

WITHHOLDING OF PENSION FUNDS BENEFITS UNDER THE SOUTH AFRICAN LAW

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**A MINI-DISSERTATION SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR
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TABLE OF CONTENT

Abstract.....	i
Declaration by the student.....	ii
Declaration by the supervisor.....	iii
Dedication	IV
Acknowledgement	v
List of international instruments.....	VI
List of abbreviations.....	vii
Table of cases.....	viii
Table of statutes.....	vix

CHAPTER 1: INTRODUCTION AND BACKGROUND OF THE STUDY.....1

1.1. Introduction.....	17-21
1.2. Statement of the research problem.....	21-24
1.3. Literature review.....	24-26
1.4. Aims and objectives of the study.....	26-27
1.5. Research methodology.....	27-28
1.6. Division of chapters.....	28

CHAPTER 2: WITHHOLDING OF PENSION

BENEFITS.....29

2.1. Introduction.....	29-31
2.2. Section 37(D).....	31-35
2.3. Deductions for dishonest conduct causing loss to the employer.....	35

2.4. Conclusion.....	35
----------------------	----

CHAPTER 3: CONCILIATION AND ADJUDICATION OF PENSION FUND

COMPLAINTS.....	36
------------------------	-----------

3.1. Introduction.....	36-37
------------------------	-------

3.2.1 Office of the Adjudicator.....	37-38
--------------------------------------	-------

3.2.1. Establishment of the OPFA	38
----------------------------------------	----

3.2.2. Appointment of the Adjudicator.....	38-39
--------------------------------------------	-------

3.3. How to lodge a complaint.....	40-41
------------------------------------	-------

3.4. Parties and definition of complaint.....	41-43
-----------------------------------------------	-------

3.5. Complaint typically received.....	43-44
----------------------------------------	-------

3.6. Statutory exclusion of the Adjudicator’s jurisdiction.....	44-45
-----------------------------------------------------------------	-------

3.7 .Main object of the office.....	45
-------------------------------------	----

3.8. Time barring and prescription.....	46-50
-----------------------------------------	-------

3.9. Investigation of complaints.....	50-52
---------------------------------------	-------

3.10. What is conciliation	52-53
----------------------------------	-------

3.11 Pension Fund Adjudicator Conciliation Procedures.....	53
------------------------------------------------------------	----

3.12 Forms of conciliation.....	54-55
---------------------------------	-------

3.13 Conclusion and recommendation.....	55-56
-----------------------------------------	-------

CHAPTER 4: PENSION FUNDS ADJUDICATOR DETERMINATIONS AND

COURT CASES ON WITHHOLDING OF PENSION BENEFITS	57
-------------------------------------------------------	-----------

4.1 An analysis of the recent cases in relation to the interpretation of section 37D of the Act.....	57
------------------------------------------------------------------------------------------------------	----

4.2	Analysis of cases referred to the SCA.....	58-61
4.3	Interpretations of the provision of section 37 by both the Adjudicators and the SCA in terms of the South African Law.....	61-63
CHAPTER 5: CONCLUSION AND RECOMMENDATIONS		64
5.1.	Introduction.....	64-66
5.2.	Conclusion.....	66
5.3.	Recommendations.....	67-68
BIBLIOGRAPHY.....		68-69

(I)

ABSTRACT

This study will analyse section 37D of the Pension Funds Act, 24 of 1956. The analysis will also give insight to pension benefits, and how they are afforded special protection by the legislature. Section 37A (1) prohibits the reduction, transfer, cession, pledge or hypothecation of pension benefits. In terms of the Act if a member becomes insolvent, pension benefits are deemed not to form part of the insolvent estate and are thereby protected from erosion by creditors. Section 37C of the Act deems pension benefits payable on the death of a member, subject to certain exceptions, not to form part of the assets of the estate of the deceased member. Section 19 of the Act also serves to protect pension benefits by restricting the manner in which a fund's assets may be invested.

(ii)

DECLARATION BY THE STUDENT

I, **Mmopa Queen Seakamela** hereby declare that the mini-dissertation for the Masters of Laws (LLM) in Labour Law degree at the University of Limpopo, hereby submitted by me, has not previously been submitted for a degree at this or any other institution and that it is my work in design and execution. All reference materials contained herein have been duly acknowledged.

Signature: _____

Date: _____

(iii)

DECLARATION BY A SUPERVISOR

I, **Adv. Lufuno Tokyo Nevondwe** hereby declare that this mini-dissertation by **Mmopa Queen Seakamela** for the degree of Masters of Laws (LLM) in Labour Law be accepted for examination.

Signature: _____

Date: _____

(iv)

DEDICATION

I dedicate this work to the following people in my life:

- To my late parents **Mr. A.M Mojapelo** and **Ms. E.M Mojapelo**, who took care of me and sacrificed all what they had, through my schooling years, and also going an extra mile through my tertiary education. I wish you were still alive to share the achievements with me.
- To my daughter **Mammekwa Seakamela** and son **Ramotlhaedi Sentereng Seakamela**, this is yours and thanks for having been there for me even in hard times. You never lost sight of me, and you sacrificed your playing time to see to it that all is well for me
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LIST OF INTERNATIONAL INSTRUMENTS

1. Home Work Convention, 1996 (no.175)
2. ILO's Social Security Convention [Social Security Minimum Standards Convention 1952 (no. 102)]
3. Old Age & Survivor Benefit Convention, 1967 (no.128)
4. Part-Time Work Convention, 1994 (no.175)
5. Plantations Convention, 1958 (no.110)
6. The European Convention for the Protection of Human Rights and Fundamental Freedom
7. The International Covenant on Economic, Social and Cultural Rights
8. SADC Charter of Fundamental Social Rights : Article 4
9. The UN Global Compact
10. Van Tonder L & Goss P. 2011 International Anti-Corruption Conference (IACC) : *Effective Use of Legal Remedies for Corruption: South African Perspective*

LIST OF ABBREVIATIONS

1. CCMA	Commission for Conciliation Mediation and Arbitrations
2. FSB	Financial Services Board
3. GEPF	Government Employees Pension Fund
4. GEL	Government Employees Law
5. HC	High Court
6. IMSSA	
7. OPFA	Office of the Pension Fund Adjudicator
8. PFA	Pension Fund Adjudicator
9. SCA	Supreme Court of Appeal

TABLE OF CASES

SOUTH AFRICAN CASES

1. Absa Bank Ltd v Burmeister 2004 (5) SA 595 (SCA)
2. Alder v Anglo American Group Pension Fund and Another [2002] 3 BPLR 3135 (PFA)
3. Anstey v Pegasus III Provident Fund and Others [2000] 2 BPLR 119 (PFA)
4. Appanna v Kelvinator Group Service of SA Provident Fund Case no. PFA/GA/475/99
5. Banking Staff Association v Old Mutual Staff Retirement Fund [2005] 3 BPLR272 (PFA)
6. Biermann v ABSA Consultants & Actuaries (Pty) Ltd and Others [2002] 4 BPLR 3347 (PFA),
7. Brown v BKB Group Retirement Fund & Another (1) [2004] 3 BPLR 5557 (PFA)
8. Buthelezi v Municipal Gratuity Fund & Another (1) [2001] 5 BPLR 1996 (PFA)
9. Cebisa Kalimashe v Eskom Pension and Provident Fund Case no 561/08 Mthatha High Court
10. Charlton and Others v Tongaat-Hullet Pension Fund (9438/05) [2006] ZAKZHC 14 (1 February 2006)
11. Cockcroft v Mine Employees' Pension Fund, [2007] 3 BPLR 296 (PFA),
12. Consol Glass v Momentum FundsAtwork Umbrella Provident Fund
13. De Bruyn v Telkom Retirement Fund [2000] 11 BPLR 1220 (PFA)
14. De Jager v Mine Officials Pension Fund & Others [2003] 5 BPLR 4656 (PFA)
15. Dlavana and Another v Shoprite Employees Retirement and Others [2002] 4 BPLR 3354 (PFA),
16. DM Razlog & PLJ Pension Fund (ABSA Consultant and Actuaries) Case no. PFA/KZN/761 /02/PM
17. Donnan v Fedsure Staff Pension Fund & Another [2004] 5 BPLR 5685 (PFA)
18. Durban Meat Security Association Pension Fund and Others v Momentum Employee Benefits (Pty) Ltd [1999] 10 BPLR 127 (PFA)
19. Epol Provident Fund & Others v Premier Retirement Fund [2002] 3 BPLR 3148 (PFA)

20. F v Minister of Safety and Security and Another (4194/2006)[2009] ZAWCHC 101, 2009 (2) SACR 639 (WCC): 2010(1) SA 606 (WCC) (26 June 2009)
21. Fischer v Henderson & Dreyer Pension Fund & Another [2003] 1 BPLR 4240 (PFA)
22. Fouche v Old Mutual Retirement Fund [2002] 6 BPLR 3577 (PFA)
23. Foukaridis v Medical University of Southern Africa & Another [2000] 5 BPLR 503 (PFA)
24. Govender v Corporate Selection Retirement Fund and CTS Transport CC (PFA)
25. Govender N.B & Sarlie L v L'Oreal South Africa Provident Fund
26. Government Employees Pension Fund v Buitendag 2006 SCA 121 (RSA)
27. Groenewald v Sasko Retirement Fund and Another [2003] 7 BPLR 4905 (PFA)
28. Harris v AECI Pension Fund & Another [2000] 7 BPLR 737 (PFA)
29. Henderson v Eskom and Another [1999] 12 BPLR 353 (PFA)
30. Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 1 BPLR 222 (SCA)
31. Horne v Absa Group Pension Fund and Another [2001] 1 BPLR 1479 (PFA)
32. Hooley v Haggie Pension Fund and Another [2002] 1 BPLR 2939 (PFA)
33. IBM Pensioners Action Group v IBM South Africa (Pty) Ltd & Another [2000] 3 BPLR 268 (PFA)
34. Intaka v First National Bank (Pty) Ltd and Others [2002] 6 BPLR 600 (PFA)
35. Jacob Sello Selebi v State (240/2011) [2011] ZASCA 249 (2 December 2011)
36. Khambule v CNA Ltd (now CNA (Pty) Ltd (1) [2001] 9 BPLR 2472 (PFA)
37. Kemmis-Betty v Woolworths (Pty) Ltd and Another [1999] 10 BPLR 170 (PFA)
38. Kenn v Minister of Safety and Security (2004) (SCA)
39. Koekemoer v Macsteel Group Retirement Plan & Another [2004] 2 BPLR 5465 (PFA)
40. Kolb v University of Natal Retirement Fund and Others [2001] 6 BPLR 2096 (PFA)
41. Lawrence v Medical Rescue International Retirement Plan & Others [1999] 12 BPLR 365 (PFA),
42. Lynn Dakin and Southern Sun Retirement Fund Case no. PFA/KZN/158/98/LS
43. Longo v Cape Joint Pension Fund [2000] 6 BPLR 623 (PFA)
44. Mahlkecht v Non-Ferrous Metal Works Pension Fund [2004] 7 BPLR 5888 (PFA)
45. Makobo v Black Tops Surface Provident Fund, PFA/NP/12091/2002/LTN (unreported)
46. Mayhew & Another v Lincoln Wood Provident Fund [2003] 11 BPLR 5303
47. Media 24 Limited & Gasant Samuals v Sonja Grobber (SAC)
48. Miles v MedX-Ray Pension Scheme (in liquidation) [2004] 7 BPLR 5902 (PFA)
49. Mohlomi v Minister of Defence 1997 (1) SA 124 (CC)

