

PERMISSIBLE DEDUCTIONS FROM PENSION BENEFITS

Prepared by

Lisa Shrosbree

Assistant Adjudicator

Pension Funds Adjudicator

Pension Lawyers Conference, February 2004

Legislature has afforded pension benefits various protective safeguards in the Pension Funds Act:

1. Section 37A(1) - pension benefits cannot be reduced, transferred, ceded, pledged, hypothecated, attached or taken into account to determine debtor's financial position
2. Section 37B – pension assets deemed not to form part of the insolvent estate
3. Section 37C - pension benefits deemed not to form part of the assets of the deceased estate – trustees to exercise equitable discretion unbound by will or nomination form
4. Section 19 - restricts the manner in which a fund's assets may be invested – avoid abuse or misuse of pension funds by persons (including employers) dealing therewith.

Permissible alienation of pension benefits

Pension Funds Act in general

- S 37A(1) refers to section 65 of the Magistrate's Court Act – up to R3000 per annum can be taken into account to determine debtor's financial position – but not permitting actual deduction
- S 37A(3)(a) and (b) – debts arising prior to Financial Institutions Amendment Act 1976, 1977 – of little application today
- S 37A(3)(c) – permissible deductions in terms of s 37D
- 37A(3)(d) – permits deduction in respect of arrear contributions; includes amount owing in respect of contributory service purchased by the member - see *Heath v Cape Municipal Pension Fund* [2003] 2 BPLR 4346 (PFA)

S 37D(1)(b)(ii) of the Pension Funds Act

- section 37D in general permits deductions for income tax, housing loans, medical aid premiums and insurance premiums, deductions permitted by the Registrar and compensation owing to the employer; most problematic is the deduction for compensation owing to the employer
- Section 37D(1)(b)(ii) reads:

A registered fund may –

- (a) ...
 - (b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –
 - (i) ...
 - (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which -
 - (aa) the member has in writing admitted liability to the employer; or
 - (bb) judgment has been obtained against the member in any court, including a magistrate's court,
- from any benefit payable in respect of the member or a beneficiary in the rules of the fund, and pay such amount to the employer terms of concerned.

- S 37D(1)(b)(ii) has the following requirements:
 1. There must be an amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund. *This means that no deduction is permitted in the hands of the fund – only in the hands of the member on his or her withdrawal from the fund.*
 2. The amount must be in respect of compensation payable. *An award of compensation in respect of damage caused is always a civil judgment; conviction in criminal court insufficient - see Buthelezi v Municipal Gratuity Fund & Another (1)[2001] 5 BPLR 1996(PFA); a Labour Court judgment upholding a dismissal for theft is also insufficient - see Erasmus v Rentmeester Assurance Ltd and Others (2)[2000] 8BPLR 878 (PFA).*

3. The employer must have suffered loss.
The member's alleged misconduct must be shown to have actually caused the employer loss – see Rowan v Standard Bank Staff Retirement Fund and Another (1) [2001] 2 BPLR 1638 (PFA).

 4. The damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member.
Mere negligent conduct does not permit a fund to deduct - see Moodley v Local Transitional Council of Scottburgh Umzinto North and Another [2000] 9 BPLR 945(D)); Razlog v PLJ Pension Fund Case No PFA/KZN/761/02/PM 31 October 2002, as yet unreported .

 5. The member must either admit liability in writing to the employer or judgment must be obtained in any court.
Admission of liability often presents problems of proof - judgment route sometimes preferable – see Rampone v Blue Ribbon Bakery and Another [2002] 12 BPLR 4198 (PFA).

