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Unpacking an employer’s rights in terms of withholding requests under section 37D of the Pension Funds Act

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OUTLINE

Section 37D of the Pension Funds Act permits an employer to request that a retirement fund withhold a member's benefit pending judgment or a written admission of liability. But what if the employer ceases to participate in the fund before judgment is obtained? Does the claim endure, and on what basis can it be enforced? This session will examine the scope of employer claims and entitlements, the duties of funds when considering withholding requests, and the practical implications of business transfers and section 14 transfers.

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Introduction and Legislative Framework

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Introduction and Legislative Framework

Retirement benefits enjoy strong statutory protection under section 37A of the Pension Funds Act 24 of 1956. As a general principle, pension benefits are not reducible, transferable, or executable. This protection reflects a long-standing policy objective: safeguarding members' retirement savings from dissipation before retirement.

However, section 37D introduces a carefully crafted statutory exception. It permits a fund to deduct amounts from a member's benefit in limited, defined circumstances - most notably where an employer has suffered damages arising from fraud, theft, dishonesty or misconduct by the member.

The purpose of section 37D is therefore twofold:

- To balance member protection with employer recourse; and
- To prevent employees accused of financial misconduct from accessing their full retirement benefit before civil or criminal liability is determined.

The section does not create an automatic employer right - it confers a discretion on trustees, which must be exercised lawfully, rationally and in accordance with fiduciary principles.

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Section 37D Amendments (Effective 1 September 2024) in Respect of Criminal Proceedings

Section 37D Amendments (Effective 1 September 2024) in Respect of Criminal Proceedings

Hemasha Mahilall v Mondi South Africa and Mondi Impact Group Fund (unreported, before the KZN Local Division, case number: 9382/2023)

Facts:

- Member resigned in 2019.
- Criminal charges laid shortly thereafter and the Fund resolved to withhold on the basis of the criminal proceedings.
- No civil proceedings instituted (eventually prescribed).
- Member launched application for payment of her benefit in 2023 – relied on PFA determinations and FST decisions supporting the view that criminal proceedings were insufficient for withholding/deduction.
- Section 37D had been amended (effective 1 September 2024) by the time when the matter was heard in November 2024 to expressly provide that a judgment "includes a compensation order granted in terms of section 300 of the Criminal Procedure Act, 1977".

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Key findings:

- Evident that section 37D protection extends to pending criminal actions (even where withholding arose prior to amendment).
- Court relied on incorrect monetary jurisdiction of Regional Court for criminal matters (R400 000 whereas correct limit is R1mil). Important implications for criminal section 37D matters if not overturned.
- Held that because the criminal court cannot issue a compensation order in the amount withheld (R1.5mil), the entire withholding was unlawful – as opposed to just the withholding of any amount in excess of that limit (whether R400 000 or R1mil). Important implications for all civil and criminal section 37D matters if not overturned.
- Matter is subject to appeal to the Full Bench of the High Court (August 2026).

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Complex Scenario 1 - Employer Ceasing Participation in the Fund

Complex Scenario 1 - Employer Ceasing Participation in the Fund

Section 37D disputes rarely arise in straightforward factual contexts. Instead, trustees are increasingly confronted with complex structural and timing issues.

A recurring issue arises where the employer exits the fund before the withholding process is finalised. The question becomes: does the employer retain standing to pursue a deduction?

The purposive interpretation must applied in terms of *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA):

1. Statutory wording of of section 37D(1)(b)(ii) and applicable jurisprudence (evidence)

   In Appanna the PFA determined that the power to withhold can only be derived from statute

1. Fund Practice Note which speaks into the Management Board's policy regarding the withholding of and the deduction from benefits in terms of section 37D(1)(b)(ii)
2. Fund Rules
3. Case Law

Continued…

37D. Fund may make certain deductions from pension benefits. -

“(1)A registered fund may (b) deduct any amount <u>due by a member to his employer</u> on the date of his retirement or on which he ceases to be a member of the fund, in respect of (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 beneficiary <u>in terms of the rules of the fund</u>, and pay such amount to the employer concerned.”

The above wording does not distinguish between a participating employer and one no longer participating in a specific fund – it simply allows for a deduction legally due to an employer subject to the Rules of a fund.

