

The Power to Deduct Pension Benefits Under Lesotho's Pension Funds Act: Lessons from South Africa and Eswatini

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Abstract

The changing demands of society and the emergence of new challenges necessitate the constant evolution and improvement of legal frameworks. In November 2019 Lesotho adopted the *Pension Funds Act* 5 of 2019 to modernise its regulation and supervision of private pension funds. Previously pension funds were regulated under the *Income Tax (Superannuation and Assurance) Regulation, 1994 (Superannuation Regulation)*. Industry participants were of the opinion that the Superannuation Regulation was inadequate for the complexity of Lesotho's private pension funds system. The primary purpose of the *Pension Funds Act* of 2019 is to safeguard the financial interests of pension fund contributors and ensure their receipt of retirement benefits on retirement. With limited exceptions, section 40 of the Act prohibits the transfer or deduction of pension benefits. This article investigates the legal framework that regulates the power of a pension fund to deduct from pension benefits as well as the limitations on this power. The purpose of the article is to propose possible interpretations of the power to deduct, with the intention of assisting those who are involved in its implementation.

Keywords

Pension deduction; administrative action; withholding of benefits; *Pension Funds Act*.

1 Introduction

In November 2019 Lesotho adopted the *Pension Funds Act 5 of 2019* (hereafter the PFA 2019) to modernise the regulation and supervision of private pension funds.¹ The need for the PFA 2019 was driven by two main legislative goals. One of them was "to protect the interests of people who make contributions into a pension fund from which they intend to draw money when they reach retirement age."² One of the provisions in which this legislative goal finds its expression is section 40 of the PFA 2019, which provides a general prohibition on the assignment or pledging of pension contributions and benefits. This protection is designed to preserve pension benefits and ensure that they are available when a member retires. However, as in other jurisdictions the legislature created an exception to this general prohibition in section 33 of the PFA 2019, which confers upon pension funds the limited power to deduct from pension benefits before a member retires.

Given that the PFA 2019 is new and has not been widely interpreted by the courts, this article examines the deduction provisions in the PFA 2019 by drawing lessons from South Africa and Eswatini. The objective is to highlight lessons that Lesotho can learn about how these provisions can be interpreted to achieve the legislative goals. The article argues that some of the legal outcomes in Lesotho in the interpretation of the pension legislation will be identical to those in South Africa due to the similarities in the legislative provisions. While this article is not a comparative study, it will draw lessons from other jurisdictions in the Southern African Development Community region to support its argument.

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¹ *Pension Funds Act 5 of 2019* (hereafter the PFA 2019).

² The second goal was "developing the domestic capital market by requiring that a portion of the pension fund contributions be invested in Lesotho, as there is currently no legislative requirement that pension moneys be invested in the country to avoid repatriation of funds into the economies of other countries." See Government Notice 26 of 2019.

The article comprises five sections. Section 1 is the introduction. Section 2 discusses the legal framework governing deductions in the PFA 2019. Section 3 discusses the purpose behind the deduction provisions, which grant power to a pension fund to deduct from a member's pension fund benefits. Section 4 discusses some of the limitations placed on the power of a pension fund to deduct from pension benefits. Section 5 discusses some of the jurisprudence that has emerged in South Africa and Eswatini on pension deductions. From this jurisprudence selected principles have been developed by the Adjudicator and the courts, which we highlight so that they can be applied in Lesotho.

2 The legal framework governing deductions from pension benefits in Lesotho

The PFA 2019 is the default legislation that sets out national standards for regulating all pension funds in Lesotho. Section 3 of the PFA 2019 captures this principle, including its exception. It provides that:

3. Application of the Act

- (1) The Act shall apply to all pension funds in Lesotho.
- (2) Where a pension fund is subject to the provisions of any other law specifically applicable to such pension fund, the provisions of this Act which would otherwise apply to such pension fund shall not apply wherever those provisions would be inconsistent with any such law.

The above provision is designed to manage the relationship between pension funds established and regulated by the PFA 2019 and those established and regulated by other statutes. A few public sector pension funds, the main ones being the Public Officers' Defined Contribution Pension Fund and the Specified Offices Defined Contribution Pension Fund, are established and primarily regulated by their own statutes.³ In this article, the focus is on pension funds that are established and regulated by the PFA 2019.⁴ Sections 40 and 33 of the PFA 2019 are the main provisions that regulate the power of pension funds to deduct from pension benefits. Section 40 provides that:

- 40(1) Notwithstanding the rules of a fund, except for deductions permitted in terms of section 33, amounts paid as contributions to a fund in respect of a member, entitlement to benefit in a fund, and amount paid out of a fund by way of benefits in respect of a member shall not –

³ *Public Officers' Defined Contribution Pension Fund Act 8 of 2008* (hereafter the PODCPFA); and the *Specified Offices Defined Contribution Pension Fund Act 19 of 2011* (hereafter the SODCPFA).

⁴ Mhango and Mosito 2023 *LDD* 186, 189-193 (discussing the public officers' pension fund, which has its own governing legislation).

- (a) be assigned, transferred, pledged, charged or otherwise become subjects to a security interest, however described; or
 - (b) be liable to be attached, sequestrated, or levied upon for or in respect of any debt or claim.
- (2) A fund shall not recognise, or in any way encourage or sanction, a purported assignment, transfer of, or granting of a pledge, charge or other security interest, however, described, in respect of entitlement to benefits by a member.

As noted earlier, section 40 is an important general provision that reflects the preservation measures that drove the need for the adoption of the PFA 2019. Three distinct but related protections are incorporated in section 40 against an assignment or pledge of the contributions to and benefits in the fund. The first protection relates to the amount of money paid into the fund as contributions by the member, employer or both. This protection extends to a member's right to have access to these contributions.⁵ Also contemplated in this protection is the right to have these contributions applied in terms of the rules of the fund.⁶ For instance, the fund may apply these contributions to pay the member a withdrawal benefit or a death benefit, or to invest in permissible assets.⁷ In other words, once the contributions are paid into the fund, they vest in the members in terms of the rules.

The second protection included in section 40 of the PFA 2019 is members' entitlement to benefits in a pension fund. This protection extends to members and their beneficiaries. Members of pension funds are entitled to benefits in terms of the rules of the fund after the occurrence of a specific event, which is usually retirement, disability, death or resignation.⁸ For example, when a member resigns most rules entitle the member to a withdrawal benefit, which is normally paid in cash, transferred to another approved fund or retained in the fund as a deferred benefit.⁹

⁵ Hunter *et al Pension Funds Act* 664.

