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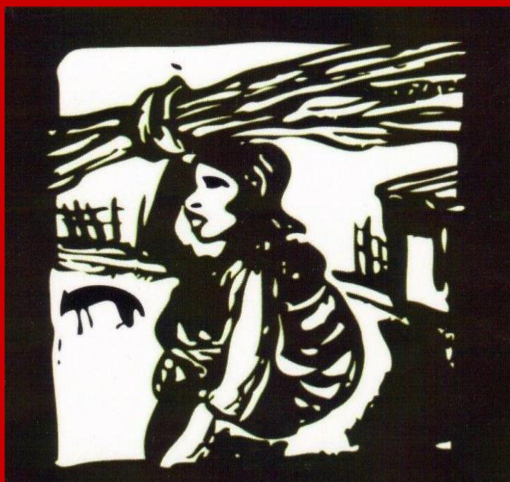

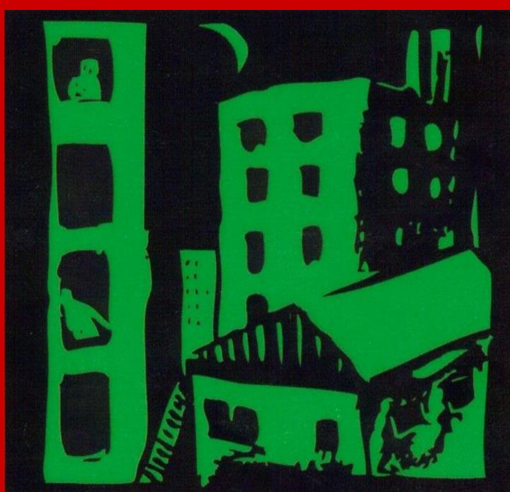

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# Overview of the legislative protection of retirement benefits against transfer, reduction, hypothecation and attachment in South Africa

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**ABSTRACT**

*This article demonstrates that the retirement industry is fragmented, with different pieces of legislation which contain differently drafted provisions addressing the same issue. In particular, it illustrates that several pension statutes provide protection against creditors to retirement benefits held by retirement funds. Further, that, while held in retirement funds, retirement benefits are protected from assignment, transfer, cession, hypothecation, pledge, reduction, attachment and execution. Furthermore, that some of these transactions appear in some of the provisions of the pension*

*statutes whereas they do not do so in similar provisions of other pension statutes. This article argues that the differences in the way similar provisions in different pension statutes are drafted leads to the development of confusing jurisprudence regarding the protection of members' retirement benefits, which needs legislative intervention. This article calls for a uniform approach across all pension statutes regarding the protection of pension benefits against members' creditors. This article further examines whether retirement benefits can be declared realisable property to enable creditors to enforce payment of their debts from these benefits. It illustrates that while it is clear that legislative protection of retirement benefits is available before these benefits accrue to members, there is, however, controversy whether this protection remains intact when these benefits have accrued to members.*

**Keywords:** Retirement benefits; annuity; attachment; transfer; protection; creditors.

## 1 INTRODUCTION

The South African law that protects retirement fund members' retirement benefits from the reach of their creditors is contained in several statutes.[1] Relevant provisions in these statutes provide special protection for retirement benefits. These provisions are intended to ensure that members can sustain themselves during their retirement. In other words, "[t]he effect of these provisions is to establish a general rule protection … pensioners from being deprived of their source of income in their retirement".[2] In this article, these provisions are referred to as "protection provisions". As important as these protection provisions are, it is disappointing that they have not received adequate judicial and academic attention in South Africa, in their own right. Instead, some of these provisions are only dealt with when exceptions to these provisions are considered by the courts and academics.[3] The protection provisions are often merely stated as

[1] See s 21 of the Government Employees Pension Law (Proclamation 21 of 1996) (GEP Law); s 7 of the Transnet Pension Fund Act 62 of 1990 (TPFA); s 10B(1) of the Post and Telecommunication-Related Matters Act 44 of 1958 (POTRMA); s 2 of the General Pensions Act 29 of 1979 (GPA); and section 37A of the Pension Funds Act 24 of 1956 (PFA).

[2] Manamela T *South Africa's occupational retirement system: a comparative social security perspective* (unpublished LLD thesis, University of South Africa, 2015) at 281.

[3] See for instance *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (2) All SA 225 (SCA), *Charlton & others v Tongaat-Hulett Pension Fund & others* [2006] 2 BPLR 94 (D), and *Gradwell v Bidpaper Plus (Pty) Ltd & others* 2012 ILJ 33 2794 (ECG). See also Matotoka D, Nevondwe L & Odeku KO "Withholding of pension benefits in South Africa: a nightmare for pension fund members" (2014) 15(5) *Mediterranean J of Social Sciences* 647, Shrosbree L "To what extent does section 37D of the Pension Funds Act protect employers from dishonest conduct by their employees?" (2005) 26 *ILJ* 17, Manamela T "Deductions from pension benefits for purposes of section 37D of the Pension Funds Act 24 of 1956: employers forced to tow the line" (2007) 19(2) SA *Merc LJ* 189, and Marumoagae C "An argument for necessary amendments to the legislative provisions regulating the sharing of retirement savings upon divorce in South Africa" (2018) 30(2) SA *Merc LJ* 283.

general principles with extensive focus being accorded to the legislative exceptions which, when applicable, cause the cover offered by protection provisions to fall way.[4]

The purpose of this article is to critically discuss similar provisions in different pension law related statutes that seek to protect retirement benefits against retirement fund members' creditors. This article also evaluates the manner in which these provisions have been interpreted by both the courts, the Office of the Pension Funds Adjudicator (Adjudicator) and academics. In particular, it assesses the circumstances in which the protection provided by these provisions will be invoked against retirement fund members' creditors. This is done in order to understand the justification for the legislative protection of retirement benefits in South Africa. The aim of this article is to examine when retirement benefits can be declared realisable property to enable creditors to enforce payment of their debts from these benefits. On this point, it will be shown that while there is no question that the legislative protection of retirement benefits is available before these benefits accrue to members, there is, however, controversy whether this protection remains intact when these benefits have accrued to members.

First, I will attempt to provide a justification for legislative protection of retirement benefits in South Africa. Secondly, I will outline the legislative framework regarding the protection provided for retirement benefits with a view to assess the significance of the differences (if any) in the way similar provisions in different statutes are drafted. I will demonstrate that there is no coherence in the usage of some of the most important words that are central to the protection that these provisions seek to offer. I will argue that there is a need to have a common understanding of these words in all the provisions that will be discussed in this article. Thirdly, with reference to relevant case law, I will critically engage the controversy regarding the status of the protection of retirement benefits that have accrued to members but have not yet been paid. Finally, I will argue that if indeed the legislature intended to protect members' retirement benefits, irrespective of whether they have accrued, from being reduced, transferred or attached while still in the custody of retirement funds, it should take lessons from the Kingdom of Lesotho regarding effective protection of retirement benefits. It is worth noting that the legislative deductions which are general exceptions to the legislative

[4] Section 37D Pension Funds Act, s 21 GEP Law, s 9 Transnet Pension Fund Act, and s 10B POTRMA. See also *Ndaba v Ndaba* 2017 (1) SA 342 (SCA); *Sentinel Retirement Fund v Mtambo & others* (75404/2013) [2015] ZAGPPHC 423 (1 June 2015); and *Fourie v Eskom Pension and Provident Fund* (18/1355) [2019] ZAGPJHC 188 (6 June 2019). See also Sigwadi M "Pension-fund benefits and child maintenance: the attachment of a pension-fund benefit for purposes of securing payment of future maintenance for a child" (2005) 17 *SA Merc LJ* 340; Marumoagae C "Retirement benefit payments used for child maintenance" (2018) *De Rebus* 21 and Mothupi S "Some practical effects of the Financial Services Laws General Amendment Act 2008 on amending section 37D(4) of the Pension Funds Act" (2010) 22 *SA Merc LJ* 214.

