



JLAW IC 3 of 2025: Pension Funds Amendment Act No. 31 of 2024 and section 37D-deductions

Introduction

The Pension Funds Amendment Act No. 31 of 2024 (PFAA) was promulgated in Government Gazette No. 50968 on 23 July 2024. It provides for changes to the Pension Funds Act and specific public sector funds that were necessary for the appropriate implementation of the two-pot retirement system as set out in the Revenue Laws Amendment Act No. 12 of 2024 (RLAA) with effect from 1 September 2024. For more detail on RLAA, refer to [JLAW IC1 of 2024: Revenue Laws Amendment Act No. 12 of 2024](#).

The PFAA applies to all funds registered under the Pension Funds Act and the funds established in terms of the following public sector fund Acts (listing the funds established under these Acts known to me):

- a. the Post and Telecommunications-related Matters Act (previously Post Office Act) No. 44 of 1958 •

Post Office Retirement Fund

- b. the Transnet Pension Fund Act No. 62 of 1990

- Transport Pension Fund
- Transnet Retirement Fund
- Transnet Second Defined Benefit Fund

- c. Government Employees Pension Law, 1996 (Proclamation No. 21 of 1996)

- Government Employees Pension Fund (GEPF)

The intention was to align pension laws across all sectors to ensure that the two-pot system is implemented in the same manner across all retirement funds.

Although the RLAA does not apply to beneficiary funds, there is a provision in the PFAA relating to future maintenance that did apply to these funds.

This document mainly focuses on the changes to the Pension Funds Act and the provisions around section 37D-deductions. Similar changes were made in the other three Acts referred to above.

It briefly touches on the introduction of the definitions aligned to the definitions in the RLAA (paragraph 1), looks at the accounting for savings withdrawals benefits (paragraph 2), considers the amendment of section 37A (paragraph 3), and then deals in more detail with the deductions allowed for under section 37D in general (paragraph 4), and specifically relating to housing loans, maintenance and divorce orders and compensation for damages due to an employer (paragraphs 5 to 8).

1. Alignment of definitions

The PFAA inserted a definition for “Income Tax Act” and then introduced the following definitions in the Pension Funds Act: “member’s interest in the retirement component”, “member’s interest in the savings component”, “member’s interest in the vested component”, “retirement component”, “savings component”, “savings withdrawal benefit” and “vested component”, which were all cross-referenced to the corresponding definitions in the RLAA.

2. Accounting for savings withdrawal benefit

Section 14B of the Pension Funds Act deals with the determination of a member’s individual account, minimum individual reserve and minimum pension increase.

Subsection (1) provides the following formula for the determination of a member’s individual account in a defined **contribution** fund:

$$MC + EC - X + IC + OC$$

Where

MC = member contributions

EC = employer contributions

X = fund expenses

IC = a member’s opening balance in the fund, and

OC = any other lawfully permitted debits from or credits to the member’s individual account

The PFAA amended the definition of “OC” in this formula by specifically adding a savings withdrawal benefit as a permissible debit.

Subsection (2)(a) relates to the determination of a member’s minimum individual reserve in a defined **benefit** fund. The PFAA added a new subparagraph (iii) that provided for the reduction of pensionable service or where applicable, the minimum amount payable based on the member’s contributions, to take into account any savings withdrawal benefits paid to the member.

These amendments align with the requirements contained in the RLAA.

3. Section 37A

Before the promulgation of the RLAA, section 37A of the Pension Funds Act only allowed for a reduction of a member’s benefit under the Pension Funds Act itself, the Income Tax Act and the Maintenance Act. As far as tax was concerned, this meant that a fund could deduct “normal” tax (a deduction under the Income Tax Act) from a member’s benefit.

Until 2011, section 99 of the Income Tax Act allowed for the issuing of a directive for arrear taxes (an IT88L) to a retirement fund. The Tax Administration Act 20 of 2011 repealed section 99 of the Income Tax Act.

Section 179(1) of the Tax Administration Act 20 of 2011, which allows for the issuing of an IT88L against a fund benefit, reads as follows:

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A senior SARS official may authorise the issue of a notice to a person who holds or owes or will hold or owe any money, including a pension, salary, wage or other remuneration, for or to a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer’s outstanding tax debt.

The issuing of an IT88L is only dealt with in the Tax Administration Act, which was not included in the list of Acts under which deductions against a member’s benefit could be made. The deduction of arrear taxes was therefore

not allowed under section 37A of the Pension Funds Act.

The PFAA amended section 37A of the Pension Funds Act to include the reduction of a benefit in terms of the Tax Administration Act. The same addition was also made in the introductory paragraph of section 37D(1)(a).

This now makes it clear that arrear taxes may be deducted from a member's fund benefit.

4. Section 37D deductions

Section 37D allows for the following deductions against a member's benefit, in order of preference: a.

The tax payable on a benefit as specified in the Income Tax Act.

