

Law Navigator



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Employer Deductions

This edition of Law Navigator is the last in the series focusing on allowable deductions in alignment with the Pension Funds Act. In this issue, we examine deductions in favour of an employer and clarify the employer's right to claim compensation for damages suffered as a result of a member's theft, dishonesty, fraud or misconduct.

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

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 strict requirements derived from the Act, as well as precedents established through case law, 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 contain 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 wrongfully in a certain situation and that this misconduct caused a loss to the employer. 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 SURF's Board of Trustees has the discretion to allow a deduction from a member's benefit.

An employer can institute a claim for a deduction in its favour when the member's employment has been terminated, irrespective of whether this results in the member's membership of the fund terminating or not. If, for example, an employee is dismissed but stays on as a paid-up member of SURF, the employer will still be able to institute a deduction claim.

In addition to the member's misconduct having resulted in a loss to the employer, one of the following two requirements must also be met:

- a. The member must have signed an admission of liability (AOL) or an acknowledgment of debt (AOD) confirming their specific misconduct, the amount of the damages caused to the employer as a result of that misconduct and agreeing that this amount may be deducted from their benefit; or
- b. a judgement must have been obtained against the member in any court, including a magistrate's court. With effect from 1 September 2024, the Pension Funds Act includes a compensation order granted by a criminal court in terms of section 300 of the Criminal Procedure Act. Section 300 of the Criminal Procedure Act empowers a criminal court to award damages to the party that suffered the loss. The effect of this is that an employer does not have to institute civil proceedings against a member to claim damages caused to it. If the employer provides evidence of its claim for damages forming part of the criminal proceedings, it will be considered sufficient to qualify as a claim under section 37D of the Act.

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.

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 SURF. SURF 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 SURF is not satisfied with the detail provided in the AOL and no or insufficient supporting information is provided by the employer, SURF is 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 SURF withhold the member's benefit pending the finalisation of the legal proceedings. The act of withholding a benefit is not explicitly provided for in the Act. *In the case of Highveld Steel and Vanadium Corporation Ltd v Oosthuizen (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA)*, the Supreme Court of Appeal 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. The Act was amended with effect from 1 September 2024 to imply this right to withhold a benefit, allowing a fund to suspend the payment of a savings withdrawal benefit to a member for a period of 12 months "where the employer has not obtained a judgment" if the payment of that benefit will result in there being an insufficient benefit left to meet the employer's loss. This suggests that a 12-month withholding period is allowed for. 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.

In the case of SA Metal Group (Pty) Ltd v Jeftha and others 2020 (1) BPLR 20 (WCC), the judge emphasised that a fund cannot indefinitely withhold a member's benefit. It confirmed that the board of trustees must give the member an opportunity to respond to the employer's allegations against them and that the trustees must consider the extent of the financial prejudice the member would suffer.

The SURF General Rules provide as follows with regards to the withholding of benefits.

Where SURF has already issued a housing guarantee for a member, the divorce order deduction in favour of a non-member spouse will be limited to the remainder of the member's benefit in SURF after the outstanding housing loan amount has been deducted.

At the request of a PARTICIPATING EMPLOYER, the BOARD has the right to withhold payment of a benefit pending the outcome of legal proceedings, provided that:

- (a) the amount withheld shall not exceed the amount that may be deducted in terms of the ACT;
- (b) the BOARD has reason to believe that the PARTICIPATING EMPLOYER has a reasonable chance of success in the proceedings that have been instituted;
- (c) the BOARD is satisfied that the PARTICIPATING EMPLOYER is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;
- (d) once the proceedings have been determined, settled or withdrawn, any benefit to which the MEMBER is entitled is paid forthwith; and
- (e) the BOARD, at the express written request of a MEMBER whose benefit is withheld or at the express written request of a PARTICIPATING EMPLOYER subject to the consent of the MEMBER whose benefit is withheld, may, if practical, permit the value of the MEMBER'S benefit as at the time of such request to be isolated, in whatever manner the BOARD believes appropriate, from the possibility of a decrease therein as a result of poor investment performance.

SURF will take the following into account when considering an employer's claim to withhold a member's benefit:

- whether the employer has instituted civil or criminal proceedings against the member;
- 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 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 SURF is 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, SURF may agree to withhold the benefit. However, for SURF to continue withholding the benefit, the employer must continue to provide substantial evidence at regular intervals, or at least once a month.

For SURF to determine whether the withholding is reasonable, the following must accompany the request to withhold a benefit:

- Confirmation that the employer has instituted legal proceedings against the member: the court case number, 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, and in the event of the employer having instituted criminal proceedings, evidence that the employer has applied for a compensation order for the damages caused by the member;
- Estimate of loss suffered (including costs of legal fees, if any);
- Such supporting evidence as required to facilitate SURF's understanding of the conduct that caused loss to the employer, including but not limited to disciplinary hearing proceedings, internal enquiries/notices of dismissal;
- Completed withdrawal claim form, where applicable; and
- Continuous updates throughout the legal proceedings.

If, after consideration of the representations made by the member, SURF is satisfied that the employer has established a legitimate case, taking into account the factors listed above and ensuring compliance with the fund rules and their fiduciary duties, SURF may agree to withhold the benefit for a specified period. However, if SURF is persuaded by the arguments or representations made by the member, SURF is 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.

What should an employer be aware of?

It is critical that the employer provides SURF with accurate and timely information to enable SURF to consider the withholding request, bearing in mind that SURF 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 SURF has agreed to it, the employer must regularly update SURF until the matter is concluded, as SURF has 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, SURF 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 periods for the withholding of a benefit – the Pension Funds Adjudicator (PFA) has held that in some instances withholding for a period of six months was unreasonable, whereas, pending the outcome of criminal proceedings, withholding for two 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 their 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, SURF 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 *P Meyburgh v PFA & others*, the Financial Services Tribunal confirmed that [T]he law acknowledges that initial claims may be based on preliminary findings and are often subject to further investigation and auditing. Consequently, the claimed amount can and may be revised as the legal and auditing processes unfold.

In the event that the employer's claim is equal to or exceeds the member's benefit, SURF 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 SURF with a reasonable estimate of the legal costs.

Important points to remember:

- Notify SURF as soon as possible about any claim 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 or AOD (with supporting documentation); or
 - a civil or criminal judgement with a compensation order; and
 - a completed withdrawal claim form, where applicable.
- If a judgment has not yet been obtained, all supporting documents relating to the employer's 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 SURF for their consideration in order for them to agree to withhold the benefit.
- Regular updates (at least once a month) must be provided to SURF to justify the continued withholding of a benefit.
- An employer does not have an automatic right to withhold a member's benefit. SURF must apply discretion in determining whether or not to withhold the member's benefit 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 SURF, together with the necessary motivation for withholding, will enable SURF to decide whether to withhold the benefit.