50. Moodley v Transitional Council Scottsburg Umzinto North and Another [2002] 9 BPLR 945 (D)
51. Molobela v Corporate Retirement Fund and Another [2011] 2 BPLR 220 (PFA)
52. Morris and Others v Metal Industries Provident Fund [2002] 11 BPLR 4054 (PFA)
53. Msundudzi Municipality v Natal Joint Pension/Provident Fund and Others 2007 (1) SA 142 (N)
54. Mudzusi v Hospitality Industry Provident Fund [2003] 4 BPLR 4593 (PFA)
55. Naicker v Orion Money Purchase Pension Fund (SA) [2002] 3 BPLR 3218 (PFA)
56. Ndlovu v Vegmoflora Fund & Another [2002] 3 BPLR 3224 (PFA)
57. Niewenhuizen v SAB Staff Provident Fund and Another [2000] 12 BPLR 1413 (PFA)
58. Nqoma v Meybro Employees Provident Fund & Others [2003] 9 BPLR 5114 (PFA)
59. Ntshiliza v ICS Provident Fund [2000] 10 BPLR 1146 (PFA)
60. Old Mutual Staff Retirement Fund v Pension Funds Adjudicator and Another [2001] 9 BPLR 2419 (C)
61. Others v Murray and Roberts Retirement Fund and Another [2004] 9 BPLR 6087 (PFA)
62. Pepcor Retirement Fund v Financial Service Board 2003 (6) SA 38 (SCA)
63. Pillay and Others v S [2007] 1 SA 11 SCA
64. Records v Barlow's Pension Funds Case no. PFA/GA/821/99
65. Roux v Cape Municipal Pension Fund [2001] 3 BPLR 1783 (PFA),
66. Sayed-Essop v Non-Ferrous Metal Works Pension Fund and Another [2000] 9 BPLR 1051 (PFA)
67. Seripe v Emfuleni Local Municipality, PFA/GA/7765/06/FM (unreported).
68. Shaw v Government Employees Pension Fund (15014/12002)[2005] ZAGPHC 353 (2 December 2005)
69. Shell Southern Africa Pension Fund & Another v Sligo & Others [1999] 11 BPLR 235 (C)
70. Singh v Commissioner, South African Revenue Service 2003 4 SA 520 (SAC) para [18] at 527I-528B]
71. Sobolewski v Murray & Roberts Retirement Fund [2003] 9 BPLR 5154 (PFA)
72. Spearman v Salt Rock Hotel Pension Fund & Others [2001] 9 BPLR 2526 (PFA)
73. Stassen v Central Retirement Annuity Fund and Another [2001] 3 BPLR 1792 (PFA)
74. Steele v Fidelity Guards Pension Fund & Others [2000] 4 BPLR 440 (PFA)
75. Stein v Rising Tide Production CC (2002)
76. T S Ehler Compliant and Nedcor Defined Contribution Provident Fund, Case no. PFA/EC/2873/01/NJ

77. Theron v PricewaterhouseCoopers Directors Provident Fund [2002] 12 BPLR 4209 (PFA)
78. Tsumi v ABI Pension Fund PFA/GA/2505/2005/SM (unreported)
79. Twerefoo v Liberty Life Association of SA Ltd & Others [2000] 12 BPLR 1437 (PFA)
80. Twigg v Orion Money Purchase Pension Fund and Another (2) [2001] 1 BPLR 3005 (PFA)
81. Vandeyar v UTICO Staff Pension Fund [2000] 3 BPLR 332 (PFA)
82. Van Wezel v Gencor Pension Fund & Others [2001] 2 BPLR 1668 (PFA)
83. Welch v Golden Pension Fund [2002] 1 BPLR 3007 (PFA)
84. Wilson v Orion Fixed Benefit Pension Fund & Others (1) [1999] 9 BPLR 89 (PFA)

TABLE OF STATUTES

SOUTH AFRICAN STATUTES

1. Arbitration Act 42 of 1965
2. Basic Condition of Employment Act 75 of 1997
3. Criminal Procedure Act 51 of 1997 (updated in 2011)
4. Civil Procedure Act 25 of 1965
5. Code of Good Practice on the Prevention of Sexual Harassment 1998
6. Employment of Educators Act 76 of 1998
7. Government Employees Pension Law (Proclamation 21 of 1996)
8. Industrial Relations Amendment Act 95 of 1982
9. Labour Relations Act 66 of 1995
10. Pension Funds Act 24 of 1956
11. Prescribed Rates of Interest Act 55 of 1975
12. Prevention & Combating of Corrupt Activities 12 of 2004
13. Proclamation 21 of 1996
14. Protection and Combating of Corrupt Activities Act
15. Public Finance Management Act 1999 (General Treasury Matters)
16. Public Service Act 138 of 1994
17. Public Service Collective Bargaining Council Resolution 2 of 1999 (Disciplinary Code and Procedures),
18. Public Service Collective Bargaining Council Resolution 1 of 2003 (Disciplinary Code and Procedures),
19. Public Service Amendment Act 30 of 2007
20. Promotion of Administrative Justice Act 3 of 2000
21. Promotion to Access to Information Act 2 of 2000
22. Republic of South Africa 2003 Senior Management Service: Public Service Handbook Department of Public Service and Administration, Part 7.
23. State Liability Act 1957
24. The Constitution of the Republic of South Africa Act 106 of 1998
25. The Public Protector Act 23 of 1994

CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study

Modern pension funds owe their existence largely to the industrial revolution and the social and technological advances that have since taken place.¹ Although pensions had been paid in one form or another for hundreds of years prior to these advances, particularly in Europe,² employees tended to work throughout their lives, and in infirmity were cared for by their extended family unit or by the local community.³

The industrial revolution saw a major change in the nature of society and the start of mass urbanization. Industrial employers took over the role of work and sustenance provider, and the village and family unit was gradually broken down. As time went on, employers needed to strive for business efficiency and productivity which led to a shorter effective working life, and it was not too long before the more socially conscious employers recognized a need to make provision for those employees who had given them good service but had become too old to keep up with the physical pressures of work in a factory.

Later, as competition among employers for skilled employees became a factor, those socially conscious employers who were known to provide some form of provision for their retired employees were able to attract better and more qualified employees, so

¹Nevondwe LT, A critical analysis of the judicial enforceability of socio-economic rights in South Africa (2010), 214, LLD thesis, submitted for examination, North-West University, unpublished. See also Nevondwe LT and Mhlaba MW, *Judicial Activism and Socio-Economic Rights in South Africa* (2012), a book submitted for publication to LAP LAMBERT Academic Publishing GmbH & Co. KG, Germany.

² For example, retiring generals were often given gifts of land or cash by way of payment for loyal service, and the servants of landed gentry were often rewarded in a similar fashion when they were no longer able to carry out their duties effectively.

³Nevondwe LT, A critical analysis of the judicial enforceability of socio-economic rights in South Africa (2010), 215, LLD thesis, submitted for examination, North-West University, unpublished.

the provision of basic pensions began to expand as a means of attracting and retaining good employees.

In the early days, development in South Africa tended to follow that in the United Kingdom. Pensions were initially paid out of current earnings, but as their coverage widened and they were increasingly demanded by long-serving skilled employees, prudent employers started to look for ways of pre-funding these expectations. It is interesting to note that the internationally recognized normal retirement age of 65 was first introduced in Germany.⁴

Around the early 1920's, governments also saw the advantage of encouraging more formal arrangements as society became more dependent on savings made during employment as a means of survival in old age, rather than reliance on the family or community unit. They also realized, however, that some form of control over how pensions were being provided was necessary, and so, with the introduction of tax incentives to encourage the growth of savings for old age, they used their respective tax legislation to establish rules regulating pension benefits. This resulted in a rapid increase in the number of employers providing properly funded and secure pension benefits.

Funds were set up either as private arrangements where the employer employed his own staff to manage the fund and invest its assets, or alternatively employers often purchased life insurance policies in the names of individual employees, and in that way removed the risk of the pension not being available should something untoward happen to the employer. Group insured arrangements, where one master policy was

⁴Statistics at the time indicated that the average life-span of a male worker was 66 years. The benevolent Germans decided, therefore, that all male employees (very few women worked full-time in those days, if at all) would retire on reaching age 65 so that they had one year remaining to enjoy themselves and put their personal affairs in order, before they died. Therefore, the cost of providing pensions was relatively low as those few who actually retired rarely survived much longer.

issued to provide the benefits for all the employees of an employer were only introduced in the early 1950's.

In 1956, the South African Government introduced what is generally recognized to be the world's first ever Pension Funds Act⁵ ("the Act") designed specifically to regulate the business of pension funds.⁶

The late 1950's and the 1960's saw incredible economic growth among First World countries and with it the emergence of giant multinational corporations employing thousands of people. The growth in pension funds during this period, and the improvement in the benefits they provided, mirrored this increase in employment and prosperity.

Since then, with the incredible advances in information technology and the growth of available investment vehicles, including the opening of international investment channels, pension funds have become highly sophisticated. This has led to a proliferation of new types of funds, including umbrella funds administered by professional sponsors and open to voluntary participation by any employer, on behalf of its employees, and preservation funds which cater for the "parking" of the retirement funding assets of individual members until they retire or decide to transfer them to another fund.

Currently, society world-wide, is on the move again, and employment patterns are changing even more rapidly. Naturally, with changes in social patterns and working conditions come changes in retirement provision, and it is likely that we will see the effects of these changes sooner rather than later in pension funds. We may even

⁵Act 24 of 1956

⁶At that time, and for several years thereafter, other countries relied mainly on trust law and various other legal principles, including, of course, the very powerful conditions imposed in their income tax acts.

find that the pension fund spawned by the industrial revolution gives way to something quite different, and is discarded into the history books. Meantime, attempts are being made by the South African Government, among others, to catch up with current social change and the ever increasing demands of consumer protection and good governance, by re-writing the Act in terms of today's needs for tomorrow's society.⁷

In an employment relationship that exists between the employer and employee there are obligations that are created that is a performance of work or service and remuneration be given to the employee. There are other reciprocal rights and obligations that are also attached; to exercise employment benefits such as the social security law provisions: the pension fund or provident fund whose funds are made due on the retirement of the employee. Section 37D of the Act provides for certain deductions which are permissible which are as follows:

- Other than housing loans provided either by the fund or by the employer, or amounts in respect of any defaults on housing loans guaranteed either by the fund or by the employer, the Act permits deductions from benefits only in restricted circumstances:
- Payment of medical aid contributions, or insurance premiums, or other purposes approved by the regulator, by arrangement with, and on behalf of, the member
- Amounts due to the employer as compensation for any damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member, where the member has admitted liability in respect of the compensation due in

⁷ See National Treasury *Retirement Fund Reform – a discussion paper* December 2004 and the Social Security and Retirement Reform discussion paper, 2007.

writing, or judgment has been obtained in any court. In this instance section 37D will come into play, where the employer could withhold pension payouts until the finalization of the case against the employee, as a protection offered to the employer who faced with financial losses due to a misconduct or criminal activities of the said employee, the misconduct or criminal activities stated above ranges from misappropriation of property, theft or shrinkages, sharing of illegal proceeds by employees to an extend of involving third parties, extortions, or damages sued against the employer for vicarious liability (civil claims against the employer for damages sustained by third parties, through an act of negligence or a wilful wrong by an employee during the cause of work). The remedy to the aforesaid situation in terms of the law, is that, the employer can recover whatever losses suffered, from the pension proceeds, either upon retirement, retrenchment, illness and dismissal of the employee for the misconduct case for the charges levelled against him and a dismissal pronounced as the appropriate sanction, when the said employee tenders a resignation to the employer or upon death of the employee.