⁶ Hunter *et al Pension Funds Act* 664; *Kransdorff v Sentrachim Pension Fund* 1999 9 BPLR 55 (PFA) para 55.

⁷ See s 29(2), which requires that "the board shall, not later than the first business day following the day on which the fund received the contribution, ensure that all moneys received by the fund are invested in accordance with the investment policy of the fund." For a list of permissible investments, see Schedule 1 of the *Pension Funds (Investments) Regulations*, 2020.

⁸ *Joint Municipal Pension Fund v Grobler* 2007 5 SA 629 (SCA).

⁹ See *Lesufi v CSIR Pension Fund* 2002 10 BPLR 3927 (PFA) (holding that the computation of any benefit must be assessed in accordance with the relevant rules of the pension fund and finding that a withdrawal benefit was correctly calculated); *Erasmus v Mine Employees' Pension Fund* 2011 2 BPLR 184 (PFA) (holding that a withdrawal benefit accrued on the date of resignation, and that a rule amendment which came into force after that date could not affect the member's entitlement to payment in terms of the fund rules applicable at date of resignation); *Atkinson v Southern Field Staff Defined Contribution Pension Fund* 2000 4 BPLR 367 (PFA)

The third protection included in section 40 is the amounts of money paid out of the pension fund as a benefit in respect of the member. These protected amounts of money can be in the form of lump-sum and/or regular payments.¹⁰

Despite these protections, section 33 of the PFA 2019 confers on the fund the power to deduct from pension benefits under limited circumstances. Section 33 provides as follows:

33. Allowable deductions from pension benefits

A fund may deduct an amount from the benefit of a member in respect of–

- (a) maintenance of dependants of a member by court order;
- (b) a debt arising from a housing loan issued or guarantee granted by the fund in respect of a housing loan of that member;
- (c) an amount for which the employee is liable under a guarantee issued by the employer for the purposes of obtaining a housing loan; and
- (d) an amount representing the loss suffered by the employer due to any unlawful activity of the member for which judgement has been obtained against the member in a court of law or a written acknowledgement of culpability has been signed by the member before a commissioner of oaths.

Section 33 is an exception to section 40 because it permits pension funds to deduct from the pension benefits if certain requirements are met. Similar provisions can be found in all modern pension legislation, including in South Africa and Eswatini, where jurisprudence has emerged to interpret the scope of those provisions.¹¹ This jurisprudence will be engaged with in the next section with a view to developing possible interpretations of and implications for section 33 of the PFA 2019.

3 The purpose of the deduction provision: Lessons from South Africa and Eswatini

As in Lesotho, section 37A of the South African *Pension Funds Act* 24 of 1956 (hereafter the PFA 1956) provides a general protection of pension fund benefits where, as a general rule, pension benefits are not reducible, transferable or executable save for certain exceptions as outlined by

(finding that a rule was unconstitutional and unreasonable); *Malema v Printing Industry Pension Fund (1)* 2001 4 BPLR 1867 (PFA) (holding that a rule amendment applied to the complainants because they were still members of the fund despite their not contributing to the fund. Their benefit entitlement was therefore calculated based on the new rules.)

¹⁰ Hunter *et al Pension Funds Act* 666.

¹¹ See ss 37A and 37D of South Africa's *Pension Funds Act* 24 of 1956; ss 31 and 32 of Eswatini's *Retirement Funds Act* 5 of 2005 (RFA 2005); and ss 49 and 52 of Botswana's *Retirement Funds Act* 38 of 2022 (RFA 2022).

sections 37A and 37D of the PFA 1956. In this sense, section 37D is South Africa's equivalent to Lesotho's section 33 of the PFA 2019. Section 37D(a) and (b) of the PFA 1956 has a wider reach than section 33 in that it provides eight grounds for permissible deductions, while there are only four grounds for permissible deductions in Lesotho under the PFA 2019. One of the most litigated and academically commented upon deduction provisions in the PFA 1956 is section 37D(1)(b), which provides that:

- (1) 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–
 - (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 pay such amount to the employer concerned.

An important case that first interpreted the above provision is *Appanna v Kelvinator Group Services of SA Provident Fund*.¹² In this case the Pension Funds Adjudicator concluded that:

The purpose of ... section 37D(1)(b)(ii) of the Act is to protect an employer's right to pursue recovery of misappropriated monies. In order to give effect to that purpose, the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgment of liability.¹³

Even though *Appanna v Kelvinator Group Services of SA Provident Fund* was decided in 2000, it has consistently being cited as a leading authority for the proper interpretation of the deduction provisions by the Adjudicator and the courts.¹⁴ Almost eight years after *Appanna v Kelvinator Group*

¹² *Appanna v Kelvinator Group Services of SA Provident Fund (Appanna v Kelvinator)* 2000 2 BPLR 126 (PFA).

¹³ *Appanna v Kelvinator* para 129. See also *Buthlezi v Municipal Gratuity Fund* 2001 5 BPLR 1996 (PFA); and Shrosbree 2005 ILJ 19-20.

¹⁴ For recent Adjudicator cases citing *Appanna v Kelvinator*, see *Van Schalkwyk v DSV Flexi Retirement Fund Pension Section* 2024 2 BPLR 39 (PFA) paras 5.5, 5.9; *Adam v Consolidated Retirement Fund for Local Government* 2023 1 BPLR 1 (PFA) paras

Services of SA Provident Fund was decided, the Supreme Court of Appeal in *Highveld Steel v Oosthuizen* had to resolve a dispute on whether section 37D(1)(b) incorporates the power of a pension fund to withhold pension benefits pending a court determination of financial loss or acknowledgment of liability by the member. In resolving the dispute, the court expressly endorsed the above position in *Appanna v Kelvinator Group Services of SA Provident Fund* in relation to the purpose of the power to deduct.¹⁵ As in *Appanna v Kelvinator Group Services of SA Provident Fund*, the court also found that the power to withhold pension benefits is supported by the plain wording of section 37D(1)(b).¹⁶ In addition, the court held that to give effect to section 37D(1)(b), its words must be construed purposively to incorporate the discretion by the fund to withhold payment of a member's pension benefits pending a court determination of or acknowledgement of a member's liability.¹⁷ The court reasoned that this was necessary because most cases involving financial loss due to dishonesty are discovered on or after the termination of employment, and the lengthy delays in finalising cases in the court system mean that an employer will find it difficult to enforce any award made in its favour by the time judgment is obtained.¹⁸

Despite recognising an implied discretion to withhold pension benefits, the court held that pension funds do not have absolute discretion to withhold benefits.¹⁹ It cautioned that the board of pension fund must exercise this discretion with care, by balancing the competing interests of the member and employer with due regard to the substance of the employer's claim, which may include the imposition of conditions, by the board, to achieve justice in the case.²⁰

5.4, 5.8; *Mhlaba v Edcon Provident Fund* 2020 2 BPLR 448 (PFA); *Van Tonder v Motor Industry Provident Fund* 2020 2 BPLR 600 (PFA) (*Van Tonder v Motor Industry Provident Fund*); *Ndebele v South African National Blood Service Provident Fund* 2019 2 BPLR 507 (PFA); *Steenkamp v Consolidated Retirement Fund for Local Government* 2018 3 BPLR 770 (PFA). Also see *Standard Bank Limited v Motsa* (2401 of 2011) [2012] SZHC 124 (8 June 2012) (*Standard Bank v Motsa*) (where the High Court of Swaziland cited *Appanna v Kelvinator* with approval).

