

Deduction from a member's retirement fund benefit to compensate the employer for damages

1. Introduction

As a general rule a fund may only make a deduction from a member's benefit if such a deduction is allowed in terms of the Pension Funds Act, the Income Tax Act, the Tax Administration Act and the Maintenance Act.

This general rule is, however, subject to the exceptions set out in section 37D of the Pension Funds Act ("**the Act**"). One of these exceptions is found in section 37D(1)(b) of the Act.

Section 37D(1)(b) only allows a deduction in respect of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member. No other kind of monies owed to the employer may be deducted from the member's retirement fund benefit.

Examples of compensation not allowed include:

- a) leave pay owed,
- b) study loans,
- c) performance bonuses,
- d) salaries paid, and
- e) damage to property

2. In what circumstances may a deduction be made?

In terms of section 37D(1)(b) 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 liability in writing to the employer; or
- b. a judgement has been obtained.

3. Deduction on basis of admission of liability

If the deduction is made on the basis of an **admission of liability**, the admission must be –

- a) in writing;
- b) made to the employer;
- c) specify the Rand value of the compensation owed to the employer;



- d) specifically state 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
- e) signed by the member.

4. Deduction on basis of a court judgement

If the deduction is to be made on the basis of a **court judgement**, it must –

- a) be granted against the member;
- b) order the member to compensate the employer for the damage caused;
- c) be clear that the damage was caused by the member's theft, fraud, dishonesty or misconduct; and
- d) be granted by a civil court or a section 300 order made in terms of the Criminal Procedure Act.

5. When may a deduction be made?

The wording of section 37D makes it clear the Fund ("Board of Trustees of the Fund") "**may**" make a deduction for damages due to an employer – it does not say the Fund "must". The Fund therefore has a discretion on whether or not to allow the deduction.

The damages must meet specific requirements set out in section 37D. The Board may only make the deduction if all of the following requirements are met -

- a. There must be an amount due by a member to his employer on the date of his retirement or the date on which he ceases to be a member of the fund;
- b. The amount due to the employer must be in respect of compensation for damage caused by the member;
- c. The damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member. The term "misconduct" must be interpreted to include an element of dishonesty.¹ ; and
- d. The member must either admit liability in writing to the employer or judgement must be obtained in any court.

6. 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. Withholding retirement benefits is a remedy that is designed to protect the rights of employers. The Board may therefore withhold payment of a member's benefit pending the determination of the member's liability, under certain circumstances.²

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 must ensure that –

- (a) it balances the competing interests of the employer and the member,
- (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 indefinitely³);

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

² *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA).

³ *Twigg v Orion Money Purchase Pension Fund and Another (1)* [2001] 12 BPLR 2870 (PFA).



- (c) it has put the employer's case to the member and has given the member an opportunity to respond to the allegations⁴;
- (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 loss⁵ 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 withheld⁶.

Remember: A fund cannot simply rely on the employer's allegations or even the outcome of disciplinary proceedings without more. The Fund must carefully scrutinize the employer's claim and the employee's explanation and weigh the parties' competing interests.

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

Section 37D(1)(b) specifically refers to a judgement in any court including a magistrate's court as well as a compensation order granted by a criminal court in terms of section 300 of the Criminal Procedure Act ("CPA"). A mere criminal conviction is insufficient. However, a deduction may only 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. A member's benefit can also be withheld pending the outcome of a criminal case.

8. Restrictions on emergency savings withdrawal claims

Section 37D(1)(bA) of the Act provides that the Board may allow a member to take a savings withdrawal benefit where the employer has not obtained a judgement or where a written admission of liability has not been executed yet if the withdrawal will not result in there being insufficient remaining funds to comply with the judgement.

In terms of section 37D(1)(bB), the Board may suspend a savings withdrawal benefit where the employer has not obtained a judgement yet and the withdrawal will result in insufficient funds being available to satisfy the pending order if it is granted in favour of the employer. The suspension is for a period of 12 months pending the judgement.

9. Conclusion

All requests for withholding a member's retirement fund benefit or making a deduction from such a benefit is only allowed in very specific instances and should be referred to the Board for a decision.

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

⁴ *SA Metal Group (Pty) Ltd v Deon Jefftha and 2 Others* [2020] JOL 46715 (WCC), *FundsatWork Umbrella Provident Fund v Ngobeni and Another* PFA 64/2020.

⁵ *FundsatWork Umbrella Provident Fund v Ngobeni and Another* PFA 64/2020.

⁶ *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).