1.2. Statement of the research problem

In South Africa and other parts of the world, members of pension funds who are employees of the participating employer to the funds are not aware of their retirement law rights. They become members of pension funds for many years without knowing their retirement investments. More often, the members will only enquire about benefit statements when they are near to reach the retirement age.

Section 37D of the Act provides the instances where pension benefits can be withheld by the fund upon the receipt of the instruction from the employer. This section creates too much confusion when it comes to application and interpretation on the side of the employer, members and funds. This section reads as follows:

“A registered fund may-

(a) deduct any amount due to the fund in respect of-

(i) a loan granted to a member in terms of section 19(5) (a); or

(ii) any amount for which the fund is liable under a guarantee furnished in respect of a loan by some other person to a member for any purpose referred to in section 19(5)(a), from the benefit to which the member or a beneficiary is entitled in terms of the rules of the fund, to an amount not exceeding the amount which in terms of the Income Tax Act, 1962⁸, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act;

(b) 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 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 to 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-

⁸ *ibid*

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

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

(c) deduct any amount which the fund has paid or will pay by arrangement with, and on behalf of, a member or beneficiary in respect of-

(i) such member's or beneficiary's subscription to a medical scheme, registered otherwise than provisionally in terms of the Medical Schemes Act, 1967 (Act 72 of 1967);

(ii) any insurance premium payable by such member or beneficiary to an insurer registered in terms of the Insurance Act, 1943 (Act 27 of 1943);

(iii) any purpose approved by the registrar, on the conditions determined by him, upon a request in writing from the fund, from the benefit to which the member or beneficiary is entitled in terms of the rules of the fund, and pay such amount, if due, to such medical scheme, insurer or person concerned, as the case may be".

This section must be read together with section 37A of the Act which reads as follows:

"Save to the extent permitted by this Act, the Income Tax Act, 1962⁹, and the Maintenance Act, 1963¹⁰, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial

⁹Act 58 of 1962

¹⁰Act 23 of 1963

position in terms of section 65 of the Magistrates' Courts Act, 1944¹¹, and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine".¹²

1.3. Literature review

According to Lisa Shrosbree legislature has afforded pension benefits various protective safeguards in the Pension Funds Act. Section 37A(1) of the Act provides that pension benefits cannot be reduced, transferred, ceded, pledged, hypothecated, attached or taken into account to determine debtor's financial position. Section 37B stipulates that pension assets deemed not to form part of the insolvent estate. Section 37C provides that pension benefits deemed not to form part of the assets of the deceased estate – trustees to exercise equitable discretion unbound by will or nomination form. Finally section 19 - restricts the manner in which a fund's assets may be invested – avoid abuse or misuse of pension funds by persons (including employers) dealing therewith.¹³

According to Nevondwe, the legislature has, in some instances, lifted the special protection given to pension benefits. Section 37D of the Pension Funds Act is one such example. In terms of the section a Pension Fund may withhold payments¹⁴ of the pension proceeds or deduct an amount for loss or damages suffered by an employer from the pension benefits of an employee where such damages have been

¹¹Act 32 of 1944

¹²PFA Act 99 of 1980

¹³Shrosbree L, Permissible deductions from pension benefits (2004), p2. A paper presented during the Pension Lawyers Association Conference, February 2004.

¹⁴ Application of rule 45(2) as contemplated in section 37D of the Act

caused by reason of any theft, dishonesty, fraud or other misconduct involving an element of dishonesty. The Act further permits deductions of any amount due in terms of the Income Tax Act, Maintenance Act¹⁵, Divorce Act¹⁶ and outstanding amounts plus interests as calculated for a housing loan.¹⁷

According to Jeram Naleen there are lawful deductions, which could be effected on the employees' pension benefits. This applies to both the pensions and the provident funds which are a form of social security and that the Act allows the fund to grant housing loans to its members. The aim and intention is solely to enable the member to acquire property on which a dwelling will be erected for the member or for his dependants or effecting improvements to an existing dwelling as in the case of *R v Woolworths (Pty) Ltd*¹⁸. Stringent measures are in place before the fund can grant a loan or stand as surety for such a loan. The fund is liable to deduct such an amount from any benefit payable on: retirement, upon resignation/ termination of employment i.e. a dismissal, employee resuming employment to a different employer, or because of death. The deductions to be effected will be in respect of amounts for which the employer is liable under a guarantee in respect of a housing loan made by some other person, a financial institution in the form of a bank¹⁹. The employer is liable to deduct the outstanding amount of the loan including the finance charges payable upon termination of the employment contract.

¹⁵ Maintenance Act

¹⁶ Divorce Act

¹⁷ Nevondwe LT, A Practical Guide to South African Pension Law and other Employee Benefits (2012), submitted for publication to LAP LAMBERT Academic Publishing GmbH & Co. KG, Germany.

¹⁸ Case no PFA/WE/1/98

¹⁹ "Employers lien" ref 145,146 and section 19(5)(a)

The Act in the same provision allows the employer to deduct any amount not exceeding the amount which in terms of the Income Tax Act²⁰, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule of the Act.

According to Peter Jodi, victims of crimes are not compensated by the state. In A case where the perpetrator is an employee of an institution and has deliberately or negligently caused an injury to another, the court may in its discretion postpone or suspend the sentence and release a person concerned on one or more conditions including by requiring the convicted person: to make a compensation, to render to the person aggrieved some specific benefit or service in lieu of compensation for damages or pecuniary loss in terms of section 297²¹, section 300²². Today it has turned out that most of the victims e.g. in the police hands, turn to sue the employer for vicarious liability²³ if the action took during the course or scope of work. The State will sometimes make an out of court settlement compensation to the victim²⁴. The total amount paid by the State will later be claimed on the employees proceeds, as part of financial losses suffered by the employer and having the right to be reimbursed in terms of section 37D²⁵

1.4. Aims and objectives of the study

The study is geared towards the critical analysis and interpretation of section 19, 37A, 37B and 37D of the Act. This study is also aimed at educating the pension fund

²⁰ Income Tax Act

²¹ Act 51 of 1977

²² *ibid*

²³ Vicarious liability

²⁴ F v Minister of Safety and Security and Another (4194/2006)[2009] ZAWCHC 101, 2009 (2) SACR 639 (WCC): 2010(1) SA 606 (WCC) (26 June 2009)

²⁵

contributors of the end product of their actions i.e. misconducts or criminal activities of employees resulting in employer suffering financial losses. The misconduct or criminal activities stated above ranges from misappropriation of property, theft in the work environment/ shrinkages, sharing of illegal proceeds by employees to an extend of involving third parties, extortions, or damages sued against the employer for vicarious liability (civil claims against the employer for damages sustained by third parties, through an act of negligence or a wilful wrong by the an employee during the cause of work). The study will also highlight the protection offered by the Act, with an in-exhaustive list of remedies in a case where the employer alleges that he or she suffered financial losses due to misconduct, negligence for claims of vicarious liability or criminal activities of the employee during the course of work.

The study will be of benefit to students and practitioners of law with special interest and specialty in Pension Law, Labour law, Constitutional law, International law, Jurisprudence, Human Rights law, Social Security law, state institutions, Non-Governmental Organizations Commission for Conciliation, Mediation and Arbitration (CCMA), Research institutes, community law centres, pension funds members, employers, funds, administrators, consultants, Financial Services Board, National Treasury, Pension Funds Adjudicator and universities.

1.5. Research methodology

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historical methods, based on jurisprudential analysis, is employed. Legal comparative method will be applied to find solutions, especially for the interpretation and application of section 19, 37A, 37B, 37C and 37D of the Pension Funds Act.

The purpose of historical research method on the other hand, will be to establish the development of legal rules, the interaction between law and social justice, and also to propose solutions or amendments to the existing law or constitutional arrangement, based on practical or empirical and historical facts. Concepts will be analysed, arguments based on discourse analysis, developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This research is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles and papers presented on the subject in conferences.

1.6. Division of chapters

The mini-dissertation consists of five inter-related chapters. Chapter one is the introductory chapter laying down the foundation. Chapter two deals with withholding of pension benefits. Chapter three deals with conciliation and adjudication of pension funds complaints. Chapter four deals with Pension Funds Adjudicator determinations and court cases on withholding of pension benefits. Chapter five is a summary of the conclusions drawn from the whole study and makes some recommendations.

CHAPTER TWO: WITHHOLDING OF PENSION BENEFITS

2.1. Introduction

Pension benefits are afforded special protection by the legislature. Section 37A (1) prohibits the reduction, transfer, cession, pledge or hypothecation of pension benefits. In terms of section 37B of the Act if a member becomes insolvent, pension benefits are deemed not to form part of the insolvent estate and are thereby protected from erosion by creditors. Section 37C of the Act deems pension benefits payable on the death of a member, subject to certain exceptions, not to form part of the assets of the estate of the deceased member. Section 19 of the Act also serves to protect pension benefits by restricting the manner in which a fund's assets may be invested.

2.2. Section 37D

The legislature has, in some instances, lifted the special protection given to pension benefits. Section 37D of the Pension Funds Act is one such example. It permits nine kinds of deductions:

- Any amount due on the benefit by the member in terms of the Income Tax Act.²⁶
- Any amount due to the fund in respect of a housing loan granted to the member by the fund in terms of section 19(5).²⁷

²⁶ Section 37D (1) (a).

²⁷ Section 37D (1) (a) (i).

- Any amount due to the fund in respect of any amount for which the fund becomes liable under a guarantee furnished for a housing loan granted to the member by some other person usually a bank or a building society.²⁸
- Any amount due by a member to his employer owing on the date of his retirement or termination of membership in respect of a housing loan granted by the employer to the member.²⁹
- Any amount due by the member to his employer on the date of his retirement or termination of membership in respect of any amount for which the employer is liable under a guarantee furnished in respect of a housing loan granted by some other person, usually a bank or building society.³⁰
- Any amount due by a member to his employer on the date of his retirement or termination of membership in respect of compensation for any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member.³¹
- Any amount which the fund has paid or will pay by arrangement, and on behalf of, a member or beneficiary in respect of subscriptions to a medical aid scheme.³²

²⁸ Section 37D (1) (a) (ii). See *Morris and Others v Metal Industries Provident Fund* [2002] 11 BPLR 4054 (PFA).

²⁹ Section 37D (1) (b) (i) (aa). See *Kemmis-Betty v Woolworths (Pty) Ltd and Another* [1999] 10 BPLR 170 (PFA).

³⁰ Section 37D (1) (b) (i) (bb).

³¹ Section 37D (1) (b) (ii).

³² Section 37D (1) (c) (i).

