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The protection of pension fund assets against creditors has been a topic of debate in several countries. The ultimate risk faced by pension fund members and pension fund beneficiaries is the loss of retirement income. As a general rule, most countries have legislative means which seek to protect pension fund members' benefits. Accordingly, South Africa is no exception to the general global trend.

The current position in South Africa is that retirement or pension savings are protected from creditors. There are various protective mechanisms that place retirement benefits beyond the reach of creditors. Chief among these protective measures are the provisions of section 37A(1) of the Pension Fund Act 25 1965 (the Act). The Act effects such protection by providing that "no benefit provided for in the rules of a registered fund (including an annuity purchased by the said fund from an insurer for a member) ...shall...be liable to be attached or subjected to any form of execution under a judgment or order of a court".

The practical effect of the provisions of section 37A(1) is that it guards against the abuse of judicial process to attach the member's pension benefits. In essence, section 37A protects a member's pension benefits from being reduced to satisfy a judgment or an attachment order against a member of a pension fund, it almost provides a general rule protecting pension fund benefits from *inter alia* attachment and execution. Its object is clearly to protect pensioners against being deprived of the source of their pensions.

The protection afforded by section 37A(1) is, however, not absolute. There are certain well-defined exceptions which are spelt out in section 37D of the Act. At the outset, section 37D(1)(b) entitles an employer the right to access pension fund benefits of the member in the hands of any fund. However, it is noteworthy that a pension fund's right to make deductions from a pension benefit remains highly circumscribed and may only be exercised in accordance with the requirements set out in sections 37D and 37A of the Act. In that regard, it may be worthwhile to refer to the provisions of section 37D, which provide as follows:

"37D Fund may make certain deductions from pension benefits

- (1) A registered fund may-
- (c) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –
- (i) (aa) a loan granted by the employer to the member for any purpose v referred to in section 19

(5) (a); or

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19 (5) (a), to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule of that Act; or

(ii) Compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has obtained against the member in any court, including a magistrate court,

From any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned".

Notwithstanding the exceptions enumerated in section 37D, it is significant that contractual debts such as car loans or computer loans in respect of which the employee still owes a balance to the employer on the date of withdrawal from the fund, fall outside the purview of section 37D(b)(ii). Consequently, such contractual debts may not be deducted from the member's benefit payable in terms of the rules of the fund, but may be recoverable through other means, for example by the employer instituting civil proceedings against the member in a court of law. Put differently, the employer desirous of recovering its debt from an indebted member can only obtain recourse through normal civil litigation.

Pertinently, section 37D(1) refers to "a member" of a registered pension fund. "Member" is defined in section 1 of the Act as meaning:

"...in relation to -

(a) a fund referred to in paragraph (a) of the definition of "pension fund organisation" any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund..."

What are the requirements in respect of deductions from a member's pension benefits due to the member's theft, fraud, dishonest or misconduct?

In terms of section 37D(b)(ii) of the Act, a fund may deduct from the member's benefits payable in terms of the rules of the fund any amount in respect of damages caused to the employer by the member as a result of theft, fraud, dishonesty or misconduct, provided:

- the member has admitted liability in writing, or
- judgment by a court of law has been obtained against the member.

The member's written admission of liability must be clear and unambiguous and should specifically allow for deductions to be made in respect of a wrongdoing committed by the member against the employer. This requirement poses a potential minefield. In practice, employers ought to be cautious that such admissions are lawful and admissible. Accordingly, a word of caution to the employers is perhaps merited. An admission must be made freely and voluntarily and without any undue pressure on the employee. Furthermore, the employer must ensure that the employee understands the consequences of his admissions. One can conceive of instances where employees purport to make admissions, only to recant these later on the grounds that pressure was brought to bear on them to admit. At any rate, such admissions may often result in criminal prosecutions. Needless to say, such admissions must be properly recorded, and the employer must preferably enlist the assistance of an independent third party, particularly an attorney.

The judgment by a court of law must relate to either of the following:

- a civil judgment sounding in money, namely a judgment made consequent to a civil action and specifically awarding damages to the employer as compensation for the financial loss suffered; or
- a compensatory order made by a criminal court in terms of section 300 of the Criminal Procedure Act, specifically allowing compensation to the employer for the financial loss suffered.