 6. The judgment or the written admission of liability must be in respect of the compensation due in respect of the damage caused. *An admission or judgment in respect of monies owed and advanced for example is not sufficient – see Ehlers v Nedcor Defined Contribution Provident Fund and Another [2002] 3 BPLR 3141 (PFA); Schneeberger v South African Insurance Association Pension Fund and Another [2001] 6 BPLR 2142 (PFA).*
- S 37D(1)(b)(ii) and the implicit power to withhold

 - s 37D(1)(b)(ii) permitting deduction includes a power to withhold payment of the benefit pending the determination of liability – see *Appanna v Kelvinator Group Services of S.A. Provident Fund [2000] 2 BPLR 126 (PFA)*

- 3 limitations on the implicit power to withhold:
 1. The benefit should only be permitted to be withheld to the extent of the amount being sued for;
 2. The period of withholding must be reasonable - see *Buthelezi v Municipal Gratuity Fund & Another* (1)[2001] 5 BPLR 1996 (PFA); *Allison v IMATU Retirement Fund*; *Twigg v Orion Money Purchase Pension Fund and Another* (1) [2001] 12 BPLR 2870 (PFA); PFA/GA/344/2002/LS; what constitutes 'reasonable' depends on the circumstances - see *Sayed-Essop v Non-Ferrous Metal Works Pension Fund & Another* [2000] 9 BPLR 1051 (PFA);
 3. Member must be given the option to disinvest the assets during the withholding period and invest them at an agreed rate of interest, alternatively, to hedge the investment performance of the assets - see *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA).

Other cases dealing with s 37D

Greyling v OZZ Pension Fund (1) [2001] 11 BPLR 2708 (PFA); *McNamee v Aeroquip SA (Pty) Ltd and Another* (1) [2001] 2 BPLR 1618 (PFA); *Theron v PricewaterhouseCoopers Directors Provident Fund* [2002] 7 BPLR 2687 (PFA); *Gumede v Hydraulic Steel Provident Fund and Another* [2002] 10 BPLR 3913 (PFA); *Le Roux v Child Welfare Provident Fund* (1) [2002] 1 BPLR 2967 (PFA); *Mudzusi v Hospitality Industry Provident Fund* [2003] 4 BPLR 4593 (PFA); *Horne v ABSA Group Pension Fund and Another* [2001] 1 BPLR 1479 (PFA)

Maintenance Act

- Permissible deduction in terms of section 26(4) of the Maintenance Act which reads:

Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under the Chapter in order to satisfy a maintenance order.

- Now also permissible to attach pension benefit to secure payment of future maintenance in terms of proviso in s37A(1) of the Pension Funds Act – see *Mngadi v Beacon Sweets & Chocolates Provident Fund Others* (DLD) Case No 4727/2002, 8 April 2003, unreported.
- An order in terms of s 16(2) of the Maintenance Act may direct the pension fund paying a pension on a monthly basis to pay maintenance payments of behalf of that member - see *S v Botha* 2001(2) SACR 281(E).

See also: *Hartwig v Iscor Pension Fund* [2003] 4 BPLR 4528 (PFA)

Divorce Act

- S7(7), s 7(8) and definition of ‘pension interest’.
- Definition of “pension interest’ has created problems - see *van der Berg v Oranje-Vrystaatse Gemeenskaplike Munisipale Pensioenfonds* [2001] 3 BPLR 1804 (PFA); where member spouse has an election - see *Ex Parte Randles: In re: King v King* [2002] 2 BPLR 3017 (D); *Mouton v Southern Staff Pension Fund* [2003] 4 BPLR 4581 (PFA).
- Some solutions:
 - liquidate the portion of the pension interest awarded to the non-member spouse to avoid the difficulties;
 - define ‘pension interest’ in the divorce settlement agreement to avoid

confusion;

- refer to the eventual benefit actually paid to the member spouse in determination of the non-member spouse's entitlement;
 - member-spouse to undertake to receive the maximum cash benefit in the event of an election.
- Notice to the fund
 - Whose responsibility? Failure to notify and consequences in *L Griffin v Central Retirement Annuity Fund* PFA/GA/941/02/NJ (as yet unreported)
 - Judicial Matters Second Amendment Bill, 2003 – duty imposed on Registrar.