¹⁵ *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 2 SA 225 (SCA) (*Highveld Steel v Oosthuizen*). Also see *Twigg v Orion Money Purchase Pension Fund (1)* 2001 12 BPLR 2870 (PFA) para 21; *Charlton v Tongaat-Hulett Pension Fund* 2006 2 BPLR 94 (D) 97I-98B; *Allison v IMATU Retirement Fund* 2004 7 BPLR 5831 (FPA); *Jeram* 2009 ILJ 810-811; *Ncobela v Edcon Provident Fund* 2014 1 BPLR 99 (PFA) (*Ncobela*); *Radebe v Mercedes-Benz South Africa Defined Contribution Provident Fund* 2022 1 BPLR 26 (PFA); *Power v Old Mutual Superfund Pension Fund* 2022 3 BPLR 66 (PFA); *Diale v Netcare 1999 Provident Fund* 2022 1 BPLR 6 (PFA).

¹⁶ *Highveld Steel v Oosthuizen* para 16.

¹⁷ *Highveld Steel v Oosthuizen* para 19.

¹⁸ *Highveld Steel v Oosthuizen* para 17.

¹⁹ *Highveld Steel v Oosthuizen* para 20.

²⁰ *Highveld Steel v Oosthuizen* para 20.

The decisions in *Appanna v Kelvinator Group Services of SA Provident Fund* and *Highveld Steel v Oosthuizen* were followed in Eswatini. In the case of *Standard Bank v Motsa*, the High Court of Eswatini had to interpret section 32(2)(a) of *Retirement Funds Act 5 of 2005* (RFA 2005), which has the same wording as section 33(d) of the PFA 2019. Section 32(2)(a) provides that:

- (2) A retirement fund may deduct an amount from the member's benefit in respect of:
 - (a) an amount representing the loss suffered by the employer due to any unlawful activity of the member and for which judgement has been obtained against the member in a court or a written acknowledgement of culpability has been signed by the member and provided that the aforementioned written acknowledgement is witnessed by a person selected by the member and who has had not less than eight years of formal education.²¹

The court reasoned that the object of this provision is to protect employers' interests by giving them rights to pursue and recover money misappropriated by their employees.²² Citing *Appanna v Kelvinator Group Services of SA Provident Fund* and *Highveld Steel v Oosthuizen*, the court held that a pension fund is empowered to withhold pension benefits in pursuit of those interests.²³ It is submitted that the above justifications in South Africa and Eswatini regarding the purpose of the discretion to deduct from and withhold pension benefits should be applicable to Lesotho, since there are similarities in the deduction provisions. Also, the limitations that have been developed to guide the discretion contained in these provisions are equally relevant and should be applicable in Lesotho. We discuss these limitations in the next section.

4 Limitations on the discretion to deduct from pension benefits

Three years before *Highveld Steel v Oosthuizen* was decided, Shrosbree, then a Senior Assistant Adjudicator, made a convincing argument for the reform of section 37D(1)(b) of the PFA 1956.²⁴ Shrosbree proposed the enactment of an express statutory authority for pension funds to withhold a pension benefit pending the determination of liability by the employer and thus to give full effect to the purpose of the provision.²⁵ Shrosbree made this proposal in response to widespread industry concerns that, despite the fact

²¹ Section 32(2)(a) of the RFA 2005.

²² *Standard Bank v Motsa* para 36.

²³ *Standard Bank v Motsa* paras 37-40, citing *Appanna v Kelvinator* and *Highveld Steel v Oosthuizen*.

²⁴ Shrosbree 2005 ILJ 17; also see cl 48 of the *Draft Conduct of Financial Institutions Bill, 2020* (proposing changes to the deduction provisions in the PFA 1956).

²⁵ Shrosbree 2005 ILJ 19.

that section 37D(1)(b) permits deductions from pension benefits, an employer will find it difficult to obtain an admission of guilt from the employee and will instead be forced to use the judicial system to establish liability.²⁶ And, since judicial procedures take time to be finalised, it is possible that by the time the judicial proceedings are finalised, the employee will no longer be in a position to pay the employer's claim.²⁷ We agree with Shrosbree, especially when one considers two important factors that are relevant to both South Africa and Lesotho.

The first consideration is that a pension fund is not compelled to deduct or withhold benefits even when all the requirements set out in the deduction provision are met. In other words, the deduction or withholding of benefits is not a guaranteed remedy available to the employer. The word "may" in section 33 of the PFA 2019, and also in section 37D of the PFA 1956 and section 32 of the RFA 2005, is an indication that the board of trustees of a pension fund has discretion to decide whether to deduct or withhold pension benefits, based on the circumstances of each case.²⁸ At the very least, the board is expected to apply its mind to relevant factors when exercising this discretion,²⁹ and to rationally exercise its discretion for the purpose for which

²⁶ Shrosbree 2005 ILJ 19; *Appanna v Kelvinator* para 129.

²⁷ Shrosbree 2005 ILJ 19; *Appanna v Kelvinator* para 129.

²⁸ *South African Broadcasting Corporation SOC Limited v South African Broadcasting Corporation Pension Fund* 2019 4 SA 608 (GJ) para 3; *Manamela* 2013 SAMLJ 586 (arguing that the trustees of the fund are not bound to withhold the benefit but they have discretion to do so that must be exercised properly).