protection that is usually provided to retirement funds, despite their importance are beyond the scope of this article and , thus, will not be discussed herein.[5]

## 2 PROTECTION OF RETIREMENT BENEFITS

In South Africa, the most common method for investing and saving towards retirement for formally employed persons is through contribution to retirement funds over a period of time. "[T]here are three predominant … vehicles for retirement savings: pension funds, provident funds and retirement annuity funds. These funds operate with the main objective to accumulate savings … [over a period of time] in order to maintain one's lifestyle after retirement …".[6] Some employers provide their employees with access to retirement funding as part of their employment package. Some employees invest independently with financial institutions that offer investment products, in order to ensure that they will be able to support themselves during retirement. It is important for employees to carefully determine how much they need to "… save for retirement and how to invest in saving in order to prepared financially for retirement".[7]

However, not everyone is able to save towards retirement, and for those who can, there are several challenges that may affect their financial security when they retire. Most of the policy and discussion documents issued by the National Treasury on behalf of the South African government clearly illustrate that government is concerned about financial security of South African residents when they reach old age.[8] In fact, government has stated that it "… is committed to increasing the financial security of all citizens".[9] Several challenges have been identified that could potentially lead to those within South Africa being unable to financially support themselves and their family members when they retire. The first common challenge is poverty due to unemployment which makes it almost impossible to save towards retirement. Secondly, some employees do not have access to retirement funds because South African employers are not legislatively bound to provide their employees with access to retirement funding. Thirdly, there is always a possibility that employees will move from

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[5] I have addressed them elsewhere. See Marumoagae MC "What are the duties (if any) of retirement funds boards when requested by employers' to withhold members' retirement benefits?" (2021) 138(4) *SALJ* [forthcoming].

[6] Willows GD, Burgers T & West D "A comparison of retirement saving using discretionary investment and Regulation 28" (2018) 21 (1) *South African Journal of Economic and Management Sciences* 1.

[7] Yuh Y "Assessing adequacy of retirement income for US households: a replacement ratio approach' (2011) 36(2) *The Geneva Papers on Risk and Insurance. Issues and Practice* 305.

[8] See for instance, Taylor Commission Committee Report no 7: Retirement and Old Age available at http://www.treasury.gov.za/publications/other/ssrr/General%20Papers/Taylor%20Report%20%20Chap%207.pdf (accessed 10 January 2021). See also National Treasury "Strengthening retirement savings: An overview of proposals announced in the 2012 Budget" (14 May 2012) available at http://www.treasury.gov.za/publications/RetirementReform/20120314%20-%20Strengthening%20retirement%20savings.pdf (accessed 10 January 2021).

[9] See National Treasury (2012) at 3.

one employment to another. In most instances, when employees who have access to retirement funding exit their employment, they do not preserve their retirement benefits.[10] Fourthly, the general "... lack of annuitisation in provident funds means that many retirees may spend their retirement assets too quickly, and face the risk of outliving their retirement savings".[11] Fifthly, recurring charges levied by retirement funds on assets under management which are generally borne by individual members play a significant role in the ultimate retirement benefits individual members of retirement funds will receive when they exit their funds. According to the National Treasury "[i]n South Africa's retirement system, recurring charges, which serve to reduce the investment return of the fund, are borne entirely by members in the form of lower benefits when they retire".[12] Finally, members' retirement benefits may be threatened by the debts they incurred during their working life. Their creditors may be inclined to claim payment from their retirement benefits.

Cognisant of these potential risks that may diminish retirement benefits that members will ultimately receive when they retire, the South African legislature has established a legislative framework that aims to protect these benefits when they retire. Over the years, the South African government has also adopted broad objectives of retirement policy which among others seek to "[e]ncourage individuals to provide

[10] See National Treasury (2012) at 8, where it was stated that "only about 10 per cent of South Africans are able to maintain their pre-retirement level of consumption after they stop working – primarily because preservation rates are low. There are several reasons for low levels of preservation. Before they retire, many workers, especially younger and lower-paid employees, withdraw their entire retirement fund balance when they leave an employer. Despite recent changes in the way these withdrawals are taxed to incentivise preservation, this trend has continued". See also Marumoagae C "Addressing the challenge of withdrawal of lump sum retirement benefit payments in South Africa: lessons from Australia" (2017) 50(1) *CILSA* 129 at 138. See also Nevondwe L "South African social security and retirement reform: a long journey towards the redrafting of the new Pension Funds Act" (2010) 15(4) *Pensions* 287 at 289, who argues that "[a]lthough South Africa has a well-established retirement industry, it does not adequately meet everyone's needs. The problem of retirement saving is closely related to other aspects of social insurance. Some people cash in their savings when they lose their jobs because their unemployment benefits are insufficient. Some people find it necessary to draw on their savings to meet medical costs in the event of an injury or ill-health. If the benefits available for dependent children are inadequate when someone dies or becomes disabled, then other family members carry an increased burden".

[11] National Treasury "Preservation, portability and governance for retirement funds" (21 September 2012) 5 available at http://www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf (accessed 10 June 2021). See also Marumoagae C "Moving towards compulsory annuitisation of provident fund benefits in South Africa" (2017) 29(2) *SA Merc LJ* 390.

[12] National Treasury "Charges in South African retirement funds" (11 July 2013) 18 available at http://www.treasury.gov.za/public%20comments/Charges%20in%20South%20African%20Retirement%20Funds.pdf (accessed 10 January 2021). It is worth noting that there are some costs that are borne by the employer.

adequately for their own retirement and the needs of their dependants".[13] The government has also encouraged employers and employees to "provide for retirement funding as part of the remuneration contract".[14] These policy considerations are as a result of the realisation that "[m]ost South Africans do not save adequately for retirement and only about half the country's workers belong to a retirement fund".[15]

Apart from these policy initiatives, there are provisions in several pension law statutes in South Africa that are specifically designed to protect members' retirement benefits from the reach of creditors.[16] This legislative initiative is aimed at reducing the financial vulnerability of the elderly population, in order for them not to be dependent on their family members for support, and ultimately the State.[17] This legislative protection also enables the government to reduce its social wage bill and to direct the financial resources in the public purse to other equally important governmental obligations, such as service delivery.

The protection provided for retirement benefits makes it difficult to diminish these benefits and maximises their chances of being used for their intended purpose of preventing poverty during retirement, which is a social function. It has been correctly argued that "[p]ension funds ... are different from other forms of financial intermediaries since they have not only a financial and economic role but also an important social function".[18] While it is trite that retirement benefits are generally protected from members' creditors before they accrue to members, there appears to be no consensus whether creditors can claim accrued retirement benefits while still in the custody of retirement funds for the satisfaction of their debts. This controversy makes it necessary to investigate the extent and nature of the legislative protection of retirement benefits in South Africa.

## 3 LEGISLATIVE PROVISIONS THAT PROTECT RETIREMENT BENEFITS

The South African retirement industry is not regulated by a single uniform statute but by several statutes that regulate different retirement funds.[19] This has led to some

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[13] National Treasury "Retirement fund reform: A discussion paper" (December 2004) 4 available at http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf (accessed 10 January 2021).

[14] See National Treasury (2004) at 4.

[15] See National Treasury (2012) at 3.

[16] See s 21 GEP Law; s 7 TPFA; s 10B(1) POTRMA; s 2 GPF; and s 37A PFA.

[17] See National Treasury (2012) at 8.

[18] Queisser M "The role of pension funds in the stabilisation of the domestic financial sector" in Brooks DH & Queisser M (eds) *Financial liberalisation in Asia: analysis and prospects* Mandaluyong : OECD (1999) 165.

