

The Financial Services Tribunal's position on the withholding of a pension benefit pursuant to a criminal complaint

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In this article we will discuss the extent to which employers may withhold a pension benefit if such employer has only laid a criminal complaint against an employee.

In terms of section 37D(1)(b)(ii) of the Pension Funds Act, 24 of 1965 (the "**Act**"), a fund may deduct any amount due by a member to his employer on the date on which he ceases to be a member of the fund, in respect of compensation (including legal costs recoverable from the member in the proceedings referred to below) 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 –

- the member has in writing admitted liability to the employer; or
- judgment has been obtained against the member in any court, including a magistrates 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.

Because it is uncommon for a member to admit liability in writing to the employer (at least, prior to any proceedings being instituted against them), it is the second scenario referred to above that is often the subject matter of disputes.

In *Highveld Steel & Vanadium Corporation Limited v Oosthuizen*[1] ("**Highveld Steel**") the Supreme Court of Appeal ("**SCA**"), for purposes of interpreting section 37D(1)(b) of the Act and the rules of the relevant fund, found that the purpose of the section is to protect the employer's right to pursue the recovery of money misappropriated by its employees.

Accordingly, the SCA interpreted the provision purposively to include the power to withhold payment of an employee's pension benefits, pending determination or acknowledgment of such employee's liability.

The SCA found that the relevant fund had a discretion to withhold a benefit and, in exercising such discretion, the fund should consider potential prejudice.

The fund was moreover bound to exercise such discretion with care and, in the process, balance the competing interests with due regard to the strength of the employer's claim. The fund may also impose conditions on employers to do justice to the case.

The SCA did not deal with whether the pending proceedings include both civil and criminal proceedings, but in that particular matter the dispute related to civil proceedings.

For a number of years following the SCA's finding, funds exercised their discretion in withholding pension benefits pursuant to section 37D(1)(b)(ii) of the Act pending civil or criminal proceedings, taking note that in terms of section 300 of the Criminal Procedure Act, 51 of 1977 ("**CPA**"), where a person is convicted of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon application of the injured person or the

prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss, with such award having the effect of a civil judgment.

The recent position adopted by the Financial Services Tribunal (“FST”) in the findings referred to below, is that an employer cannot withhold a pension benefit in terms of section 37D(1)(b)(ii) of the Act if the employer failed to institute civil proceedings and had only laid a criminal complaint against an employee.

Judge Harms[2], sitting as the Deputy Chairperson of the FST, in the case of *FundsAtwork Umbrella Provident Fund v Elvis Eliah Ngobeni and Another* Case No.: PFA64/2020 (“**Ngobeni**”), in considering the rules of the relevant fund and the provisions of the Act, found that the case of Highveld Steel merely dealt with the withholding of payment pending the finalisation of civil proceedings and it did not hold that a fund is entitled to withhold payment because a criminal case has been opened or even upon conviction.

Judge Harms stated that “*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*”.

He stated further that since the employer in the case did not inform the fund of a civil action or even an intention to claim, a jurisdictional fact for the exercise of a discretion by the fund to withhold was absent.

In the case of *Tape Aids for the Blind v Ashwin Anadh Palhad and Others* Case No.: PFA3/2022 (“**Tape Aids**”), Judge Harms repeated what he stated in Ngobeni and considered the applicability of section 300 of the CPA, in particular.

The FST found that it is doubtful that section 300 of the CPA covers fraud[3], but for the purpose of its finding assumed that fraud was covered by section 300 of the CPA.

This resulted in the issue before the FST being whether laying a criminal complaint amounted to the institution of legal proceedings as required by the rules of the relevant fund.

The FST held that criminal proceedings are instituted by the State through the prosecuting authorities and laying a criminal complaint has no legal consequences.

Thus, laying a criminal complaint, the FST found, does not commence legal proceedings. Legal proceedings may or may not follow, depending on the decision of the prosecutor.

The Pension Funds Adjudicator now adopts the same approach to withholding matters, as has been articulated in the FST’s above findings.

In the result, the industry has largely adopted the position that a fund should only be permitted to withhold an individual’s benefits if the employer has instituted civil proceedings against the individual or has obtained an interdict against the fund, preventing payment.

The position of the FST brings into focus the difference in the requirements for a delictual claim and the requirements for a criminal conviction (i.e. in the context of section 300 of the CPA). Although they are similar, the major difference is that a delictual claim needs to be proved on a balance of probabilities, while the burden of proof for a criminal conviction is that of being beyond reasonable doubt.

Accordingly, criminal conviction requires a higher burden of proof than a delictual claim.

In principle, section 300 of the CPA is a convenient, cost effective and efficient way for a victim to receive compensation for damages without the need to institute parallel or after the fact civil proceedings against an offender.

Some commentators have also suggested that section 300 of the CPA fits perfectly within the framework of restorative justice spearheaded by the Constitution of South Africa.

As stated above, in terms of section 300 of the CPA a court may instruct an offender to repay the victim for damages suffered as a result of the offender’s conduct. Section 300(3)(a) states that such a finding by a court has the same effect as a civil judgment of the magistrate’s court. In light of this the position of the FST, as reflected in Ngobeni and Tape Aids, should be carefully scrutinised –

- in Ngobeni, it is unclear whether application was made for an order in terms of section 300 of the CPA. It appears that the fund only relied on the fact that a criminal case was opened, with no indication that the employer would have pursued damages whether by way of application in terms of section 300 of the CPA or separate civil proceedings; and
- in Tape Aids, Judge Harms focused on the wording of the rules of the relevant fund, which provided that a benefit may only be withheld if legal proceedings are instituted. It appears that the fund in that case only relied on the fact that a criminal complaint was laid, leading to Judge Harms' finding that a criminal complaint is not the institution of legal proceedings.

In conclusion, withholding a pension benefit would always be subject to the rules of the relevant fund. Further, criminal proceedings could be sufficient to withhold pension benefits on the grounds that the criminal complaint is actually prosecuted and judgment is obtained in terms of section 300 of the CPA (bearing in mind any prosecutorial backlogs).

Whilst the findings of the FST are reviewable in terms of the Promotion of Administrative Justice Act, 3 of 2000, the position of the FST is currently unchallenged in a court.

Footnotes

[1] 2009 (4) SA 1 (SCA)

[2] Also a concurring Judge in the Highveld Steel matter.

[3] In doing so it referred to *S v Liberty Shipping and Forwarding (Pty) Ltd and Others* [1982] 4 All SA 141 (D) 1982 (4) SA 281 (D), where it was held that the wording of section 300 of the CPA was vague in that it is unclear as to whether the section only covers damage to property or whether it covers damage to a person as well. Since the approach of the courts was very conservative at the time, the court opted for a strict interpretation of the section and held that fraud, in that instance, was excluded from the cover of section 300 of the CPA.



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