•Create **procedural requirements** (indemnity, request, etc.) tied to that status

Continued…

A deduction of a member’s fund will then be payable in terms of the Rules of the fund –

Deductions From Benefits
(2) The FUND may also withhold payment of a portion or the whole of any benefit payable in respect of a MEMBER or a BENEFICIARY as may be allowed by law, legal precedent, or in the opinion of the BOARD, be reasonable for purposes of allowing a deduction referred to in paragraph (1), provided that (c) in the instance where a PARTICIPATING EMPLOYER requests the FUND to withhold payment of a benefit pending civil proceedings to obtain a judgment as envisaged in section 37D(1)(b)(ii) of the ACT, the PARTICIPATING EMPLOYER shall indemnify and keep the FUND and ADMINISTRATOR harmless against any costs associated with the request, the withholding process and any liability, directly or indirectly, arising from the FUND/ADMINISTRATOR giving effect to the PARTICIPATING EMPLOYER’s request to withhold the benefit. Such liability shall, without derogating from the generality of the foregoing, include any legal and other costs incurred by the FUND/ADMINISTRATOR in obtaining legal or other expert advice in relation to the request and the process, as well as the costs and any other expenses incurred or for which the FUND/ADMINISTRATOR may become liable arising from any litigation in relation to the matter. The FUND may in addition to this indemnity require that the PARTICIPATING EMPLOYER must provide the FUND and ADMINISTRATOR with a further written indemnity in which event both indemnities shall apply.
(d) the FUND may at any time amend, change or terminate its decision to withhold a benefit on reasonable grounds, including where the BOARD is of the opinion that there is any undue delay in the prosecution of the civil proceedings by a PARTICIPATING EMPLOYER as envisaged in paragraph (c).

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Case Law

ABSA Bank LTD v Burmeister and Others [2005] 3 All SA 409 (SCA) - Background

"The effect of s 37A(1) is to establish a general rule protecting pension fund benefits from inter alia attachment and execution. (The amendment of the section by s 45 of 1998 is not material to the present case.) Its object is clearly to protect pensioners against being deprived of the source of their pensions. In terms of s 37(B) such benefits are also deemed not to form part of the assets in the insolvent estate of the person in question. The protection afforded by s 37A(1) is, however, subject to a number of exceptions, one of which is the exception provided for in s 37D(1)(b). That section, therefore, affords to an employer a right of access to pension fund benefits which other creditors do not have. The rationale of the exception can only be the employer's participation in the pension fund concerned, normally by way of employer contributions. If the exception permitted the ex-employer access to pension fund benefits in the hands of any pension fund, the exception could well lose its rational basis. One thinks, for example, of the situation that may arise where the benefits are transferred to the pension fund of a new employer to which further contributions are made. The inference, therefore, is that the pension fund referred to in s 37D(1)(b) was intended to be a reference to the original pension fund, ie the employer's pension fund which in this case is the Absa Bank Pension Fund. It is true, as emphasized by counsel for the appellant, that the pension benefits in the hands of a subsequent fund could be traced back to their origin in what I have called the employer's pension fund. But that does not, in my view, justify the construction sought to be placed on the section."

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Section 37A (1) of the Pension Funds Act 24 of 1956 provides that:

"Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No.58 of 1962), and the Maintenance Act,1998, <u>no benefit provided for in the rules of a registered fund </u>(including annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall<u>, notwithstanding anything to the contrary contained in the rules of such fund,</u> be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, <u>or able to be attached or subjected to any form of execution under a judgment or order of court of law</u>,……:Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependent or dependents during such period as it may determine."

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Although Section 37D in itself creates an exception to a rule of general application. Such a provision will normally be strictly interpreted; in other words, the legislature will be presumed to have intended that only cases clearly falling within the scope of the language used are to be excepted.

Most rules require a “participating employer”.

A former employer is not contractually bound by the rules – all the safeguard provided in case law. The rules create protection around procedural requirements (indemnity, requests, etc.) tied to that status (what happens if the Employer is liquidates – the Fund is left without indemnity or it has little to no effect).

employer’s right is generally preserved, as the claim arises from the employment relationship and the benefit remains within the “original employer fund,” as contemplated in ABSA

Create practical bottleneck - hypothetical case to interdict as *Absa* can be interpreted generously – purposive interpretation vs locus standi.

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Complex Scenario 2 - Section 14 Transfers – Do Claims Follow the Benefit?

Complex Scenario 2 - Section 14 Transfers – Do Claims Follow the Benefit?

Absa confirms that the right is linked to the "Employer's Fund"

The court rejected a broad interpretation that would allow an employer to follow the benefit across any fund.