[19] Marumoagae C "Liability to pay retirement benefits when contributions were not paid to the retirement fund" (2017) 20 *Potchefstroom Electronic Law Journal* 4.

retirement fund members being discriminated against by not being provided with benefits that are offered to members of retirement funds regulated by other legislation.[20] Nonetheless, all these statutes have provisions that are aimed at protecting members' retirement benefits from their creditors. The legislative protection is subject to allowable legislative deductions, the discussion of which is beyond the scope of this article.

Section 21(1) of the Government Employees Pension Law (Proclamation 21 of 1996) (GEP Law), section 7 of the Transnet Pension Fund Act 62 of 1990 (TPFA), section 10B (1) of the Post and Telecommunication-Related Matters Act 44 of 1958 (POTRMA), section 2 of the General Pensions Act 29 of 1979 (GPA) and section 37A(1) of the Pension Funds Act 24 of 1956 (PFA) contain the South African law that aims to protect members' retirement benefits from the reach of their creditors. While these provisions are drafted in an almost similar manner, they contain important differences which demonstrate that they do not necessarily provide the same protection. Section 21(1) of the GEP Law provides that:

> "… no benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act. 1998 and section 7 (8) of the Divorce Act, 1979 (Act No. 70 of 1979), be liable to be attached or subjected to any form of execution under a judgment or order of a court of law".

First, this provision prohibits the assignment, transfer, cession, pledge and hypothecation of pension benefits or rights thereto. Secondly, it endeavours to protect members' retirement benefit from their creditors.[21] In other words, this provision protects retirement benefits that are due to members or their beneficiaries, or rights that such members or their beneficiaries have in respect of those benefits. Section 1 of the GEP Law defines "benefit" as "… any annuity or gratuity, or both an annuity or gratuity, as the case may be". In order to ensure that there is no confusion that the benefit contemplated in this section refers to retirement benefits paid by the fund regulated by the statute, the legislature defined "annuity" and "gratuity" separately. Section 1 of the GEP Law states that an annuity is "… an amount which is paid annually"

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[20] See Mhango MO 'The right to equality and access to courts for government employees in South Africa: time to amend the Government Employees Pension Law" (2019) 19 *African Human Rights Law Journal* 340 at 339, who correctly argues that "[s]ustaining a parallel pension regime has had the negative effect of significant omissions by the political branches of the state of South Africa to keep up with the reforms in the Pension Funds Act and other modernisation efforts applied to the increasingly dynamic private pension system. This omission has led to constitutional problems, some of which have in recent years been resolved by the judiciary". See also Marumoagae C "Concern regarding the 'debt' created by Rule 14.10.9 of the Government Employees' Pension Fund Rules" (2016) 19 *PELR* 4 and Nevondwe (2010) at 289.

[21] See *Government Employees Pension Fund v Naidoo & another* [2006] 3 All SA 332 (SCA) at para 7.

and a gratuity as "a single amount benefit payable in terms of this law". Defining an annuity as an amount that is paid annually appears to a bit confusing and may attract an interpretation that views an annuity as a once-off annual payment. In practice, when the word annuity is used, it is often in relation to a monthly payment or at the very least, a replacement of the member's monthly salary when the member retires. In fact, an annuity can be understood to be a type of retirement income product that members can purchase using part or all of their accrued retirement benefits to provide regular income, either for life or for a determinable period of time.[22] This is often loosely referred to as a "pension" in practice.

The GEP Law specifically provides protection against seven (7) transactions to which retirement funds can be subjected, namely: assignment, transfer, cession, pledge, hypothecation, attachment, and execution of retirement benefits. This provision does not distinguish between retirement funds that are not yet due to members and those that are due and have accrued to members. There is no clarity whether protection is limited to retirement benefits that are still invested by the fund on behalf of the member which the member merely has an interest in and no direct claim to because exit events identified in the rules of the fund have not yet occurred, or whether this protection only extends to these benefits when one of the identified exit events has taken place but benefits have not yet been paid to the member. There are recognisable differences in the way section 7 of the TPFA is drafted when compared with section 21(1) of the GEP Law. Section 7 of the TPFA provides:

> "No pension or lump sum from the Transport Pension Fund, or right to such a benefit, or right in respect of contributions made by a member or on his or her behalf, shall be capable of being assigned or transferred or otherwise ceded, or of being pledged or hypothecated, or be liable, subject to section 7 of the Divorce Act, 1979 (Act No. 70 of 1979), and the Maintenance Act, 1998 (Act No. 99 of 1998), to be attached or subjected to any form of execution under a judgment or order of a court of law …" .

Unlike section 21(1) of the GEP Law which refers to a benefit or right in respect of a benefit payable, section 7 of the TPFA refers to a pension or lump sum in respect of contributions made to the fund by the member or on the member's behalf. It is not clear why the legislature decided to use different wording for the protection that these two provisions provide over members' benefits. It can be taken for granted that the word "benefit" includes a pension in the form of a monthly annuity for pension fund members and lump sum benefit for both pension fund and provident fund members. However, it becomes a bit complicated when section 7 of the TPFA specifically refers to contributions made as opposed to benefit payable as provided by section 21(1) of the GEP Law.

[22] Money Advice Service "What is an annuity?" available at https://www.moneyadviceservice.org.uk/ (accessed 18 January 2021).

It is not clear whether the protection offered by section 7 of the TPFA is literally limited to contributions made either by the member alone or the member and the employer. Thus, whether it excludes the value of the interest that may have accrued on those contributions as a result of investments made by retirement funds. These differences in wording can lead to unnecessary interpretative difficulties that may eventually prejudice members of retirement funds regulated by the TPFA if the literal interpretation is to be considered. Section 21(1) of the GEP Law appears to be clear of this potential interpretation nightmare. This is so because it clearly refers to the "benefit payable" which is a phrase that obviously refers to retirement benefits that are due to members when they exit their funds, or their beneficiaries when members have passed on. Nonetheless, section 7 of the TPFA provides protection for retirement benefits against the same transactions that are listed in section 21(1) of the GEP Law, which are: assignment, transfer, cession, pledge, hypothecation, attachment and execution of retirement benefits.

Unlike the GEP Law, the TPFA and the POTRMA do not define the words "pension", "annuity" and "benefit". The context within which these words are used in the latter statutes is not clear. Given the importance of these words when implementing and interpreting the relevant protection provisions of these statutes, there is a need for uniformity and common understanding of these words and their usage in these statutes. It is submitted that all the pension law statutes must have the same definition of these words to avoid unnecessary interpretation inconsistencies. Further, that the word "annuity" should be defined as "regular periodic payments that are made to the retirement fund member as a result of an income product that was purchased through the member's retirement benefits".

The word "pension" should also carry the same definition as the word "annuity". Section 1 of the GPF appears to view an annuity as a pension. It defines an annuity as "… an amount which is payable each year and includes a pension or an allowance". It is submitted that "benefit" should be defined to mean "money payable to the retirement fund member or his or her beneficiary as a result of the member's contributions to the fund during the period of the member's membership in accordance with the rules of the fund". The recommended definition is more in accordance with that provided in section 1 of the PFA, where "benefit" is defined as "… any amount payable to a member or beneficiary in terms of the rules of that fund". The recommended definitions are broad enough to cater for all retirement funds irrespective of whether they are pension funds, provident funds or retirement annuity funds.

