

Sygnia Umbrella Retirement Fund (SURF)

Section 37D

June 2022



Managing Section 37D claims

Can employers claim against an employee's retirement fund benefit for damages caused by that employee?

Section 37A of the Pension Funds Act of 1956 ("the Act") prohibits a member's benefit from being reduced, ceded, transferred or attached by creditors. There are exceptions, however. Section 37D of the Act permits certain deductions from a member's benefit, one of which is a claim by an employer in respect of compensation for loss or damages suffered as a result of a member's theft, dishonesty, fraud or misconduct.

The focus of this note is to clarify the employer's right to claim compensation for loss suffered as a result of a member's conduct. The strict requirements derived from the Act, as well as precedents established through the determinations of the Pension Funds Adjudicator ("PFA"), provide a framework that the trustees of the Sygnia Umbrella Retirement Fund ("SURF") utilise when considering an employer's request to withhold a member's benefit or to effect a deduction from the member's benefit.

How does an employer claim for damages?

An employer's claim must be in respect of damages suffered as a direct result of the member's theft, dishonesty, fraud or misconduct. Misconduct must show an element of dishonesty and must have resulted in a loss to the employer. It is not enough for the employer to demonstrate that the member did not comply with a policy or procedure – the employer must show that the member acted intentionally and maliciously in a certain situation. For example, failure to pay back a study loan is a breach of contract and would not meet the elements of dishonesty (or any of the other categories) required for a deduction in terms of Section 37D.

The request to withhold a member's benefit or to effect a deduction from the member's benefit must be made by the employer, but only the board of trustees has the discretion to allow a deduction from a member's benefit.

To lay a claim, the employer must obtain:

- a) an admission of liability or an acknowledgment of debt signed by the member ("AOL"), along with supporting documents that confirm the facts of the matter, and confirmation that the member is aware of the actions that gave rise to the request by the employer and that the alleged theft, dishonesty, fraud and/or misconduct by the member falls within the ambit of Section 37D of the Act; or
- b) a judgement (civil or criminal) against the member in any court.

The distinction between “deduction from a benefit” and “withholding of a benefit” and the requirements that apply in each scenario should be clearly understood.

Deductions

In the AOL, the member must acknowledge indebtedness to the employer, must agree to the amount to be deducted and paid to the employer and must include a detailed description of how the loss arose. Attached hereto is SURF’s AOL form, which must be completed by both the employer and the member.

To request a deduction from the member’s benefit in favour of the employer, the written AOL and any supporting documents must be completed in full and be presented to the trustees. The trustees will assess the AOL to determine its enforceability and, if satisfied, will authorise a deduction from the member’s benefit and payment thereof to the employer. However, if the trustees are not satisfied with the detail provided in the AOL and no or insufficient supporting information is provided by the employer, the trustees are under no obligation to give effect to the AOL, in which instance SURF must release the benefit to the member.

Withholding

In the event that the employer’s efforts to obtain an enforceable AOL are unsuccessful, the employer may institute legal proceedings against the member in a court of law.

In such a case, the employer must request that the trustees withhold the member’s benefit pending the finalisation of the legal proceedings.

Again, the trustees have full discretion in this regard. The board must apply its mind appropriately, impartially and in a balanced manner and, when making a withholding decision, must consider the rights of the employer and its reasonable chance of success in pursuing the matter, as well as the rights of the member.

Recent case law (*SA Metal Group (Pty) Ltd v Deon Jeftha and others, case number, unreported, 20298/2019*) has emphasised that trustees must consider the rights of the member, especially where a member has put up a spirited defence. This requires that the board of trustees afford the member an opportunity to respond to the employer’s allegations against them and make representations to SURF before the board of trustees makes a decision regarding the withholding of the benefit. If, after consideration of the representations made by the member, the trustees are satisfied that the employer has established a legitimate case, taking into account the factors listed below and ensuring compliance with their fiduciary duties, the trustees may agree to withhold the benefit for a specified period. However, if the trustees are persuaded by the arguments or representations made by the member, the trustees are under no obligation to withhold the benefit, in which instance SURF must release the benefit to the member. The employer will be afforded an opportunity to challenge the arguments or representations made by the member.

