

Legal Focus

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Deduction from a member's retirement fund benefit to compensate the employer for damages suffered because of the member's theft, fraud, dishonesty or misconduct

1. Introduction

Section 37A of the Pension Funds Act ("**Act**") provides that no benefit from a fund may be reduced, transferred, ceded, pledged or hypothecated, attached or subjected to any form of execution under a judgment or order of a court of law, except in limited instances mentioned in the Act. One such instance is in respect of compensation owed by a member to an employer as a result of the member's theft, fraud, dishonesty or misconduct that contains an element of dishonesty.

2. In what circumstances may a deduction be made?

In terms of section 37D(1)b(ii) of the Act the board of trustees of a fund ("**Board**") has a discretion to make a deduction from the member's benefit in favour of the employer if –

- (a) the member has admitted in writing to the employer that he is liable to the employer for compensation as a result of damage caused to the employer as

a result of the member's theft, fraud, dishonesty or misconduct containing an element of dishonesty; or

- (b) a court ordered the member to pay compensation to the employer as a result of damage caused to the employer as a result of the member's theft, fraud, dishonesty or misconduct containing an element of dishonesty.

3. What must the fund consider before exercising its discretion in relation to a deduction?

Before making a decision, the Board must ensure that the following requirements have been met:

- (a) The damages were suffered by the member's employer (the participating employer), not a third party.
- (b) The damages were caused by the member's theft, fraud, dishonesty or misconduct. The High Court has ruled that the term "misconduct" must be interpreted to include an element of dishonesty.¹
- (c) If the deduction is to be made on the basis of an **admission of liability**, it must –
 - i. Be in writing;
 - ii. Be made to the employer;
 - iii. Specify the Rand value of the compensation owed to the employer;
 - iv. Stipulate that the damage was caused due to the member's theft, fraud, dishonesty or misconduct, with a brief description of such theft, fraud, dishonesty or misconduct; and
 - v. Be signed by the member.

¹ *Moodley v Local Transitional Council of Scottburgh Umzinto North and Another* [2000] 9 BPLR 945 (PFA).

- (d) If the deduction is to be made on the basis of a **court judgment**, it must –
 - i. Be granted against the member;
 - ii. Order the member to compensate the employer for the damage caused;
 - iii. Be clear that the damage was caused by the member's theft, fraud, dishonesty or misconduct; and
 - iv. Be granted by a civil court (not a criminal court)².

4. When may a benefit be withheld at the request of the employer?

Boards are often faced with requests from employers to delay payment of a member's benefit, pending the outcome of an investigation into the actions of the member or pending legal action that will be or has been initiated against the member. The Board may withhold payment of a member's benefit pending the determination of the member's liability, under certain circumstances.³

When considering a request from the employer to withhold payment of the member's benefit pending the outcome of legal proceedings against the member, the Board should ensure that –

- (a) The pending legal proceedings are of a civil nature (not criminal)⁴;
- (b) It is satisfied that there is no undue delay by the employer in pursuing the claim (since the power of the Board to withhold the benefit must be exercised reasonably and not indefinitely⁵);
- (c) It has put the employer's case to the member and has given the member an opportunity to respond to the allegations⁶;

² See paragraph 5 below.

³ *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA).

⁴ See paragraph 5 below.

⁵ *Twigg v Orion Money Purchase Pension Fund and Another* (1) [2001] 12 BPLR 2870 (PFA).

⁶ *SA Metal Group (Pty) Ltd v Deon Jeftha and 2 Others* [2020] JOL 46715 (WCC), *FundsatWork Umbrella Provident Fund v Ngobeni and Another* PFA 64/2020.

- (d) It is satisfied that the employer has a reasonable chance of succeeding with its claim against the member;
- (e) It is satisfied that the employer will suffer irreparable harm or loss⁷ if the benefit is not withheld; and
- (f) The member's benefit is protected from suffering a decline in value during the period the benefit is withheld⁸.

5. Can a deduction be made or payment of a benefit be withheld in relation to criminal proceedings?

Until recently the Pension Funds Adjudicator (“**PFA**”) interpreted the reference to “judgment in any court including a magistrate’s court” to include both a civil court judgment as well as a compensation order granted by a criminal court in terms of section 300 of the Criminal Procedure Act (“**CPA**”). This meant that whilst a mere conviction was insufficient, a deduction could be made from a member’s benefit if the criminal court ordered the member to compensate the employer in terms of section 300 of the CPA. It also meant that a member’s benefit could be withheld pending the outcome of a criminal case.

In two recent cases⁹, the Financial Services Tribunal (“**Tribunal**”) ruled that –

- a deduction can only be made from a member’s benefit in the case of a civil judgment (not in the case of a compensation order in terms of section 300 of the CPA); and
- a member’s benefit may only be withheld in the case of a civil action (not in the case of a pending criminal case against the member).

⁷ *FundsatWork Umbrella Provident Fund v Ngobeni and Another* PFA 64/2020.

⁸ *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).

⁹ *FundsatWork Umbrella Pension Fund v Matjiane and Another* PFA 39/2020, *FundsatWork Umbrella Provident Fund v Ngobeni and Another* PFA 64/2020.

The PFA's office has confirmed¹⁰ that it will follow the same approach as the Tribunal.

6. Conclusion

All requests for withholding a member's retirement fund benefit or making a deduction from such a benefit should be referred to the Board for careful consideration and a decision.

Retirement funds or other clients requiring more information should not hesitate to contact their consultant.

¹⁰ Inter alia during a webinar in April 2021.