administrative support among the smaller funds is likely to be less rigorous.

Payment of the trust monies takes place within the parameters of the resolution taken by the board of trustees of the fund concerned at the time of transfer. This resolution typically allows for a monthly payment to be made to the child's caregiver to assist with maintenance costs and may make provision for extra once-off payments to cover health and education-related needs. The minor is eligible to claim remaining funds from the trust on reaching the age of 18 years. The trust company has the discretion to amend these provisions as circumstances

52. ABSA Trust, Fairheads, Sanlam Trust, Syfrets Trust and Standard Executors and Trustees.

53. Including only management fees, fees to complete tax returns, income collection, and capital withdrawals.

54. *Personal Finance*, 2 November 2007, *What Trust Companies Charge to Manage Assets of Under R100,000*, accessed at [http://www.persfin.co.za/html/persfin/trustcompanies\\_table.html](http://www.persfin.co.za/html/persfin/trustcompanies_table.html).

require, without further reverting to the retirement fund or considering any other factors than the representations of the caregiver.

With effect from 1 July 2007, the Children's Act has reduced the age of majority so that 18-year-olds can now receive payment directly (whereas, previously, payment was made to a guardian or caregiver or trust on their behalf). In the case of the MWPF, the Principal Officer reported that they are looking retrospectively at all their existing clients who may now qualify for payouts since the legislation has changed.

## 9 Dispute procedures

There is no provision for a formal hearing and the fund assesses any conflict of fact in the course of processing the claim. The Board decides on any disputed issues. An aggrieved claimant may refer any dispute to the Pension Funds Adjudicator or the High Court.

None of the funds interviewed have internal appeals systems in place to challenge trustee decisions, although Metropolitan reported that they are considering the introduction of a period for review of trustee decisions before payment is made. When asked about the lack of opportunity to appeal, fund administrators cited the law that allows claimants to lodge a complaint in writing to the board of trustees and, if dissatisfied with the response, to the Pension Funds Adjudicator. Fund representatives stressed that if trustees took reasonable efforts to trace dependants and duly considered all available information when taking a decision, they could not be held liable for the payment of monies to further claimants, even if these persons had a legitimate claim to the benefit.

Fund administrators reported very few challenges to trustee decisions and stated that it was seldom that a trustee decision was overruled by the Pension Funds Adjudicator. In order to avoid potential problems, some of the funds did not provide dependants or would-be beneficiaries with the full breakdown of how funds had been allocated.

## 10 Points of contact with claimants

All the registered retirement funds process claims centrally at a head office situated in either Johannesburg or Cape Town.

According to fund administrators, process information and forms can be obtained from any service point associated with the employer or the fund administrator (such as any branch of Standard Bank for a Standard Bank Group Fund application, or any one of the mines for a MWPF application, or any branch of Sanlam for a fund administered by Sanlam). Information on the progress of the claim can only be obtained from the head office of the fund, and outstanding documents must likewise be provided to the offices of the fund, although some employers appear to be prepared to be of assistance in making inquiries or delivering documents. The funds can obviously also all be reached by post, telephone and telefax.

Despite the supposed decentralisation of application services, the Principal Officer for MWPF noted that the various mines bus people into the fund's offices in Johannesburg to make their claims. He said about 80 people came to the offices in Johannesburg every day. He said they don't have to, but "they like to come here". Furthermore, the Principal Officer reported that applicants typically return to the MWPF office several times before a claim is finalised, because "they don't bring everything in the correct format". When asked whether applicants are provided with a list of requirements, the principal officer said there was no single list because applicants were typically illiterate and so "there is no point in writing it down". He added that different claims also required different documents and so officials had to handle each application on a case-by-case basis. The MWPF is looking at contracting TEBA to manage the application process in future. The administrator will provide the mines with a checklist of requirements and the mines will outsource to TEBA and pay per case.

## 11 Communication with members and pensioners

The extent of communication with members varied across funds. The MWPF acknowledged that communication to date had been poor. They have established a communication team and recently developed a communication strategy. Plans include the development of a booklet that provides members with contact details of the principle officer and the Pension Funds Adjudicator, a summary of the rules of the fund, and so on. The booklet is due for release in 2008.