Section 10B (1) of the POTRMA is drafted in almost the same manner as section 7 of the TPFA. It also refers to a pension and lump sum or the right in respect of contributions made by the member or on the member's behalf. The only recognisable difference is the number of transactions against which that this provision protects retirement benefits. While it provides protection for cession, pledge, hypothecation, attachment and execution of retirement benefits, it does not make express protection

for assignment and transfer of retirement benefits. It appears that members of retirement funds regulated by the POTRMA are not protected against their retirement benefits being transferred or assigned from their retirement funds. The aim or even purpose of not expressly providing this protection is not clear.

Section 2 of the GPF does not use the word "pension" but the word "annuity" in the alternative with the word "benefit" or right in respect of an annuity or benefit payable under pension law. This section does not make reference to the right that members have in respect of their contributions to their retirement funds in the same way that section 10B (1) of the POTRMA and section 7 of the TPFA do. Just like section 21(1) of the GEP Law and section 7 of the TPFA, section 2 of the GPF also lists the same number of transactions that retirement benefits of members of a retirement fund regulated by this statute are protected against.

Out of all similar provisions from different statutes that provide protection of retirement benefits, section 37A(1) of the PFA is the only provision that has received a fair amount of judicial[23] and academic[24] recognition. Section 37A(1) of the PFA provides:

> "No benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944) …".

While this provision contains most of the items provided for in other similar provisions of the pension law related statutes, it also has other items that are not provided in those statutes. As such, it appears to be providing more protection for retirement benefits than other pension law related statutes. Unlike provisions contained in other pension law statutes, this provision starts by referring to the benefits that are expressly provided for in the rules of retirement funds that it regulates. It recognises that the retirement fund rules are a source of benefits that are offered by a particular retirement

[23] See *Sentinel Retirement Fund & another v Masoanganye* (1003/2017) [2018] ZASCA 126 (27 September 2018) at para 1 and *M v M & another* (230/2016) [2016] ZAFSHC 132 (4 August 2016) at para 8.

[24] See Manamela E "'You break, you pay': pension benefits deductions for damage caused to the employer by the employee" (2013) 25 *SA Merc LJ* 578.

fund. The Adjudicator (which is established by the PFA)[25] and courts have consistently held that retirement fund rules are supreme and binding on a fund's officials, members, shareholders, beneficiaries and anyone so claiming from the fund,[26] to the extent that they are not inconsistent with the PFA. It is, thus, not surprising that the legislature in this provision made express reference to the retirement funds rules, thereby endorsing the importance of the rules when applying and interpreting this provision.

It is interesting to also note that the legislature in section 37A(1) of the PFA, in addition to the word "benefit", also included an annuity purchased or to be purchased by the retirement fund from a third-party insurance company on behalf of the member. It is worth noting that section 1 of the ITA also recognises that living annuities can be purchased from an external person, usually an insurance company, or can be provided by the fund to the member. Section 37A(1) of the PFA identifies the complexities that are inherent in the structure of retirement funds generally, and various financial products that retirement funds offer, in particular.

First, section 37A(1) of the PFA recognises that retirement benefits that members may receive are usually provided by the fund itself. These benefits can be in the form of withdrawal benefits which are generally due when members exit their retirement funds before the date of retirement because of resignation, dismissal or retrenchment. Retirement fund members will also be eligible to receive retirement benefits when they reach a retirement age expressly provided for in the rules. There are retirement fund rules that also make provision for disability benefits and funeral benefits for their members; some of these benefits can be provided in the form of a lump sum payment. Retirement benefits cannot be provided as lump sum payments by pension funds. Pension fund members can only commute up to one-third of the total value of retirement interest as a single payment and the rest must be paid in the form of an annuity, including a living annuity.[27] In practice, some provident funds in their rules makes provision for their members to voluntarily choose to use all or part of their retirement benefits to purchase annuities from insurance companies.[28]

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[25] Section 30B(1) PFA.

[26] See *Tek Corporation Provident Fund & others v Lorentz* [2000] 3 BPLR 227 (SCA) at para 28, *Johnston v Pencare Pension Fund & another* [2019] JOL 41112 (PFA at) para 5.2 and *Phekiso & others v SACCAWU National Provident Fund and others* [2019] JOL 42008 (PFA) at para 5.2.

[27] Section 1(*c*)(ii)(dd) of the Income Tax Act 58 of 1962 (ITA). See also the amendment effected by Taxation Laws Amendment Act 23 of 2020, which introduces compulsory annuitization for provident fund members for all their contributions that will be collected from 01 March 2021.

[28] See Sanlam Reality "How to decide between a living or life annuity" available at https://www.sanlamreality.co.za/wealth-sense/life-annuity-living-annuity-difference/ (accessed 08 February 2020), where it is explained that a life annuity is an insurance product that can provide an income for life with annual increases and will not leave capital for the annuitant's dependants to inherit once he or she passes on.
See https://www.saica.co.za/integritax/1998/524_The_living_annuity_and_estate_duty.htm (accessed 08 February 2020), where a living annuity is explained as "a compulsory purchased annuity which is

Secondly, this provision also recognises that once retirement funds have accrued to members, in the case of pension funds, members can either be forced to purchase an annuity within the fund or with an external insurance company. In relation to provident funds, members can be encouraged to purchase an annuity with an external insurance company. To demonstrate the seriousness with which the legislature regards the concept of annuitisation, in 2017 the legislature amended the regulations issued in terms of section 36 of the PFA by introducing default regulations.[29] These amendments included the introduction of Regulation 39 which provides that "[t]he board of all pension funds, pension preservation funds, and retirement annuity funds must establish an annuity strategy".[30]

This regulation further states that "{w}here the rules of a provident fund or provident preservation fund enable a member to elect an annuity, the board must establish an annuity strategy".[31] This regulation mandates that when determining annuities, the boards of retirement funds must consider several risks, such as, the level of members' income that will be paid to retiring members, the investment, inflation, and other risks relating to the income that will be received by beneficiaries of deceased members.[32] Among others, this regulation also recognises that "… living annuities may be paid directly from the fund or through a fund owned policy or sourced from an external provider as part of the annuity strategy".[33]

Unlike similar provisions from other pension law related statutes, section 37A(1) of the PFA specifically protects accrued retirement benefits that have been used to purchase annuities either inside the fund or from insurance companies. However, just like similar provisions from other pension statutes, section 37A(1) of the PFA does not explicitly address the status of protection of retirement benefits that have accrued and not yet been paid to members or deceased members' beneficiaries, which have not been used to purchase annuities. Given the fact that this provision has explicitly provided protection for accrued retirement benefits that are either intended to purchase, or have been used to purchase, annuities, it can be argued that this protection also extends to all other retirement benefits. In other words, protection will only be lifted once these benefits are paid over to the member or the deceased member's beneficiaries.

Unlike other similar provisions discussed in this article, section 37A(1) of the PFA refers to the right to both the benefit and the contributions made by members or on

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available to members of retirement annuity funds and pension funds who are retiring from employment. On retirement from these funds, the member is required to utilise at least two-thirds of the accumulated fund value to purchase a compulsory annuity".

29 Government Gazette 41064 of 25 August 2019. All retirement funds were given until 1 March 2019 to comply with these regulations.

30 Regulation 39(1)(*a*) of the PFA.

31 Regulation 39(1)(*b*) of the PFA.

32 Regulation 39(2)(*a*) of the PFA.

33 Regulation 39(3)(*a*) of the PFA.

their behalf. Reference to both the benefit and the contributions erases any doubt relating to the nature of the payment that is due to members or their beneficiaries. This is clearly the retirement benefits that are provided for in the rules which include contributions and the accrued investment. These benefits in terms of this provision will be protected against reduction, cession, transfer, pledge, hypothecation, attachment and execution. It is interesting to note that this provision does not include protection against assignment of retirement funds but introduces a unique transaction against which it offers protection , that of reduction. This is a clear indication that the protection provided by similar provisions of different pension related statutes is not the same. Some members' retirement benefits are protected against transactions that other members of retirement funds regulated by different statutes are not protected against, such as "reduction" of benefits.