²⁹ *Letsoalo v Lukhaimane* (48743/16) [2017] ZAGPPHC 1246 (13 December 2017) para 20 (reasoning that it is trite that the board's decision can be interfered with where it is demonstrated that it had taken into account irrelevant, improper or irrational factors, or where its decision can be said to be one that no reasonable body of trustees properly directing itself could have reached); *Karger v Paul* 1984 VR 161 164; *Asea Brown Boveri Superannuation Fund No 1 Pty Ltd v Asea Brown Boveri Pty Ltd* 1999 1 VR 144 (reasoning that a court can review the exercise of a trustee's discretion only on the grounds that the trustee failed to exercise the discretion in good faith, upon real and genuine consideration, and in accordance with the purposes for which the discretion was conferred); *Schoeman v Rentmeester Pensioenfonds* 2003 9 BPLR 5145 (PFA) (where the Adjudicator found that the trustees of the fund properly applied their discretion and their decision did not reveal an improper purpose); and *Whitelock-Jones v Old Mutual Staff Retirement Fund* 2000 6 BPLR 674 (PFA) (the Adjudicator holding that where a board of a pension fund has discretion, such discretion is required to be exercised for the purpose for which it was given by considering relevant matters and ignoring irrelevant matters to the task at hand).

it was given.³⁰ To strengthen this point, the Financial Services Tribunal³¹ recently held, in the context of deductions, that

the Fund is not the agent of the employer and is not supposed to act in the interests of the employer and as far as issues between employer and member are concerned, it should act independently.³²

Hence, it is submitted that an explicit withholding provision in section 33 of the PFA 2019 or in the rules of the fund would provide certainty and effective protection of the employer's interests against an employee's unlawful activity, and *vice versa*. Given the established judicial opinions that confirm the power to withhold benefits, it is submitted that pension funds in Lesotho should expressly regulate the right and power to withhold pension benefits in their rules.³³

The second consideration is that pension funds are not permitted to withhold benefits indefinitely or without qualification. This results from a decision by the Adjudicator in *Anstey v Pegasus III Provident Fund*,³⁴ where the Adjudicator set aside, as unlawful and unreasonable, the decision of the participating employer to withhold pension benefits for an indefinite period.³⁵ In this case the rules of the fund permitted the employer to withhold pension benefits for a maximum period of one year. However, contrary to the rules

³⁰ *Manzini v Metro Group Retirement Fund* 2001 12 BPLR 2808 (PFA); *Cowan and Others v Scargill* 1984 2 All ER 750 para 761 (holding that "powers must be exercised fairly and honestly for the purposes for which they are given and not so as to accomplish any ulterior purpose, whether for the benefit of the trustees or otherwise"); *Balls v Strutt* 1841 1 Hare 146 para 149 (holding that "it is a principle in this Court that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of his trust"); and *South African Association of Retired Persons v Transnet Ltd* 1999 4 All SA 25 (W) para 55; *Whitelock-Jones v Old Mutual Staff Retirement Fund* 2000 6 BPLR 674 (PFA); and *Edge v Pensions Ombudsman* 1999 4 All ER 546 (CA).

³¹ The *Financial Sector Regulation Act* 9 of 2017 (FSRA) introduced an autonomous tribunal in accordance with s 219. This tribunal replaced the Financial Services Board Appeal Board and became operational on 1 April 2018. Its primary role is to review decisions made by decision-makers, as defined in s 218 of the FSRA. Additionally, the tribunal fulfils other duties as mandated by the Act and various financial sector laws, offering a platform for aggrieved individuals to apply for the reconsideration of decisions affecting their interests.

³² *Anax Logistics Services (Pty) Ltd v Qubeka* (PFA95/2020) [2021] ZAFST 121 (28 April 2021) para 11; *Fundsatwork Umbrella Provident Fund v Ngobeni* (PFA64/2020) [2020] ZAFST 6 (3 December 2020) (*Fundsatwork v Ngobeni*) para 6.

³³ *Highveld Steel v Oosthuizen*; *Standard Bank v Motsa*; *Hansen Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund* 2023 ZAGPJHC 96 (where a pension fund adopted rules to regulate the power to withhold benefits); and *Dakin v Southern Sun Retirement Fund* 1999 9 BPLR 22 (PFA) (*Dakin v Southern Sun Retirement Fund*) 24 (where the rules regulated the withholding of benefits where a member is suspected of having caused damage to the employer, provided that a civil action was immediately instituted and that the employer was not responsible for any delay in the proceedings).

³⁴ *Anstey v Pegasus III Provident Fund* 2000 2 BPLR 119 (PFA) (*Anstey v Pegasus*).

³⁵ *Anstey v Pegasus* 125.

the employer withheld the benefits for a period of two years without taking any active steps to finalise the matter.³⁶ The proposition in *Anstey v Pegasus III Provident Fund* has since been followed by the Adjudicator³⁷ and upheld by the High Court in *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane*.³⁸ There, the court held that "it is a well-established principle that the employer cannot be allowed to withhold the benefit indefinitely. Should the employer's liability not be determined within a reasonable period, the Fund is not entitled to withhold the benefits".³⁹ The Adjudicator also applied this proposition recently in *Van Tonder v Motor Industry Provident Fund* and ordered the participating employer to quantify the loss suffered by it in terms of section 37D(1)(b) as a result of a member's theft within 45 days, and the fund had to pay any money due to the member within two weeks.⁴⁰ This decision was motivated by the need to prevent the funds from being withheld indefinitely without qualification. Similarly, in *Jonck v Retail and Allied Employees Provident Fund* the Adjudicator followed the proposition in *Anstey v Pegasus III Provident Fund* and ordered the pension fund to pay within four weeks a withdrawal benefit that had been withheld.⁴¹

Furthermore, in *Dakin v Southern Sun Retirement Fund*⁴² the Adjudicator found that the power to deduct from pension benefits should limit members' rights as little as is practically reasonable. The Adjudicator clarified that this requires the balancing of interests, noting that "the interest of a member not to have his or her benefit diminished is thereby balanced against the employer's interest not to be unlawfully deprived of his property."⁴³ The Adjudicator found it problematic that, in withholding a benefit for legitimate reasons on behalf of a withdrawing member, the fund did not afford the member protection from suffering a decline in the value of the benefit during the period for which it is withheld. This is because after a member's benefit was withheld the benefit remained in the fund subject to the same fate as

³⁶ *Anstey v Pegasus* 125.

³⁷ See *Jonck v Retail and Allied Employees Provident Fund* 2023 1 BPLR 6 (PFA) (*Jonck v Retail and Allied Employees Provident Fund*); *Van Schalkwyk v DSV Flexi Retirement Fund Pension Section* 2024 2 BPLR 39 (PFA); *Van Tonder v Motor Industry Provident Fund*; *Ndebele v South African National Blood Service Provident Fund* 2019 2 BPLR 507 (PFA); *Adam v Consolidated Retirement Fund for Local Government* 2023 1 BPLR 1 (PFA).

³⁸ *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane* 2021 JOL 53144 (GP).