However, this scenario is slightly nuanced from *Absa,* here the benefits are transferred under section 14 of the PFA - does an employer's pending section 37D claim "travel" with the benefit to the receiving fund. *Absa* says no, but can the employer make a new application with the transferee fund?

Absa is explicit that the employer's access is justified by its participation in the original fund. That justification does not extend to a different fund, even if the benefit is traceable. Once the benefit moves, the jurisdictional anchor is broken. *"… it makes no sense that a subsequent fund should be authorised to deduct an amount due to the ex-employer on the date the ex-employee ceases to be a member of that subsequent fund and not on the date the ex-employee ceased to be a member of the original fund."*

The transferee fund has no relationship with that employer.

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Practical issues – Introduction

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Practical issues – Introduction

The real battleground in section 37D matters is governance.

Fiduciary Duties

Trustees act in a fiduciary capacity. Their duties include:

- Ensure full compliance by the employer;
- Acting in the best interests of the fund and its members - balance the competing interests;
- Exercising discretion with care and independently;
- Avoiding rubber-stamping employer requests.

The discretion to withhold is not mechanical — it must be informed by proper consideration of the evidence.

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Prescription and Delay Considerations

Trustees must be vigilant regarding delay. While section 37D allows withholding pending the outcome of proceedings, it does not permit open-ended suspension of benefits.

Key considerations include:

- Whether proceedings have been instituted within a reasonable period;
- Whether the employer is prosecuting the claim diligently;
- Whether continued withholding remains justified.

Trustees must balance:

- The employer's right to recover damages;
- The member's constitutional and statutory right to access retirement benefits; and
- Ranking of deductions (bond, divorce, maintenance orders) – discretion and order of receipt.

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<u>Procedural Fairness</u>

Before approving withholding, trustees must ensure:

- The member is notified;
- The member is afforded an opportunity to respond and scrutiny of claims – section 7C PFA;
- A prima facie case is established.

Failure to follow fair process renders decisions vulnerable to challenge before the Pension Funds Adjudicator or the courts.

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Avoidance of Arbitrary or Indefinite Withholding

Withholding must be:

- For a defined purpose;
- Subject to review;
- Proportionate to the alleged loss.

Trustees should implement:

- Clear internal policies;
- Defined review timelines;
- Documented reasons for decisions.

Governance failures in this area often result not from bad faith, but from poor process discipline.

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Practical issues – Recent Case Law Considerations

Practical issues – Recent Case Law Considerations

<u>Jacobs v Telkom Retirement Fund & others (2022) 43 ILJ 1902 (GP)</u>

<u>Facts:</u>

- Member resigned in 2012.
- Criminal charges laid in 2013, apparently withdrawn in 2019, NPA advised in 2021 that the criminal matter is proceeding but no further progress.
- Civil action instituted in 2014, plea eventually filed later that year after an exception, no further progress.
- NPA requested employer to hold over civil action until finalisation of criminal proceedings.
- Member still not paid in 2021, launched application for payment of benefit, employer launched counter-application for interim interdict.

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Key findings:

- No question that there was an inordinate delay in finalisation of proceedings.
- Member also has a duty to not contribute to the delay.
- Member should have followed up with his attorneys in respect of civil proceedings.
- Member waited until 2021 to launch application.
- Reasonableness of withholding determined by both the period and circumstances of each case.
- Both parties deemed to have contributed to the delay in this matter and delay was deemed to not be unreasonable. Interim interdict granted in favour of the employer.

See for example: *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane N.O. and others [2021] JOL 53144 (GP)* where failure to institute proceedings within 9 months of resignation was deemed to be unreasonable i.e. 9 months v 9 years!

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Tongaat Hulett Sugar South Africa Limited v Tongaat Hulett Pension Fund 2010 and Others (AR27/2022) [2023] ZAKZPHC 34

Facts:

- Member resigned in 2019, without making any representations regarding the allegations.
- Criminal charges laid in 2019, the Fund resolved to withhold on the basis of those charges and informed the member. Also provided the member with the employer's request to withhold, the relevant extract from the Rules of the Fund and an invitation to submit queries.
- Member lodged PFA complaint, PFA found in her favour (withholding unlawful) for failure by Fund to obtain representations (relied on *SA Metal Group (Pty) Ltd v Jeftha and others, [2020] 1 BPLR 20 (WCC)*).
- Employer launched section 30P appeal – dismissed by High Court on a "point of procedure". Employer appealed that judgment to the Full Bench.

