



BETWEEN THE TIDES

THE 2012 PENSION LAWYERS ASSOCIATION CONFERENCE

Attachment of pension fund benefits to satisfy maintenance orders (payable to a child)

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Introduction ¹

- This paper discusses:
 - Maintenance orders (MOs) that are payable by pension funds (PFs) to a child
 - Background information
 - Relevant legal provisions
 - Some challenges facing the pension fund industry
 - Recommendations and conclusion

Introduction ²

- This paper does not discuss the following issues:
 - Division of pension benefit between spouses at divorce
 - The distribution of pension benefit (death benefit) in terms of (to) s37C of the Pension Funds Act (PFA)
 - The payment of tax when the benefits are paid

Background and relevant legislation ¹

- PFs are governed by the common law, PFs rules & various statutes
- With regard to PFs and MOs, the relevant statutes are:
 - The PFA
 - Maintenance Act (MA) and
 - The Constitution

Background and relevant legislation ²

- Purpose of establishing pension funds
 - Provide retirement income for members
 - Provide benefits for the members' dependants and nominees should the member die while in service
- The provisions addressing the protection of PF benefits are contained in s 37A of the PFA

Background and relevant legislation ³

- Section 37A states that pension benefits may only be reduced, transferred, ceded, pledged, hypothecated or attached to the extent permitted by:
 - s37D of the PFA, the Income Tax Act 58 of 1962, MA, s 65 of the Magistrates Courts Act 32 of 1944, and the Divorce Act 70 of 1979
- Section 37D of the PFA provides for permissible deductions

Background and relevant legislation ⁴

- Relevant to this paper is the exception with regard to maintenance obligations
- PF has a right to withhold or deduct amounts of pension benefits to pay maintenance to the dependants (s 26 (4) and Chapter 5 of the MA)
- Chapter 5 of the MA makes it clear that courts have powers to attach a pension benefit for arrear maintenance of a child
- The law was not clear with regard to attaching benefits for future maintenance of a child

Background and relevant legislation ⁵

- Recent court decisions established that South African courts have a legal obligation to enforce orders (including future maintenance of a child) e.g. *Magewu v Zozo*, *Mngadi v Beacon Sweets* etc
- The applicant is required to show history of failure to take maintenance obligations seriously on the part of the defaulting member

Some issues regarding enforcement of maintenance orders by pension funds

1. Powers of PFs in enforcing MOs

- The PFA and the MA confer powers and mechanism to PFs to enforce MOs against defaulting members.
- This provides relief to an applicant who has an order
- This is in line with s28 of the Constitution that protects the best interest of a child –see *Bannatyne v Bannatyne*
- There is a difference between ongoing payments to pensioners and once off payments to other withdrawing members. Hunter *et al* (p672-3) expressly records that no deductions can be made until a benefit accrues:

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“while an amount payable in terms of a ‘maintenance order’ issued in terms of the Maintenance Act may be deducted by a fund from a member’s benefit, or his or her minimum individual reserve, only the member’s benefit and not his or her minimum individual reserve may be attached and executed against in satisfaction of a maintenance order if a court so orders.”

2. Withholding of pension benefits pending the finalization of a maintenance claim

- The question is whether a PF can withhold a pension benefit (or part of it) pending the finalization of a maintenance claim
- *Highveld Steel v Oosthuizen*– the SCA confirmed the powers of a PF to withhold the payment of benefits due to a member at termination of employment pending finalization of a claim for damages allegedly suffered by the member's employer (s 37D)

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- Hunter *et al* submits that the *Highveld Steel* case can be used to argue that s37D implicitly permits a fund to withhold payment of a benefit for the purpose of providing the protection for the persons to whom the maintenance is, or will be owed.
- I agree with this submission

3. How do maintenance orders come into being and when do they stop?

- The applicant can be awarded a MO after suing the member for maintenance in a competent court
- MO may be based on agreed terms between the parties
- MO by default

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- A duty of support is based on the principle of law that a member has to maintain his/her dependants (child)
- This duty stops when minors reach major age or becomes self- supporting
- If the MO was granted in circumstances where it was not supposed to have been given, the order will terminate when the specific judgment/MO is rescinded by a competent court

4. Hierarchy of allowable deductions in terms of s37D of the PFA

- There are twelve possible deductions
- It is possible that a member may face various claims to s37D
- Therefore it is important that PF trustees and other relevant parties understand the hierarchy of allowable deductions
- For example
 - MOs should be deducted before divorce deductions (s 37D(3)(b));
 - maintenance and divorce orders can only be deducted after the amounts of housing loans have been deducted.

5. Enforcement of MOs by PFs and mode of payment

- Pension benefit due to a member can only be attached when there is a MO granted by a competent court
- PFs are not allowed to pay money to any person other than the member – except where it is covered by s37D.
- PFs normally pay lump sum (cash) – no significant increase to the burden of administering pension funds
- They can make periodical payments in a case where the fund has pensioners receiving ongoing pensions

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- Where pension benefits have already been paid to a private bank account of the member, my view is that the latter benefit is no longer in the hands of pension funds.
- The attachment of the benefit to s37D will no longer be possible
- The applicant will have to pursue an action against the defaulting member and the bank
- It is beyond the scope of this paper to explore this possibility in detail

6. Duties and responsibilities of PF trustees, members, and dependants of members with regard to the enforcement of MOs

- It is important for all parties to understand their duties and/or responsibilities
- PF trustees have a duty to protect the interests of fund members and beneficiaries (s7(C)(2) of the PFA).

