



There has been much written on the topic of permitted deductions from the retirement fund benefits of employees to compensate their employers for damages caused by the employee, as well as various Pension Fund Adjudicator determinations. Despite this, employers and members frequently make enquiries on the subject of employers claiming against an employee's retirement fund benefit.

### The correct approach to compensating an employer

Section 37D of the Pension Funds Act in general permits deductions from a member's retirement fund benefit for income tax, pension-backed housing loans, divorce orders deductions, deductions permitted by the Registrar and compensation owing to the employer. The most problematic of these is the deduction for damage caused to an employer.

Where an employer has suffered a loss as a result of an employee having committed **fraud, theft, dishonesty or (dishonest) misconduct** the employer may request the Fund to make a deduction from that member's retirement fund benefit as compensation for the loss. Although a claim to reimburse an employer is permitted by law, the request for a deduction against a member's fund benefit must meet strict requirements before the Board of Trustees will approve such a deduction. Proof of the member's liability must be provided, and the Trustees have a duty to consider the rights of both the employer and the member. Therefore, **before the Fund will make a deduction from the member's retirement benefit, there must be either:**



A written admission of liability; or



A civil judgment ordering the employee to reimburse his/her employer for the loss suffered by his/her employer as a result of his/her fraud, theft, dishonesty or misconduct; or



A criminal judgment against the employee, where the employee has been found guilty by a court of having committed fraud, theft, dishonesty, or misconduct against his/her employer. However, the court must have issued a compensation order in terms of section 300 of the Criminal Procedure Act, ordering the employee to pay his/her employer compensation for its loss.



## Admission of Liability - getting the right information

The most common section 37D situation occurs when the employer is aware of the theft, fraud or dishonesty caused by an employee at the time that the employee is either dismissed or resigns. In this instance, the employee is usually required to complete and sign an Admission of Liability Form. It is very important for employers to realise that this form is only considered legally binding on the Fund if the employee has specifically made all of the following admissions:

- Specified the actual Rand amount of money owed to the employer for the loss or damage caused by reason of fraud, theft, dishonesty or (dishonest) misconduct. When employees insert the Rand amount of the damages that they caused their employer, they often insert words like 'about' or 'approximately': this would not constitute a valid admission and would prevent the Fund from making any deduction from the member's withdrawal benefit.
- Stated the exact nature of the action that led to the financial loss to the employer. i.e. that he/she stole ABC from the employer, committed fraud by doing XYZ, was involved in dishonest misconduct by doing 123, or was dishonest by way of 456.
- Agreed to the reimbursement of the employer from their retirement fund benefit and authorised the Fund to make the deduction to pay the employer the amount specified.
- Stated that this admission has been made voluntarily by the employee.

## What if the employee won't admit to the wrongdoing and refuses to sign an Admission of Liability?

The Supreme Court has indicated that the right to deduct money from an employee's withdrawal benefit also **extends to the authority to withhold the payment of the benefit pending the determination of the employee's liability towards his/her employer in a court of law.**

In many instances, employers are faced with two challenges at the time of termination of the employment contract:

### FIRSTLY

Where an employee refuses to sign an admission of liability for the loss or damage caused and the employer has not yet obtained a court judgment against the employee.

### SECONDLY

When an employer may only suspect dishonesty by the employee, but still has to prove it and determine the amount involved. In this instance the employer is faced with the challenge of ensuring that the member's benefit is withheld whilst they investigate the matter with the intention of obtaining a compensation order for the loss suffered.



## The employee must request that the Fund withhold the member's retirement fund benefit

Where an employer considers requesting that the Trustees withhold an employee's retirement fund benefit pending the outcome of a civil or criminal case, the following is required:



The employer's request to withhold a benefit must be in writing, should clearly indicate what the damages were, and what steps the employer is taking to establish proof of the theft/fraud, etc. against the former member.



The employer should also indicate when it anticipates to have completed its investigation to prove liability against the former member.

The Trustees will make their own decision regarding the withholding of benefits. It is important to note that the decision to withhold a member's Fund benefit rests with the Trustees and not with the employer. It is however considered reasonable that the request to withhold a member's benefit is submitted to the Fund shortly after the termination of the member's employment, as the Fund seeks to pay members their benefits within 60 days of withdrawing from the Fund.

The following essential considerations will apply in respect of the withholding of benefits:

- **The Fund may only withhold as much of the benefit as may be required to compensate the employer** in terms of the section 37D claim. Any residual balance must be paid to the employee.
- **Trustees have a duty to consider and balance the rights of both the employer and the member.** This means that the period of withholding must be reasonable and where the employer is the cause of undue delays in finalising its investigation and/or litigation, the Trustees may be required to release the benefit and make payment to the member.

- **Within 90 days of the member having exited the Fund and the employer having requested that the member's benefit be withheld, the employer must submit proof of civil or criminal proceedings having been instituted.** The employer should provide the Fund with either the police docket/charge number, or case number for a civil action (disciplinary hearings, CCMA and Labour Court rulings are not sufficient grounds to withhold a member's benefit.)
- **The employer must at the same time indicate to the Fund how it has a reasonable chance of success in the case against the employee** - this goes to demonstrating that the employer is not acting in bad faith.
- Where there are delays in the legal proceedings, the employer must provide the Fund with legitimate reasons for the delay and demonstrate that they are not the cause for delays.



Once the outcome of legal proceedings is known, the Fund must be notified thereof, indicating the exact financial deduction determined by the civil court or, in terms of a section 300 compensation order by the criminal court.

## What are some non-admissible deductions in respect of section 37D relating to theft/fraud/ dishonesty/misconduct?

Contractual debts such as car loans, computer loans, failure to work the requisite notice period, over-payments by the employer's payroll and the like, in respect of which the employee still owes a balance to the employer on the date of withdrawal, fall outside the provisions of section 37D(1) (b) of the Act. Therefore, such contractual debts may not be claimed/deducted from the member's retirement benefit and should rather be recovered through other means, for example, by the employer deducting such outstanding amounts from final salary and/or leave payments that may be due to the employee. Alternatively, employers should institute civil proceedings against the employee in a court of law to recover such debt through normal civil litigation.



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