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Key findings:

- Noted that Jeftha requires a fund to afford a member the opportunity to make representations “before” resolving to withhold.
- But found the PFA’s reliance on Jeftha to be misplaced because:
  - Member did not refute allegations of dishonesty at disciplinary enquiry or CCMA.
  - Member was invited by the Fund to raise queries after the Fund decided to withhold but did not.
  - Member did not refute allegations in PFA proceedings.
  - The Court in Jeftha failed to consider that representations may be made after the initial decision to withhold is made.
  - The Rules and the Act do not afford a member the right to make representations “at a stage where the basis for the withholding of the pension benefit is made, pending finalisation of the investigation that is underway”. Representations can be made even after decision [to withhold] is made.
  - If there has been procedural unfairness, appropriate remedy is not to set aside withholding.

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Hansen Genwest (Pty) Ltd v Corporate Selection Umbrella and others [2023] JOL 57697 (GJ)

Facts:

- Husband and wife both members, husband resigned in 2021, wife dismissed in 2022.
- Civil proceedings instituted against them jointly in 2022 for R1.3mil.
- Fund resolved to withhold husband's benefit, not wife's due to nature of conduct.
- Employer sought interdict from High Court in respect of wife's benefit.

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Key findings:

- Interdict sought does not amount to an anti-dissipation order (which is to preserve property to which the applicant [employer] has no special claim). No need to prove ordinary third and fourth requirements for an interdict: irreparable harm (state of mind of member to dissipate) and/or no suitable alternative remedy.
- Interdict amounts to interim relief pending "quasi-vindicatory action" because employer has a claim to the benefit in terms of section 37D. So the employer must only prove the first and second requirements for an interdict: a prima facie right and that the balance of convenience favours the withholding.
- Employer must however also show that the Fund has unreasonably refused to withhold the benefit, having regard to the provisions contained in its rules (but see *Spar Group Ltd v Old Mutual Superfund Provident Fund & others (2025) 47 ILJ 651 (WCC)* below).

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Key findings (continued):

- A *prima facie* right is established even where a member casts some doubt regarding the employer's claim – such as a *"mere contradiction"* or *"unconvincing explanation".* In those instances the matter should be left to trial for determination. But not if there is *"serious doubt".*
- Conversely, a mere allegation of theft/fraud/dishonest misconduct is insufficient to establish a *prima facie* right - it is necessary to consider the evidence that will be adduced.
- The Court carefully scrutinised each individual claim against the member and found that some fell within section 37D whilst others didn't (about R380K of the total R1.3mil claimed was deemed to fall within section 37D).
- The Court also considered that the member was cited as a joint wrongdoer in the civil trial and resolved that it was unlikely that the trial court would award more than 20% of those damages against her in terms of the Apportionment of Damages Act, 1956.
- Granted interdict in respect of 20% of R380 000. i.e. R76 000, and the balance of the member's benefit to be paid to her.

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<u>*Spar Group Limited v Old Mutual Superfund Provident Fund & Others, Western Cape High Court (Case No: 2025–180517)*</u>

<u>Facts:</u>

- Member dismissed in June 2025, civil proceedings instituted shortly thereafter in July 2025.
- Fund resolved to pay out benefit based on employer’s alleged failure to submit required documents and/or amend particulars of claim by end of September 2025.
- Employer approached High Court for interim interdict.

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Key findings:

- The Court was very critical of the conduct of the Fund, specifically:
    - Requesting the particulars of claim to be amended to specify a cause of action as contemplated in section 37D – held that the Fund should have considered the essential nature of the allegations contained in the particulars of claim, which clearly included dishonesty.
    - Requesting a more precise quantification of the claim at an early stage of the litigation – deemed out of kilter with ordinary trial practice.

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<u>Key findings (continued):</u>

Agreed with the Hansen + Genwest (Pty) Ltd judgment in relation to the nature of the interdict sought and that only the first and second requirements for an interdict need be proved.

- But disagreed that the Employer must also show that the Fund has unreasonably refused to withhold the benefit.
  - Reasoned that at the responsibilities of the Fund as per the Rules and the Highveld Steel and Vanadium Corporation Ltd v Oosthuizen, Supreme Court of Appeal (Case No: 103/2008) judgment are akin to the requirements for an interdict (establish a prima face right and weigh the balance of convenience). But what about the Fund's ongoing duty to assess the reasonableness of the delay (deemed by the Court to be part of the balance of convenience) in the context of an interdict?
  - Concluded that an employer can seek an interim interdict even before the Fund makes a decision.
- Granted the interdict (until finalisation of the action proceedings).

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QUESTIONS

THANK YOU

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