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*“Rights and obligations in an evolving Retirement Funds environment”*

**PENSION LAWYERS**



**A S S O C I A T I O N**

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# ATTACHMENT OF BENEFITS AND SECTION 37A

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**PENSION LAWYERS**  
  
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## INTRODUCTION

- Sec 37A touches on the protection of retirement benefits.
- Basic principle: to ensure that retirement benefits are utilised in order to provide retirement benefits for the member until his / her death and in the event of his / her death prior to retirement that those benefits are utilised for the maintenance of his / her dependants.

## SUMMARY OF S37A: OVERALL SCHEME

- According to Sec 37A subject to the following exceptions, creditors will not be allowed to attach retirement benefits in the hands of the fund:
  - Deductions permitted by the Act such as housing, damages caused by the employees. (Section 37B)
  - Payment of income tax (IT88).
  - Maintenance payments.
  - A maximum amount of R3000 can be taken into account in a determination in terms of a judgment debtor's financial position of Section 65 of the Magistrates' Court Act.

## QUESTION AND CASE STUDY

**Can a pension fund pay to a third party portion of a member's benefit on the instruction of that member, when it became due and payable (but not yet paid)?**

[Refer to Case Study for hypothetical facts]

- The are two school of thought

**School of thought 1**: Once the right to a benefit has accrued and become payable (but not yet paid) to the member, the prohibition in dealing with the pension benefit, in terms of Section 37A continues.

**School of thought 2**: Payment of a debt owing to a third party on the express instruction of a member does not constitute a reduction of the member's benefit as contemplated in Section 37A.

## SECTION 37A COMPONENTS

Section 37A refers to:

- a benefit;
- a right to a benefit; and
- a right in respect of a contribution

- There is a distinction between “a benefit” and “a right to a benefit”
- Section 37A refers to the right to claim that benefit upon the happening of certain events or the fulfillment of certain conditions (ie reaching retirement age; termination of employment; or death)
- “right to a benefit” is converted into “a benefit” upon the accrual of that right.
- Section 37A(1) encumbers both the “right to a benefit” and “the benefit” itself.

## RESTRICTIONS

- Section 37A expressly states that the right to a benefit or the benefit itself may not be:
  - Reduced;
  - Transferred;
  - Ceded;
  - Pledged;
  - Hypothecated;
  - attached; or
  - subject to any form of execution (under a judgment debtor's financial position for purposes of Section 65 of the Magistrates Court Act).
  
- Ceding, pledging or hypothecating all involve the “giving over” of a right to benefit – as discharge for a debt.
  
- Section 37A(1) specifically prohibits pension benefits being used as security for debts owed by the member to third parties.

## RESTRICTIONS

- Attachment, execution and Section 65 proceedings are all concerned with a member's estate.
- Section 37A(1) permits a fund to withhold or suspend payment should any attempt be made – to attach or execute a judgment on the member's pension benefits.
- The prohibition on attachment, execution etc applies as long as the benefits are still in the hands of the fund.
- Should a member commit any of the prohibited acts in Section 37A(1), these will not be enforceable against the fund.
- Section 37A(2)(a): Sec 37A(1) cannot be circumvented by amending the rules of a pension fund to permit payment of a reduced benefit to the member.

## School of Thought 1

- Section 37A ensures that by all means retirement benefits reach the member, or his / her dependants or beneficiaries.
- Sec 37A protects benefits by regulating the use of the “the right to the benefit” and “the benefit” or “the benefit payable” itself.
- Once the benefit reaches the member, there is no longer a justifiable basis on which to regulate how the member chooses to spend the money.
- The test when pension benefits lose their legislative protection was outlined in the English case of *Jones & Co N Laventy* [1909] 2KB 1029 by Darby J where it was stated that:

*“In my opinion a pension, when it has been paid to the person entitled to receive it, ceases any longer to be pension; it has lost its character of pension, just like dividends which, after payment, lose their character of dividends. It becomes part of the pensioner’s ordinary money”.*

- Once the right to a benefit has been accrued and the benefit becomes payable to the member, the prohibition in dealing with the pension benefit (in terms of Section 37A) continues.

## School of Thought 1

- The legislative has sought to exclude from the estate of a member all pension benefits, whether they have accrued or not, until such time as they have actually been paid into the estate and affixed with the member's other assets.
- Nothing done to a pension benefit prior to its payment, that falls within the prohibitions contained in Section 37A, is permissible.
- Section 37A prohibits any dealing with the right or benefit in a way that would result in the entire benefit not reaching the member.
- **A member may appoint an agent to accept payment on his / her behalf and when the fund makes such payment, it will have discharged the debt due to the member.**

## School of Thought 2

- Payment by a pension fund to a third party of a portion of the pension benefit owing to a member in satisfaction of the member's debt to the third party does not constitute an infringement of Section 37A.
- Provided that such payment is made on the instruction of the member; and
- so long as the payment is pursuant to any rights granted by the member to the third party.
- A pension fund is prohibited from recognising a claim by a third party for payment of a benefit or part thereof which is payable to a member.
- It is different if on the instruction of the member to whom the benefit is payable, the fund discharges that member's debts to a third party on his behalf.

### Rationale for distinction:

- If a member instructs the fund to pay his creditors on his behalf, his benefit is not thereby reduced, transferred, ceded, pledged or hypothecated.
- The right to receive the full benefit still vests in the member
- At his sole selection, part of the proceeds of the benefit are applied in reduction of his benefit.
- The member still receives the full benefit of the amount owing to him.

- To avoid a contravention of Section 37A:
  - The instruction to pay the member's creditor must emanate from the member himself and not from the creditor.
  - The instruction takes the form of an ambiguous mandate to the fund, revocable at the election of the member.
  - There is clear and indisputable written proof of the member's instruction to the fund.