



The Financial Services Tribunal has made waves in relation to two recent decisions about withholding of benefits.

Withholding benefits under section 37D - recent Tribunal decisions

The main question that has arisen is whether or not a fund can make a decision to withhold a benefit if an employer has not instituted civil action against the member.

The facts

On 3 December 2020, the Tribunal decided *Fundsatwork Umbrella Provident Fund / N and The Pension Funds Adjudicator*¹. In this matter, the fund withheld the member's benefit at the request of the employer as a result of allegations of misconduct. The member complained to the Adjudicator's Office and the fund was ordered to pay the benefit and fund return to the member plus interest on that amount. The fund applied to the Tribunal for reconsideration of the Adjudicator's order.

Points made by the Tribunal

- The fund is not, in respect of the withholding of the withdrawal benefits, a person aggrieved (as required by the Financial Sector Regulation Act) and has no legal standing at the Tribunal;
- Section 37D deals with two situations (with respect to damages due to the employer) (a) an admission of liability (which is not relevant to this matter) and (b) a civil judgment.
- The Tribunal referred to the Supreme Court of Appeal (SCA) matter, *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*² which dealt with the withholding of payment of a benefit pending the finalisation of civil proceedings. The Tribunal stated that the SCA did not hold that a fund is entitled to withhold payment because a criminal case has been opened or even upon conviction. A conviction is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted.
- Since the employer did not inform the fund of a civil action or even an intention to claim, a jurisdictional fact for the exercise of its discretion by the fund was absent.

¹ PFA64/2020

² (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA) ;[2009] 2 All SA 225 (SCA); (2009) 30 ILJ 1533 (SCA)

In other words, due to the fact that the employer did not tell the fund that it had instituted civil action against the member, the fund could not exercise a discretion to withhold the benefit.

The Tribunal also made the point that the law, as espoused in the *Highveld Steel* case was an interpretation of the law as it stands and, thus, would apply to decisions by fund boards that had already been made prior to the date of the *Highveld Steel* judgement.

The Jeftha principles were applied

It is noteworthy that the Tribunal also referred to the withholding decision not being in line with the principles espoused by the High Court in the matter of *SA Metal Group (Pty) Ltd v Deon Jeftha and others*³. We have written about this case previously and pointed out that the High Court required the fund in this case, when making a withholding decision to, among other things:

- scrutinise withholding claims very carefully (especially where the member has put up a spirited defence);
- apply its mind appropriately, impartially and in a balanced manner and consider the interests of both the employer and the relevant member; and
- specifically consider the possibility of financial prejudice to the member.

Interest

The fund argued that the Adjudicator could not order the fund to pay interests on the benefit and fund return. The Tribunal disagreed and stated that the Pension Funds Act provides that where an Adjudicator determination consists of an obligation to pay an amount of money, the debt “shall bear interest” as from the date and the rate determined by the Adjudicator. This imposes a statutory duty on the Adjudicator to impose interest. Thus the Tribunal would not overturn the Adjudicator's order to the fund to pay interest.

The Petra Diamonds Tribunal decision

The next matter was two separate applications by the fund and the employer to reconsider the same Adjudicator determination:

- *Fundatwork Umbrella Pension Fund / M / Pension Funds Adjudicator*⁴, and
- *Petra Diamonds Southern Africa (Pty) Ltd / M / Pension Funds Adjudicator*⁵.

This matter again dealt with an Adjudicator decision to order the fund to pay a benefit and fund return plus interest to the member where the fund had made a decision to withhold the benefit based on a request from the employer (who alleged misconduct by the member).

In this matter, the employer had not instituted civil proceedings against the member but had laid a criminal charge against the member.

In this case, the fund's legal counsel specifically argued that section 300 of the Criminal Procedure Act⁶ 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 found the fund's decision to withhold a benefit.

The Tribunal disagreed with this argument. The Tribunal referred to the *Highveld Steel* case and stated that the case is precedent for:

“...where the employer has instituted civil proceedings for the recovery of compensation from the former employee, the fund has a discretion to withhold the benefits upon carefully balancing the competing interests of the employer and the employee”.

The Tribunal stated that:

- the case law is not authority for the contention that the mere opening of a criminal case at the police station proceedings 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”.

Again 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.

³ Unreported case 20298/2019

⁴ PFA 41/2020

⁵ PFA 39/2020

⁶ Act 51 of 1977

What to do now?

Many funds have taken the view, in the past, that a section 300 order under the Criminal Procedure Act amounts to an order for compensation that would satisfy the requirements of section 37D. This would be contrary to the Tribunal's views as set out in the above cases and funds may want to reconsider their 37D processes.

Timing may also be a consideration: as a result of the Tribunal decisions, one of the questions funds will also need to apply their minds to, is whether they will be able to exercise their discretion to withhold a benefit if the employer has not instituted civil litigation but has indicated that it is building a case to do so. May the fund withhold the benefit pending the civil action?

Tribunal decisions are not precedent (unlike court judgements) and, thus, funds are not bound by the Tribunal's interpretation of the law. However, similarly to Adjudicator determinations, funds often take heed of Adjudicator and Tribunal determinations.

Funds will need to make up their own minds as to whether they take a similar interpretation as the Tribunal to section 37D. If they are unsure, they should seek expert legal advice. Employers will also need to take decisions as regards any civil action against members while noting these Tribunal decisions.

Funds need to be careful to act impartially when there is a section 37D withholding request from an employer and this must be reflected in their actions and documentation.