³⁹ *Scientia Optimate Financial Services (Pty) Ltd v Lukhaimane* 2021 JOL 53144 (GP) para 43.

⁴⁰ *Van Tonder v Motor Industry Provident Fund* para 6.

⁴¹ *Jonck v Retail and Allied Employees Provident Fund* para 6.1.

⁴² *Dakin v Southern Sun Retirement Fund* para 27. Also see Shrosbree 2005 ILJ 21 (discussing *Dakin v Southern Sun Retirement Fund*).

⁴³ *Dakin v Southern Retirement Fund* para 27.

the fund's other investments, which scenario might turn out to be less favourable to the member.⁴⁴

The Adjudicator directed the fund to amend its rules by giving members the right to disinvest their benefits from the fund's portfolio and to invest them at an agreed rate of interest or to hedge the investment performance of the assets concerned.⁴⁵ The problem that informed the Adjudicator's decision in *Dakin v Southern Sun Retirement Fund* was that, while the rules of the fund regulated the power to withhold benefits, in applying those rules the investment interests of the member were not considered.⁴⁶ This is contrary to express legislative provisions and existing jurisprudence, all of which point to the fact that pension funds must act reasonably and in the best interests of the member by ensuring that the member does not suffer undue prejudice during the time the benefit is being withheld.⁴⁷

More recently, in *Ncobela v Edcon Provident Fund* the Adjudicator found that the decision to continue to withhold benefits after criminal charges lodged by the employer had been withdrawn was reasonable. The participating employer was proactive in giving the fund progress reports, which the Adjudicator found demonstrated a genuine interest by the employer to finalise the matter.⁴⁸ The Adjudicator also found that the delay in the prosecution of the case against the affected member was not the fault of the employer. It concluded that "the discretion to withhold the complainant's benefit is being exercised properly and the [Edcon Provident Fund] cannot be ordered to pay the benefit to the complainant at present."⁴⁹

The considerations from the above cases make a strong case for the legislature in Lesotho to explicitly legislate on the authority of pension funds to withhold pension benefits because of the numerous unintended consequences that may arise. Alternatively, the Regulator in Lesotho could control this area through regulations that could require pension funds to expressly address in their rules the power to withhold benefits.⁵⁰ In other jurisdictions pension funds are prevented from withholding benefits unless

⁴⁴ *Dakin v Southern Sun Retirement Fund* para 27. Also see Shrosbree 2005 ILJ 21 (discussing *Dakin v Southern Sun Retirement Fund*).

⁴⁵ *Dakin v Southern Sun Retirement Fund* para 28.

⁴⁶ *Dakin v Southern Sun Retirement Fund* para 28.

⁴⁷ Manamela 2013 SAMLJ 585. See also s 7C(2)(a) of the PFA 1956.

⁴⁸ *Ncobela* para 5.5.

⁴⁹ *Ncobela* para 5.5. Also see *Van Tonder v Motor Industry Provident Fund* para 5.9 (where the Adjudicator held: "This Tribunal notes with concern the passive role played by the board of the first respondent in resolving this matter").

⁵⁰ Section 12(p) of the PFA 2019: "The rules of a fund shall be written in the English Language and shall, subject to this Act and the regulations, state ... such other requirements as may be prescribed by the Regulator." For more information about subsidiary legislation and the exercise of powers, see parts V and VI of the *Interpretation Act* 19 of 1977.

the power to withhold is expressly provided for in the rules of the fund. We propose the same should be legislated upon in Lesotho.⁵¹

5 Emerging jurisprudence on pension deductions

Rich jurisprudence and academic studies have developed around the interpretation and application of the power to deduct or withhold pension benefits in South Africa and Eswatini. This jurisprudence offers lessons of interpretation for Lesotho, especially because of the similarities in the legal traditions and legislative frameworks of the three countries. From the interpretation of the deduction provisions by courts and tribunals in South Africa and Eswatini, several useful principles have been established and applied to regulate the power to deduct. We discuss at least six principles, which are not exhaustive but represent a potential area from which lessons for Lesotho can be drawn.

The first principle, developed in Eswatini, is that pension benefits may be deducted or withheld not only during the lifetime of the pension fund member but also after the member's death. Before 2012 it was not certain whether, after the death of a pension fund member, a pension fund in Eswatini was permitted to deduct money from a member's fund account and pay it over to an employer as compensation for embezzlement. This question was tested and answered affirmatively in *Standard Bank v Motsa*. This case has been thoroughly discussed and interpreted.⁵² The authors analyse the case and highlight the clarity it brings to the application of pension deduction provisions. In this case Mr Mavela Motsa, an employee of Standard Bank of Swaziland Limited, died while employed by the financial institution. He was a member of the Standard Bank Swaziland Pension Fund and his dependants were entitled to certain benefits from the fund on his death. The fund had decided to pay the death benefits to two of his dependants.⁵³ Before the pension fund had paid out any benefits Standard Bank of Swaziland, the employer, discovered that Mr Motsa had embezzled E5.5 million.⁵⁴ The employer started a process to deduct some of this money from the member's death benefits by approaching the High Court with a request to be granted an interdict against the pension fund and the executor

⁵¹ See *Dr Hira Lal v State of Bihar Civil Appeal* (Supreme Court of Appeal; Division Bench - Two Judge, Appeal (Civil)) case number 1677-1678 of 18 February 2020 para 15 (holding that pension benefits cannot be withheld without the sanctioning of the rules of the fund); *DS Nakara v Union of India* 1983 AIR 130, 1983 SCR (2) 165; *Devaki Nandan Prasad v State of Bihar* 1983 AIR 1184, 1983 SCR (2) 921.

⁵² Mhango and Mosito 2023 LDD 183-213.

⁵³ *Standard Bank v Motsa* para 40(2) of the order of the court, stating "the 4th and 5th Respondents be and are hereby interdicted from paying out any pension benefit to the first and second Respondents or to any of the beneficiaries of the deceased estate, pending the final determination of the action."