This refers to the tax payable on lump sums in accordance with the retirement fund lump sum benefit and retirement fund lump sum withdrawal benefit tax tables, and the tax at the member's marginal rate payable on a savings withdrawal benefit. The tax tables can be found on the SARS website.

b. A housing loan or guarantee provided by the fund, provided that it was granted before the granting of a divorce or maintenance order which gave rise to a deduction under section 37D.

c. Maintenance and interim maintenance order amounts, plus the tax payable on it. d.

Divorce order amounts.

e. Compensation for damages caused by the member to their employer in respect of theft, dishonesty, fraud or misconduct, provided that the member has either admitted liability to the employer in writing or a judgment has been obtained against them in a court.

f. An amount which the fund paid or will pay at the request and on behalf of the member or beneficiary in respect of –

i. medical scheme contributions;

ii. insurance premiums;

iii. any purpose approved by the Financial Services Conduct Authority (FSCA). The fund has to apply to the FSCA for this authorisation to make this deduction. From 1 October 2024, the fee for such an application is R1,856.00 as determined under FSCA General Notice 1 of 2024 published on 27 September 2024. The FSCA has previously approved deductions in respect of medical aid shortfalls and burial expenses.

g. Arrear or outstanding taxes owed to SARS that the fund has to deduct from a member's lump sum or savings withdrawal benefit under the Tax Administration Act.

SARS will issue an IT88L to the fund to indicate the outstanding taxes to be deducted. This can be for Assessed Tax, Provisional Tax or Administrative Penalties.

The SARS Guide to Complete the Lump Sum Tax Directive Application Forms confirms the following:

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- IT88L **will not** be attached to the tax directive issued if the reason for the tax directive is "Death", "Death Member / Former Member after retirement" / "Security of mortgage bond order / housing loan" or 'Transfer' since the benefit is payable to a third party and / or it does not accrue (sic) to the taxpayer.
- If the taxpayer has an arrangement for outstanding taxes or indicates the amount on the IT88L must not be withheld a letter from SARS Debt collection is required to instruct the Fund of the amount to be paid over to SARS or where debt was settled or reduced to ignore the IT88L.

Section 37D(1B) limits the aggregate of all amounts deducted to the amount of the member's individual account or the member's minimum individual reserve. This simply means that the fund cannot deduct more than the

amount available in the fund for the member.

5. Housing loans or guarantees

Section 19(5) of the Pension Funds Act

If its rules allow for it, a fund can provide a direct housing loan to a member or issue a guarantee in favour of a third party who provided such a loan. Section 19(5) of the Pension Funds Act makes it clear that the loan must be used to –

- a. settle an existing housing loan;
- b. purchase a house or a stand on which a house will be built; or
- c. make additions or alterations to a house or maintain or repair such house.

In all these cases, the property must be owned by the member and/or their spouse and must be occupied by the member or their dependant.

Regulation 28 amendments

On 1 July 2022, National Treasury published amendments to Regulation 28 under Notice No. 2230 in Government Gazette No. 46649 which became effective on 3 January 2023. One of the changes was the reduction of the maximum asset allocation to housing loans from 95% to 65% of the fund's assets (by implication a member's fund benefit), applying to new loans issued after 3 January 2023. The intention behind this reduction was to reduce members' abuse of the fund-backed housing loan schemes.

PFAA changes

The PFAA aligns section 19(5)(c) of the Pension Funds Act with the amended Regulation 28 by confirming that a housing loan or guarantee may not exceed 65% of the member's individual account or minimum individual reserve, as the case may be, in the member's interest in the savings, retirement and vested components. It also deletes paragraph (d), which allowed a fund to increase the threshold to 100% under certain circumstances. The threshold must be applied on the net housing loan amount, i.e. net of income tax, and applies across all three components.

The PFAA changes section 19(6)(a), which allows the FSCA to temporarily exempt a fund from compliance with any part of section 19(5) on application, by adding in a requirement of a prescribed fee to be paid for such application. There is currently no fee prescribed, but in all likelihood the same fee as that applying for all other types of exemptions as set out in FSCA General Notice 1 of 2024 published on 27 September 2024, i.e. R1,856.00, will also apply for this exemption application.

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Before 1 September 2024, section 37D(1)(b)(i) allowed a fund to deduct a housing loan or housing loan guarantee granted to a member by his employer. Fund backed-housing loans or guarantees provided by an employer to their employee-members were however not provided for under section 19(5); it only allowed (and still does) funds to grant housing loans or guarantees to members. To align the empowering provision in section 19(5) with allowable deductions, section 37D(1) has been amended to take away the deduction in favour of an employer for housing loans or guarantees provided by that employer. A fund is therefore not allowed to deduct an amount payable to an employer in respect of a housing loan or guarantee provided by the employer from a member's benefit. A housing loan for which the fund acted as guarantor will however qualify as a permitted deduction under section 37D(1)(a)(ii).