Across all funds, members receive an annual member statement and, in theory, there are also regular newsletters (monthly or quarterly) sent electronically or via post, although these were not consistently produced. Funds also made information available to members on websites and, where relevant, via an intranet. Telkom in particular reported extensive use of the intranet in communicating with members. All members of staff are trained on the use of the intranet and, with the exception of staff at a few small Telkom outposts, all members of staff are required to log on to the intranet on a regular basis. In this way, staff members are provided with fund information and are encouraged to update nomination form details.

The MWPF and SASOL ran workshops to provide members with information. In some instances, these workshops involved all new employees. In other instances, the workshops were held with shop stewards or human resources representatives, who were then expected to pass the information on to other members.

Funds also had mechanisms in place for communication with retired members (pensioners). However, communication with widows and orphans receiving pensions was generally poor. SASOL has a pensioners' association that is run by a pensioner who sits on the board of trustees. The association provides information and support to retired members. However, the association has, to date, not been involved in supporting widows and orphans who receive pensions.

The research highlighted the important role of employers in facilitating access to benefits for minors and their caregivers. This is particularly so for a group or umbrella funds, involving large numbers of employers. Regular communication with employers is therefore essential. The MIBFA have recently developed an operations manual to provide employers with guidance on how to better assist members to keep records updated and submit various claims.

The failure to communicate with claimants affects the investigation of the claim as well as the resolution of any problems that may arise. It also jeopardises any interaction between the Fund and the claimant when a life certificate is needed. The following are examples of typical cases reported by various advice offices in which a lack of communication was evident.

## 12 Pension stoppages

Where a monthly pension is paid, each of the funds (with the exception of Standard Bank<sup>55</sup>) requires the caregiver to complete an annual certificate of existence. The certificate is posted to the last-known address of the recipient of the pension payment (including adults receiving pensions on behalf of children). The recipient is required to sign the document in the presence of a commissioner of oaths and return the document to the trust within a given period. Usually, the trust will send two or three reminders if the certificate is not returned. Thereafter, the payment is suspended until such time as the recipient provides proof of his or her existence. Other reasons why monthly payments may be stopped include the death of the caregiver, the death of the child, incorrect banking details and complaints about the quality of childcare.

Fund administrators were asked about the proportion of child pensions payments that were suspended prematurely (that is, before the child reaches the age of 18). Unfortunately, at the time of preparing this report, this information was only available from three of the funds and the figures are not entirely convincing.

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55. The Principal Officer of the Standard Bank Group Retirement Fund said that the certificate of existence was stopped because it is difficult to administer and costly. She said that, as of January 2008, they have decided to use Home Affairs information. They will get an annual update from Home Affairs on the death status of all pension beneficiaries.

- ▶ AMPLAT reported that, out of 842 children registered for maintenance payments since 1 October 2006, only two payments were currently suspended (because of problems with banking details). The Principal Officer explained that the number of suspended benefits was extremely low (for claims since October 2006) because the Trust (Bophelo Trust Services) conducted home visits to trace any beneficiaries whose payments had been prematurely suspended for any reason.
- ▶ MIBFA reported that approximately 2% of maintenance contributions had been suspended prematurely – usually because the certificate of existence was not returned in time. However, in such cases, caregivers usually contacted the fund within a couple of months of suspension to ask about the monies. Once the fund confirms that the recipients are still alive, payment is resumed.
- ▶ However, these low figures are brought into question by statistics provided by the Telkom Retirement Fund, on the surface one of the most organised funds. According to the administrator, 261 children's pensions (12.5% of the total number of children's pensions) had been suspended prematurely over the past 12 months. Reasons cited include child death (24), outstanding certificates of existence (135), bank-related problems (36) and other outstanding information (66). The Telkom figures may reflect the logistical difficulties associated with use of postally delivered certificates of existence, and suggest that the premature termination of child pension payments warrants further investigation, at the very least to determine the scale of the problem.

Furthermore, while the certificate of existence might go some way towards proving that the recipient of the pension payment is alive, it does not monitor whether the minor dependants are still in the care of that adult. Modifications to the certificate of existence might help in this regard. As an example, in the case of children of school-going age, the certificate could include a section for the school principal to sign and stamp, verifying that the children are indeed still in the care of the adult who is receiving money on their behalf. Obviously, any alterations to the certificate would have to be carefully thought through so as not to create any unintended additional barriers to children to receiving their social insurance benefits.

