



A paradigm shift
IN CONSUMER PROTECTION

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S37D Deductions: CONSUMER PROTECTION
ANGLE

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DEFINITION OF PENSION FUND

- Object to provide retirement benefits (s1)
- As a general rule, benefits payable only when member exits
- S37A and D appear to originate from 1978 amendments
- Purpose to allow access to cash for 'essential needs', employer protection, division of joint estate, protection of certain of creditors

PERMISSIBLE DEDUCTIONS

- **Only Ten** (*Tom v Private Security sector Prov Fund [2009] 3 BPLR 35 (PFA)*). ***I think its twelve***
 - *Housing loan granted by Fund;*
 - *Amounts for which Fund liable under Guarantee furnished by Fund for housing loan*
 - *Housing loan granted by employer*
 - *Amounts for which Employer liable under Guarantee furnished by E for housing loan*
 - *Compensation to employer for damages caused by member (judgment or admission)*
 - *Amount paid/payable to medical scheme obo member*
 - *Amount paid /payable to long term insurer obo member*
 - *Amount paid/payable obo member for any purpose approved by Registrar*
 - *Amounts assigned to non-member spouse*
 - *Maintenance order*
 - ***Tax on benefit and employees tax***

DUTIES OF FUNDS IN RELATION TO DEDUCTIONS

- S7C(2) protect interests of members and beneficiaries
- Fund owes duty of care and diligence to members and beneficiaries
- No similar duty to creditors, but they are owed duty of good faith
- Creditors also have rights derived from s37D

WHO BEARS THE ONUS???

- Onus on person seeking deduction to prove that deduction falls within 37D

Rowan v Standard Bank Retirement Fund and another [2001] 2 BPLR 1643 (PFA)

- No duty rests on member
- Where withholding or deducting arises from circumstances not provided for in 37D, unlawful

Odayan v Orion Money Purchase Pension fund and another [2005] 6 BPLR 523 (PFA)

DUTIES IN RESPECT OF HOUSING LOANS GRANTED BY THIRD PARTIES

- Fund has a duty to ensure that loan granted to member (not his spouse or relative)
- Fund has duty to ensure that the loan granted was for a home loan and no other purpose
- Fund has a duty to ensure that there is still balance outstanding on loan

Tom v Private Security Prov Fund - fund deducted after member settled amount – held to be unlawful

- If member disputes the balance, duty to investigate and if there doubt, withhold until matter decided by courts

DUTY IN RESPECT OF HOUSING LOAN DEFAULT WHERE MEMBER STILL WITH FUND

- Fund must satisfy itself that there has been default
- Fund must only deduct as a last resort
- Fund must first satisfy itself that no other arrangement for payment can be made
- See, s37D(1)(a)(ii)(cc)
- If arrangement can be made, then don't deduct??
- What happens if arrangement proposed by member to bank is unacceptable to the latter???

DUTY IN RESPECT OF HOUSING LOANS WHERE MEMBER IS TRANSFERRED ITO s 14

- Before deducting, Fund must first establish whether:
 - *It is not possible to transfer the loan or guarantee*
 - *It is not possible for member and bank to negotiate the repayment*
- Only if Transferor Fund is satisfied that it is not possible can it deduct and pay the bank
- See, s37D(1)(a)(ii)(bb)

IN RESPECT OF DAMAGE CAUSED TO EMPLOYER

- Without court order, no duty to pay – only withhold
- Duty to ensure that judgment is in respect of damage caused as a result of fraud, theft , dishonesty, misconduct
- Is there duty to pay where judgment obtained in default and member is challenging/rescinding it? *I think no, Fund must rather withhold*
- In the case of written admissions:
 - *duty to notify member of claim by employer*
 - *Duty to investigate employer's claim, when and how admission made*
 - *Duty to ensure that admission complies with reqs of 37D*
 - *Some employers threaten to withhold final salary if admission is not signed*
 - *Admission not made voluntarily is not binding on Fund and member*

DUTY IN RESPECT OF DIVORCE ORDERS

- Duty to ensure that divorce order complies with 37D(1)d) requirements & Divorce Act s 7, and that it is not vague and incapable of enforcement (*Blaauw v Lifestyle RA Fund & another [2010] 1 BPLR 22 (PFA)*)
- In 2010, Adjudicator held in several cases that if spouses agree that non-member spouse will be entitled to maturity value of RA Policy, that is not pension interest (*Boucher v Momentum RA [2010] 3 BPLR 261 (PFA)*)
- Still some doubt in cases where divorce granted after resignation of member but before payment. (*I think still payable, see 37D(4)(ii)(bb)*)
- Inform member of divorce order
- Duty to inform the member of the amount deducted

CAN FUND REFUSE TO DEDUCT IF RULES ARE SILENT OR DON'T ALLOW DEDUCTION ALLOWED IN 37D

- I think not
- I think legislation takes precedence over rules
- Most funds don't give housing loans or guarantees – because s19(5) says “if its rules permits and subject to Regulations”
- No similar restriction in respect of 37D deductions
- It would therefore be improper for Fund to refuse to deduct where request complies with 37D

WHAT ABOUT MEMBER REQUESTS UNDER 37D(1)(c)

- It is surprising that there is no case law on 37D(1)(c)
- It is more surprising that financial advisors have not encouraged members to use 37D(1)(c)
- Are Funds failing in their duties by not informing members of this option????
If legislature did not want it there, it would have removed it!!!!!!! (s7D(c)?)
- Ito this subsection, members can ask Fund to pay for his medical aid or long term insurance premiums
- Subsection provides for no further requirements
- The subsection is silent on how long this can continue

SECTION 37D(1)(c)(iii)

- Any purpose approved by Registrar
- If member needs money to send children to tertiary institution, can they make request to Fund under this subsection?
- Is Fund the obliged to seek Registrar's approval?

Thank you