Tax payable on housing loan/guarantee-deductions

Housing loan or guarantee deductions can be made –

- from the benefit that the member or beneficiary becomes entitled to in terms of the rules of the fund when the member exists the fund. This usually only applies to pre-retirement exits or early retirement because the loan

repayment period should have been calculated to a date ending at the latest on the member's normal retirement date, resulting in the full loan amount having been settled by then. If a member leaves employment and decides to take their vested component and savings component as withdrawal benefits, the outstanding amount would be deducted across all three components;

- in the case of a transfer to another fund, from the transfer amount, once again across all three components.

This is a last resort deduction, and should only be considered if the trustees of the transferring fund are satisfied that it is not reasonably possible to negotiate the repayment or transfer of the loan or guarantee; or

- in the case of the member defaulting on the repayment of the loan where the member stays in the fund, from the amount of the benefit which the member would have received on termination of membership on the date of default. A strict interpretation of the law suggests that since the member will only become entitled to his vested and savings components if his membership of the fund terminates before they reach their normal retirement age, the amount of the deduction will be limited to the total value of the member's benefit in these two components. The deduction must however be made proportionately across all three components. This deduction must also only be made as a last resort, after the trustees are satisfied that no other arrangement for the repayment can be made.

Section 37D(2) of the Pension Funds Act states that the latter two deductions will constitute a deemed withdrawal benefit. This aligns with paragraph 4(1)(b) of the Second Schedule to the Income Tax Act which deems a deduction under section 37D(1)(a), (b) and (c) of the Pension Funds Act to be a lump sum benefit that accrues on the date it is deducted. SARS' Guide to Complete the Lump Sum Tax Directive Application Forms explains as follows how the tax on this deduction should be dealt with:

- c) When the approved Fund becomes liable for the guarantee or the loan before there is an exit event, the Fund must deduct the amount from the member's minimum individual reserve. This amount will be deemed to accrue to the member and is taxable in the hands of the member.
- d) The employees' tax to be deducted or withheld on the loan amount will not reduce the amount payable to the third party.
- e) Section 37D(1)(e) of the Pension Funds Act makes provision for the deduction of employees' tax from the member's minimum individual reserve to avoid hardship for the member.

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- f) The payment of employees' tax is also deemed to be a lump sum benefit for purposes of the Second Schedule to the Act and is thus taxable in the hands of the member. A second tax directive application for the tax-on-tax must be submitted where the member is still in employment or transfers the resignation benefit to another fund.
- g) The following formula must be used to determine the tax-on-tax effect that the deduction of the employees' tax from the minimum individual reserve creates:
 - i) $X = A / C \times B$
 - ii) X = represents the amount for which the additional tax directive (the second application / tax on-tax) must be applied for.
 - iii) A = the tax deductible as per the first tax directive.
 - iv) B = 100
 - v) C = 100 minus the member's effective rate of tax as determined by the first tax directive, e.g., C will be 100 - 18 = 82. The effective rate of 18% must be used where the rate is less than 18%. Therefore, the effective rate cannot be less than 18%. Where the effective rate is between:
 - A) 18% and 26.99% use 27%;
 - B) 27% and above use 36% as the effective rate to ensure no hardship is caused on

assessment.

vi) (Effective rate = PAYE as per first tax directive **divided** by the amount of the loan amount).

To summarise:

A. If the member terminates their employment and leaves their benefit, or the balance thereof after they withdrew their vested component and/or savings component in the fund, the fund must apply for two tax directives:

1. Form B Request for a Tax Deduction Directive Pension and Provident Funds - Events Before Retirement or Death, selecting the option Security of Mortgage Bond Order / Housing Loan, which will result in the deduction being taxed on the withdrawal tax table, and
2. a tax directive application for the tax on the tax payable under the first tax directive, which tax will be calculated in accordance with the formula set out under paragraph g) of the previous section.

Both the withdrawal benefit tax and the tax-on-tax will be deducted from the member's individual account or minimum individual reserve. The total amount of the outstanding loan will accordingly be available for set-off against the member's total benefit or, in the case of a housing loan guarantee, for payment to the financial institution who provided the housing loan to the member.

B. If the member terminates their employment and transfers their benefit to another fund (i.e. their fund membership terminates), the tax will be calculated on the withdrawal tax table and paragraph A.1 above will apply.

Restrictions

Section 37D contains two restrictions relating to housing loans or guarantees:

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- i. A fund may not grant a housing loan or guarantee to a member if the fund received notice and proof that a divorce has been instituted which will result in a division of assets, including the member's pension interest in the fund, unless the fund obtained the non-member spouse's consent.
- ii. A fund may only allow a member to take a savings withdrawal benefit if there will be sufficient remaining funds to repay the outstanding loan or guarantee.

6. Maintenance

PFAA changes

The PFAA brought about the following major changes as far as the deduction of maintenance amounts from a member's individual account or minimum individual reserve is concerned.

- a. Section 37D(1)(d)(iB): It includes a deduction in terms of an interim maintenance order granted by a court under rule 43 of the High Court rules or rule 58 of the Magistrates' Court rules.