⁵⁴ Emalangeni is the currency of Eswatini and its value is equivalent to the South African currency.

of the estate from paying out death benefits or liquidating or distributing any assets of the estate of the late Mr Motsa.⁵⁵

The dependants and the executors of Mr Motsa's estate objected to the bank's attempts, arguing that the deduction provision in section 32 of the RFA 2005 applied only to a member who is alive and who is exiting the fund because of resignation, dismissal or retirement. Since the member in this case did not resign, retire or get dismissed, section 32 could not be applied to deduct from the employee's death benefits. The court dismissed this argument. The court reasoned that since the misconduct resulting in loss to the employer could be discovered only after a member's retirement, dismissal or death, a rigid interpretation of section 32 of the RFA 2005 limiting its application to circumstances where the member is alive would defeat the intention of Parliament.⁵⁶

As pointed out earlier, the purpose of the deduction provisions is to protect an employer's financial interests in recovering misappropriated funds by allowing such an employer to deduct from an employee's pension fund account any money that has been misappropriated by an employee. The nub of the court's reasoning in *Standard Bank v Motsa* is that it does not matter whether a deduction is made after the employee has died, resigned, retired or been dismissed. According to the court, what the legislature wants to achieve is compensation for the employer for the financial loss resulting from misconduct committed by its employee. Whether the misconduct is discovered before or after the death of the employee is beside the point. The position of the court in *Standard Bank v Motsa* was that the legislature could never have intended to allow deductions only against a member or employee who is alive, as opposed to one who is deceased. The court reasoned that if this had been the case, the legislature would have made this unambiguously clear.⁵⁷ In the final analysis the court held that section 32 of the RFA 2005 must be read widely by extending it to a scenario

where a member has died without acknowledging culpability or without a judgment against him, and his employer proceeds against his estate, dependants or beneficiaries who are by the rules of the Act liable to be deducted.⁵⁸

The effect of this ruling is that deduction provisions in Eswatini will be understood to apply when a member ceases to be a member of the fund, whether due to death, resignation, dismissal or retirement. We submit that this principle should apply to circumstances in Lesotho.

⁵⁵ *Standard Bank v Motsa* para 1. See the discussion of this case in Mhango and Mosito 2023 LDD 182-213.

⁵⁶ *Standard Bank v Motsa* para 31.

⁵⁷ *Standard Bank v Motsa* paras 29-32.

⁵⁸ *Standard Bank v Motsa* para 32.

The second principle, developed in South Africa through judicial and tribunal interpretations of the deduction provisions, is that the deduction or withholding of benefits must be made in connection with a benefit that has accrued or is due for payment to a member upon the member's exit from the fund, in accordance with the rules.⁵⁹ In other words, the member must be exiting the fund due to retirement, resignation, dismissal or death, and a benefit must have accrued to the member for any of these reasons. This means that a future benefit, one that has not accrued to the member, does not fall within the category of benefits that may be deducted or withheld.⁶⁰

The third principle is that the decision to deduct from or withhold pension benefits amounts to administrative action. This is because such a decision is predicated on an empowering legislative provision and constitutes an exercise of public power or a performance of a public function by the board of a pension fund.⁶¹ Besides, the decision to deduct or withhold pension benefits is an implementation of a legislative policy to protect the employer's financial and property interests.⁶² Therefore, administrative law principles, such as the *audi alteram partem* rule, procedural fairness and rationality,

⁵⁹ *Records v Barlows Pension Fund* 2000 8 BPLR 920 (PFA) paras 26-30 (holding that an actuarial reserve value is not a benefit payable and may not be the subject of deduction). See Shrosbree 2005 ILJ 22 for a discussion of this case.

⁶⁰ *McNamee v Aeroquip SA (Pty) Ltd* 2001 2 BPLR 1618 (PFA); *Records v Barlows Pension Fund* 2000 8 BPLR 920 (PFA).

⁶¹ *SA Metal Group (Pty) Ltd v Jefftha* 2020 1 BPLR 20 (WCC) (*SA Metal Group v Jefftha*); *Fundsatwork v Ngobeni* para 14; *Mbatha v Transport Sector Retirement Fund* (0016223/19) [2020] ZAGPJHC 18 (19 February 2020) paras 9-10 (the judge holding that "I subscribe to the generally accepted view that a decision of the board of a pension fund taken in terms of section 37C of the PFA 1956 constitutes administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that PAJA applies to such a review"); *Titi v Funds at Work Umbrella Provident Fund* (1728/2010) [2011] ZAECHMHC 22 (10 March 2011) (holding that a pension fund, when acting in terms of the provisions of the PFA 1956 and administering the funds on behalf of its members, exercises public power. The decisions that it is empowered to take in terms of s 37C of the PFA 1956, and the power to effectively override the express wishes of its members, may conceivably affect members of the public. Any decision made in pursuance thereof and which could negatively affect members of the public would, therefore, be subject to judicial scrutiny and review in terms of the provisions of PAJA. The applicant was, therefore, entitled to a reasonable opportunity to make representations.) Also see *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 3 SA 132 (AD) 152E-I (affirming the view that the JSE performs functions that affect the public and indeed the whole economy and therefore decisions made by the JSE are subject to judicial review).

⁶² *Putsoa v Standard Lesotho Bank* (LAC/REV 3 of 7) [2007] LSLAC 12 (29 October 2007) paras 13-19 (holding that in determining what constitutes administrative action and noting that administrative action involves, among other things, the implementation of legislation, a decision taken in the exercise of a public power or the performance of a public function in terms of an empowering provision, affecting the rights, interests or legitimate expectations of others).

apply to ensure that the power is controlled and exercised lawfully.⁶³ Academic studies and jurisprudence on this principle have matured substantially in the last decade.⁶⁴ To illustrate this principle, the courts and tribunals have held that a decision to withhold pension benefits must be preceded by a request from the employer.⁶⁵ In the South African case of *SA Metal Group v Jeftha*⁶⁶ the Western Cape High Court found that a member has a right to be heard before a decision to withhold benefits is made by a pension fund. The court held:

I agree with the argument of Mr *Freund* SC that one can safely assume that the employer's case, as related to the fund, must be put to the employee to afford him an opportunity to respond thereto before the fund should assume the liberty to take a decision impacting on the rights of the employee. I believe especially so where there is a spirited defence by the employee, as in the matter before me. The question remains whether the fund applied their mind appropriately, impartially and in a balanced manner.⁶⁷

The Financial Services Tribunal has followed this decision and reasoning.⁶⁸ The *audi alteram partem* principle is a well-known concept in the jurisprudence of Lesotho, especially as it relates to those who are tasked with the exercise of public power or the performance of public functions.⁶⁹

⁶³ *Sitela v MEC for the Provincial Department of Health Eastern Cape Province* 2002 6 BPLR 3524 (B) (holding that an employee should have been informed of the basis for the decisions before taking action).