It goes without saying that in his application for such an order the employer must allege that some wrongdoing has been committed by the employee which amounts to theft, fraud, dishonest or misconduct in terms of section 37D(b)(ii). In practice, that is often preceded by a disciplinary process, held in accordance with the principles of law, against the employee.

The theft, fraud, dishonest or misconduct should have been committed while the employee was still a member of the fund.

The issue that often raises some measure of confusion relates to instances where a member has resigns from the employer and terminates membership from that particular fund and transfers their pension fund benefits to a pension preservation fund administered by a different service provider. In other words, the benefits are held by a third party and no longer the employer's pension fund. The question then often arises as to whether the provisions of section 37D(1)(b) apply? Put differently, in circumstances described, will the pension benefits enjoy the protection afforded by section 37A(1) of the Act?.

ABSA Bank LTD v Burmeister & others

Burmeister (first respondent) was formerly employed by ABSA as a manager at its branch in Springs, Gauteng. He resigned on 15 April 1997. Three months after his resignation, in July 1997 the pension fund benefits accruing to him were paid by the appellants pension fund, Absa Bank Pension Fund, to the Protector Pension Fund, a subsidiary of Old Mutual. The pension benefits were subsequently used to purchase a compulsory linked life annuity with Sanlam Assurance Ltd. The annuity is administered by Sanlam Personal Portfolios (Pty) Ltd, (third respondent). In February 1998 Absa Bank (Appellant) issued summons against Burmeister in the High Court, Johannesburg, claiming damages in the sum of R1 765 269.05 being the loss it alleged it had

suffered as a result of the latter's dishonest and fraudulent conduct while in its employ. Burmeister initially defended the action but did not appear in court on the day of the trial, 2 August 2000, and as a result a default judgment was granted against him in the sum of R721 420.56. The judgment remained unsatisfied and on 25 March 2002 the sheriff purported to attach the life annuity to the extent of R300 000. Burmeister sought an order to the High Court, for setting aside of the attachment. The appellant was joined as a third party at its own request and opposed the application and brought a counter-application for an order declaring in effect that its judgment against Burmeister was of such nature as to entitle it to cause the annuity to be attached. The matter came before Potgieter AJ who granted the order setting aside the attachment and dismissing the counter application with costs. The matter was appealed.

The crisp issue on appeal was whether section 37D(1)(b) extends to the third respondent which was in control of the benefits. The appellant contended that they do, the appellant contended that the wording of section 37D(1)(b) is wide enough to conclude a subsequent fund of which the ex-employee is a member and to which the pension benefits emanating from the original fund have been paid. Burmeister contended the contrary. In his illuminating decision, Scott JA stated the following:

"It emerges from the foregoing that 'member' in section 37D (1)(b) includes a former member who has not received all the benefits that may be due to him or her from the fund. Differently, a member remains such until he/she has received all the benefits and that person's membership is terminated according to the rules of the fund..."

The SCA held that the exception provided by section 37D(1)(b) affords an employer a right of access to pension fund benefits which the other creditors do not have. The rationale for this exception can only be the contributions. If the exception permitted the ex-employer access to pension fund benefits in the hands of any pension fund, the exception could lose its rational basis. The judge held further that 'the registered pension fund' referred to in section 37D(1)(b) of the Act must be construed as a reference to the pension fund of which the ex-employee was a member at the time of his employment, i.e. the fund which the employer participated and not some other fund to which the pension fund benefits may subsequently have been transferred. The appeal was dismissed with costs.

As was held in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 2 All SA 225 (SCA)*, trustees of a pension fund are not entitled to make any deduction in the absence of a written admission of liability by the member concerned or a judgment obtained by the employer against the member. As stated above, an employer should put in place mechanisms for obtaining proper admissions from employees. Such processes must accord with the rules of natural justice. There should not be any room for suspicion that an employee was unduly influenced to make any admissions. Charges of undue influence an employee may make later, can be anticipated by proper process that is independently conducted by an independent attorney. Where such a due process has been established, it would be difficult for any employee to later disavow their written admissions.

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