Section 21 of the GEP Law; section 7 of the TPFA; section 10B(1) of the POTRMA; section 2 of the GPF; and section 37A of the PFA all have a second part to them. They all provide some sanctions for members or deceased members' beneficiaries who attempt to effect the transactions against which these sections provide protection. Such an attempt may lead to retirement funds being withheld, suspended or discontinued at the discretion of the board, and in relation to the GPF at the discretion of the relevant Minister. In terms of these sections, these sanctions may lead to retirement benefits being paid to members' dependants or beneficiaries, guardians or trustees, whichever are applicable. This part of these provisions is somewhat confusing. While it is clear that this proviso is triggered when members have attempted to perform transactions against which these provisions are aimed to protect retirement benefits, the rationale behind this proviso is not entirely clear. Surely, if a member attempts any of these transactions, the protection provided by these provisions will be triggered and the boards of retirement funds will refuse to carry out such transactions. If these transactions are done without the involvement of the boards, they will have no force of law. This proviso appears to apply more to accrued retirement benefits which have not been paid to either members or their beneficiaries.

Given the fact that it is generally accepted that assets held by retirement funds are owned by those retirement funds,[34] it is difficult to see how members can lawfully enter into transactions that may diminish their retirement benefits while they are still in the custody of their retirement funds. While not necessarily, perhaps when these benefits have accrued the position might be different. Do these provisions refer to accrued retirement benefits? In other words, when the boards learn that their members have ceded, assigned, transferred, reduced, hypothecated, agreed to the attachment, or execution of their accrued retirement benefits, do they have the power to withhold them, suspend payment, or discontinue payment? These questions are yet to be answered both by the courts and academics. It submitted that the proviso provided by these provisions appears not to have any significant practical effect, and can be

[34] Section 5 PFA.

removed. The circumstances under which retirement funds will withhold, suspend or discontinue payment are not clear. It is further not clear what will guide the boards when taking such decisions. Perhaps there is a need for all retirement funds to clarify this in their rules to ensure that the discretion that the boards are called upon to exercise is not unfettered but guided by the rules.

## 4 DISCUSSION OF PROHIBITED TRANSACTIONS

It is submitted that there is no justification for similar provisions in the different pension related legislation to be drafted differently, and to provide protection for different transactions for different retirement funds. There is a need for uniformity. In order to unify the law regulating the protection provided for retirement benefits against transactions that may diminish members' benefits, it is recommended that all these provisions should be amended and replaced by the following draft provision:

> "Save to the extent permitted by this Act, no benefit that is not yet due to the member or which has accrued but is still held by a fund (including an annuity provided by a fund or one purchased from a third party), or right to such benefit, shall, notwithstanding anything to the contrary contained in the rules of such fund, be capable of being transferred, reduced or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law." .

This recommended draft provision should be read together with the recommended definition of the word "benefit" provided above. Most importantly, it includes all the legislatively recognised transactions against which retirement benefits must be protected. These are: assignment (which includes transfer and cession); hypothecation (which includes a pledge); reduction, attachment and execution. This is to ensure that all retirement fund members receive the same protection from transactions that have the potential of preventing them from receiving adequate benefits for their retirement.

### 4.1 Transfer, assignment or cession of retirement benefits

Section 21(1) of the GEP Law lists assignment and transfer, in the alternative, among the transactions against which this provision protects members' retirement benefits. This amounts to unnecessary duplication. It is well known in the banking industry, in particular, that "assignment" is used to indicate that there is a party that has transferred a legal right or an interest in a legal right to another person.[35] In *Simon v Air Operations of Europe AD & others*, it was clearly stated that "[t]he word 'assignment' in our law is usually used to denote a transfer of both rights and obligations …".[36] It is worth noting

[35] See generally Rajapakse PJ "Assignment of mortgage loans to the special purpose vehicle in securitisation programs (2005) 24(1) *University of Tasmania LR* 49.

[36] *Simon v Air Operations of Europe AD & others* 1999 (1) SA 217 (A) at para 22. See also *Securicor (SA) (Pty) Ltd v Lotter* 2005 (5) SA 547.

that "cession" has also been "… defined as a bilateral juristic act in terms of which a right is transferred by agreement between the transferor (cedent) and the transferee (cessionary)".[37]

While there may be linguistic differences between transfer, assignment and cession, legally speaking, at the core of these terms is the transfer of legal rights from one person to another. It is thus submitted that it is devoid of any sense in the context of pension law for the legislature to use these three words in similar provisions in different pension statutes that are meant to protect members' retirement benefits. Even if they are used in the alternative and separated by the word "or", they amount to unnecessary duplication because they mean virtually the same thing. There is no reason why all these words should be used. It is recommended that only the word "transfer" should be used, and be defined to include both assignment and cession of rights, in all the similar provisions of different statutes that are meant to protect members' retirement benefits.

**4.2 Reduction of retirement benefits**

The legislative protection against the reduction of retirement benefits seeks to prevent transactions that are aimed at unjustifiably decreasing the value of benefits that members are entitled to receive when exiting their retirement funds. One of the most popular means of reducing members' retirement benefits is the miscalculation of members' pensionable service, particularly for members of the Government Employees Pension Fund (GEPF). The GEPF was established in 1996, when ten separate retirement funds, including those that served the public service of the former homelands (such as, the Government Pension Fund of Bophuthatswana) were amalgamated.[38] The idea behind the creation of one major retirement fund that would assist public sector employees to save towards their retirement was to standardise the benefit structure for all government employees.[39] Section 14(5) of the GEP Law[40] lists all the funds that have been merged to establish the GEPF, and refers to them as "previous funds". Section 14(2) of the GEP Law provides:

> "All assets, including any right to claim any amount, and all liabilities, including any obligation to pay any pension, related benefit or any other amount in terms of any law, of a previous fund in respect of which a date is determined under subsection (1), shall with effect from that date pass to and vest in the Fund.".

[37] *Brayton Carlsward (Pty) Ltd & another v Brews* 2017 (5) SA 498 (SCA) at para 9. See also *LTA Engineering Co Ltd v Seacat Investments* (Pty) Ltd 1974 (1) SA (A) 762 (A).

[38] Moleko N & Ikhide S "Pension funds evolution, reforms and trends in South Africa" (2017) 9(2) *International J of Economics and Finance Studies* 134 at 140.

[39] See generally Hendricks F "The private affairs of public sector pensions in South Africa : debt, development and corporatization" in Hugo K (ed) *Reforming pensions in developing and transition countries* United Kingdom : Palgrave Macmillan (2014) 220.

[40] Proclamation 21 of 1996. This is the law that established the GEPF.

This provision was meant to ensure continuity by allowing members of different retirement funds to continue with the new fund as if they had been members of this fund since the date of their employment. Unfortunately, section 14 of the GEP Law did not place an obligation on the employer to provide the board of the newly established fund with the records of all its employees to ensure that the fund could properly calculate their pensionable service which would determine the value of the benefits members will receive when they exit the fund. As a result, after 1996, the GEPF did not have proper records of employment for all employees who were members of different retirement funds before its establishment, particularly when they had exited the fund. The onus was placed on members to prove their date of employment, and for those who could not provide adequate proof of their date of employment, the initial years of their employment were not taken into consideration when their pensionable service was calculated.

