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EMPLOYMENT

HANDS OFF MY RETIREMENT BENEFIT! NOT SO QUICKLY...

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Providing an employee with retirement benefits, either in the form of a pension fund or provident fund (there is a distinction between these two, but for the purposes of this article we will refer to the monies that are paid out to a member of a retirement benefit scheme, as a pension benefit), is commonplace, but not compulsory in terms of South African law. It may surprise many employers to realise that there are currently no legal obligations placed on employers to given an employee any retirement benefits, and very often the employee is left to make his own arrangements.

It is even more critical, especially for employees, to understand that where retirement benefits are in fact provided, the employer is a separate legal entity to the retirement fund, and the division between the legal liabilities and obligations that lie on these separate legal persons, are critical to understand.

The purpose of a Fund is to assist the employee to save for retirement. An employee becomes a member of the Fund, usually when the employer requires or allows it, and the employee is then a member of the Fund, which is a legal entity separate from the employer, and also regulated by a completely different set of laws than the employer. It is imperative to understand the legal principles that distinguish a retirement fund from the employer. A retirement fund is administered and managed by its board of trustees and in most instances an administrator to manage the interests of members. The fund's rules and Pension Fund Act determine the scope in which the administrators, board and trustees may act in administering Funds. Whereas the relationship between the employer and the employee is regulated by the Labour Relations Act, the Basic Conditions of Employment Act and the Employment Equity Act, the relationship between the Fund and the employee is regulated by the Pension Funds Act and the rules of the Fund.

The only legal obligation, which may arise on behalf of an employer, which has contractually elected to provide an employee with retirement benefits, is to make payment of the required contributions on behalf of the employee to the fund, and after the employer has paid the necessary monthly contribution to the Fund on behalf of the employee, it really has few remaining obligations to the employee. The savings accumulated in a Fund are dependent on the contributions made to the Fund, which can be made by either the employer, employee or both. Upon termination of the employee's employment with the employer, the Fund (and not the employer) has the legal obligation to pay out benefits that accrue to the member of the Fund. On termination of employment, the employer does not receive any payment from the pension fund, and has no obligation to pass on, or make payment to the former employee.

There is no legal obligation placed on an employer to administer the Fund (although it must have representatives on the Board of Trustees). The Board of Trustees of the Fund and the administrator have the obligation to run, operate and administer the Fund generally. Therefore, in the instance that an employee is not paid out his benefits, an employee has a right of recourse against the Fund and not the employer. Ordinarily then, after the monthly contribution has been paid over to the Fund, the employer steps out of the picture and has nothing further to do with the member's pension benefit.

However, employers need to be aware that section 37D of the Pension Funds Act, which allows a registered fund to deduct and pay any pension benefit that would usually be payable to a member or their beneficiaries, to the member's employer as compensation for damages caused to the employer by virtue of the employee's dishonest conduct while employed. The case of *Highveld Steel & Vanadium Corporation Limited v Oosthuizen* (2009) 30 ILJ 1533 (SCA) ("**Highveld**") confirmed that the objective of s37D (1) (b) is to protect an employer's right to recover money that has been stolen or misappropriated by its employees. Furthermore, the Highveld case confirmed that where an

employer wants to seek the relief allowed by Section 37D of the Pension Funds Act, it is entitled to require the fund to withhold payment of the member's benefit, until such time as a court order is obtained confirming that the damages are payable to the employer, so that the fund can then satisfy the court order out of the pension benefit. Section 37D is a useful tool that employers should be aware of, as it provides a useful source of recourse and security for satisfying an order against a dishonest former employee who may otherwise have squandered or hidden assets away.



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