- Any amount which the fund has paid or will pay by arrangement, and on behalf of, a member or beneficiary in respect of insurance premiums.³³
- Any amount which the fund has paid or will pay by arrangement, and on behalf of, a member or beneficiary in respect of any purpose approved by the Registrar on the conditions determined by the Registrar upon a request in writing from the fund.³⁴

2.3. Deductions for dishonest conduct causing loss to the employer.

Such deductions form the subject matter of many complaints before the Adjudicator and therefore deserve further discussion.

Where an employee has committed some form of dishonest conduct which has caused loss to the employer, provided certain conditions are met, the fund may, in its discretion, deduct that loss from the employee's pension benefit when it becomes payable and pay it to the employer directly. The relevant provision is section 37D (1) (b) (ii) of the Act, which reads:

A registered fund may –

(a) ...

(b) 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

–

³³ Section 37D (1) (c) (ii).

³⁴ Section 37D (1) (c) (iii).

- (i)
- (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 been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pays such amount to the employer concerned.

The requirements of section 37D (1) (b) (ii) are very specific and must be strictly adhered to before a deduction will be lawful. The following are some important points to note in this regard.

- Section 37D (1) (b) (ii) does not expressly permit the withholding of a benefit. However in *Appanna v Kelvinator Group Services of SA Provident Fund*,³⁵ the Adjudicator came to the conclusion that in order to give effect to the purpose of section 37D (1) (b) (ii), namely, to protect an employer's right to pursue recovery of misappropriated monies, section 37D (1) (b) (ii) must be interpreted impliedly to include the power to withhold payment of the benefit pending the determination of liability. The power to withhold must be exercised reasonably however. What constitutes 'reasonable' depends on the

³⁵ [2000] 2 BPLR 126 (PFA)

circumstances of the case.³⁶

- Note that many fund rules provide for a specific power of withholding.³⁷ In that case the period for which and circumstances under which the benefit may be withheld must be determined with reference to that rule.
- Before a deduction is permitted, either the member must have admitted liability to the employer in writing or a judgment must have been obtained against the member. Both the admission and judgment must be for compensation owing to the employer for damage caused to it by the member's dishonest conduct. So for example, a written admission that the member is indebted to the employer is not sufficient. The admission must, in addition, contain a statement to the effect that the employee committed some form of misconduct against the employer for which compensation is payable.
- 'A registered fund **may**': This phrase indicates that discretion is conferred on the fund. This aspect of section 37D is often misunderstood. Where an employer requests that the benefit in question be withheld or a deduction be made, the fund must weigh up all relevant factors to determine whether or not to agree to the request. The employer has no automatic entitlement in this regard. When the Adjudicator receives a complaint that the fund is unreasonably withholding a benefit or has unreasonably made a deduction from a benefit, the object of his investigation is to determine whether or not

³⁶ *Buthelezi v Municipal Gratuity Fund & Another (1)* [2001] 5 BPLR 1996 (PFA), and *Sayed-Essop v Non-Ferrous Metal Works Pension Fund & Another* [2000] 9 BPLR 1051 (PFA).

³⁷ *Horne v Absa Group Pension Fund and Another* [2001] 1 BPLR 1479 (PFA)

the fund has exercised its discretion properly. If the evidence shows that the fund simply rubber-stamped the employer's request in this regard, it is at risk of a finding against it that either it failed to exercise its discretion or that it failed to exercise its discretion properly.

- 'from any benefit payable': This means that a deduction can only be made in the hands of the member and a deduction from a benefit in the hands of the fund is not contemplated. For as long as a member who has not yet reached retirement age remains in the fund, a deduction in terms of section 37D is impermissible.³⁸
- 'in respect of compensation': it is not sufficient for the member to simply have committed dishonest conduct against his or her employer. In respect of such conduct, there must be 'an amount due ... in respect of compensation'. In other words the employer must have suffered loss as a result of the misconduct and the loss must have been quantified. This means that even if the employee in question is convicted by a criminal court for theft committed against the employer, the fund will not be permitted to deduct the amount stolen from the pension benefit unless compensation is payable in respect of such theft.³⁹

Note that where criminal proceedings have been instituted, the employer may

³⁸ See *Records v Barlow's Pension Fund (1)* [2000] 8 BPLR 920 (PFA), where the member was entitled to a retirement benefit consisting of a cash lump sum and a monthly pension for the remainder of his life. The fund sought to make a deduction from the complainant's actuarial reserve value (which represented the capitalized value of the member's benefit). The Adjudicator held that this was not permissible as the reserve value was not a benefit payable upon the complainant's retirement.

³⁹ See in this regard *Buthelezi v Municipal Gratuity Fund & Another (1)* [2001] 5 BPLR 1996 (PFA).

request the prosecutor to make an application in terms of section 300 of the Criminal Procedure Act.⁴⁰ Section 300 authorizes a court which has convicted an accused person of an offence involving damage or loss of property (including money) to award compensation to the victim of such crime, upon application by the victim or the prosecutor.⁴¹ A section 300 order is sufficient for the purposes of section 37D.

- 'by reason of any theft, dishonesty, fraud or misconduct by the member': Theft, dishonesty and fraud all describe wrongful and intentional conduct causing harm. 'Misconduct' has been interpreted strictly to mean wilful, reckless or intentional delicts.⁴² Therefore negligent conduct is insufficient for the purpose of section 37D (1) (b) (ii). In *Razlog v PLJ Pension Fund*⁴³ it was partly because the fund was unable to show that the complainant's mistaken dealings were in any way tainted with impropriety or dishonesty that the Adjudicator found that the fund was not entitled to make the deduction in spite of it being clear that the complainant had caused substantial loss to his employer.

⁴⁰ Act 51 of 1977

⁴¹ A section 300 compensation order has the effect of a civil judgment of that court.

⁴² See *Moodley v Local Transitional Council of ScottburghUmzinto North and Another* [2000] 9 BPLR 945(D).

⁴³ [2003] 1 BPLR 4294 (PFA)

CHAPTER THREE: CONCILIATION AND ADJUDICATION OF PENSION FUNDS COMPLAINTS

3.1. Introduction

The establishment of the Office of the Pension Funds Adjudicator (OPFA) filled an important void in South Africa's regulatory and oversight framework.⁴⁴ Prior to the inception of the OPFA, there was no specialist tribunal in South Africa that essentially investigates, conciliates and adjudicates upon complaints lodged in terms of the Pension Funds Act (PFA).⁴⁵ Its establishment is undoubtedly the beacon of hope particularly to all those marginalised and less vocal retirement funds 'members and their dependants'.⁴⁶

The OPFA has its fair amount of significant challenges from the beginning. These challenges were, among other things, lack of pension law jurisprudence, stiff resistance from major role players in the pensions industry, conducting its early work in the context of a society whose majority had been economically, socially and politically marginalised by the apartheid regime and the serious shortage of staff personnel.⁴⁷ From inception, the OPFA was only adjudicating complaints until 1st August 2008, when conciliation service was also introduced. The Pension Funds Adjudicator (Adjudicator) decides which complaints are to be referred for conciliation in pursuance of the objective of resolving complaints in a procedurally fair, economical and expeditious manner.⁴⁸ However, if the parties, out of their own

⁴⁴ The OPFA was established on 19 April 1996 by the insertion of chapter VA into the Pension Funds Act. The OPFA operation commenced in 1998 when the new Pension Funds Adjudicator was appointed

⁴⁵ Act, 24 of 1956

⁴⁶ Rustomjee C, OPFA Annual Report 2007/2008, p9

⁴⁷ The OPFA from inception was operating in Cape Town and it was only in 2004 when another office was established in Johannesburg. This has contributed to the fact that majority of South Africans were not aware of the existence of the office since the locations itself was not central. The office is now operating in Johannesburg and the Cape Office has been closed down with effect from 31st December 2009

⁴⁸ Section 30D of the PFA.

volition request and agree that the complaint should be conciliated, the adjudicator will consider such a request.⁴⁹

For all the funds registered with the Registrar of Pension Funds, if a person is aggrieved by the decision of the Trustees or is not satisfied with the computation and calculation of his/her benefits, he/she is entitled to lodge a complaint with the Adjudicator in terms of chapter VA of the PFA. Public servants, those who are employed in the national and provincial government, belong to the Government Employees Pension Fund (GEPF). They are governed by the Government Employees Pension Law.⁵⁰ If members of the GEPF or beneficiaries have complaints, they cannot lodge their complaints with the Adjudicator.

3.2. Office of the Adjudicator

3.2.1. Establishment of the OPFA

The OPFA was established with effect from 19 April 1996 by the insertion of chapter VA into the Pension Funds Act, 24 of 1956 as amended. Chapter VA comprises sections 30A to 30X. The OPFA has been in existence for thirteen years now, since the first Pension Funds Adjudicator, Prof. John Murphy was appointed in January 1998.

During 1996, pursuant to recommendations made by the Mouton Committee of Investigations into a Retirement Provision System for South Africa, the PFA in South Africa was amended to create a special process by which complainants against

⁴⁹ Mohlala M, Pension Funds Adjudicator Guidelines and Procedures for the Conciliation of Complaints, published on 1st August 2011, p8.

⁵⁰ Proclamation 21 of 1996

pension funds can be investigated and decided. A new Chapter VA was enacted creating the OPFA with the object of disposing of complaints in a procedurally fair, economical and expeditious manner. The legislation was borrowed liberally from the provisions establishing the office of the Pension Ombudsman in the United Kingdom. In many respects the two offices resemble each other, function similarly and perform the same tasks.⁵¹

3.2.2. Appointment of the Adjudicator

The Adjudicator is appointed by the Minister of Finance after consultation with the Financial Services Board (FSB).⁵²

Section 30C of the Pension Funds Act⁵³ stipulates that the Minister shall, after consultation with the Financial Services Board, appoint –

- (a) a person to the office of the Pension Funds Adjudicator;
- (b) one or more persons to the office of Deputy Adjudicator; and
- (c) When deemed necessary, an Acting Adjudicator

No person shall be appointed as Adjudicator, Deputy Adjudicator or Acting Adjudicator unless he or she is qualified to be admitted to practice as an Advocate under the Admission of Advocates Act, 1964 (Act No. 67 of 1964), or as an Attorney under the Attorneys Act, 1979 (Act No. 53 of 1979), and-

- (a) for an uninterrupted period of at least 10 years practiced as an advocate or an attorney; or

⁵¹ Murphy Alternative Dispute Resolution in the South African Pension Funds Industry: an Ombudsman or a tribunal, a speech delivered at the IPEBLA Conference in Bordeaux, June 2001.

⁵² Section 30C (1)

⁵³ Section 30C(1)

(b) for an uninterrupted period of at least 10 years was involved in the tuition of law and also practiced as an Advocate or Attorney for such period as renders him or her suitable for appointment as Adjudicator; or

(c) possesses such other experience as renders him or her suitable for appointment as Adjudicator, Deputy Adjudicator or Acting Adjudicator⁵⁴

The Adjudicator and Deputy Adjudicator shall be appointed by the Minister for a period of no more than three years and may be re-appointed on expiry of his or her term of office.⁵⁵ The Adjudicator and Deputy Adjudicator may at any time resign as Adjudicator or Deputy Adjudicator by tendering his or her resignation in writing to the Minister: Provided that the resignation shall be addressed to the Minister at least three calendar months prior to the date on which the Adjudicator or Deputy Adjudicator wishes to vacate his or her office, unless the Minister allows a shorter period.⁵⁶

The Minister may remove the Adjudicator or Deputy Adjudicator from office on the grounds of misbehavior, incapacity or incompetence, after consultation with the FSB.⁵⁷

In the event of the resignation, removal or expiry of the term of office of the Adjudicator, the Minister may appoint an Acting Adjudicator to act as Adjudicator until a competent person is appointed. An Acting Adjudicator has all the powers and must perform all the duties of the Adjudicator.⁵⁸

⁵⁴ Section 30C (2),

⁵⁵ Section 30C (3)

⁵⁶ Section 30C (4)

⁵⁷ Section 30C (5)

⁵⁸ Section 30C (6) (a) (b)

3.3. How to lodge a complaint

Section 30A of the Act states:

- “(1) Notwithstanding the provisions of the rules of the fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after receipt of the complaint the complainant may lodge the complaint with the Adjudicator.”

