



## WITHHOLDING BENEFITS – DUTIES OF EMPLOYERS AND FUNDS

Whilst the Pension Funds Act (“the Act”) is centred on protecting the benefits and interests of members, it does provide an employer with a means of recourse against a member in the event of dishonesty, theft, fraud or misconduct by employees under section 37D(1)(b)(ii).

It is however important for an employer to understand that this section of the Act is not a means to punish or prejudice an employee. Furthermore, a fund and an employer must communicate constantly when a benefit is being withheld in terms of this section of the Act. Once the employer has uncovered the dishonesty, theft, fraud or misconduct and before the benefit is paid out, the employer must notify the fund in writing of their request for the benefit to be withheld and as soon as possible provide the fund with (i) a written admission of liability or (ii) a judgement handed down by a court of law.

In the event that the employer cannot provide the fund with points (i) or (ii), the employer must provide the fund with evidence that the matter is being actively pursued. Examples of this type of evidence would be a case number or a letter from the National Prosecuting Authority confirming it intends to prosecute the case.

The employer must not assume that once the fund is notified of the request to withhold the benefit and has agreed to do so, it has no further obligations towards the fund. The

employer must keep the fund apprised of the progress of the litigation in order to show that the litigation is progressing as expediently as possible, namely court procedures are being strictly adhered to.

Similarly, a fund has a responsibility to monitor the litigation to ensure that the member is not being prejudiced. In order to do this, a fund must agree and implement a process with the employer whereby the employer provides the fund with regular updates on cases where benefits are being withheld. Failure by the employer to provide ongoing progress reports to the fund must be addressed immediately.

There is not a maximum period of time for which a benefit can be withheld; however the withholding of the benefit must be exercised reasonably and the benefit cannot be withheld indefinitely. Whilst the Pension Funds Adjudicator (“the Adjudicator”) is aware of the fact that litigation can be a long and drawn out process, the Adjudicator will not look favourably on delays caused by the employer or the fund.

It is evident from a recent Supreme Court of Appeal determination that the fund not only has to monitor the litigation to the extent that it is aware of the current status of the litigation and the court date (if one has been set), it also has to ensure it is aware of the outcome of the litigation once the matter has been to court and must act in terms of the order made by the court.

### BENEFICIARY FUNDS – IS THERE A CHOICE?

When distributing a benefit in terms of section 37C of the Pension Funds Act (“the Act”), trustees have discretion. As part of their discretion they are required to investigate the most appropriate, cost effective and practical payment methods in respect of benefits payable to a minor child.

One option is to place the benefit of a minor child into a beneficiary fund. Once the benefit is paid into the beneficiary fund, the guardian will receive monthly payments in respect of the minor child’s expenses and can apply to the fund for ad hoc payments for certain expenses e.g. medical expenses or educational expenses.

Payment into a beneficiary fund is appealing as a means to protect the minor child’s benefit; however trustees must consider a number of factors before they make payment into a beneficiary fund as in doing so they take away the rights of a guardian to manage the assets of the minor child.

In the *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) case it was clearly stated that trustees had to consider the amount of the benefit, the ability of the guardian to administer the benefit, the qualification (or lack thereof) of the guardian to administer the benefit and the use of the benefit in such a manner that it can provide for the minor until he or she attains the age of majority. In addition to these considerations, trustees must not lose sight of the immediate needs of the minor child. Whilst a monthly payment from a beneficiary fund may be the most appropriate method of payment (and acceptable to the guardian) in the long-term, the immediate needs of the minor child may require a portion of the benefit to be paid as a cash lump sum.

Even after taking the above-mentioned points into consideration and applying them to the personal circumstances of a minor child and his or her guardian, the trustees may not be in the clear. Trustees need to take note of the fact that the Pension Funds Adjudicator (“the Adjudicator”) has made a determination on a complaint where the payment of the minor child’s benefit into a beneficiary fund was not disputed, but rather the right of the guardian to select which beneficiary fund the benefit was paid into.

The Adjudicator ruled that the decision to pay the benefit into a beneficiary fund was correct, based on the facts before the trustees (which included the consent of the guardian to do so); however the trustees could not dictate which beneficiary fund the benefit had to be paid into. The trustees were ordered to allow the guardian to choose which beneficiary fund the guardian wanted the benefit to be paid into.

Going forward, funds may receive more complaints from guardians in respect of their rights to choose which beneficiary fund they want a minor child’s benefit paid into.