Rule 43 of the Provincial and Local Divisions of the High Court of South Africa and Rule 58 of the Rules Regulating the Conduct of the Proceedings of the Magistrates' Courts of South Africa, made under section 6 of the Rules Board for Courts of Law Act No. 1 of 1985, allow a spouse to apply to court for an interim order in respect of inter alia maintenance for themselves and/or their children. These orders are in place and enforceable until a divorce is finalised, at which time it will be replaced by the divorce order incorporating the maintenance provisions.

- b. Section 37D(3)(aC): It lays to rest the question of whether future maintenance can be deducted.

Before 1 September 2024, there was an implied obligation on funds to ascertain a member's mala fides before future maintenance amounts could be deducted. In the case of *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D) the court confirmed that section 26 of the Maintenance Act No. 99 of 1998 did not provide for future maintenance deductions, but did concede that where a member resigned from their pension fund with the specific objective of thwarting payment, i.e. displaying mala fides, the

relevant sections of the Maintenance Act and the Pension Funds Act may be interpreted to include the payment of future maintenance in one lump sum. In *Sentinel Retirement Fund v Mtambo and Others* [2015] JOL 33440 (GP) the court found no indication of mala fides on the member's side and concluded that an order directing the member to pay and the fund to deduct an amount of future maintenance in one lump sum was contrary to the provisions of sections 37A and 37D of the Pensions Funds Act read with the Maintenance Act.

Following the enactment of the PFAA, a fund will be able to give effect to the deduction of future maintenance from a member's individual account or minimum individual reserve without having to investigate the intent behind the member's failure to pay maintenance.

- c. Section 37D(3)(aC): The fund must deduct and pay arrear maintenance as a lump sum to the maintenance claimant and can pay future maintenance in monthly payments directly to the maintenance claimant or pay it as a lump sum to a beneficiary fund.

A court order claiming payment of future maintenance can either stipulate that the fund must make the deduction and pay the maintenance to the maintenance claimant every month as and when the member fails to pay maintenance, or that it be deducted and paid as a lump sum.

Most funds who do not pay monthly pensions do not have the supporting administration systems that allow them to make regular payments from a member's individual account or minimum individual reserve.

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Section 37D(3)(aC) allows a fund to pay the maintenance to a beneficiary fund which will then deal with the monthly payments to the maintenance claimant. There is currently no guidance on how the beneficiary fund should deal with maintenance payments once the lump sum is transferred to it.

- d. Section 37D(1A): The fund is authorised to make a maintenance deduction from the capital value of a pensioner's pension after retirement.

Before 1 September 2024, section 37D(1)(d) also allowed for this deduction from an in-fund pensioner's pension; the only difference is that this is now dealt with in a separate subsection.

- e. Section 37D(3)(aD): Where there is a maintenance order against the fund in place, the fund may only allow a member to take a savings withdrawal benefit if there will be enough of the member's individual account or minimum individual reserve left to comply with the maintenance order.
- f. Section 37D(3)(aE): If the fund is aware of a pending maintenance claim against the fund and it has received a formal written notice from the maintenance investigating officer to suspend a savings withdrawal benefit, it must suspend such benefit if the withdrawal will result in there not being enough of the member's individual account or minimum individual reserve left to comply with the pending order once it is granted.

A maintenance order deduction must be done across all three components. If the maintenance order amount plus the amount that the member wants to take as a savings withdrawal benefit is less than the total value of the member's individual account or minimum individual reserve, then the fund may allow that withdrawal.

The prohibitions under sections 37D(3)(aD) and (aE) only apply in relation to a savings withdrawal benefit. If a member of a preservation fund for example wants to take a pre-retirement withdrawal from their vested component and there is a pending or final maintenance order against the fund, the fund will not be able to suspend that withdrawal.

Requirements for valid maintenance order-deduction

To be binding on a retirement fund, a maintenance order must meet the following requirements.

- A. The order must have been issued by a **South African court**.

An order issued by a foreign court will not be binding on a South African fund. That order must first be made in a South African court and must include a reference to the Maintenance Act.

- B. The fund must be **named** in or **identifiable** from the order.

If the correct name of the fund is not provided, but the fund can be identified by for example a reference in the

order to the member's employment with a participating employer in the fund or the member's membership or policy number, this requirement will be met.

C. It must be clear what **amount** must be deducted from the member's benefit.

The exact amount that must be deducted must be specified.

D. It must be an order contemplated in **section 37D(1)(d)(iA) or (iB)** of the Pension Funds Act.

The order must be for the payment of maintenance as defined in the Maintenance Act or interim maintenance in terms of Rule 43 of the High Court rules or Rule 58 of the Magistrates' Court rules.

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Deduction of maintenance order-amount against out-of-fund annuity

While it is possible to make a maintenance order deduction against the capital of an in-fund pensioner's pension, the same principle does not apply to an annuity bought out-of-fund in the member's name.