The act of “withholding a benefit” is not provided for in the Act, but a Supreme Court of Appeal decision held that Section 37D should be interpreted to include the power of a fund to withhold payment pending the outcome of instituted action. It further noted, however, that Section 37D must not be interpreted solely for the employer’s benefit and that the merits of each case must be considered individually. Withholding of a benefit is not an automatic right and is at all times at the discretion of the trustees.

In recent Financial Services Tribunal (“Tribunal”) determinations, the Tribunal referred to the Supreme Court of Appeal (“SCA”) matter *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA)*, which dealt with the withholding of a benefit payment pending the finalisation of civil proceedings. The Tribunal referred to the SCA case in support of its finding that a criminal conviction is not a judgment against a member that quantifies compensation in respect of damage caused and that costs are not automatically awarded against persons convicted.

The next Tribunal matter applied to two separate applications, by a fund and an employer, to reconsider the same Pension Funds Adjudicator (“PFA”) determination:

- Fundsatwork Umbrella Pension Fund/M/Pension Funds Adjudicator; and
- Petra Diamonds Southern Africa (Pty) Ltd/M/Pension Funds Adjudicator.

In this matter, the employer had not instituted civil proceedings against the member but had laid a criminal charge against the member. The fund argued that section 300 of the Criminal Procedure Act empowers a criminal court, upon conviction of an offence that has caused loss, to award damages (on application to the court). Thus, it was argued that the laying of the criminal charge is sufficient to support the fund’s decision to withhold a benefit.

The Tribunal **disagreed** with this argument, holding that:

- There is no authority for the contention that the mere opening of a criminal case at the police station will suffice for the purposes of section 37D; and
- “The potential prejudice to the employee who may urgently need access to his funds ... dictate that civil proceedings ... must at least have been instituted, otherwise the provisions of section 37D will be abused by employers who have no genuine claim against the employee or have no serious desire to pursue a claim for compensation”.

The Tribunal found that as there were no civil proceedings by the employer claiming loss, the fund could not exercise its discretion to withhold the member’s benefit under section 37D of the Act.

Tribunal decisions are not precedent (unlike court judgements), and funds are thus not bound by the Tribunal’s interpretation of the law. However, as with determinations by the PFA, funds would be reckless not to take heed of Tribunal determinations.

SURF therefore requires that an employer institute civil proceedings against members whose benefits they request the fund to withhold. The board of trustees will require confirmation that civil proceedings have been instituted by an employer when it considers a request to withhold a benefit. Failure to institute civil proceedings will result in the board believing that the employer has no genuine claim against the employee or has no serious desire to pursue a claim for compensation, leading to a denial of the withholding request.

Factors the trustees must take into account include the following:

- Evidence that the employer has instituted civil legal proceedings against the member, confirmation of the court case number and copies of the documents pertaining to the action or application lodged with the applicable court (this may be accompanied by details of criminal proceedings also instituted against a member, but criminal proceedings alone will no longer be sufficient grounds for the trustees when considering a request to withhold a member's benefit);
- Whether the employer is actively pursuing the matter;
- Whether the employer has a reasonable chance of success;
- Whether the employer is responsible for any delays in the legal proceedings;
- Whether the employer's case has been put to the member and whether the member has been afforded an opportunity to respond to the employer's allegations; and
- The possibility of financial prejudice to the member if the benefit is withheld.

