

Law Navigator



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Protection of Benefits and Allowable Deductions

This edition of Law Navigator focuses on the protection of a member's benefit in a retirement fund before their fund membership has been terminated, and on the different types of deductions allowed for in the Pension Funds Act.

Protection of Benefits

1. Section 37A

Section 37A of the Pension Funds Act addresses the general protection of a member's benefit in a retirement fund. It specifies that a member's benefit as provided for in the fund's rules (or their right to such benefit) may not be reduced, transferred, ceded, pledged, hypothecated, attached or executed except as allowed for by the Pension Funds Act, the Income Tax Act, the Tax Administration Act or the Maintenance Act. In addition, when a court conducts an inquiry under Section 65 of the Magistrates Courts Act to determine a judgement debtor's ability to pay, only a maximum of R3 000 per annum from a member or beneficiary's pension interest may be taken into account.

A member or their beneficiary may not use a fund benefit as security for other debts. If the fund becomes aware of an attempt to transfer, cede, pledge or hypothecate a fund benefit, the board may withhold or suspend payment of the benefit or pay it to one or more of the dependants of the member or beneficiary (or to the guardians or trustees of such dependants).

A fund may pay a fund benefit to a third party if there is clear evidence that the member or the beneficiary is not able to open a bank account. In such circumstances, SURF would require a letter from the bank or other evidence depending on the circumstance confirming that the member or beneficiary cannot open an account.

Members often request that payments go into a joint bank account, generally one shared with a spouse. This is actually a normal bank account with one main account holder, the second party (the spouse)

having been given authority to operate on the account by way of a power of attorney. SURF may not pay a benefit into such an account, as there is a risk that the non-member spouse may withdraw the benefit without the member's consent.

Protection under section 37A only applies while the benefit is in the fund. The protection falls away once the benefit has been paid into the member's or beneficiary's bank account, and the amount paid becomes "money" like any other amount paid into that account.

This was confirmed by the Pension Funds Adjudicator in *Ehlers v Nedcor Defined Contribution Provident Fund and Another* [2002] 3 BPLR 3141 (PFA):

19. While the benefit is held by a pension fund, section 37A of the Act is obviously applicable, and the benefit may not be attached by any court order. Hence, had the Complainant chosen to retain the benefit in the fund in the form of a deferred pension or alternatively had transferred it to another pension fund such as a retirement annuity fund or a preservation fund, then his benefit would have been incapable of attachment. However, this did not happen here. Once the benefit was paid (by means of an electronic transfer into his bank account), it lost its character as a benefit because the ordinary common law principles of confusio and commixtio applied, whereby when things or property of different values are mixed or fused and are no longer readily separable, ownership of the things is acquired by the possessor. Regarding the ownership of monies in a bank account, it is settled law that ownership thereof vests with the bank.

2. Section 37B

Section 37B of the Pension Funds Act offers protection of a benefit payable in terms of the rules of a retirement fund upon the insolvency of the person entitled to that benefit. It provides that if the estate of any such person is sequestrated or surrendered, the benefit shall not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by their creditors or the trustee in their insolvent estate.

Like the protection afforded by section 37A, this protection only applies so long as the benefit has not been paid.

In the case of *M and Another v Murray and Others* (251/2019) [2020] ZASCA 86; 2020 (6) SA 55 (SCA) (9 July 2020) where the member

had received his pension payout before his estate was sequestrated, the Supreme Court of Appeal rejected the claim that the member's pension benefit paid to him, including the assets purchased with it, were exempted from attachment in terms of section 37B and argued as follows:

[15] *"Benefit" is defined in s1 of the Act as "any amount payable to a member or beneficiary in terms of the rules of that fund". The reference to "payable" instead of "paid" clearly envisages a sum to which a member of a pension fund or a beneficiary is entitled to receive but has not yet received. So construed, the amount remains a "benefit" to the extent it has not yet been paid to the member or beneficiary. Once the benefit is paid to him or her, the beneficiary ceases to be a "member" of the pension fund according to the rules of the fund, and the money ceases to be a "benefit". It loses its character once in the hands of the beneficiary and ceases to be a benefit. The beneficiary may do as they please with it. Such a beneficiary can thus hardly complain if creditors lay their hands on the money to satisfy outstanding debts.*

[16] *Thus, all that s37B entails is that, while in the hands of a pension fund, the insolvent's pension interest cannot be attached by his or her trustee on the basis that it forms part of the insolvent's assets. It protects only the pension benefit of a person whose estate is sequestrated, which Mr M[...]’s estate was not when he received his pension pay-out. The effect of a sequestration order is to divest an insolvent of his or her estate and to vest it in a trustee. Section 37B seeks to establish an exception to the provisions of s20(1)(a) of the Insolvency Act. When Mr M[...] received the payment, his estate had not as yet been sequestrated. There was thus no insolvent estate or trustees to speak of. Section 37B therefore could not find application when the payment was effected. For that reason, Mr M[...] could not bring himself within the exception, and payment could only have been made into his "regular estate". Having then disposed of those monies in the manner in which he did renders them susceptible to attack. This is fortified by s23(7) of the Insolvency Act, which provides that during the sequestration, "the insolvent may for his own benefit recover any pension to which he may be entitled."*

3. Section 37C

The introduction to section 37C(1) of the Pension Funds Act states:

Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner...

This limits the member's freedom of testation as expressed in a beneficiary nomination form or in their will, instead protecting the financial needs of their dependants. The trustees, who are responsible for distributing the member's death benefit in an equitable manner between the dependants and non-dependent nominated beneficiaries, must take these financial dependency needs into account.

Because the death benefit does not form part of the assets in the deceased member's estate, it cannot be attached by creditors.

Allowable Deductions

Section 37D of the Pension Funds Act allows for the following deductions against a member's retirement fund benefit:

- Tax due under the Income Tax Act payable on a fund benefit.
- A housing loan or guarantee provided by the fund.
- Maintenance order amounts, plus any tax payable on such.
- Divorce order amounts.
- Compensation for damages to the employer relating to theft, dishonesty, fraud or misconduct where the member has admitted liability to the employer in writing or a judgment has been obtained against the member.
- Medical scheme contributions paid by the fund on behalf of the member or beneficiary.
- Insurance premiums paid by the fund on behalf of the member or beneficiary.
- Amounts paid on behalf of the member or beneficiary for any purpose approved by the Financial Sector Conduct Authority.
- Any arrear taxes owed by the member to the South African Revenue Service.

Whether you are starting your first job or already working and planning for retirement, unpacking and understanding the benefits provided by your retirement fund is one of the smartest financial moves you can make. Retirement funds are not just about saving but also about protecting your future.

The great thing is that your benefits are safe guarded by law. It is never too late or too early to learn how these can work for you.

Stay tuned for more details about retirement fund deductions for maintenance and divorce order amounts in the next edition of the *Law Navigator*.