There have been conflicting opinions on whether the complainant is obliged to serve the complaint on the fund or employer in terms of this section prior to lodging the complaint with the OPFA as a jurisdictional pre-requisite. However, complainants are still encouraged to pursue this route initially, as many complaints are resolved in this manner without the necessity for formal investigation.⁵⁹ In *Bernard v Municipal Gratuity Fund*⁶⁰, the Adjudicator ruled that a complainant is not obliged to first lodge a complaint with a fund or a participating employer before approaching the OPFA for relief

The complaint must be in writing. This includes electronic mail and fax. The complainant may submit his or her complaint in any language and the OPFA will, if necessary, obtain a translation of such communication. The office’s documentation on how to submit a complaint has also been translated into various languages

⁵⁹ Jeram An Introduction to Pension Law (2005) 17, unpublished

⁶⁰ PFA/GA/24186/2008/SM (unreported), visit www.pfa.org.za, 2009 determinations. See also *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund* [2005] 3 BPLR272 (PFA).at paragraphs 11

commonly used in South Africa.⁶¹ Personal and telephonic contact is usually conducted in the complainant's preferred language.⁶² The OPFA has also placed the procedures on how to lodge the complaint in the website.⁶³

A complaint lodged with the Adjudicator should contain the following information:

- Full personal details, including all contact details
- Full details of the employer/fund/respondent, including all contact details
- History of employment and membership of the fund
- Full specifics of the complaint, with particular reference to the definition of a complaint, contained in section 1 of the Act
- Proof that the respondent had been approached prior to the submission to the Adjudicator (this could either be a copy of the letter, a fax confirmation sheet or a copy of proof of registration of the document)
- A copy of the respondent's response, if available
- All relevant (and only *relevant!*) documents in support of the allegations/dispute
- Details of the remedy sought⁶⁴

3.4. Parties and definition of complaint

"Pension fund organization" is defined in section 1 of the Act. Essentially it amounts to a pension, provident, preservation⁶⁵ or retirement annuity fund.

⁶¹ The office has prepared a set of guidelines to assist complainants when formulating complaints. Should you require a copy, contact the office and a written copy will be sent to you.

⁶² Ibid at 17–18

⁶³ The OPFA website is www.pfa.org.za.

⁶⁴ Visit www.pfa.org.za, procedure for lodging complaints.

⁶⁵ *Human v Protektor Pension Fund* [2001] 9 BPLR 2462 (PFA)

A “complainant” must be a member or former member of a pension fund, a beneficiary or former beneficiary of a fund, or an employer who participates in a fund. In addition a complainant may also be the board of management of a fund, or a member of the board.⁶⁶

The respondent in a case is the person or entity against whom the complaint is directed. It is usually the pension fund or the employer, but in terms of section 30G of the Act, a party to a complaint may be any person, apart from those that qualify under the definition of “complainant”, it may include anyone whom the Adjudicator believes has a sufficient interest in the case.⁶⁷

“Complaint” is defined in section 1. According to this definition the complaint must relate to a specific complainant,⁶⁸ and must also relate to either:

- (1) *the administration of the fund, or*
- (2) *the investment of its funds,⁶⁹ or*
- (3) *the interpretation or application of its rules.⁷⁰*

Further, the complainant must allege one of the following:

⁶⁶ Section 1

⁶⁷ *Brown v BKB Group Retirement Fund & Another (1)* [2004] 3 BPLR 5557 (PFA): where the complaint was against the fund. The Adjudicator, after establishing that monies in an employer reserve account were earmarked to compensate those members who were to lose their post retirement medical aid subsidies from the employer, joined the employer as a party due to its interest in the matter.

⁶⁸ It is difficult for the Adjudicator to assess prejudice or loss to a complainant if the complaint does not show what damage he had in fact suffered. For instance, if the complaint is that the fund is being mal-administered due to the fund not disclosing information to the complainant, he would have to show how this had impacted on him, how his rights or benefits were affected. Further, financial loss or prejudice must be properly quantified.

⁶⁹ *Durban Meat Security Association Pension Fund and Others v Momentum Employee Benefits (Pty) Ltd* [1999] 10 BPLR 127 (PFA).

⁷⁰ The application of a fund’s rules was raised in *IBM Pensioners Action Group v IBM South Africa (Pty) Ltd & Another* [2000] 3 BPLR 268 (PFA).

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;⁷¹
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;⁷²
- (c) that a dispute of fact or law has arisen in relation to the fund between the fund or any person and the complainant; or⁷³
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund.⁷⁴

3.5. Complaints typically received

The complaints received and determined by the Adjudicator deal with a broad range of pension fund matters, including the calculation, granting and payment of benefits,⁷⁵ actuarial and trustee discretion,⁷⁶ trustee duties,⁷⁷ employer discretion,⁷⁸ interest payments,⁷⁹ disclosure and access to information,⁸⁰ investment returns,⁸¹

⁷¹ This was illustrated in *Khambule v CNA Ltd (now CNA (Pty) Ltd (1))* [2001] 9 BPLR 2472 (PFA), in a complaint against the trustees, who had the responsibility to consider and approve housing loans, but had delegated this responsibility to an independent consultant, with adverse consequences. It was shown that the consultant had not acted in the members' best interests in the granting of the housing loans and that the trustees acted *ultra vires* by their omission to take reasonable steps to protect the member's interests.

⁷² *Spearman v Salt Rock Hotel Pension Fund & Others* [2001] 9 BPLR 2526 (PFA)

⁷³ *Shell Southern Africa Pension Fund & Another v Sligo & Others* [1999] 11BPLR 235 (C).

⁷⁴ *Harris v AECI Pension Fund & Another* [2000] 7 BPLR 737 (PFA)

⁷⁵ *Fischer v Henderson & Dreyer Pension Fund & Another* [2003] 1 BPLR 4240 (PFA)

Sobolewski v Murray & Roberts Retirement Fund [2003] 9 BPLR 5154 (PFA),

Donnan v Fedsure Staff Pension Fund & Another [2004] 5 BPLR 5685 (PFA), and

Twerefoo v Liberty Life Association of SA Ltd & Others [2000] 12 BPLR 1437 (PFA)

Foukaridis v Medical University of Southern Africa & Another [2000] 5 BPLR 503 (PFA)

⁷⁶ *Koekemoer v Macsteel Group Retirement Plan & Another* [2004] 2 BPLR 5465 (PFA)

⁷⁷ *Van Wezel v Gencor Pension Fund & Others* [2001] 2 BPLR 1668 (PFA)

⁷⁸ *Wilson v Orion Fixed Benefit Pension Fund & Others (1)* [1999] 9 BPLR 89 (PFA).

⁷⁹ *Lawrence v Medical Rescue International Retirement Plan & Others* [1999] 12 BPLR 365 (PFA), *Kolb v University of Natal Retirement Fund and Others* [2001] 6 BPLR 2096 (PFA), *Old Mutual Staff Retirement Fund v Pension Funds Adjudicator and Another* [2001] 9 BPLR 2419 (C), *Stassen v Central Retirement Annuity Fund and Another* [2001] 3 BPLR 1792 (PFA), *Ntshiliza v ICS Provident Fund* [2000] 10 BPLR 1146 (PFA), *De Bruyn v Telkom Retirement Fund* [2000] 11 BPLR 1220 (PFA), *Clavana and Another v Shoprite Employees Retirement and Others* [2002] 4 BPLR 3354 (PFA), *Alder v Anglo American Group Pension Fund and Another* [2002] 3 BPLR 3135 (PFA) and *Fouche v Old Mutual Retirement Fund* [2002] 6 BPLR 3577 (PFA).

⁸⁰ *Ndlovu v Vegmoflora Fund & Another* [2002] 3 BPLR 3224 (PFA).

Steele v Fidelity Guards Pension Fund & Others [2000] 4 BPLR 440 (PFA)

⁸¹ *Hooley v Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA)

interest rate applied to benefits,⁸² misrepresentation,⁸³ deductions from benefits,⁸⁴ the calculation of actuarial reserve value,⁸⁵ pension increases,⁸⁶ discriminatory practices,⁸⁷ employer duties in terms of the rules⁸⁸ and governance issues.

3.6. Statutory exclusion of the Adjudicator's jurisdiction

Several restrictions are placed on the Adjudicator's jurisdiction in terms of the Act.

He does not have jurisdiction in the following instances:

- Certain funds whose head office, or that of the participating employer(s), is outside the Republic;⁸⁹
- Funds to which the State contributes, provided they are not registered in terms of the Act; for example GEPF;⁹⁰
- Complaints in respect of which proceedings have already been instituted in a civil court, if the subject matter is the same;⁹¹

⁸²*Ntshiliza v ICS Provident Fund* [2000] 10 BPLR 1146 (PFA)

⁸³*Roux v Cape Municipal Pension Fund* [2001] 3 BPLR 1783 (PFA), *Biermann v ABSA Consultants & Actuaries (Pty) Ltd and Others* [2002] 4 BPLR 3347 (PFA), *Intaka v First National Bank (Pty) Ltd and Others* [2002] 6 BPLR 600 (PFA) and *Naicker v Orion Money Purchase Pension Fund (SA)* [2002] 3 BPLR 3218 (PFA).

⁸⁴*Records v Barlow's Pension Fund (2)* [2001] 11 BPLR 2755 (PFA) & [2000] 8 BPLR 920 (PFA)

Mudzusi v Hospitality Industry Provident Fund [2003] 4 BPLR 4593 (PFA)

⁸⁵*De Jager v Mine Officials Pension Fund & Others* [2003] 5 BPLR 4656 (PFA)

⁸⁶*IBM Pensioners* op cit note 32.

⁸⁷*Low v BP Southern Africa Pension Fund and Another*: The trustees of the fund had decided to increase the benefits of active members in order to make their packages more competitive in the open market. The complainant, a pensioner, felt that this was a discriminatory practice at the expense of the pensioners. The Adjudicator found that the trustees were entitled to differentiate between members or groups of members to achieve a legitimate objective by proportionate means. The fiduciary duties of trustees do not compel them to treat all members or groups of members alike in all circumstances. Unfair discrimination was defined as any differentiation made without fair and sound reasons or justifications. The objective of making the employment packages more competitive was found to be legitimate. The means employed to achieve the objective were proportionate and not arbitrary or unduly onerous.

⁸⁸*Harris* op cit note 36.

⁸⁹Section 2 The Registrar may under certain circumstances outlined in the section permit these funds to register under the Act.

⁹⁰For example, the Government Employees Pension Fund, Transnet Pension Fund and South African Post Office Retirement Fund

⁹¹Section 30H (2) of the Pension Funds Act.

- Complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relate to the decisions taken by the board, or any stakeholder in the fund, or any specialist tribunal convened in terms of section 15K;⁹²
- Complaints where the fund is under liquidation.⁹³ Section 28 of the Pension Funds Act provides for members and creditors of the fund to lay their claims with the liquidator where the fund is under liquidation;⁹⁴
- Complaints relating to the money invested in a trust. The Adjudicator has pronounced in *Niewenhuizen v SAB Staff Provident Fund and Another*⁹⁵ that the OPFA has no jurisdiction over trust funds and that where a breach of trust is alleged in a trust fund, the matter falls to be determined by the ordinary courts. Put differently, if your complaint relates to the decision of the fund to place the benefit in a trust arrangement, then such a decision can be reviewed by the Adjudicator.

3.7. The Main object of the office

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A (3) of this Act in a procedurally fair, economical and expeditious manner by ensuring that its services are accessible to all, Investigating complaints in a procedurally fair manner, reaching a just and expeditious resolution of complaints in accordance with the law, innovative and proactive in thought and in action and support, encourage and provide opportunities for individual growth.⁹⁶

⁹² Section 30H (4) of the Pension Funds Act. See also *Ledwaba and 10 Others v Murray and Roberts Retirement Fund and Another* [2004] 9 BPLR 6087 (PFA).

⁹³ *Miles v MedX-Ray Pension Scheme (in liquidation)* [2004] 7 BPLR 5902 (PFA)

⁹⁴ *Groenewald v Sasko Retirement Fund and Another* [2003] 7 BPLR 4905 (PFA)

⁹⁵ [2000] 12 BPLR 1413 (PFA) at paragraphs 24 and 25

⁹⁶ OPFA Annual Report 2010/2011, p1.

3.8. Time-barring and prescription

A complaint must be lodged within three years of the act or omission that gave rise to the complaint.⁹⁷ This period commences when the complainant became aware of the act or omission, or should reasonably have become aware thereof.⁹⁸ If the three year period has expired, the Adjudicator may not investigate the complaint unless he exercises his discretion to condone the late lodging on good cause shown.⁹⁹ Good cause usually devolves into several interactive components, being the period of time elapsed, the prospects of success of the complaint, the prejudice to either party, or the reason(s) for the late submission.¹⁰⁰

Section 30I of the Act, sets time limits for lodging complaints with the Adjudicator, and was introduced in 1996 by the Pension Funds Amendment Act.¹⁰¹ Section 30I used to read as follows:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) If the complainant was unaware of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

⁹⁷ Section 30I (1)

⁹⁸ Section 30I (2)

⁹⁹ Section 30I (3)

¹⁰⁰ See Nevondwe “*Time limits on lodging complaints to the Pension Funds Adjudicator*” 2008 Vol 16 part 2 JBL 43. See also *Mahlknecht v Non-Ferrous Metal Works Pension Fund* [2004] 7 BPLR 5888 (PFA), *Longo v Cape Joint Pension Fund* [2000] 6 BPLR 623 (PFA), *Nqoma v Meybro Employees Provident Fund & Others* [2003] 9 BPLR 5114 (PFA) and *Epol Provident Fund & Others v Premier Retirement Fund* [2002] 3 BPLR 3148 (PFA).

¹⁰¹ Act, 22 of 1996

- (3) The Adjudicator may on good cause shown or of his or her own motion –
- (a) either before or after the expiry of any period prescribed by this Chapter, extend such period; [or]
 - (b) Condonation in compliance with any time limits prescribed by this Chapter.”

The above provisions mean that once a complaint has been barred, it does not end the matter because the Adjudicator still has discretion to extend the three year period or to condone non-compliance. However, a complainant needs to show good cause to enable the Adjudicator to exercise her discretion pursuant to subsection (3) above. Section 30I (1) of the Act is a time-barring, not a prescriptive provision.¹⁰²

There is a good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this issue. As Didcott J explained in *Mohlomi v Minister of Defence*¹⁰³ in paragraph [11]:

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interest of justice. They protract the disputes over the rights and obligations are sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

¹⁰² *Tongaat-Hulett Group Ltd v Murphy No & Others* [2000] 9 BPLR 973 (PFA). In this decision, the Adjudicator ruled that if the complaint were time-barred, the Adjudicator had no power of dealing with it unless he extended the relevant period or condoned non-compliance with the requirement. If the Adjudicator allowed the extension or the condonation, he had to make a relevant order and expressly mention this in his ruling.

¹⁰³ 1997 (1) SA 124 (CC)

Similarly, it was held in *Vandeyar v UTICO Staff Pension Fund*¹⁰⁴ that the purpose of section 30I (1) of the Act is to ensure finality and certainty in pension fund affairs and to promote efficiency by an incentive for the prompt enforcement of complaints: “all legal systems accept that the operation of obligations should be limited by requiring enforcement with a reasonable period of time”.

In *Melane v Santam Insurance Company Limited*¹⁰⁵, the Appeal Court pronounced on the standard that had to be met in order for condonation to be granted. Holmes JA held (at 532):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

¹⁰⁴ [2000] 3 BPLR 332 (PFA)

¹⁰⁵ 1962 (4) SA 531 (A)

In the present circumstances, the existence of good cause was determined according to various considerations such as the following:¹⁰⁶

- the degree of lateness and the reasons for it;
- the importance of the case;
- the complainant's prospect of success on the merits;
- the possibility of harm to either party; and
- any genuine attempts at settling the dispute.

However, this position applies to cases which have been lodged to the OPFA before 13 September 2007. From this date, I will outline the current position.

Section 30I of the Pension Funds Amendment Act imposes certain time limits with regard to lodgment of complaints before the Adjudicator and states as follows:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

The power of the Adjudicator to condone non-compliance with the Act has been removed and if the complaint has been lodged outside the three year period, it cannot be investigated by the Adjudicator. Section 30I of the Act put the poor people

¹⁰⁶ See Hanekom *Retirement Planning Manual on South African Retirement Funds and other Employee Benefits* vol 1 (2007) 9.3(j).

in the rural areas in the disadvantage because the majority of these people are not aware of their pension law rights. This means that even though they are entitled to the pension or provident funds they cannot access their benefits if they lodged their complaint outside the three year period.¹⁰⁷ Section 11 of the Prescription Act¹⁰⁸ stipulates that “the period of prescription of debt shall be three years in respect of any other debt not mentioned in subsection (a), (b) and (c).

The previous provision in the Act¹⁰⁹ was better since it gave the Adjudicator the discretion to condone non-compliance with the three year period if there is a prospect of success on the complainant.

The question will be if the complaint is prescribed what happened to the pension fund member retirement savings? Who owns that money, is it the pension fund or the state. What happened to the poor man who works hard for many years and save some money for himself and his family? The second question will be is the Act meant to improve the life of the poor or to enrich the so called the rich. In this case it is obvious that the Act is not healing the injustices of the past and protects the so called marginalized or previous disadvantaged individuals.¹¹⁰

The Adjudicator dealt with various cases¹¹¹ on the time-barring and prescription which cannot be discussed in this article.

3.9. Investigation of complaints

¹⁰⁷ Nevondwe “*Time limits on lodging complaints to the Pension Funds Adjudicator*” 2008 vol 16 part 2 JBL 47.

¹⁰⁸ Act,68 of 1969

¹⁰⁹ Act, 24 of 1956

¹¹⁰ Nevondwe “*Time limits on lodging complaints to the Pension Funds Adjudicator*” 2008 vol 16 part 2 JBL 47.

¹¹¹ See, *Makobo v Black Tops Surface Provident Fund*, PFA/NP/12091/2002/LTN (unreported) (where the Adjudicator reasoned that there was an extraordinary long delay and concluded that no good cause existed for the condonation of the non-compliance with the time limit, see also *Tsumi v ABI Pension Fund* PFA/GA/2505/2005/SM (unreported) and *Seripe v Emfuleni Local Municipality*, PFA/GA/7765/06/FM (unreported).

The service offered by the OPFA is free of charge.

No party shall be entitled to legal representation at the proceedings before the Adjudicator.¹¹² This has been interpreted as meaning that a party does not have an automatic right to legal representation. The aim of this provision is to ensure that proceedings before the Adjudicator are informal, accessible, expeditious and inexpensive. The investigative process is therefore modeled more closely on the European “inquisitorial” manner than the South African adversarial procedure, although it has features of both. Be that as it may the Adjudicator must determine a complaint in an impartial manner, and there is therefore no question of acting “on behalf” of a complainant.

The main objective of the Adjudicator is to resolve complaints as defined in a procedurally fair, economical and expeditious manner.¹¹³ He may employ any person to assist in the performance of his functions,¹¹⁴ but he may not delegate the functions of investigation or adjudication.¹¹⁵ This means that the Adjudicator has to sign every determination.

The Adjudicator may follow any procedure which he considers appropriate in conducting an investigation, including procedures in an inquisitorial manner.¹¹⁶ He also has the power of subpoena.¹¹⁷ Once an investigation into a complaint has been completed, the Adjudicator must furnish written reasons for his determination to all

¹¹² Section 30K, See *Henderson v Eskom and Another* [1999] 12 BPLR 353 (PFA).

¹¹³ Section 30D.

¹¹⁴ Section 30Q(d).

¹¹⁵ Section 30Q(f).

¹¹⁶ Section 30J(1).

¹¹⁷ Section 30J(3)

parties concerned.¹¹⁸ A copy of the determination must also be lodged with the Registrar or Clerk of the Court which would have had jurisdiction had the matter been submitted to a court.¹¹⁹ In practice, the majority of complaints are disposed of on the papers only, supplemented by any additional information sought by the OPFA. Occasionally the nature of the matter will be such that a hearing is required.

In ordering relief, the Adjudicator may make any order that a court of law may make.¹²⁰ The decisions of the Adjudicator are binding and have the same status as a civil judgment. The determination may be executed by the sheriff of the court which would otherwise have had jurisdiction.¹²¹ Any party who is not satisfied with the Adjudicator's decision may, within six weeks from the date of that decision, apply to the High Court for relief as set out in section 30P of the Act.¹²² The party making the application must give written notice to all other parties of their intention to apply to the High Court.

3.10. Pension Funds Adjudicator Conciliation Service

Section 30E (1) (b) of the Act empowers the OPFA to establish a Conciliation Service which will first conciliate a dispute before being referred to adjudication. The Pension Funds Adjudicator Conciliation Guidelines governs the whole processes of the conciliation and are available in the OPFA website or in the Conciliation Service Unit upon request.

¹¹⁸ Section 30M.

¹¹⁹ *ibid*

¹²⁰ Section 30E (1)(a)

¹²¹ Section 300

¹²² *Mayhew & Another v Lincoln Wood Provident Fund* [2003] 11 BPLR 5303.

In South Africa, the Commission for Conciliation, Mediation and Arbitration (“CCMA”) has registered a tremendous success of a 70% dispute settlement rate through conciliation. Inspired by these international and national trends, the OPFA recruited the majority of their Conciliators from the Commission for Conciliation, Mediation and Arbitration (CCMA) which, together with the then Independent Mediation Service of South Africa (IMSSA)¹²³ have run internationally accredited courses in mediation training and development.