Section 16(2)(a) of the Maintenance Act provides that any court that made or makes a maintenance order –

(a) shall, subject to paragraph (b)(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied—

.....

that it is not impracticable in the circumstances of the case:

This confirms that a court may make an order against the administrator of a retirement fund where such fund has a contractual obligation to pay money to the person against whom a maintenance order is made, to make periodical payments on that person's behalf, unless it is impracticable to do so.

Section 37D(1)(d)(iA) of the Pension Funds Act provides for the deduction of maintenance order amounts from the value of a retirement fund member's fund benefit.

Section 37D(1A) of the Pension Funds Act in turn confirms that in the case of a pensioner, the maintenance deduction shall be made from the capital value of the pensioner's pension after retirement.

Section 37D of the Pension Funds Act accordingly confirms that a fund (via its administrator) may make maintenance payment deductions from the value of an active member's benefit or the capital value of a pensioner's pension.

Both 16(2)(a) of the Maintenance Act and section 37D of the Pension Funds Act apply to an in-fund annuity, in other words, an annuity provided by and paid from a retirement fund. But neither refers to an out-of-fund annuity, being an annuity that has been purchased from an insurer in the name of the former member of the fund. In such a case, the benefit would already have passed to the insurer. The provisions of the Pension Funds Act do not apply to such an annuity. The administrator of the fund will have no control over it and will not be in a position to make any deductions from either the capital of that annuity or the monthly annuity payments as allowed for under section 16(2)(a) of the Maintenance Act.

The Maintenance Act does allow for the deduction of maintenance payments from an out-of-fund annuity.

Section 26(4) of the Maintenance Act, which provides as follows –

“ (4) Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order”.

confirms that an annuity payment may be attached to satisfy a maintenance order. BUT this only applies to the monthly annuity income and not to the capital underlying the annuity. Under the annuity contract, the annuitant is

entitled only to the monthly income payments as and when they become due and payable. The annuitant is not entitled to the underlying capital, nor is he entitled to commute any portion of his capital value unless in the case of a living annuity, it falls under the de minimis-amount as referred to in paragraph (c) of the definition of "living annuity" in section 1(1) of the Income Tax Act. The amount that may be attached

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under section 26(4) of the Maintenance Act cannot exceed the amount that the annuitant himself is actually entitled to, which is only the monthly annuity payments.

Tax payable on maintenance order-deductions

Section 37D(1)(e) of the Pension Funds Act confirms that the employees' tax in terms of the Fourth Schedule of the Income Tax Act payable on maintenance order-deductions must be deducted from the member's individual account or minimum individual reserve, or the benefit payable to a pensioner. The tax-on-tax principle as set out in Interpretation Note 89 - Maintenance Orders and the Tax-On-Tax Principle will apply.

With regards to monthly future maintenance payments, the fund should only take the current month's maintenance payment into account. For example, for an order made in June that stated that monthly payments of R10 000 should be paid to a member's non-member spouse with effect from 1 July, (a) in the formula set out in Interpretation Note 89 - Maintenance Orders and the Tax-On-Tax Principle would have been R10 000 for the first payment. For each subsequent payment, it must be the amount payable in that month; in this case, R10 000. Previous months' maintenance deductions should not be taken into account. This is the same as the method used to calculate regular income such as salaries and commission.

The same calculation method applies to a non-South African tax resident. The fund should take the implications of a tax treaty into account.

7. Divorce orders

"Pension interest" definition before 1 September 2024

Before 1 September 2024, there were different definitions of "pension interest" for pension and provident (occupational) funds, preservation funds and retirement annuity funds.

For occupational funds, "pension interest" was defined in section 1(1) of the Divorce Act to mean the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office. Simply put, it was the member's deemed resignation benefit on date of divorce.

The Divorce Act did not define "pension interest" in a preservation fund. The Pension Funds Act introduced such a definition in section 37D(6) with effect from 1 November 2008, stating that it was the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated, or the member or the deferred pensioner retired on the date on which the decree was granted ; in short, the member's benefit in the fund on the date of divorce.

The definition of "pension interest" in the Divorce Act in relation to a member of a retirement annuity fund referred to the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1 (2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act. The interest rate referred to here is equal to the repurchase (repo) rate as determined from time to time by the South African Reserve Bank, plus 3,5% per annum.

PFAA changes

In relation to divorce order deductions, the PFAA inserts definitions for "Divorce Act" and "pension interest".

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The definition of "Divorce Act" merely reflects the full name of that Act. The definition of "pension interest" on the other hand brings in a new calculation method.

The definition of "pension interest" does not distinguish between the different types of retirement funds. For all funds, it is the member's individual account or minimum individual reserve, as the case may be, determined in terms of the rules of that fund, on the date of the court order, or simply stated, the member's benefit in the fund on date of divorce. Furthermore, this definition does not only apply in relation to a court order granted under the Divorce Act, but also to a court order granted in respect of the division of assets of a marriage according to the tenets of a religion, which inter alia allows spouses in for example Muslim marriages to claim immediate deduction of their portion of a member's pension interest from a retirement fund.

