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In case you missed it...

1. [February 2021: Smoothed Bonus Policies Final](#)
2. [January 2021: Seshego Legal Insights](#)

Section 37D (1) (b) (ii) of the Pension Funds Act – is it necessary for the Employer to open a criminal case before the fund can withhold payment of a benefit?

1. What is the legal position with regard to withholding of benefits?

The main purpose of Section 37D (1) (b) (ii) of the Pension Funds Act (“the Act”) is to protect the employer from damage caused due to the theft, dishonesty, fraud or misconduct of a member and to compensate the employer by deducting an amount from the member’s pension benefit. However, the deduction can only be made if the member has admitted liability in writing or a court has delivered a judgement against the accused member.

The wording of the section does not in itself allow the fund to withhold payment of the member’s benefit. However, it has long been recognised that, given the delays in the South African judicial system, the section cannot be implemented unless the fund is also able to withhold payment of the benefit until such time as a judgement in favour of the employer has been obtained.

Where the legislation is silent on an issue, case law is important. Funds have therefore been able to rely on the decision made in 2009 by the Supreme Court of Appeal in the matter of *Highveld Steel versus Vanadium Corporation Ltd versus Oosthuizen* (“the Highveld Steel case”). The court took the view that to give effect to the purpose of Section 37D (1) (b) (ii), the wording of the section had to be interpreted to include the power of a fund to withhold payment of a member’s benefit pending the determination by a court or the member admitting liability in writing.

2. What (if anything) has changed since the judgement in the Highveld Steel case?

A judgement in the High Court, delivered in December 2019 in the matter of *SA Metal Group (Pty) Ltd v Deon Jetha and others* (“the Jetha case”) emphasised that any decision made by the trustees to withhold payment of a benefit must be “lawful and reasonable” and expanded on what this means (refer [Seshego Insights Edition 8, August 2020](#)).

In particular the judgement stressed the need for the member to be given a chance to refute the allegations made by the employer against him and to advise the trustees of the financial prejudice he would suffer if payment of his benefit were to be withheld.

Since the decision of the High Court in the Jetha case, there have been a plethora of determinations made by the Pension Funds Adjudicator (“the Adjudicator”) against retirement funds that have withheld payment of benefits subject to a deduction in terms of Section 37(1) (b) (ii) of the Act. The determinations instructed the funds concerned to pay the benefit being withheld to the member, together with penalty interest.

A couple of funds then appealed to the Financial Services Tribunal (“the Tribunal”). In most of these cases, the Tribunal upheld the determination made by the Adjudicator.

3. Recent Decisions by the Tribunal – the employer must open a civil case

Two recent decisions by the Tribunal have added a new requirement – that the employer must open a civil case as evidence of a serious desire to obtain compensation of the money owed to it.

3.1 Funds at Work Umbrella Provident Fund (“FAW Provident Fund”) versus E.E Ngobeni and the Pension Funds Adjudicator

The employer (uBank, a participating employer in the FAW Provident Fund) had opened a criminal case against the member as it believed the member had been involved in fraudulent transactions while in its employment.

The FAW Provident Fund had withheld payment of the member’s benefit on this basis. The member had lodged a complaint with the Adjudicator, who had supported his case and ordered the FAW to pay the benefit together with fund return and penalty interest. The FAW Provident Fund had then taken the Adjudicator’s determination on appeal to the Tribunal.

Much of the argument focused on the reasons the Adjudicator gave for the determination against the FAW Provident Fund. The FAW Provident Fund argued that it could not have been expected to have applied the principles set forth in the Jetha case, since it had taken the decision to withhold payment of the benefit some time before the High Court had delivered that judgement. The Tribunal rejected that argument on the grounds that

allowing the member the right to refute the allegations made by the employer was a principle of natural justice which funds should always have applied in response to a request by the employer to withhold payment of a benefit. The Tribunal commented that the Fund was not an agent of the employer.

The Tribunal went further and stated that “The Fund is not entitled to withhold payment because a criminal case has been opened or even upon conviction. A conviction is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted”.

Since the employer did not advise the Fund of an intention to institute civil action or even to claim compensation, there was no legal basis for the Fund to withhold payment of the benefit.

3.2 Funds at Work Umbrella Pension Fund (“FAW Pension Fund”) and Petra Diamond versus the Pension Funds Adjudicator

The facts of the case are similar to the Ngobeni case discussed in 3.1 above. Again, the Adjudicator ruled that the FAW Pension Fund acted only on the submissions made by the employer and did not act impartially and in a balanced manner.

The employer and the FAW Pension Fund took the case on appeal to the Tribunal. Apart from stressing that the trustees must act impartially, provide the member with a chance to refute the allegations by the employer and not merely accept the word of the employer, the Tribunal also stated the following:

- (a) the mere opening of a criminal case at the SAPS is insufficient for Section 37D purposes;
- (b) the fund was not entitled to withhold the member's benefit without a civil case having been instituted;
- (c) employers that do not institute a civil claim can abuse Section 37D since failure to open a civil case suggests that the employer has no genuine claim against the member or no serious desire to pursue a claim for compensation.

Note: if a criminal court issues a judgement against a member, the employer can request that court to issue a compensation order in terms of Section 300 of the Criminal Procedure Act, 1977 and if the court issues such an order, the employer can in fact be compensated for damages suffered due to the criminal actions of an employee.

Furthermore, Section 37D (1) (b) (ii) (bb) refers to “judgement....against the member....in any court”.

4. What happens going forwards?

- 4.1 The rulings of the Tribunal are not binding on other retirement funds but boards of trustees should be aware that appeals on a determination made by the Adjudicator against a fund that has withheld payment of a member's benefit, are likely to be unsuccessful.
- 4.2 Funds must ensure that they have given the member a proper chance to refute the allegations of the employer and to explain the financial prejudice to him that is likely before taking any decision to withhold payment of a benefit. Funds need to bear in mind that the penalties imposed by the adjudicator – full fund return on the benefit withheld together with penalty interest – would have to be subsidised by the members of the fund if the fund's fidelity guarantee policy does not agree to pay any penalties resulting from an adverse determination by the Adjudicator.
- 4.3 Instituting and perusing a civil case can be expensive. This would be a cost for the employer and not for the fund. Going forwards, employers may be reluctant to incur such an expense when the value of the member's benefit is relatively small.

Comment

As mentioned in 4.1 above, the rulings of the Tribunal are not binding on other retirement funds. It is possible that a fund may ask a higher court to review a ruling by the Tribunal on this matter.

Until this happens, boards of trustees must ensure that before taking any decision to withhold payment of a pension benefit, they follow a proper procedure, in particular with regard to allowing the member to state his case and refute the employer's allegations.

Should you have any questions regarding the above, please contact your consultant to assist you.

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