The Conciliation Service Unit is a new unit in the OPFA and has not yet been tested before, but so far (for the past two years) progress has been made in this unit since there is a settlement rate of over 70%.¹²⁴

Where in the opinion of the Adjudicator a matter is capable of speedily resolution, it will be referred to conciliation. Unlike the CCMA/Bargaining Councils – parties do not choose to go for conciliation, the Adjudicator decides on the complaints to be conciliated.

3.11. What is conciliation?

Rycroft (Mediation Principles, 1997) defines conciliation as, “a form of assisted negotiation between two or more parties in which an additional person, the conciliator, intervenes in various ways with the object of facilitating a settlement between the parties”. In broad terms, conciliation is a consensual process in which an independent, objective person, without prejudice, attempts to assist disputing parties to reach an agreement for the resolution of a complaint. Under the

¹²³ This organisation has since been succeeded by Tokiso Dispute Settlement.

¹²⁴ This figure was given by the Head of Conciliation at the Pension Funds Adjudicator strategic planning workshop, 2010. See also the OPFA Annual Report, www.pfa.org.za.

conciliation, the Adjudicator provides the forum for the parties to a complaint to engage in an open negotiation of the complaint with the aim of reaching an agreement.

3.12. Pension Funds Adjudicator Conciliation procedures

Prior to investigating a complaint, the Adjudicator shall determine whether such complaint is appropriate for conciliation. Once the Adjudicator has determined that a complaint before her is appropriate for conciliation, the parties to the complaint will be notified of the proposed conciliation in writing, by telephone or other appropriate means.¹²⁵

If a party disagrees to the holding of conciliation, such party will be required to provide its reasons in writing to the OPFA. In cases where a party expresses disagreement with proceeding to conciliation, the Adjudicator will consider the reasons offered before deciding whether or not to proceed with conciliation or investigate the matter.¹²⁶ The views expressed by the party in disagreement with the holding of the conciliation will not be exchanged between the parties as to do so may prejudice the potential conciliation outcome.¹²⁷

Conciliation proceedings are private and confidential. No person may refer to anything said at conciliation proceedings during any subsequent proceedings, save where such issue is not likely to cause prejudice to any of the parties.¹²⁸ No person, including a conciliator, may be called as a witness during any subsequent

¹²⁵ See OPFA Conciliation Guidelines, section 5.1 and 5.2.

¹²⁶ Section 5.3

¹²⁷ Section 5.4

¹²⁸ Section 5.5

proceedings in the investigation and adjudication process or in any court to give evidence about what transpired during conciliation.¹²⁹

Generally, documents will be exchanged between the parties prior to the holding of conciliation in the form of the referral form and other relevant documents as may be admitted by the conciliator. Because of the diverse locations of the parties, the conciliation may be conducted by telephone or in person, unless otherwise decided by the Adjudicator.¹³⁰

If parties to conciliation reach a settlement of the complaint, the Adjudicator will confirm the outcome in writing to all parties by issuing a Conciliation Determination that has the same effect with a statement determination in terms of Section 30M read with Section 30 O of the PFA. The parties to the conciliation shall not be represented by a legal representative unless agreed to otherwise by the parties or the Adjudicator. Any party who is permitted to have legal representation at conciliation will be expected to bear their own legal costs.¹³¹

3.13. Forms of Conciliation

The conciliator may conduct the conciliation proceedings in such a manner as s/he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express and the need for a speedy settlement of the dispute. The following are the most recommended forms of conciliation under the auspices of the OPFA Conciliation Service however the list is not exhaustive:

¹²⁹ Section 5.6

¹³⁰ Section 5.7 and 5.8

¹³¹ Section 5.9 and 5.10

Teleconference conciliation

The conciliator appointed to attempt to resolve the dispute is allowed to use a telephone interview with both parties to clarify the issues and check the facts involved in a dispute. This method will however only be allowed in exceptional circumstances taking cognizance of the issues of the procedural fairness.¹³²

Mediation and Facilitation

The conciliator is to facilitate the sharing of information through informal discussions whilst looking at workable, practical and cost effective means of settling the dispute. What it in a nutshell entails is that, the conciliator is at the centre of managing and driving the process of conciliation.¹³³

¹³² Section 7.1
¹³³ Section 7.2

CHAPTER FOUR: PENSION FUNDS ADJUDICATOR DETERMINATIONS AND COURT CASES ON WITHHOLDING OF PENSION BENEFITS

4.1 An analysis of the recent cases in relation to the interpretation of section 37D of the Act

The employment relationship is a legal relation/link between the employer and employee with reciprocal rights and obligations¹³⁴. There exists a rendering service by the employee in an exchange for benefits and social security. The relationship is based on trust and honesty of both parties¹³⁵. Application of national policies and the adaptation to laws and regulation derived from national policy is/was of importance. Implied in this notion is that, within existing rights and legal positions amongst members of pension and provident funds, and beneficiaries in terms of the funds, there were/are laws and regulations that govern these relationship¹³⁶. The PFA section 37D has been one of the many sections that was subject to disputes in the area of employment

In many determinations in terms of section 30M of the Act, made by pension fund adjudicators, interpretation and the application of section 37D of the Act were centres of disputes. Some cases were then referred to the Supreme Court of Appeal to confirm the funds power to withhold benefits¹³⁷

¹³⁴ Statements from the ILO *Convention on Promoting Jobs and Protecting People*, June 17 2011

¹³⁵ The breach of trust by failing to be honest as outlined in the case of : *Edcon Ltd v Pillemer N.O & others (2007) 16 LAC 1.11*

¹³⁶ S.F Du Toit *Pension: Some Law Aspects*

¹³⁷ Shepstone & Wylie Attorneys : *Articles and recent developments*

4.2 Analysis of cases referred to the SCA¹³⁸

In an unanimous judgment¹³⁹ handed by the Court, the SCA confirmed that, a fund under section 37D of the PFA has a discretion to withhold the payment of pension benefits due to a member at termination of his employment, pending the finalization of a claim for damages allegedly suffered by the member's employer by reason of theft, dishonesty or fraud committed by a member.

The same contention was upheld in the *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*¹⁴⁰. In this case the applicant Highveld Retirement Fund (Provident Section) and Highveld Retirement Fund (Pension Section) withheld the pension payouts of the defendant pending the finalization of a claim for damages allegedly suffered by the employer as a result of the acts of misconduct i.e. bribery, fraud, theft and other transgressions involving dishonesty.

Oosthuizen was employed by Highveld Steel as a manager in the metallurgical division, responsible for stores with contents worth R177million. He was charged with misconduct and subjected to disciplinary proceedings for charges levelled against him, for bribery, fraud, theft and other transgressions involving dishonesty. The employee pleaded guilty for some of the charges levelled against him (which he conceded in the disciplinary hearing) but was subsequently dismissed. Shortly after his dismissal, he applied for the withdrawal of his benefits from the fund. The fund

¹³⁸ Supreme Court Of Appeal in South Africa

¹³⁹ Unanimous case handed on the 1 December 2008

¹⁴⁰ (103/2008)[2008] ZASCA 164 (01 December 2008)

withheld the pension proceeds in terms of the fund's rules¹⁴¹, and waited for a final determination of civil court for recovery of the losses. He contested the action of the employer's pension fund for withholding his pension fund in the Pretoria High Court. The court granted an order that the fund release all dues to the member. The decision was based on the notion: that the pension funds rules in terms of section 37 D do not expressly confer power to the fund to withhold pension benefits. Such power in terms of the court's decision could not be implied.

The fund elected to launch an urgent application and sought an interdict¹⁴² restraining the respondent from withdrawing any of his pension benefits and any other relief sought. The issues raised in the appeal were:

- I. The court to intervene in the order granted by the Pretoria High Court that ordered the fund to pay the ex-employee all the pension proceed that were withheld.
- II. Application for a court interdict to restrain any action by the employee to compel the fund to pay the proceeds
- III. Affirmation or the court to confirm that the board of the Fund had power to withhold payment of the pension benefits due to the employee, pending the outcome of the decision of the civil court to grant and order to recover financial losses suffered by the employer through the acts of misconduct by the employee. The decision/award by the court will determine the quantum, which will then be withdrawn from the total amount retained by the fund.

¹⁴¹ Rule 12 of the Provident Section Fund that was to be read together with s37D(1)(b)(ii) of the PFA of 1956

¹⁴² Interlocutory interdict: is a temporary measure which provisionally decides rights of the parties' pendent lite' (when legal proceedings are still pending between the parties). The applicant has to show that irreparable harm is likely to result if the remedy is not granted, and that there is no other satisfactory remedy.

The court in dealing with issue of intervening in the decision upheld by the High Court raised in the application, the court upheld certain contentions by invoking decisions in the *Absa Bank Ltd v Burmeister*¹⁴³. In this case it was held that section 37D of the Act, regulated the deductions from the pension benefits and was to be interpreted restrictively. Courts were not vested with implicit power to protect the employer by preserving their rights pending an action to ascertain whether or not it is owed money. If it was the case, this would cause prejudice to the employee i.e. instituting and delaying actions. It is important that the objects of section 37D (1)(b) be reckoned i.e. a purposive interpretation that includes the power granted to the employer to withhold the members pension benefits pending a determination of the members liability.

In addressing the question of the interdict (an urgent application to restrict the implementation of the order compelling the fund to pay the dues), the court was of the opinion that the employer had an option to apply for an interim relief in its action, after the dismissal of the intervention application. The order to be granted in this instance is a definitive rights of parties and has no effect of disposing the substantial portion of the relief claimed in the main proceedings.

In addressing the merits of the application raised, where the applicant contended that rule 12 of the Provident Section Fund read together with section 37D(1)(b)(ii), implicitly conferred upon the trustees of the Fund power to withhold or delay payment of the benefits due to a member pending a determination or admission of

¹⁴³ (647/02) 2004 ZASCA 16 (26 March 2004)

liability. The court conceded to the notion, and that the trustees were not entitled to make any deduction in the absence of a judgment. Letting loose payments will imply that the employee could simply circumvent the actions right to claim for losses by simply resigning and thus immediately claim for pension payout upon the discovery of his criminal conduct. The same provision reflects the section 37D of the PFA¹⁴⁴, where the trustee vests with the right to make such deductions from member or other beneficiaries, in respect of a claimed lodged by the employer in writing within a reasonable time.

The court went further to give clarity on the provisions of section 37A (1). The section dealt strictly with the reduction or deduction of the pension proceeds. Section 37D (1) (b) protects the employer's rights to pursue a recovery of the misappropriated monies by the employee. The employer will find it difficult to retrieve the losses if the proceeds are paid prior the finalization of the case. Therefore the fund is vested with powers to make discretion to withhold payments of the pension proceeds. In addressing potential prejudice, the court was of the opinion that the fund in exercising the discretion, it must take care by balancing the competing interests of both parties, by doing justice to the case. The High Court decision was then set-aside and substituted by a postponement pending the final determination of the action instituted by Highveld in the Transvaal Provincial Division

4.3 Interpretation of the section based on the analysis of the provision by Pension Fund Adjudicators and the SCA Judges

¹⁴⁴ *ibid*

Section 37D (1) (b), is a protection offered to the employer by law, to withhold the pension proceeds of the employee. The quantified amounts should be due to the employer as compensation for any damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member. In a case where the member has admitted liability in respect of the compensation due in writing the employer will then request the fund to deduct the amount from the due pension proceeds. In a case where there is no admission of liability the employer will then refer the case to claim the same. Judgment in a civil court (including civil claims against the employer for damages sustained by third parties, through an act of negligence or a wilful wrong by the employee during the cause of work)¹⁴⁵ or an award for compensation has to be obtained in a criminal court¹⁴⁶ . Within that period the employer could inform the fund to withhold pension payouts until the finalization of the case against the employee.

