



Evolving jurisprudence on section 37D

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PENSION  **LAWYERS**
ASSOCIATION



AGENDA

- Section 37A
- Section 37D
- Consequential amendments of Section 37D
through CoFI
- Recent case law
- Questions

Section 37A

S37A of the Pension funds Act (“the Act”) - benefits may not be reduced, transferred or executed

S37D is an exception to S37A and specifies certain permissible deductions

Allowable deductions

- ITA (including IT88)
- Pension-backed housing loans
- Compensation to Er due to fraud, theft, misconduct and dishonesty
- Pension interest awards on divorce
- Maintenance claims
- Medical aid subscriptions
- Insurance premiums
- Any amount approved by the authority

CoFI

Amendment of section 37A of Act 24 of 1956

Section 37A of Act 24 of 1956 is amended by inserting following subsection (4): “(5) Unclaimed benefits may not be reduced or utilised for any other purpose by a fund.”

- Does it include admin fees, fund expenses, tracing expenses and poor investment performance?
- Expenses applicable to active Mbrs and unclaimed benefits

Amendment to section 37D

(1) A registered fund may—

- (a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 (Act No. 58 of 1962), and Tax Administration Act (Act No. 28 of 2011); and any amount due to the fund in respect of—*

CoFI

by substituting in subsection (1)(b) for the words preceding subparagraph (i):

*“(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,]** on the date on which the member’s employment with a participating employer in a fund is terminated, in respect of—”;*

- Deduction effected after termination of the employment relationship
- Default regulations implications?

by substituting in subsection (1) for paragraph (d):

*deduct from a member's or deferred pensioner's benefit, member's interest or minimum individual reserve, deferred pensioner or the capital value of a pensioner's pension after retirement, as the case may be—
any amount assigned from **[such]** the benefit or individual reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No. 70 of 1979) or in terms of any order made by a court in respect of the division of assets of a marriage under **[Islamic law]** the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion pursuant to its dissolution;*

CoFI

(iB) any amount payable as maintenance in terms of an interim maintenance order granted by the court in terms of rule 43 of the High Court Rules.”;

- Duplication of Section 37D(1)(d)(iA)
- Hierarchy contained in 37D(3)(b) would also have to be amended
- Active Mbr not entitled to a benefit
- Garnishee orders may be obtained in respect of a Mbr’s salary
- Tax on tax effect

(d) by inserting in subsection (3) following paragraph (a):

“(aA) For the purposes of a deduction in terms of subsection (1)(d), read with subsection (6), where the member has an outstanding housing loan granted by the fund or in respect of which the fund granted a guarantee, the member’s pension interest is deemed to be the amount as contemplated in the definition of section 1 of the Divorce Act or as contemplated in subsection (6), reduced by the outstanding loan amount as at the date of divorce, irrespective of whether the outstanding amount is due and payable.

- Prejudice to a non-member spouse

CoFI

(aB) A reduction referred to in paragraph (aA) will apply only if the loan or guarantee was granted prior to the granting of the order as contemplated in section 7(8) of the Divorce Act.

(aC) A retirement fund may not, without the consent of the member's spouse, grant a loan or guarantee if the fund is aware that a divorce action in respect of the member is pending.

- How would a non-member spouse prove that the fund was aware?
- Must the Mbr inform the fund when applying for a loan, or must the fund ask the question?
- This must only apply to spouses married in community of property or out of community with accrual

CoFI

(aD) In respect of a deduction referred to in subsection (1)(d)(iA), the retirement fund must pay the maintenance, as directed in the maintenance order—

(aa) as a lump sum in respect of arrear maintenance;

(bb) in monthly payments in respect of future maintenance or annually in advance where a fund is unable to make monthly payments.”;

- Section 1 of the Maintenance Act only permits arrear maintenance deductions
- Deductions can only be effected from a benefit
- Administrative burden of making monthly payments
- No legal obligation to pay monthly payments

CoFI

by substituting in subsection (4)(a) for subparagraph (i):

“(i) must be deducted by—

*(aa) the **[pension]** retirement fund or **[pension]** retirement funds named in or identifiable from the decree;*

*(bb) the **[pension]** retirement fund or **[pension]** retirement funds to which the **[pension]** retirement fund referred to in item (aa) transferred the pension interest referred to in the decree; or*

(cc) the portion paid to the spouse and the portion to be transferred to a retirement fund or retirement funds on his or her behalf;”; and

by substituting for subsection (6):

- Non-member spouse must be given an option to take full or part-cash and also full transfer or part-transfer

CoFI

(6) Despite paragraph (b) of the definition of “pension interest” in section 1 (1) of the Divorce Act, 1979 (Act No. 70 of 1979), the portion of the pension interest of a

(a) member of a pension preservation fund or a provident preservation fund;

(b) member that preserves the member’s benefit in a pension preservation fund or a provident preservation fund; or a

(c) deferred pensioner of a pension preservation fund or provident preservation fund, that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the retirement fund if –

*(i) **his or her** the member’s membership of the fund terminated, or*

(ii) The member elected to withdraw his preserved benefit fund; or

(iii) the member or the deferred pensioner retired on the date on which the decree was granted.