If the trustees are satisfied that the employer has a legitimate case, and after consideration of the member's arguments or representations in response to the employer's case against them, the trustees may agree to withhold the benefit. However, for the trustees to continue withholding the benefit, the employer must continue to provide substantial evidence at regular intervals, or at least once a month. For the trustees to determine whether the withholding is reasonable, the following must accompany the request to withhold a benefit:

- Confirmation that the employer has instituted civil proceedings against the member: confirmation of the court case number and copies of the documents pertaining to the action or application lodged with the applicable court that set out the employer's claim against the member;
- Estimate of loss suffered (including costs of legal fees, if any);
- Disciplinary hearing proceedings, internal enquiries/notices of dismissal or such supporting evidence to facilitate the trustees' understanding of the conduct that caused loss to the employer;
- Completed withdrawal claim form; and
- Continuous updates throughout the legal proceedings.

It should be noted that a criminal judgment or conviction is in itself insufficient for the employer to be compensated. In terms of section 300 of the Criminal Procedure Act, in addition to the conviction, the employer must request a compensation order for damages to be recovered from the member's benefit. This must be highlighted to SAPS when proceedings are initiated.

What should an employer be aware of?

It is critical that the employer provides the trustees with accurate and timely information to enable the trustees to apply their minds to the withholding request, bearing in mind that the trustees must also consider the rights of the member and must consult the member to allow them an opportunity to state their case before making a decision to withhold a benefit.

Furthermore, for withholding to continue once the trustees have agreed to such, the employer must regularly update the trustees until the matter is concluded, as the trustees have a duty to consider the rights of both the employer and the member.

If the employer is the cause of undue delays in finalising the investigation and/or ensuing litigation, the trustees must review the circumstances objectively and consider whether any party is being unduly prejudiced by the continued withholding of the benefit. Importantly, the Act does not specify minimum or maximum time periods within which a benefit may be withheld – the PFA has held that, in some instances, withholding for a period of six (6) months was unreasonable, whereas, pending the outcome of criminal proceedings, withholding for two (2) years was considered reasonable in other instances. Each case is thus dealt with on its merits, and the PFA has cautioned employers against abusing section 37D in the hope of finding evidence after the fact and has advised that proper oversight must be observed.

In practice, the employer generally establishes that a member has committed theft, dishonesty, fraud or misconduct only after the member has left service and his/her benefit has been settled or is about to be settled by the administrator. It is therefore imperative that the employer notifies the administrator and, in turn, the trustees as soon as the employer becomes aware of the member's theft, dishonesty, fraud or misconduct, especially if the employer intends to recover an amount for damages caused against the member's benefit.

What portion of the member's benefit can be withheld?

The employer must quantify the loss it has suffered, as the fund cannot withhold an amount exceeding that claimed by the employer.

In the event that the employer's claim is equal to or exceeds the member's benefit, the trustees may withhold the member's entire benefit in the fund. If the employer's claim is less than the member's benefit, then only the amount claimed by the employer may be withheld, and the remainder of the member's benefit will be paid to the member.

Notwithstanding the above, the Act allows for an employer to include in its claim legal costs that were or will be incurred. The employer must provide the trustees with a reasonable estimate of the legal cost.

Important points to remember:

- Notify the administrator as soon as possible about any claim that the employer may have against a member's benefit.
- Any request for a deduction from a member's benefit must be accompanied by:
 - a signed and fully completed AOL (with supporting documentation); or
 - a civil or criminal judgment (with a compensation order); and
 - a completed withdrawal claim form.
- If a judgment has not yet been obtained, all supporting documents relating to the employer's civil case against the member, including a case number and any other documents (summons, notice of motion, affidavits, statements) lodged with a court must be sent to the trustees for their consideration in order for them to agree to withhold the benefit.
- Regular updates (at least once a month) must be provided to the trustees to justify the continued withholding of a benefit.
- An employer does not have an automatic right to withhold a member's benefit. The trustees must apply discretion in determining whether to withhold the member's benefit or not and must give due consideration to the member's version of events.
- Employers often withhold the claim form to prevent the member from accessing their benefit, but only a request made to the fund, together with the claim form and the necessary motivation for withholding, will enable the trustees to decide whether to withhold the benefit.

Get in touch

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We look forward to hearing from you.

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