Though there is a protection of the employer in terms of the law, disputes were around the interpretation of section 37D (1) (b). *“In giving effect to the purpose of the section, the wording must be interpreted purposively to include the power to withhold pension payout, pending the determination or acknowledgement of liability”*¹⁴⁷. Over and above the correct interpretation, the employer has to:

¹⁴⁵ *F v Minister of Safety and Security and Another (4194/2006) [2009] ZAWCHC 101:2009 (2) SACR 639(WCC);2010 (1) SA 606 (WCC) (26 June 2009)*, where a 24yrs old woman sued the Department and Van Wyk for damages arising out of her being assaulted and raped by Van Wyk previously employed as a police officer. The claim was based on the fact that he was *“acting with the course and scope of his employment as a policeman in the employ of the SAPS”*. *Shaw v Government Employees Pension Fund (15041/2002)[2005] ZAGPHC 353 (2 December 2005)*, was another case where deductions were made on pension proceeds of the employee for a settlement on civil claims against the employer Minister of Safety and Security for David Moffat who was assaulted and sustained an injury on the eye for resisting an arrest. An action was also taken against the *Minister of Defence in the Mohlomi’s case* in the Witwatersrand Local Division for injuries sustained when a soldier intentionally shot a plaintiff a minor then

¹⁴⁶ In terms of section 300 of the Criminal Procedure Act 51 of 1977

¹⁴⁷ The interpretation of the provision in terms MML Maya Judge of the Supreme Appeal Court Highveld Case

- I. Forward a formal request to the fund to withhold payment of the pension proceeds
- II. The employer has established a prima facie case against the member
- III. The employer has taken all reasonable steps to enter the case on the court roll at the earliest possible date and not be responsible for the delays in the prosecution of proceedings
- IV. The fund to use its discretion on the matter, within the prescribed time limits/reasonable time limits, and pending the outcome of litigation, to avoid unjustified prejudice of the employee (this is balancing the conflicting interest of both parties) as outlined in *Molobela v Corporate Selection Retirement Fund and Another*¹⁴⁸

Implied in this context is that even though pension assets are regarded as special kind of savings for retirement of the employee, and also deserving protection, the law will however not cover up for financial misconduct committed by the employee at the employers expense. Once there is a prima facie case against the employee, the employer should notify the fund to withhold the pension proceeds. The employer, who stands to suffer financial losses/ suffer patrimonial losses due to the conduct of the employee, will upon admission of liability or upon receipt of a judgment request the fund to withdraw the x amount for compensation from the employees' pension proceeds. The protected recovery mode for the employer's financial losses defends the employer from losing out if the pensions are made available prior the completion of the case.

¹⁴⁸ [2011] 2 BPLR 220 (PFA), as the withholding of benefits was permissible if only for a reasonable time, the adjudicator advised the fund to periodically review the issue. It was a fact that the criminal case pending against the employee took long than expected, but it was not unreasonable long when considering the time/period for concluding criminal cases within the justice system

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 Conclusions

The OPFA has a very important role to play in the retirement industry and in protecting members of retirement funds. The proper management of retirement savings is crucial to the welfare and wellbeing of South Africans, and also to the economy since they are a source of long-term savings.¹⁴⁹ The OPFA has, since its establishment in 1998, done very well in affording members of pension funds an opportunity to have their complaints investigated and resolved in a procedurally fair, economical and expeditious manner, without the need to resort to the courts. To further enhance accessibility to members of the public, the OPFA has since April 2011 been participating in the centralised complaints helpline for all financial Ombudsman schemes, where members of the public can phone a toll-free number for more information about the different financial Ombudsman schemes. This bears and interests.¹⁵⁰

Noting the above achievements, the term of office of three years of the Adjudicator is a worrying factor since this period is not enough for the Adjudicator to set systems and processes for the speedy resolution of complaints. The aforesaid observations in dealing with complaints and disputes raised by the affected members was noted in the funds supervised under the PFA as opposed to the funds established under the special laws e.g. GEPF and the GEL for the public servants¹⁵¹.

¹⁴⁹Gordhan P, OPFA Annual Report 2010/2011, p2

¹⁵⁰ *ibid*

¹⁵¹ Report of the Public Protector in South Africa: no 20 of 2008/2009 On the investigations into allegation of the improper deduction of pension benefits of a member of the South Africa Police Services and the

There is on-going Social Security and Retirement Reform Discussion Paper which was issued in 2007 which raises an important issue regarding the regulation of retirement funds, including bargaining council funds and funds established in terms of specific statutes, in terms of a single Retirement Funds Act,¹⁵² extending the jurisdiction of the Adjudicator to funds over which he does not have jurisdiction, and to reform the adjudicator's office¹⁵³. Currently the Adjudicator has jurisdiction only on funds which are registered with the Registrar of Pension Funds in terms of the PFA.¹⁵⁴ The Adjudicator lacks jurisdiction on the GEPF which has more than 1, 16 million contributing members and 311 345 pensioners and beneficiaries, the Transnet Pension Fund and South Africa Post Office Retirement Fund.¹⁵⁵ This creates a concern since members of the above fund do not have recourse and they have to contact the fund directly if they are not satisfied with the benefits they have received.

High unresolved complaints raised with the GEPF are a clear indication that there are systemic blockages which are purely administrative problems which the Minister of Finance has to deal with. Members' complaints on the other hand are indicative of poor or no knowledge of the provisions in the Act i.e. special reference to section 37D (the withholding of the pension proceeds of the member).This implies that more

identification of systemic deficiencies in the practices and procedures for the recovery of the Departmental debt from pension benefits

¹⁵² Paragraph 119.

¹⁵³ Paragraph 132.

¹⁵⁴ Nevondwe L, South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act, *Pensions an International Journal*, 2010, Vol.15 No. 4, Macmillan Publishers Ltd, p294.

¹⁵⁵ Nevondwe L, The law regarding the division of the retirement savings of a retirement fund member on his or her divorce with specific reference to *Cockcroft v Mine Employees' Pension Fund*, [2007] 3 BPLR 296 (PFA), *Law, Democracy and Development Journal*, Vol, 13, 2009 (1), Juta Publishers, p9.

awareness should be made to the members specifically on protection offered to the employer, to withhold the pension proceeds of the employee for: amounts due to the employer as compensation for any damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member, and where the member has admitted liability in respect of the compensation due in writing, or judgment has been obtained in court¹⁵⁶.

The investments of the pensions for higher earning of the members will be an added advantage as opposed to a non-disclosure of benefits that the employer gains through investment of the proceeds that would not benefit the respective members, or pensions being determined by the market values then. One option that could be a remedy is the defined contributions that provide a lump-sum payout on retirement and which does not depend on the market share prices which could at any given moment plunge to their lowest, and being to the detriment of the member or beneficiaries.

5.2 Recommendation

A change to only Act that will govern all sectors, which will therefore allow adjudication of all complaints by all who have a competency of dealing with such cases, and to resolve the cases in a procedurally fair, economical and expeditious manner, without the need to resort to the courts especially in the GEPF, where there are still challenges, for the members.

¹⁵⁶ *ibid*

BIBLIOGRAPHY

ARTICLES AND REPORTS

1. Du Toit S.F Pension: Some Law Aspects
2. Hanekom (2007) Vol 1 Retirement Planning Manual on South African Retirement Funds and other Employee Benefits
3. Gordhan P, OPFA Annual Report 2010/2011
4. Jeram N. January 2005 Introduction to pension law manual, Industrial Law Journal
5. Jeram N. March 2008. Pension law overview-a basic guideline, Part 2
6. Law, Democracy and Development Journal, Vol, 13, 2009 (1), Juta Publishers
7. Mkhabela Huntly Adeyeke Inc. September 2009 Employment updates. Withholding of pension benefits when an employee commits misconduct
8. Mohlala M, August 2011. Pension Funds Adjudicator Guidelines and Procedures for the Conciliation of Complaints
9. Murphy June 2001 Alternative Dispute Resolution in the South African Pension Funds Industry: an Ombudsman or a tribunal, a speech delivered at the IPEBLA Conference in Bordeaux
10. National Treasury Republic of S.A. December 2004 Retirement Fund Reforms (Discussion Paper)
11. Nevondwe L 2008 Vol 16 part 2 JBL 43. "Time limits on lodging complaints to the Pension Funds Adjudicator"
12. Nevondwe L, 2010 Vol.15 No. 4 South African Social Security and Retirement Reform: A long journey towards the redrafting of the new Pension Funds Act, Pensions an International Journal, Palgrave Macmillan Publishers
13. OPFA Conciliation Guidelines
14. Shepstone & Wylie Attorneys: Articles and recent developments
15. Shrosbree L, February 2004. Permissible deductions from pension benefits (A paper presented during the Pension Lawyers Association Conference, February 2004).
16. Report of the Public Protector in South Africa: no 20 of 2008/2009 On the investigations into allegation of the improper deduction of pension benefits of a member of the South Africa Police Services and the identification of systemic deficiencies in the practices and procedures for the recovery of the Departmental debt from pension benefits
17. Rustomjee C, OPFA Annual Report 2007/2008

WEBSITE ARTICLES

1. <http://www.csvr.org.za/wits/confpaps/jordi.htm>. Peter Jordi. February 2005. Compensation for the Victims of Crime in a Civil Context
2. <http://www.fanews.co.za/articles.asp?> Compliance Regulatory: 2 PFA: *Criminal Conviction alone not enough for withdrawal benefits to be withheld*. November 2011
3. <http://www.itinews.co.za/news.aspx?categoryid=5> Mandy Smith February 2009. *Responsibility for reporting Niehaus forgery could extend beyond Mashatile*.
4. www.nwpg.gov.za NW Provincial Administration, Department of Human Settlements Procedure Manual for Service Terminations
5. <http://www.helfin.co.za/index.php> *Practical application of section 37D-Dishonesty by Employment*
6. http://9iacc.org/papers/day3/ws1/d3ws1_pricewaterhouse.html *Effective Use of Legal Remedies for Corruption: A South African Perspective*
7. <http://www.paralegaladvice.org.za/docs/chap06/21.html> *Pension and Provident funds*
8. <http://www.oxford.co.za/cws/public.Admin/law-of-delict.in.sa/819835.htm>
9. www.pdfqueen.com/basic-principles-of-commercial-law-5th-edition-havenga-free
10. [www.pmg.org.za/taxonomy Land and Enviromental Affairs/](http://www.pmg.org.za/taxonomy/Land+and+Environmental+Affairs/) Parliamentary Monitoring Group
11. www.pprotect.org Report of the Public Protector in Terms of Section 182(1) (b) of the Constitution of the Republic of South Africa, 1996 and Section 8 (1) of the Public Protector Act, 1994. Report no 20 of 2008/2009
12. www.e-tools.co.za Labour Public. Pretoria Feb 28 1996
13. [www.workinfo.com/free/newsletter Vol2No11.htm](http://www.workinfo.com/free/newsletter/Vol2No11.htm)
14. [www.justiceforall.com.unreported cases](http://www.justiceforall.com.unreportedcases). *The Current Crisis of the S.A Labour Movement*