- A and B seem to be a duplication

Case law

SA METAL GROUP (PTY) LTD v JEFTHA

- Mbr dismissed, Er conducted investigations and alleged he had committed fraud
- Mbr informed of allegations of fraud and withholding of benefit
- Er requested fund to withhold benefit. Fund advised Er of information required to withhold benefit
- Requested information not received by the Fund, but the benefit was withheld
- Mbr lodged a complaint with the PFA

Case law

Complaint before the PFA

- Mbr denied allegations of fraud/collusion to the detriment of Er and breach of employment contract, tendered inspection of his bank account
- Mbr argued as follows:
 - Er failed to institute legal proceedings within six months as required
 - fund never considered his version and the financial prejudice caused by the withholding
 - information relied on by Er not placed before the fund when decision to withhold was made and all additional information submitted by Er subsequent to the decision was irrelevant

Case law

Fund's response at the PFA

The fund responded as follows:

- withholding of the benefit was in terms of the law and its rules
 - no undue delay on the Er's part in pursuing a civil claim
 - due processes followed in exercising discretion to withhold the benefit
- Mbr's
- fund satisfied that there was a prima facie case against the Mbr

Case law

PFA ruling

The PFA ordered the release of the benefit for various reasons, including the following:

- failure to follow procurement procedure not *prima facie* proof of collusion and dishonesty
- no allegations that he benefited financially for the alleged wrongdoing
- fund rubber-stamped the Er's request to withhold benefit without investigating merits of allegations and the financial prejudice the Mbr might suffer

Case law

Matter before the High Court

The High Court held as follows:

- Fund did not comply with the *audi alteram partem* rule in withholding Mbr's benefit
- Er introduced evidence not presented to the fund when the decision to withhold was made and when the PFA issued the ruling
- Pension benefits protected against creditors unless explicitly authorised by the Act and any contrary conduct is unlawful
- Section 37D given purposive interpretation to include power to withhold benefit in order to provide the Er opportunity to obtain judgement

Case law

- When making decision to withhold a benefit, trustees must put the Er's case to Mbr to afford an opportunity to respond (*audi alteram partem*)
- Trustees must apply their mind appropriately, impartially and in a balanced manner
- Mere allegations placed before the fund which if true would cause damages arising from dishonest conduct would not on its own be sufficient to meet the test set out by the SCA in *Highveld Steel*
- Section 37D withholding likened to an interdict, only granted after stringent requirements have been met

Case law

- Proof of the fraud, theft, misconduct or dishonesty required before fund can make a decision to withhold benefit
- Trustees have fiduciary duty to take all reasonable steps to ensure that interest of Mbr's in terms of the rules and the Act are protected
- Trustees must actually be independent and be seen to be independent and there should be no doubt about their impartiality
- Trustees did not conduct their responsibility with the required independence and impartiality

Case law

- High Court supported the PFA's decision and found that the trustees of the fund did not comply with their legally prescribed fiduciary duties. The appeal was dismissed

Key Take aways

- Mbr must be given a right to respond to the Er's allegations
- Mere allegations by the Er are not sufficient to withhold a Mbr's benefit

Case law

FUNDSATWORK UMBRELLA PENSION FUND v MATJIANE

- Er informed Mbr of allegations of fraud against him
- Mbr resigned with immediate effect and became entitled to a withdrawal benefit
- Er requested the fund to withhold the Mbr's benefit on allegations of fraud
- Mbr lodged a complaint with the PFA requesting his benefit to be released

Case law

Matter before the PFA

- PFA ordered fund to pay the Mbr's benefit, plus 9.75% penalty interest
- PFA held as follows:
 - decision to withhold benefit inconsistent with fund rules, applicable procedure not followed
 - trustees acted on submissions made by Er and did not put the Er's case to the Mbr
 - trustees did not apply their minds appropriately, impartially and in balanced manner

Case law

Matter before the Financial Services Tribunal (FST)

- Fund and Er lodged appeal with the FST on various grounds, but the FST made a decision by solely considering whether the trustees had properly exercised their discretion to withhold the withdrawal benefit
- Er laid fraud charge against Mbr with the SAPS in February 2019 and the Mbr only lodged his complaint in June 2019
- No evidence regarding the status of the police investigation nor evidence that the NPA had taken a decision to prosecute Mbr
- In addition, Er had not instituted a civil case against the Mbr

Case law

- Fund argued criminal case of fraud was sufficient to withhold benefit as section 300 of the Criminal Procedure Act allows a criminal court to make an award of damages in favour of Er
- Fund relied on the 2009 *Highveld Steel* Supreme Court of Appeal case
- Held: *Highveld Steel* case, Er had instituted civil proceedings. *Highveld Steel* case not authority for allowing a fund to withhold a benefit where only criminal charges had been laid

Case law

- Mere opening of a criminal case at the SAPS is not sufficient for Section 37D purposes. Fund was not entitled to withhold the Mbr's benefit without a civil case having been instituted
- Civil proceedings need to be instituted to protect Mbr who may need the money urgently. If no civil proceedings instituted section 37D would lead to abuse by Ers who might not have a genuine claim

Case law

Key take aways

- Funds must review their current withholding cases to ensure that their decisions comply with the law
- Criminal case is not sufficient to withhold a benefit

Questions?