Interplay between Divorce Act and PFAA

1. Occupational funds

The Divorce Act definition of "pension interest" refers to a member's resignation benefit, which consists of their vested component, and under certain circumstances also their savings component; the retirement component does not become payable on resignation.

The reference to a member's resignation from office in the Divorce Act definition also means that pension interest does not apply once a member has resigned from employment, even though they may still be a member of the fund.

Following the implementation of the two-pot system, if a divorce order refers to pension interest as defined in the Divorce Act, applying that definition will result in a smaller allocation to a non-member spouse as it will exclude the member's retirement component in the calculation of their pension interest, even though the deduction will be done across all three components. It is also debatable whether a fund would be able to give effect to a deduction against the individual account or minimum individual reserve of a paid-up member or pensioner.

If the divorce order refers to pension interest as defined in the Pension Funds Act, the calculation will include the member's retirement component, which forms part of the member's individual account or minimum individual reserve. The reference to the terms member's individual account or minimum individual reserve in the Pension Funds Act-definition also includes paid-up members and pensioners.

It is therefore important to determine which definition is referred to in the divorce order, as it can have a significant impact on the amount payable to the non-member spouse.

2. Preservation funds

Since preservation funds are not referred to in the definition of "pension interest" in the Divorce Act, a divorce order referring to a division of pension interest as defined in the Divorce Act is technically incorrect.

3. Retirement annuity funds.

The calculation of pension interest in a retirement annuity fund in accordance with the definition in the Divorce Act will render a different answer to a calculation done using the definition in the Pension Funds Act. The answers are dependent on the repo rate (Divorce Act) and the growth in the fund (Pension Funds Act).

It is important to note that the Pension Funds Act does not prescribe the method of the calculation of a member's pension interest in a retirement annuity fund, but only what the fund may deduct from the member's benefit.

The PFAA added subsection (6) to section 2 of the Pension Funds Act, making it clear that [i]n the event of a conflict between the provisions of this Act and the Divorce Act, the provisions of this Act prevail.

Section 37D(1)(d)(i) of the Pension Funds Act allows the fund to deduct any portion of the pension interest assigned to a non-member spouse in the court order from a member's individual account or minimum individual reserve in the fund.

If a divorce order refers to a division of a member's pension interest as defined in the Divorce Act, the retirement annuity fund will have to do two calculations:

- (a) First calculate the member's pension interest in accordance with the definition in the Divorce Act to see what the non-member spouse is entitled to; and
- (b) Then calculate the member's pension interest in accordance with the definition in the Pension Funds Act to see what the fund may deduct.

Example:

Divorce order wording: The non-member spouse is entitled to 50% of the member's pension interest as defined in the Divorce Act.

Calculation of the member's pension interest according to the Divorce Act: R500,000. The non-member spouse is then entitled to R250,000.

Calculation of the member's pension interest according to the Pension Funds Act:

- Scenario 1: R520,000. Although 50% of this is more than R250,000, the fund may not deduct more than the amount the non-member spouse is entitled to.
- Scenario 2: R480,000. Section 37D(1)(d)(i) limits the deduction that the fund may make to the portion of the pension interest assigned to a non-member spouse in a court order. For purposes of the deduction, the fund must apply the definition of pension interest as defined in the Pension Funds Act and deduct the portion of that pension interest that was assigned to the non-member spouse from the member's benefit.

The two different scenarios can be summarised as follows:

| Calculation ito Divorce Act | Calculation ito Pension Funds Act | What the fund may deduct |
|-----------------------------|-----------------------------------|--------------------------|
| R500,000 | R520,000 | R250,000 |
| | R480,000 | R240,000 |

Where a divorce order refers to a portion of the member's pension interest in a retirement annuity fund as defined in the Divorce Act being assigned to a non-member spouse, the fund may only deduct the assigned portion of the member's pension interest as calculated under the Pension Funds Act, provided that it is not more than the assigned portion of the pension interest calculated under the Divorce Act.

Divorce orders and housing loans

Section 37D(3)(aA) is inserted to prohibit a fund from granting a housing loan or guarantee to a member without the non-member spouse's consent if the fund received notice from either the member or the non member spouse and proof that a divorce has been instituted or an application has been made which will result in a division of assets, including the member's pension interest in the fund. Evidence of such proceedings having started are for example a confirmatory letter from either party's attorney or the proposed settlement agreement. This prohibition applies until the divorce has been finalised or a court order has been issued.

Section 37D(3)(a) of the Pension Funds Act states that [a]ny amount that may be **deducted** in terms of subsection (1)(d) may only be deducted after the member's individual account or member's minimum individual reserve, as the case may be, has been reduced by any loan amount or guarantee amount referred to in subsection (1)(a), where the loan or guarantee was granted prior to the granting of the court orders irrespective of the fact that that amount is due and payable or not.

This does not mean that when a member's pension interest is calculated, any outstanding housing loan / guarantee amount must first be deducted from the member's individual account or minimum individual reserve. It that were the intention, then this provision should have been included in the definition of "pension interest".