⁶⁴ Manamela 2007 SAMLJ 193; Hanekom *Manual on Retirement Funds* para 9.15.7.3.7.2; Barret 2002 *Pensions World* 1; *Titi v Funds at Work Umbrella Provident Fund* (1728/2010) [2011] ZAECMHC 22 (10 March 2011) (finding that pension funds perform administrative action when distributing death benefits and their actions are reviewable as such); *Cebisa Kalimashe v Eskom Pension and Provident Fund* (Mthatha High Court) (unreported) case number 561/08 Of 18 November 2018 (holding that the Eskom Pension and Provident Fund exercises a public function as the administrator of insurance policies given by the insurer in lieu of the invested fund serves to protect its members by ensuring that the fund is operated in the best interest of members, including ensuring that the payment of insurance contributions by Eskom is regular); *Mbatha v Transport Sector Retirement Fund* (0016223/19) [2020] ZAGPJHC 18 (19 February 2020) para 18 (holding that "I subscribe to the generally accepted view that a decision of the board of a pension fund taken in terms of s 37C of the [Pension Funds Act] constitutes administrative action for the purposes of the Promotion of Administrative Justice Act and applies to such a review" and rejecting the opposite view in *Gerson v Mondi Pension Fund* 2013 6 SA 162 (GSJ)); *Kim v Agri Staff Pension Fund* (2017/47543) [2019] ZAGPJHC 156 (6 February 2019) (holding that the *Promotion of Administrative Justice Act* 3 of 2000 applies to pension funds when they make decisions in terms of s 37C of the *Pension Funds Act*); *Buitendag v Government Employees Pension Fund* 2006 4 BPLR 297 (T).

⁶⁵ *South African Broadcasting Corporation SOC Limited v South African Broadcasting Corporation Pension Fund* 2019 4 SA 608 (GJ) para 3; *Reckitt Benckiser Retirement Fund v BC Gamede* Case No PFA 34/2020.

⁶⁶ *SA Metal Group v Jeftha* para 62.

⁶⁷ *SA Metal Group v Jeftha* para 62.

⁶⁸ *Fundsatwork v Ngobeni* para 14.

⁶⁹ *Moqhali v Lesotho Telecommunications Corporation* (CIV/APN\247\93) (NULL) [1993] LSHC 56 (6 October 1993) (holding that because of the public nature of the

Given that pension funds exercise public power when they withhold or deduct pension benefits, there is no doubt that the above jurisprudence will be applied in Lesotho in relation to pension deductions under section 33 of the PFA 2019.

The fourth principle is that a pension fund is permitted to withhold pension benefits only pending the finalisation of civil proceedings,⁷⁰ or upon criminal conviction where a court has also awarded a compensation order.⁷¹ This principle was applied in *Fundsatwork Provident Fund v Ngobeni*, where the Financial Services Tribunal held that the deduction provision in section 37D(1)(b)(ii) of the PFA 1956

deals with two situations, namely an admission of liability ... and a civil judgment. *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164 ... dealt with the withholding of payment pending the finalisation of civil proceedings. It did not hold that a Fund is entitled to withhold payment because a criminal case has been opened or even upon conviction. A conviction is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted.⁷²

Prior to *Fundsatwork Fund v Ngobeni*, the prevailing legal position was that a fund could withhold pension benefits pending not only criminal but also civil proceedings.⁷³ We agree with the reasoning in *Fundsatwork v Ngobeni* that the withholding of benefits should be restricted to civil proceedings. Our view is that this is supported by the principle that pension funds are

respondent there is no doubt that the *audi alteram partem* rule must apply); *Maloma v Lesotho Brake Clutch and Spares* (LC 35 of 98) [2002] LSLC 13 (12 August 2002); *Thabo v Mohatlane Skills Training Centre* (CIV/APN 84 of 2013) [2014] LSHC 56 (31 January 2014).

⁷⁰ *Highveld Steel v Oosthuizen* para 19 (reasoning that "[i]t seems to me that to give effect to the manifest purpose of the section 37D(1)(b), its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. I daresay that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent.")

⁷¹ *Tape Aids for the Blind v Palhad* (PFA3/2022) [2022] ZAFST 38 (16 May 2022). Also see *Sayed-Essop v The Non-Ferrous Metal Works Pension Fund (2)* 2003 7 BPLR 4956 (PFA) (holding that for the fund to effect a deduction from withdrawal benefits, it is necessary for the employer to obtain a compensation order in terms of s 300 of the *Criminal Procedure Act* 51 of 1977. In the absence of a compensation order, no deduction is permitted). See the discussion of this case in Shrosbree 2005 ILJ 20.

⁷² *Fundsatwork v Ngobeni* para 12. Also see *Mpuru v Corporate Selection Umbrella Retirement Fund* 2022 1 BPLR 19 (PFA) (endorsing the new position in *Fundsatwork v Ngobeni*).

⁷³ Momentum 2021 https://eb.momentum.co.za/webDocumentLibrary/LegalUpdates/2021/Legal_Update_3_of_2021_Withholding_of_a_benefit.pdf 2.

predominantly private contractual arrangements.⁷⁴ Thus, disputes involving pension funds should be governed by civil as opposed to criminal processes. Since section 37D is an exception to the general rule to preserve pension benefits, it should be interpreted restrictively to contemplate a civil judgment for which a deduction can be pursued.

The fifth principle is that the deduction or withholding of pension benefits can be given effect to only by a pension fund in which the employer seeking the deduction is a contributing employer and the employee is a member.⁷⁵ In other words, a transferee pension fund cannot deduct pension benefits against a member who is joining the fund. Only the transferor pension fund can deduct when a person ceases to be its member.⁷⁶ This principle is closely related to the second principle discussed above.

The last and sixth principle is that deductions from pension benefits are permissible only if they relate to financial loss that involves dishonest conduct by the member or employee.⁷⁷ And, in relation to a written admission of liability as contemplated in section 37D(1)(b) of the PFA 1956, South African jurisprudence requires that such an admission must show that the loss in relation to which the deduction is sought should have been caused by theft, fraud, dishonesty or misconduct that involved an element of dishonesty.⁷⁸ The emphasis on the element of dishonesty in South Africa

⁷⁴ See Kaplan and Frazer *Pension Law* 24, 31 and 39-40. Also see *Sloan v Union Oil Co of Canada Ltd* 1955 4 DLR 664 (BCSC) (recognising the contractual nature of pension funds).

⁷⁵ *Absa Bank Ltd v Burmeister* 2005 3 All SA 409 (SCA) (holding that a proper interpretation of s 37D(1)(b) is that it was intended to apply to the fund of which the employee was a member during his employment. The court rejected the argument that the wording of s 37D(1)(b) is wide enough to include a subsequent fund of which the ex-employee is a member and to which the pension benefits emanating from the original fund had been paid); and *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund* 2006 3 BPLR 210 (N).

⁷⁶ Manamela 2013 SAMLJ 585.