For instance, in *Mmileng v Government Employees Pension Fund & others*,[41] a government employee started working on 13 January 1978 as a clerk in the office of the Auditor-General of the former Bophuthatswana government. On 1 December 1984, she was transferred to the Bophuthatswana Department of Defence. She became a member of the Government Pension Fund of Bophuthatswana and later became a member of the GEPF after the merger. She retired in October 2014. When she approached the GEPF in November 2014 to claim her retirement benefits she was advised that according to the GEPF's records her pensionable service had only commenced in 1995 and that she would have to provide proof to the contrary. This meant that her period of service from 1987 to 1995 was not considered when calculating her pensionable service. She approached the officials of her employer to provide her with proof of employment, but her employer could not find information on her profile kept in the employer's archives.[42] In declining to consider the employee's period of service from 1978, the GEPF argued that she had not proved that she had been a contributing member of the previous fund from 1978,[43] thereby placing the onus of proof on her.

The Court noted that the GEPF's records were inaccurate, and that it was thus not in a position to refute the employee's allegation that she had started contributing towards her retirement funding as a result of her employment in 1978.[44] Had the employee not challenged the decision of the GEPF not to take into account her service of employment from 1978, her pensionable service could have been reduced by almost seventeen years. Given the lack of knowledge that retirement fund decisions can be challenged, and the fact that litigation is expensive in South Africa, it is possible that

[41] *Mmileng v Government Employees Pension Fund & others* (7397/16) [2016] ZAGPPHC 1067 (15 December 2016) at para 3.

[42] See *Mmileng* (2016) at para 3.6

[43] See *Mmileng* (2016) at para 5.

[44] See *Mmileng* (2016) at para 9. See also Marumoagae C "The GEPF fails its members" (2021) 21(1) *Without Prejudice* 34.

there are many people whose years of service are incorrectly reduced. This results in incorrect calculation of their pensionable service, leading to them being provided with reduced retirement benefits. It is submitted that, under these circumstances, the provisions meant to protect members' retirement benefits against reduction should be utilised to prevent retirement funds from financially prejudicing members by unjustly reducing their retirement benefits.

Another way of reducing members' retirement benefits is through rule amendments which have the effect of depriving members of their retirement benefits. For instance, in *Joint Municipal Pension Fund v Grobler & others,*[45] the employee was a member of a retirement fund and was retrenched. Within 14 days of the date of the member's retrenchment, the fund at the request of the employer caused its rules to be amended.[46] Before the amendment, all of the member's years of service within the municipal sector before employment with the employer "fell to be included in determining his 'pensionable service"'.[47] Due to the amendment, the member's "pensionable service for purpose of calculating his retrenchment benefit was limited to the six and a half years of his employment with the [employer, thereby being] … paid a very considerably reduced retrenchment benefit".[48]

One of the fund's rules specifically provided that the value of an established benefit before an amendment shall not be decreased unless the fund is in financial difficulties,[49] which was not the position in this case. In declaring the rule amendment invalid, the Court held that if the trustees were to be empowered by the rules, "… on the eve of an event that would entitle a member to claim the benefits that have accumulated during his or her membership of the fund … to amend the rules so as to remove or reduce such benefits, [then that] … would permit an intolerable injustice".[50] This is so because the amendment had the effect of reducing the member's retirement benefits contrary to the legislative protection provided to those benefits.

The Supreme Court of Appeal (SCA), in *National Tertiary Retirement Fund v Registrar, Pension Funds,*[51] interpreted the phrase "save as permitted by this Act" in section 37A(1) of the PFA as permitting the reduction of members' benefits in certain instances. The SCA held that "… there may well be circumstances where a reduction of benefits may be required in the interests of all the members of a pension fund and it is highly unlikely that the Legislature could have intended to prohibit a rule amendment …

[45] *Joint Municipal Pension Fund v Grobler & others* [2007] 1 BPLR 1 (SCA).

[46] See *Joint Municipal Pension Fund* (2007) at para 2.

[47] See *Joint Municipal Pension Fund* (2007) at para 2.

[48] See *Joint Municipal Pension Fund* (2007) at para 2.

[49] See *Joint Municipal Pension Fund* (2007) at para 3.

[50] See *Joint Municipal Pension Fund* (2007) at para 13.

[51] *National Tertiary Retirement Fund v Registrar, Pension Funds* [2009] 2 BPLR 97 (SCA).

in these circumstances".[52] The Court was of the view that a fund can amend its rules to absolve itself from the obligation to pay guaranteed benefits where there is a deficit, and to bind the employer to make good on the shortfall. The Court specifically held that "… it cannot be inconsistent with the Act to retain those benefits but to make them conditional on funding from the employer".[53] This appears to mean that a rule amendment that is aimed at ensuring the financial viability of a fund, and which is not targeting one or a selected group of members, even if it leads to the reduction of the members' retirement benefits, will be legally justifiable.

### 4.3 Pledge and hypothecation

It is difficult to understand why the legislature in some of the provisions that are meant to protect retirement benefits listed both pledge and hypothecation as transactions against which these provisions aim to protect retirement benefits. It cannot be denied that the idea behind hypothecation is to provide another person with real security in a form of a real right over property of another. This can be in the form of mortgage, lien, tacit hypothec, statutory hypothec or pledge.[54] The discussion of these forms of real security is beyond the scope of this article. It only suffices to note that a pledge is a form of hypothec. It is thus unnecessary for the words "pledge" and "hypothecated" to be used in the same provision. In other words, a pledged retirement benefit will be hypothecated.

Section 21 of the GEP Law; section 7 of the TPFA; section 10B(1) of the POTRMA; section 2 of the GPF; and section 37A(1) of the PFA specifically aim to prevent retirement fund members providing their creditors with enforceable real rights over their retirement benefits. Hunter et al correctly observe that, absent these provisions, a retirement fund member "would be able to pledge his or her benefit as security for payment of the member's debt to a third party. On default by the member, and if the pledge gave the creditor a real right in respect of the benefit, the creditor could enforce that right against the fund".[55] These provisions are aimed at ensuring that retirement fund members do not decrease the value of their retirement benefits in favour of their creditors while still contributing to their funds, thereby impacting their ability to save adequately for their retirement. It is recommended that this objective can still be achieved by only referring to the word "hypothecated" in these provisions.

[52] See *National Tertiary Retirement Fund* (2009) at para 23.

[53] See *National Tertiary Retirement Fund* (2009) at para 24.

[54] For more discussion, see Kahn E & Kritzinger KM *Principles of the law of mortgage, pledge and lien* Cape Town : Juta (1999) at 1.

[55] Hunter R, Esterhuizen J, Jithoo T & Khumalo S *The Pension Funds Act: a commentary on the Act, regulations, selected notices, directives and circulars* Johannesburg : Hunter Employee Benefits Law (2010) at 670.

### 4.4 Attachment and execution

Usually, creditors must obtain judgments for payment of money against their debtors. When debtors fail to pay, creditors can have writs or warrants of execution issued by courts to instruct sheriffs to attach the debtors' properties.[56] Once the property has been attached, the sheriff will sell the property in execution to satisfy the judgment debt. *Sentinel Retirement Fund & another v Masoanganye* (*Sentinel* (2018)) held that "[a]n 'attachment', in ordinary legal parlance, is the taking of property into the actual or constructive possession of a court of law, and 'execution', in this context, the enforcement of a court order or judgment".[57] The legislature, through section 21 of the GEP Law; section 7 of the TPFA; section 10B(1) of the POTRMA; section 2 of the GPF; and section 37A(1) of the PFA, deliberately protected retirement benefits from attachment and execution by members' creditors. All these provisions have included attachment and execution of property as transactions against which all retirement fund members in South Africa, irrespective of the funds they belong to, are protected. Members' creditors cannot enforce payment of what members owed them from members retirement benefits for as long as such benefits are held by retirement funds.