Section 37D(1)(d) refers to a deduction from a member's individual account or minimum individual reserve.

Section 37D(3)(a) in turn limits a pension interest deduction to the remainder of the member's individual account or minimum individual reserve after the deduction of the outstanding housing loan / guarantee amount. This section therefore does not imply that the **calculation** of the pension interest is impacted by an outstanding housing loan / guarantee amount, but rather the **deduction** itself.

Example:

The divorce order states that the non-member spouse is entitled to 50% of his pension interest.

The member's individual account on date of divorce is R200,000. His pension interest is therefore R200,000 and the non-member spouse is entitled to R100,000.

The member has an outstanding housing loan of R110,000. This reduces the member's individual account to R90,000. The fund can accordingly only deduct R90,000 from the member's individual account.

Savings withdrawal benefit prohibition

The PFAA introduces section 37D(aA) which prohibits a fund from allowing a member to take a savings withdrawal benefit if the fund received written notice from either party in divorce proceedings that proceedings have been instituted that will result in a division of the member's pension interest in the fund, unless the fund has obtained the non-member spouse's consent. This prohibition remains in place until the divorce proceedings are finalised or a court order is issued.

Requirements for binding divorce order

To be binding on a retirement fund, a divorce order must meet the following requirements.

A. The **fund** must be **named** in or **identifiable** from the order.

If the correct name of the fund is not provided, but the fund can be identified by for example a reference in the order to the member's employment with a participating employer in the fund or the member's membership or policy number, this requirement will be met.

B. It must be clear what **percentage of the member's pension interest** or what **amount** is assigned to the non-member spouse.

Where a portion of a member's pension interest is assigned, the correct terminology must be used. An order that entitles the non-member spouse to for example a percentage of the member's "provident interest", "preservation interest", "retirement annuity interest", "fund interest", "pension fund", "pension benefit", "joint estate", "interest in the fund", "policy proceeds" or "maturity value" will not be binding on the fund.

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C. The **fund** must be **specifically ordered** to pay the amount concerned to the non-member spouse.

The fund is not allowed to make a deduction from a member's benefit unless it is specifically ordered to do so.

If the above requirements are not met, the order will still be valid. It will just not be enforceable against the fund, which means that the member will then have to find an alternative way to comply with it.

An order that is not binding on the fund cannot be rectified by agreement between the parties. They for example cannot enter into an amended settlement agreement to rectify the deficiency. They will have to go back to court to get an amended court order.

Suggested simplified wording for a binding divorce order

- a. The applicant is a member of the ABC Provident Fund ("the fund").
- b. The respondent is entitled to 50% of the applicant's pension interest in the fund.
- c. The fund is ordered to pay the assigned portion of the pension interest to the respondent or to transfer it to an approved fund of the respondent's choice.

Non-member spouse's options

The PFAA does not change anything relating to a non-member spouse's options. The non-member spouse still has only one of two options:

- a. Have the assigned amount paid to them directly (section 37D(4)(b)(ii)(bb)), **or**
- b. Request that it be transferred to another retirement fund on their behalf (section 37D(4)(b)(ii)(cc)).

Proportionate deduction and tax payable on assigned pension interest

Any pension interest deduction must be done across all three components.

If the non-member spouse chooses to have the assigned amount paid to them, it will be taxed in their hands as a resignation benefit.

If they opt to transfer it to another fund, there will be no tax payable on transfer. The transfer documents must indicate the split between the relevant components and the receiving fund must split the transfer amount accordingly.

Deduction of pension interest in respect of pensioners

Section 37D(1A) allows for the deduction of pension interest from the capital value of a pensioner's pension after retirement. This is not a new provision – before 1 September 2024 it was dealt with in section 37D(1)(d).

An in-fund pension is therefore capable of being reduced through a divorce order providing for a deduction of a portion of a member's pension interest in favour of a non-member spouse.

This does not apply to an out-of-fund life or living annuity because those products are provided and fall under the provisions of the Insurance Act and not the Pension Funds Act. The Long-term Insurance Act does not contain a definition for "pension interest" nor does it allow for any deductions against an annuitant's income in favour of a non-member spouse. The Supreme Court in the case of *Montanari vs Montanari* [2020] ZASCA 48 (05 May 2020) confirmed that an annuitant's annuity income is an asset that can be valued and that it forms part of the estate of the annuitant. The implication of this is that where parties are married in community of property or out of community with accrual, this income will be subject to the accrual system.

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8. Damages due to employer

PFAA changes

The PFAA amended section 37D(1)(b) by –

- a. deleting the references to the deduction of housing loans granted or housing guarantees furnished by a member's employer. Refer to paragraph 5 of this document for more information of this;
- b. also providing for a deduction on the date on which a member's employment with a participating employer in a retirement fund is terminated in accordance with the Income Tax Act and the Tax Administration Act, in addition to the previous two dates which is the member's retirement date and the date on which they cease to be a member of the fund;
- c. only allowing a fund to permit a member to take a savings withdrawal benefit where the fund has not yet made a deduction under a written admission of liability or a court order if doing so will result in there being sufficient funds left to give effect to the admission or court order; and
- d. requiring a fund to suspend a savings withdrawal benefit for a year pending a judgement in favour of an employer-deduction if allowing the payment of such benefit will result in the member's remaining benefit not being insufficient to comply with the pending order.