Regarding quality of care, it is impossible for funds to monitor this on an ongoing basis. MIBFA apparently requests regular social worker reports on care arrangements in cases where the caregiver is over the age of 65. However, for the most part, funds rely on neighbours or relatives and other community members to report (on an *ad hoc* basis) if they have concerns about the wellbeing of a child beneficiary who is poorly clothed or fed or not attending school. In such instances, the monthly pension is suspended until an investigation is complete.

### 13 Unclaimed or unpaid benefits

All employers are required to submit a Contribution Return Form to the fund on a monthly basis (by the seventh day of the following month) in compliance with labour regulations. The Contribution Return Form provides details on the status of each member. In the event that an employer stops making monthly contributions to the fund on behalf of a member, the employer is required to provide the Fund with a notification of reason (for example, death, withdrawal, retirement or resignation). Funds accordingly have records of all members who have left the fund and who have benefits due to them.

In order to get some sense of the scale of unclaimed monies, requests were made to each of the funds for information on unclaimed benefits<sup>56</sup>. At the time of preparing this report, the following information was available (unfortunately, information from the various funds is not available in consistent format).

56. As mentioned earlier, it is a lot more difficult to determine the number of unclaimed benefits for dependants of members who die while in retirement because there is no monthly contribution to the fund, the termination of which could alert the fund administrators to the death of a member.

Fund	Estimated % of death claims fully paid within 12 months of death	Current number of unclaimed benefits
Mineworkers Provident Fund	Not available	'Very few' unclaimed but 7,000 or 8,000 pending (i.e., partially claimed or insufficient information).
SASOL Pension Fund	Not available	No unclaimed or pending at the moment.
Telkom Retirement Fund	20%	2
Standard Bank Group Retirement Fund	36%	45 cases currently pending.
Metropolitan Employee Benefit Umbrella Funds	Not available	Apparently not a problem.
Metal and Engineering Industries Provident and Pension Funds	~90%	~1%
AMPLAT Group Provident Fund	~40%	382 outstanding death claims since October 2006.

Once again, the accuracy of the figures is cause for concern. The high proportion of death benefits paid within 12 months by the Metal and Engineering Industries Fund and AMPLATS, relative to Telkom, requires further investigation.

These figures contrast sharply with the concern recently expressed by the Registrar of Pension Funds over the management of extensive unclaimed benefits by registered retirement funds. When dealing with unclaimed benefits, the rules of the various funds refer to 37C of the PFA, which states that, in the disposition of pension benefits upon the death of a member, if no dependant is traced within 12 months, the money should be disbursed to the nominees. If no nominees can be traced, the monies revert to the estate or, if no inventory in respect of a member has been received, into the Guardian's Fund. Where benefits remain unclaimed for a determined period of time, a common practice is that the rules of a fund provide that they revert to the fund. Unclaimed benefits are held indefinitely (in suspension, often in a separate trust) and can, in theory, be claimed at any stage by legitimate dependants. These monies accrue interest but no further contributions. They are also subject to tax deductions (after a given period) and administrative costs. None of the funds reported transferring unclaimed monies to the Guardian's Fund. The effect of this is to hold the monies for the use of members in the future. The FSB has directed that no such rule may be implemented with effect from 31 December 2008<sup>57</sup>.

Another issue for consideration is the death of members in retirement. The death of a contributing member will always be evident to the fund administrator, because the member will stop contributing monthly. However, the death of a member in retirement is more difficult to monitor.

According to one interviewee, some deaths go unreported by family members specifically so that the pension will not be stopped. If a pensioner's death is registered with the Department of Home Affairs, the pension will automatically be stopped. It will then be up to the dependants to actively claim benefits. These dependants are unlikely to get the same kind of support as that provided to dependants of members who die in service. This is an issue that requires further exploration.

## 14 Gaps in coverage

Coverage is dependent on the rules of the fund. Members, and consequently their children, may lose their benefits when they are out of employment. Extended death benefits are limited and, where the incidence of AIDS is so high, reliance cannot be placed on a social insurance system that does not cater for that.

When members move between jobs, their dependants are often not aware of pension monies held by previous employers, and are unable to access it. The burden of proving claims becomes more difficult after the lapse of any significant period of time. Claims against multiple funds may also result.

<sup>57</sup>. Circular PF 126 available on <http://www.fsb.co.za>.

The benefit may be lost if a member dies while not in service. Depending on the terms of the rules of the fund, the benefit may also be lost or reduced if the member is dismissed or resigns. There is little opportunity or incentive to plan for retirement and it may be that lower-paid workers and their families are inclined to place greater reliance on the social grant system. There are no figures to suggest the extent of these problems and it is an area that requires further research.