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- PF trustees should also establish if there are any other maintenance orders against the defaulting member.
- Applicants should ensure that their personal details and banking particulars are correct for easy facilitation of the payment process

7. Notice of the intended attachment and execution must be given to both the fund and the member

- The MO should be brought to the attention of both the defaulting member and his/her PF (*Louw v Louw* [2006] 3 BPLR 203 (NC))

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- In *Louw v Louw*
 - The Court sets aside an order where the respondent's pension benefit was attached without any prior notice to the member nor the pension fund.
 - It was noted that sections 26 and 30 of the MA are silent on the subject of notice, but that did not mean that the legislature could have intended to allow the attachment of a debt owing to a person without notice to that person.
 - That will infringe upon the *audi alteram partem* rule

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- A PF has a sufficient interest in the matter to warrant being given a notice.
- It is important that the PFs receive the notice timeously so that they can comply with the order before the member exit the fund.
 - In practice PFs often get the order too late to give effect to it because the member may have already left the fund.

8. The burden of administering pension funds

- Do MOs increase the burden of administering pension funds?
- Attachment of pension benefit is a very effective tool given that there are many maintenance defaulters in South Africa
- Pension funds have a legal duty to comply with all applicable laws

9. Failure by PFs to comply with maintenance orders

- What happens if pension funds fail to enforce or to comply with the maintenance order?
- It will be improper for PFs to refuse to deduct if the request (order) complies with s37D.
- Attachment of PF benefit in the circumstances where deductions do not fall under s37D is illegal.
- PF trustees will be acting *ultra vires*.

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- If a fund does not comply despite the order being enforceable then it would give rise to further litigation which would cost the fund.
- Could the fund have a claim against the board members (pension fund trustees)?
- If the reason for non-compliance is failure on the part of the administrator, the PF can seek the extra costs from the administrator.

10. Some challenges facing courts, PF trustees

- PFs are not given proper orders, often they just receive a fax requesting payments
- Some attorneys who practice family law are not always aware of the requirements of the PFA and so orders are often deficient
- Often MOs do not satisfy the requirement of an order
- Details of the defaulting member are not always clear to identify him/her

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- Orders are often received after a benefit is paid out and prior notice of the impending order is not given to the fund
- To the extent that when a fund is cited, that fund is not served on and the name of the funds differs
- There are instances where some attorneys do not do their homework e.g. serving an order to a wrong fund where a member had transferred in terms of s14 of the PFA while the maintenance order was being obtained.

Some relevant cases

Mbhele v Mbhele (AR 118/10 ZAKZPHC 29 [2010])

- Provisions for retaining money in a fund to make periodical payments for the maintenance of a major, who is in need of maintenance. If a major child is incapable of managing his or her affairs, a *curator bonis* may be appointed to administer such affairs and provide the necessary maintenance from fund made available to the curator
- The Court held that the appointment of the curator was dictated by particular facts of the case and could not be regarded as a binding precedent for the appointment of a curator in all circumstances.

Mitchell v Harte (10309) ZAWCHC [2010] 397

- The case dealt with the issue of withholding of the pension benefit for the purpose of ensuring that a member complies with the payment of money towards maintenance obligations. The High Court held that the default order (anti-dissipating order) was granted in circumstances when it should not have been granted.
- It held that the anti-dissipating order (interdict) allowed by s28 of the MA, read with s37(A)(1) of the PFA should only be granted if the procedure prescribed by the Maintenance Act.

Elesang v PPC Lime Interest and others (1076/2006)[2006] ZANDHC 73

- The Court held that payment of the benefit into a trust account pending the finalization of the divorce action could not amount to the contravention of the provisions of s 37A(1) of the PFA.

Recommendations and conclusions

- The attachment of pension benefits assists children and spouses who are usually faced with a daunting task of ensuring that the defaulting parties comply with their maintenance obligations
- This is in line with the spirit of the Constitution (devising mechanism of enforcing court orders; and the protection of the best interest of a child (s28, *Mngadi*, and *Magewu*))

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- There is no doubt that many South Africans live in poverty, this includes many children that have to survive without any support from their parents
- This affects their chances of enjoying their childhood in a healthy and conducive environment, and the opportunity to receive proper education to enhance their potential for gainful employment in the future

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- A maintenance order that cannot be enforced is just an ordinary piece of paper in the hands of the possessor
- Therefore it is incumbent upon PF trustees, administrators, members, etc to ensure that maintenance orders are enforced/complied with

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- This ensures that PFs are not used by defaulting members to hide their assets from the dependants in order to frustrate a maintenance order
- The question I pose is whether pension funds should be the first place where claimants can ensure the payment of maintenance, especially if there are other available assets for attachment

Thank you