Requirements for deduction in favour of employer

The following requirements must be met before a fund can make deduction in terms of section 37D(1)(b):

- a. There must be an amount due by the member to their employer on the date of their retirement, when their fund

membership ceases or when they terminate employment.

The definition of “employer” in the Pension Funds Act refers to an employer participating in the fund. Because there is no employer participating in a preservation or retirement annuity fund, section 37D(1)(b) does not apply to retail funds; it only applies to occupational funds.

b. The amount due be in respect of compensation payable in respect of damage caused to the employer.

Compensation should be ascertainable or quantified. If the employer suffered damage but is unable to quantify the compensation payable for such damage, the employer cannot claim a deduction under this section.

c. The damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member.

The principle of restrictive application has to be applied in interpreting the meaning of ‘misconduct’. This means that where words having a limited or particular meaning are followed by a phrase of general application, the meaning of the said phrase is restricted to the generic meaning of the preceding words. ‘Misconduct’ as referred to in this section must therefore be interpreted as referring to wilful, reckless and intentional conduct, which would exclude negligent misconduct.

d. The member must either admit liability in writing to the employer, or a judgment must be obtained in any court, including a magistrate’s court.

The PFAA amended this section to specifically include a compensation order in terms of section 300 of the Criminal Procedure Act 51 of 1977.

Where the employee has been convicted of a criminal offense, this on its own is not sufficient. A compensation order issued in terms of the Criminal Procedure Act, as part of the sentence, is required.

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The member’s guilty plea in a criminal trial can however constitute a valid admission for purposes of a section 37D(1)(b)-deduction, as confirmed by the Financial Services Tribunal in *Nyathi South Africa (Pty) Ltd v C Mngomezulu and 2 Others PFA39/2024*.

In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen (103/2008) [2008] ZASCA 164 (01 December 2008)*, the Supreme Court of Appeal held that trustees of a pension fund are not entitled to make deductions in the absence of a proper written admission of liability or court judgment. The judgment or the written admission of liability must relate to the compensation due in respect of the damage caused to the employer by the member’s conduct and must include the specific amount of compensation or damages suffered. The Financial Services Tribunal confirmed this principle in the case of *Edward Snell & Co Pty Ltd v LP Rahlao and Others PFA71/2024* on 29 April 2025, emphasising that the member’s written admission of liability “must be clear and unambiguous and should specifically allow for deductions to be made in respect of a wrongdoing committed by the member against the employer”.

A written admission of liability must therefore –

- i. be a clear and unequivocal admission of the member’s indebtedness to the employer which were caused due to the dishonest conduct by the member against the employer;
- ii. be made voluntarily and hence there must be no duress or undue influence;
- iii. explain the circumstances that gave rise to the loss suffered by the employer to enable the fund to establish whether the member’s conduct, in fact, amounts to theft, fraud, misconduct or dishonesty. It cannot be a mere tick box of options to select either theft, fraud, misconduct or dishonesty; and
- iv. be signed by the member as confirmed by the Pension Funds Adjudicator in *Consol Ltd t/a Consol Glass v Momentum FundsAtWork Umbrella Provident Fund [2008] 2 BPLR 130 (PFA)*.

The right to withhold payment of a member’s benefit

Following the implementation of the two-pot system, a member does not become entitled to the payment of their total fund benefit on termination of employment. The member can however still claim payment of their vested

component and/or savings component when they resign.

The right of an employer to withhold payment of a member's benefit pending finalisation of an employer's claim for damages was first confirmed in the Highveld Steel-case, which also held that the withholding cannot endure indefinitely. The fund must exercise its discretion with care and in the process balance the competing interests of the member and the employer with due regard to the strength of the employer's claim. In doing so, the audi alterem partem-rule must be applied, which means that both parties must be heard. The principle of allowing a member to respond to an employer's deduction-claim before the fund decides to withhold payment of the member's benefit was confirmed by the High Court in SA Metal Group (Pty) Ltd v Jefftha and Others [2020] 1 BPLR 20 (WCC). This case was referred to in various subsequent determinations issued by the Pension Funds Adjudicator and rulings made by the Financial Services Tribunal.

Tax payable on deductions in favour of an employer

If a member's employment is terminated as a result of theft, fraud, misconduct or dishonesty, they will not become entitled to a withdrawal benefit. At best the member can claim their vested component, and under certain circumstances, also their savings component.

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The same principles as those applying to the tax payable on housing loans or guarantees apply to the deductions in favour of an employer, except that Form B currently does not currently contain a reason relating to these deductions that can be selected.

Hettie Joubert

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