⁷⁷ *Chagonda v Transport Sector Retirement Fund* 2023 1 BPLR 3 (PFA); *Rowan v Standard Bank Staff Retirement Fund* 2001 2 BPLR 1643 (PFA) (holding that the employer "must produce proof that an amount was due in respect of compensation owing in respect of damage caused to it by the theft, dishonesty, fraud or misconduct of the complainant and that it was in possession of a written admission of liability in that regard"); *Rampone v Blue Ribbon Bakery* 2002 12 BPLR 4198 (PFA); *Motlokoa v Standard Bank Group Retirement Fund* 2020 JOL 52331 (PFA); *Hemraj v Columbus Retirement Fund* 2022 5 BPLR 93 (PFA); *Razlog v PLJ Pension Fund* 2003 1 BPLR 4294 (PFA) (explaining that the fund bears the burden of proving that the complainant caused damage, and that such damage resulted from his theft, dishonesty, fraud or misconduct); *Maseko v Central Bank of Swaziland* (42 of 2012) [2012] SZSC 64 (30 November 2012) (upholding a decision to deduct based on a fund rule as a result of theft, dishonesty, fraud or misconduct); and *Swazi MTN Limited v Nxumalo* (898 of 2016) [2016] SZHC 114 (15 July 2016).

⁷⁸ See *Rowan v Standard Bank Staff Retirement Fund* 2001 2 BPLR 1643 (PFA) (finding that an acknowledgement of debt is insufficient if not accompanied by an acknowledgement of delictual conduct); *Makhamo v Corporate Selection Umbrella Retirement Fund No. 2: Participating Employer – Gold Leaf Tobacco Corporation*

is predicated on the statutory wording in section 37D(1)(b) of the PFA 1956, which makes it clear that a deduction may be applied to compensate the employer in connection with damages caused by "reason of any theft, dishonesty, fraud or misconduct by the member."⁷⁹

The element of dishonesty has been found to be an overarching justification that will permit a pension fund to deduct from a member's benefits. In *Moodley v Local Transitional Council of Scottburgh Umzinto North*⁸⁰ the court ruled that financial loss suffered due to misconduct committed by a member must involve an element of dishonesty to qualify as a ground for a permissible deduction. Financial loss due to negligent misconduct by a member that does not involve an element of dishonesty will not allow a fund to deduct pension benefits. In *Pillay v RFA Umbrella Provident Fund*⁸¹ an employee used information obtained during his employment for his own benefit, despite his employment contract's providing for a restraint of trade against using such information. The Adjudicator found that a deduction on the grounds of a breach of contract is not permissible under section 37D(1)(b).

The above jurisprudence is relevant and useful for the interpretation of section 33(d) of the PFA 2019. It suggests that the unlawful activity contemplated under section 33(d) may also involve dishonesty or moral turpitude. Otherwise it would defeat the general protection in section 40 of the PFA 2019. The legislature could not have imposed a general rule to protect benefits under section 40 and then provided less stringent criteria to reduce those benefits through deduction under section 33. It could be argued that the legislature in Lesotho was mindful of the statutory wording in section 37D(1)(b)(ii) of the PFA 1956 regarding "any theft, dishonesty, fraud or misconduct by the member", and opted for all-encompassing wording that provides for "loss suffered by the employer due to any unlawful activity of a member" as a ground for a permissible deduction. This is because fraud, theft and dishonesty are all unlawful activities that involve moral turpitude. It is submitted that in Lesotho section 33(d) of the PFA 2019

(Pty) Ltd 2020 2 BPLR 422 (PFA) (the Adjudicator finding that the complainant signed a blank admission of liability form, which it did not regard as an unequivocal admission of liability for the purposes of s 37D(1)(b)(ii); the fund was therefore ordered to pay the complainant's withdrawal benefit within two weeks of the present determination); and *Rampone v Blue Ribbon Bakery* 2002 12 BPLR 4198 (PFA) (holding that the employee must admit liability in writing for compensation owed to the employer due to the employee's misconduct and acknowledge debt establishing liability); *Serongwa v Steve Ochse and Partners Provident Fund* 2003 6 BPLR 4814 (PFA).

⁷⁹ Section 37D(1)(b) of the PFA 1956.

⁸⁰ *Moodley v Local Transitional Council of Scottburgh Umzinto North* 2000 9 BPLR 945 (D).

⁸¹ *Pillay v RFA Umbrella Provident Fund* (PFA) PFA/KN/000026080/2016/UM of 13 December 2016.

should be interpreted to give a fund the power to deduct in circumstances that involve moral turpitude or dishonesty such as fraud, theft or embezzlement. Our proposed interpretation means that the legal outcomes in South African cases such as *Moodley v Local Transitional Council of Scottburgh Umzinto North* will be identical to those in Lesotho. Our interpretation is in keeping with the main goal that drove the enactment of the PFA 2019, as highlighted in the introduction.

6 Conclusion

Pension funds are long-term savings vehicles. They were established with the primary objective of saving for the future and mitigating the risks of old age. To advance this objective the PFA 2019 was enacted to protect the interests of contributors in a pension fund from which they intend to draw money when they reach retirement age. Section 40 is one of several provisions in the PFA 2019 that seek to achieve this objective.

However, not everyone lives or works until they reach retirement age. Some people pass away or change jobs. All these events entitle members to certain benefits. A question always arises as to whether there are any deductions that ought to be made from the benefits before they are paid to the member or their dependants. The PFA 2019 regulates the types of deductions that can be made.

This article has discussed the provisions in the PFA 2019 that regulate pension deductions under section 33. Given that the PFA 2019 is new, the provisions are discussed in this article with reference to the jurisprudence developed in South Africa and Eswatini. The general position in this article is that the jurisprudence from South Africa and Eswatini is relevant and provides lessons on how one might interpret the deduction provisions in Lesotho and deal with various practical challenges.

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List of Abbreviations

FSRA	Financial Sector Regulation Act 9 of 2017
ILJ	Industrial Law Journal
LDD	Law, Democracy and Development
PAJA	Promotion of Administrative Justice Act 3 of 2000
PFA 1956	Pension Funds Act 24 of 1956 (South Africa)
PFA 2019	Pension Funds Act 5 of 2019 (Lesotho)
PODCPFA	Public Officers Defined Contribution Pension Funds Act 8 of 2008
RFA 2005	Retirement Funds Act 5 of 2005 (Eswatini)
RFA 2022	Retirement Funds Act 38 of 2022 (Botswana)
SAMLJ	South African Mercantile Law Journal
SODCPFA	Specified Offices Defined Contribution Pension Fund Act 19 of 2011