



HIGH COURT CASE –WITHHOLDING A BENEFIT (SECTION 37D)

SA Metal Group (Pty) Ltd v Deon Jeftha and others, case number, unreported, 20298/2018 (Judgement 12 December 2019)

A. BACKGROUND

In the recent past, the requirements that a fund must meet when withholding a benefit (under section 37D of the Pension Funds Act (“the Act”)) have been fairly clear-cut. Thus, when responding to withholding requests, complaints or objections lodged with the Pension Funds Adjudicator, the principles have been fairly straight-forward from the point of view of whether or not the fund has met the requirements for lawfully withholding a benefit.

In this publication, we consider a recent unreported High Court judgement: *SA Metal Group (Pty) Ltd v Deon Jeftha and others, case number 20298/2018*. This judgement was delivered on 12 December 2019.

The original Adjudicator determination, which dispute forms the basis of the *Jeftha* judgement, does not appear on the website of the Adjudicator.

It is anticipated that the *Jeftha* decision will lead to changes in the processes that funds currently typically follow when making a section 37D withholding decision.

B. THE JEFTHA CASE

The Adjudicator complaint

The umbrella fund, in which the employer participated (“the Fund”), had made a decision to withhold the benefit of D Jeftha (“Jeftha”). Jeftha complained to the Adjudicator and the Adjudicator found in his favour. The High Court case was an application by SA Metal Group (Pty) Ltd (“the Employer”) to set aside the determination of the Adjudicator.

The Judge in *Jeftha* states that Jeftha, in his complaint to the Adjudicator, alleged that the Fund had:

- improperly acquiesced to the withholding request,
- not considered his version,
- not investigated the allegations (indicating bias towards the employer),
- not considered his interests; and
- not considered the prejudice to him.

Exercise of a fund's discretion to withhold: (i) balancing competing interests, and (ii) affording the member an opportunity to be heard

The court considered various sections of the Pension Funds Act (“the Act”) including board duties (section 7C), reductions and deductions (section 37A and 37D) and complaints (Chapter VA). Jeftha submitted that the withholding decision had been made by the Fund without complying with the principles of natural justice

and without the board “exercising their discretion with care and in the process balancing the competing interests with due regard to the employer’s claim”. *Jeftha* stated that it was not unusual for the Fund not to afford employees an opportunity to respond to and test the employer’s allegations and not to balance employees’ interests against the employer’s interest. He asked the court to express its displeasure on this point and the court stated that if this was the case “it is deplorable”.

Across the industry, it has not been common practice for a fund, when making a decision about withholding a benefit, to afford the employee an opportunity to be heard concerning the allegations against him/her. The common practice is to require the employer to show that it has a case that on the face of it and if proved, would mean that the employee was guilty of fraud, dishonesty or theft that caused damages to the employer. In addition, currently many funds do not correspond with the employee at all regarding the withholding, even around the decision to withhold, as this communication is attended to by the employer.

There were also allegations around:

- (i) whether the Fund followed its own withholding process
- (ii) whether it received the documentation it requested from the employer
- (iii) whether the employer updated the Fund regularly enough,
- (iv) whether and at what stage the employer alleged *Jeftha*’s conduct included an element of dishonesty, as well as
- (v) when and why the withholding decision was made.

The Judge stated that the Fund was alerted to the fact that the continued withholding of *Jeftha*’s benefit was unlawful and that he was being severely prejudiced and there was no indication that the fund considered this. The Judge went on to state that *Jeftha*’s circumstances legally and morally required consideration by the Fund, but that he was not given this courtesy.

According to *Jeftha*, when making a withholding decision, a fund is required to apply its mind appropriately, impartially and in a balanced manner. Any claim against the benefit must be carefully scrutinised and the possibility of financial prejudice must be considered.

The court in *Jeftha* referred to the following, often quoted, paragraph in the case of *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 1 BPLR (SCA)* at paragraph 20:

‘Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pensions funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer’s claim. They may also impose conditions on employees to do justice to the case.’

The Judge in *Jeftha* expressed the view that it would not satisfy the test in *Highveld Steel*, when making a withholding decision, that the fund may rely on allegations put before them by the employer, which if true would show damages arising from dishonest conduct by the employee. That would not be enough. The Judge states that it is trite law that it is important to afford a party affected by an exercise of a discretion which may result in severe prejudice to his rights, a proper opportunity to be heard. The Judge then goes on to state that the employer’s case (as related to the fund) must be put to the employee to afford him an opportunity to respond before the fund makes its decision. It is assumed that this means that *the fund* must put the employer’s case to the employee. The Judge states that this is especially so where the employee has put forward a spirited defence.

The finding

When the Judge in *Jeftha* turned to considering the Adjudicator’s findings for purposes of deciding whether to dismiss the application or not, the Judge stated that *he agreed with her findings for the reasons she stated* and that the trustees did not comply with their fiduciary duties, were not impartial or independent and the managers of the fund abdicated their responsibility to ensure the provisions of section 37D were not abused. The findings of the Adjudicator that the court referred to specifically were (among others):

- That *Jeftha*’s non-compliance with company policies would not be dishonest conduct as required by section 37D;
- The employer’s request had been rubber-stamped by the fund without investigation into the merits of the allegations or the financial prejudice that he might suffer, and
- Withholding was not justifiable in law.

The application was dismissed with costs.

Conclusion

Jeftha requires that funds will need to consider amending their section 37D processes and rules so that they:

- Scrutinise withholding claims very carefully, especially where the member has put up a spirited defence;
- Apply their mind appropriately, impartially and in a balanced manner and consider the interests of both the employer and the member;
- Specifically consider the possibility of financial prejudice to the member;
- Correspond with the member (or his/her representative);
- Put the employer’s case (as related to the fund) to the employee to afford the employee an opportunity to respond *before* the fund makes its withholding decision;
- Are careful to note when a withholding decision is made, and the reasons for it; and
- Follow their own processes and receive regular information from the employer and member.