## Appendix 9: The Guardian's Fund

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### 1 The scheme

Although the Guardian's Fund is not a social insurance scheme, it holds monies for children until they are majors. It receives monies in terms of any law<sup>1</sup> or order of court, monies that are accepted by the Master in trust for any known or unknown person<sup>2</sup> and monies in the hands of any person carrying on business and that have remained unclaimed by the rightful owners for a period of five years<sup>3</sup>. The Guardian's Fund is empowered to receive social insurance benefits for a child where there is no guardian. The Fund has been so poorly administered that no funds other than the GEPP pay monies over to it. It accordingly operates as the umbrella trust of the GEPP.

### 2 Governance and administration

The Guardian's Fund is set up by the Administration of Estates Act<sup>4</sup> and is under the control of the Master of the High Court. It is subject to the same audit, investment and accounting controls as any other state institution.

Children's access to the benefits held by the Fund are safeguarded by the same measures as apply to the other statutory funds, namely that the Fund is audited by the Auditor-General, the decisions of the Master constitute administrative action and are reviewable by the High Court, and the Fund and the Master are organs of state and are subject to the oversight of the Public Protector in terms of the Public Protector Act. These safeguards are not sufficient for reasons set out above and, other than the audit control, they are all complaints-driven and the courts are prohibitively expensive.

The Fund has been notoriously badly managed. The Auditor-General qualified his report on the Fund in the 2004/5 financial year owing to extensive administrative failures, including fraud amounting to R9 million, a discrepancy between the Fund's records and the Public Investment Commission's records of R258 million, the fact that outdated manual systems were still being used and numerous interest calculations had not been performed. Subsequent annual reports have not yet been published.

### 3 Points of contact with beneficiaries

The Guardian's Fund has offices at all magistrate's courts.

### 4 Payment processes

Monies received are held in an account on the books of the Fund in the name of the beneficiary, and are invested with the Public Investment Commission. No cost is charged. The Master does not process claims or investigate claims. The Master operates for all purposes as a trust and executes the mandate of the fund that has placed monies with the Master. The day-to-day functions of the Fund are performed by magistrates.

The Master has a duty to pay out to the natural guardians, tutors or curators of minors monies that may be "immediately required for the maintenance, education or other benefit of the minor<sup>5</sup>", and to pay interest at a prescribed rate compounded monthly<sup>6</sup> on such money for a period of five years from the date on which the money became legally claimable<sup>7</sup>. Such payments are made monthly.

Although a wide number of institutions and business are obliged to pay over unclaimed monies to the Fund, this does not occur and no steps to enforce this are taken by any person. The result is that this statutory protection

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1. Section 86(1)(b).

2. Section 86(1)(c).

3. Section 93.

4. Section 86 of the AEA.

5. Section 90.

6. Section 88(1).

7. Section 88(2).

is ineffective. Ninety-seven percent of the monies received were payments due to minors from the GEPPF. The remainder is payments from deceased estates due to minors.

Few payments from any trust or pension fund were paid over. This is neither a requirement of the AEA<sup>8</sup>, nor of any pension fund legislation, and was typically left in the discretion of the trustees of the pension fund.

There are no reasons in the AEA why payments cannot be made to foreigners in other countries, illegal immigrants or asylum seekers and, by extension, their children.

## 5 Communication between the Fund and claimants

The Fund communicates with beneficiaries by post.

## 6 Unclaimed or unpaid benefits

The Master publishes a list of certain of the unclaimed monies in the *Government Gazette* each year in September<sup>9</sup>. These monies are those amounts over R1,000 that have not been claimed during a period of one to three years after being deposited in the Fund, but do not include monies paid over by persons in business that have remained unclaimed for more than five years. The Master does not trace any such beneficiary. If these monies remain unclaimed after 30 years, they are declared forfeit to the state<sup>10</sup>.

Few people read the *Government Gazette*, and child beneficiaries may be prey to tracing agents who utilise the information in the *Gazette* to trace beneficiaries at an excessive cost to the beneficiary, or by arranging for the funds to be transferred to their own personal banking accounts.

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8. Section 86(1)(b), which requires that monies may only be received by the Guardian's Fund if payable under any statute or the AEA.

9. Section 91.

10. Section 92.