While it may be taken for granted that retirement benefits cannot be attached while in the custody of retirements funds, irrespective of whether they have accrued, this issue is not necessarily settled in South Africa. There is no doubt that members merely have interests in their retirement benefits that have not yet accrued to them and that these assets belong to retirement funds as their assets.[58] However, the issue of whether retirement benefits that have accrued to members but not yet paid to them can be attached, does not appear to be settled. When allowable deductions are not applicable, the circumstances under which retirement funds cannot rely on the protection provided by provisions discussed in this article against third parties are not clear. This was illustrated in *Sentinel* (2018).[59]

In this case, a retirement fund member appealed his conviction on racketeering charges in contravention of section 26 of the Prevention of Organised Crime Act 121 of 1998. It was found that "the member had benefited from illegal sales of electricity to Eskom to the value of R 8.9 million".[60] The member resigned from his employment and

[56] See Rules 45 & 46 of the High Court Rules and Rule 41 of the Magistrates Court Rules for the execution procedures, the discussion of which is beyond the scope of this article. It suffices to mention that the creditor must first attach the movable properties. If there are no movable properties or they are insignificant to satisfy the judgment debt, it is then that the creditor can go after the immovable property. However, if the execution of the immovable *property* is likely to lead to unjustifiable limitation of the right contained in s 26(1) of the Constitution of the Republic of South Africa, 1996, the execution must be subject to judicial intervention. See generally *Gundwana v Steko Development CC & others* 2011 (3) SA 608 (CC) [Own emphasis].

[57] (1003/2017) [2018] ZASCA 126 (27 September 2018) at para 10.

[58] See s 5 PFA.

[59] See *Sentinel* (2018).

[60] See *Sentinel* (2018) at para 3.

his withdrawal benefit accrued to him. He elected that his benefit should be paid to him in terms of the rules of the fund.[61] After his conviction, the State obtained a restraint order which required the disclosure and surrender of his realisable property.[62] A *curator bonis* was appointed to take control of his assets and administer them. The *curator bonis* informed the member's retirement fund that he considered the member's retirement benefits to be realisable property when he ceased to be a member of the fund after they accrued to him.[63] The *curator bonis* requested the member's banking details from the fund. The fund did not accede to the *curator bonis'* request and contended that "s 37A of the PFA protected this benefit from being paid to the curator and also that [the members'] bank account details were confidential and could not be disclosed to a third party".[64]

The fund then approached the High Court "… to interdict the curator from attaching [the member's] pension benefit and to obtain a declaratory order that the benefit may not be attached as realisable property in terms of the restraint order".[65] The curator clarified that "… he did not wish to attach the pension benefit in the hands of the Fund; he only wanted information pertaining to [the member's] bank accounts so that steps could be taken to prevent the unlawful dissipation of the money once it was paid to him".[66] The Court had to determine whether "a restraint issued under POCA relating to the property of a defendant constitutes an 'attachment' or 'any form of execution under a judgment or order of a court of law' as envisaged by s[ection] 37A of the PFA".[67]

Before the SCA could deal with this issue, it outlined the differences in its approach and that of the High Court.[68] While, as a result of *stare decisis* and the rules regulating precedent, the SCA's approach is authoritative, nonetheless, the High Court's approach seems to be more interesting. The High Court's approach invokes doubt whether it can be regarded as being settled that section 37A(1) of the PFA and similar provisions of other pension statutes should apply to accrued retirement benefits held by retirement funds.

In *Sentinel* (2018) the High Court's approach was simply that "once the benefit became due to be paid to the member the fund no longer '[had] any title or hold of the benefit"'.[69] Further, that the member's membership "ceases when he 'becomes entitled

[61] See *Sentinel* (2018) at para 2.
[62] See *Sentinel* (2018) at para 4.
[63] See *Sentinel* (2018) at para 4.
[64] See *Sentinel* (2018) at para 5.
[65] See *Sentinel* (2018) at para 6.
[66] See *Sentinel* (2018) at para 6.
[67] See *Sentinele* (2018) at para 9.
[68] Unfortunately, despite determined efforts, I could not locate the High Court judgment. I thus rely on the reflections of the SCA.
[69] See *Sentinel* (2018) at para 15.

to receive the pay-out of the benefit"'. In terms of this approach, once the retirement benefit accrues to the member due to any of the exit events prescribed in the rules, such benefit is not only no longer an asset of the retirement fund but also the interest that the member had in the benefit entitles the member to demand immediate payment of the benefit from the fund. Once the member derives an entitlement to be paid his or her retirement benefits because of the event that triggers the payment of such benefit, the fund is obliged to disinvest the investment that the member initially only had an interest in, turn it into a cash benefit and pay it to the member. My understanding of the High Court's approach is, that once the fund is legally obliged to disinvest the member's benefit and pay it to the member, the benefit automatically becomes an asset in the member's estate. This is so notwithstanding the fact that the retirement benefit that is due to the member has not yet been paid to the member. I am convinced that there is merit in this approach. This approach challenges the view that for as long as the member's benefit is held by the fund it remains the asset of the fund or, at the very least, should be deemed the asset of the fund as provided for by section 5(1)(b) of the PFA.

In dismissing the High Court's approach, the SCA looked at the definition of the word "benefit" in section 1 of the PFA and interpreted it in line with section 5(1)(b) of the PFA, which provides among others that:

> "… all the assets, rights, liabilities and obligations pertaining to the business of the fund shall, notwithstanding anything contained in any law … be deemed to be assets, rights, liabilities and obligations of the fund to the exclusion of any other person, and no person shall have any claim on the assets or rights or be responsible for any liabilities or obligations of the fund, except in so far as the claim has arisen or the responsibility has been incurred in connection with transactions relating to the business of the fund".

The SCA merely stated that a "benefit" payable to a member is, therefore, deemed to belong to the fund and not the member. With respect, the analysis is, and should not be, as simple as the SCA seems to suggest. It is worth noting that section 5 of the PFA generally does not distinguish between various assets that are held by retirement funds. It does not classify assets in terms of those that still need to be invested on behalf of members and those that should be disinvested to be paid to members. This is the discussion that has been avoided by both the courts and academics in South Africa, which the High Court in this case seems to be initiating.

It will be a lost opportunity for both the courts and academics not to honour the High Court's invitation and engage in this debate. I submit that there is merit in a view, which the High Court seems to be advocating , that perhaps accrued retirement benefits that are due to retirement fund members should not be afforded the protection of protection provisions. It is certainly true, as stated by the SCA, that "before the benefit became payable it was an asset of the fund".[70] However, it is debatable whether, as the

[70] See *Sentinel* (2018) at para 15.

SCA has held, when the benefit is due and payable it remains the asset of the fund.[71] If indeed this was the legislature's intention, it is submitted that the legislature must amend the law to make this absolutely clear.

It will be interesting to see how the Constitutional Court will deal with this issue should it come before it. The law as stated by the SCA can lead to great injustices if not properly considered. Imagine that parties who have cohabited for several years are about to separate and one of them successfully establishes the existence of a universal partnership[72] between them. Further, that he or she assisted the other with the household's necessities which enabled the other not only to focus on his or her work but also to accumulate retirement savings. At the time of the court proceedings, the member of the fund is dismissed, retrenched, resigns or retires and his or her retirement benefits become due to him or her but not yet paid to him or her within a period of six months after the parties' universal partnership order. If the court declared that a universal partnership existed between them of all assets acquired by them up to the date of the dissolution of this partnership, on the current application of the law, the non-member party to the universal partnership will not be able to claim any portion of the accrued retirement benefits of the member. This example illustrates that there are instances, with some of which our courts have not yet been confronted, where the current application of the law will lead to serious injustice.

Absent any legislative clarity, in order to prevent unjust outcomes, the courts must properly engage the provisions that are aimed at protecting retirement benefits. The current wording of section 5(1)(*b*) of the PFA in particular, is very vague in relation to when the assets held by the fund should be regarded as owned by the fund. It is capable of being interpreted in the way the SCA in *Sentinel* (2018) has interpreted it, that it

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[71] See *Sentinel* (2018) at para 15.

[72] See *Pezzuto v Dreyer* [1992] ZASCA 46; 1992 (3) SA 379 (A) at 390, where it was held that the three essential requirement for universal partnership are that "… each of the partners bring something into the partnership; whether it be money, labour or skill; that the business should be carried on for the joint benefit of the parties; and that the object should be to make a profit (Pothier: *A Treatise on the Contract of Partnership* (Tudor's translation) 1.3.8). A fourth requirement mentioned by Pothier is that the contract should be a legitimate one". See also *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 18 which held : "In this light our courts appear to be supported by good authority when they held, either expressly or by clear implication that: (a) Universal partnerships of all property which extend beyond commercial undertakings were part of Roman Dutch law and still form part of our law. (b) A universal partnership of all property does not require an express agreement. Like any other contract it can also come into existence by tacit agreement, that is by an agreement derived from the conduct of the parties. (c) The requirements for a universal partnership of all property, including universal partnerships between cohabitees, are the same as those formulated by Pothier for partnerships in general. (d) Where the conduct of the parties is capable of more than one inference, the test for when a tacit universal partnership can be held to exist is whether it is more probable than not that a tacit agreement had been reached." In this case the Court accepted that the woman "… spent all her time, effort and energy in promoting the interests of both parties in their communal enterprise by maintaining their common home and raising their children" (para 19). See further *S v S* 2018 (6) SA 528 (WCC).

refers to all the assets held by the fund on behalf of members irrespective of whether or not they have accrued.

I submit that it can also be interpreted in accordance with the High Court's approach in *Sentinel (*2018), that only assets that are to be invested or have been invested on behalf of members can be declared to be assets of the fund. In other words, for accrued benefits not to be regarded as assets of the fund. In my view, it does not make sense that once the retirement benefits are due to members on the day they accrue to them, these benefits are still protected from members' creditors, but that once paid to members they lose that protection merely because they can no longer be referred to as retirement benefits. It must be noted, however, that the law as it currently stands, is in accordance with the interpretation by the SCA. The law is currently that assets held by retirement funds, whether they accrued or not, if not yet paid to members, constitute assets of those funds. The SCA agreed with the High Court that "… once a benefit is paid to the member, and he ceases being a member, the protection afforded to the benefit by s[ection] 37A(1) [of the PFA] falls away and the pay-out then becomes part of the general estate of the former member".[73]

## 5 LESSONS FROM THE KINGDOM OF LESOTHO

The fragmented legislative regulation of the South Africa retirement industry is at best very concerning. It results in different statutes regulating the same pension law issue differently. This causes unnecessary uncertainty in the law. It also provides certain retirement fund members with some degree of protection that is not provided to members of retirement funds regulated by other pension statutes. This is true for section 21 of the GEP Law; section 7 of the TPFA; section 10B(1) of the POTRMA; section 2 of the GPF; and section 37A(1) PFA, which have been drafted in an ambiguous manner making it difficult to understand the extent of the protection they provide to members' retirement benefits. If indeed the legislature intended, absent allowable deductions, to provide retirement benefits with absolute protection irrespective of whether they accrued, it is submitted that guidance can be sought from the way the Kingdom of Lesotho offers protection to retirement fund members' benefits.

Section 32 of the Kingdom of Lesotho's Pension Funds Act,[74] provides that "[n]otwithstanding anything to the contrary contained in any law or in the rules, any benefit payable by a fund shall not form part of the assets of the estate of a member". This is a short provision which provides a clear intention of the Kingdom of Lesotho's legislature. If a benefit is payable to the member, the fact that such benefit has not yet been paid, means that it is not yet the member's asset. While this may lead to unjust outcomes, as illustrated above, at the very least there is certainty in Lesotho in relation to this issue. The unified provision proposed in this article is in accordance with the

[73] See *Sentinel* (2018) at para 16.

[74] Kingdom of Lesotho's Pension Funds Act 63 of 2019.

approach taken by the legislature in the Kingdom of Lesotho. It is suggested that for the purposes of legal certainty, it should be adopted by the South African legislature.

However, if it is not the intention of the legislature, absent allowable deductions, to provide absolute protection to members' retirement benefits, there is scope to rethink the law and declare that accrued retirement benefits which have not yet been paid to members fall within their joint estate in order to prevent unjust outcomes in certain cases, such as that of a universal partnership discussed above.

## 6 CONCLUSION

This article discussed the South African legal framework regarding the protection the legislature provides to members' retirement benefits when there are no allowable legislative deductions that should be made from such benefits. It compared several similar provisions from different pension statutes and demonstrated that they are drafted differently and offer different protection to members of retirement funds. On the assumption that the legislature intended to provide absolute protection to members' retirement benefits held in various retirement funds if no legislative deductions are applicable, this article proposed a draft provision that it is hoped will, if adopted, provide legislative clarity on the extent of protection provided to retirement benefits. This protection will continue until the retirement benefits are paid to members. Reference was made to the way the Kingdom of Lesotho protects retirement fund members' benefits through legislation. It was argued that the position in Lesotho appears to be more certain than the South African position.

Notwithstanding, the above recommendation, this article also indicated the potential unjust outcomes that may result from the way the law is currently applied, as confirmed by the SCA in *Sentinel* (2018). It is hoped that this article will spark academic and judicial debates on how the South African law should treat accrued retirement benefits and whether they should receive protection at all times or that such protection should be limited.

**BIBLIOGRAPHY**

**Books**

Hunter R, Esterhuizen J, Jithoo T & Khumalo S *The Pension Funds Act: a commentary on the Act, regulations, selected notices, directives and circulars* Johannesburg: Hunter Employee Benefits Law (2010).

Kahn E & Kritzinger KM *Principles of the law of mortgage, pledge and lien* Cape Town : Juta & Co (1999).

**Chapters in books**

Hendricks F "The private affairs of public sector pensions in South Africa: debt, development and corporatization" in Hugo K (ed) *Reforming pensions in developing and transition countries* United Kingdom: Palgrave Macmillan (2014) 220.

Queisser M "The role of pension funds in the stabilisation of the domestic financial sector" in Brooks DH & Queisser M (eds*) Development Centre seminars*. *Financial liberalisation in Asia: analysis and prospects* Mandaluyong: OECD (1999) 165.

**Journal articles**

Manamela E "'You break, you pay': pension benefits deductions for damage caused to the employer by the employee" (2013) 25 *SA Merc LJ* 578.

Manamela T "Deductions from pension benefits for purposes of section 37D of the Pension Funds Act 24 of 1956: employers forced to tow the line" (2007) 19(2) *SA Merc LJ* 189.

Marumoagae C "Addressing the challenge of withdrawal of lump sum retirement benefit payments in South Africa: lessons from Australia" (2017) 50(1) *CILSA* 129.

Marumoagae C "An argument for necessary amendments to the legislative provisions regulating the sharing of retirement savings upon divorce in South Africa" (2018) 30(2) *SA Merc LJ* 283.

Marumoagae C "Concern regarding the 'debt' created by Rule 14.10.9 of the Government Employees' Pension Fund Rules" (2016) 19 *Potchefstroom Electronic Law Journal* 1.

Marumoagae C "Liability to pay retirement benefits when contributions were not paid to the retirement fund" (2017) 20 *Potchefstroom Electronic Law Journal* 1.

Marumoagae C "Retirement benefit payments used for child maintenance" (2018) *De Rebus* 21.

Marumoagae C "The GEPF fails its members" (2021) 21(1) *Without Prejudice* 34.

Marumoagae MC "What are the duties (if any) of retirement funds boards when requested by employers to withhold members' retirement benefits?" (2021) 138(4) *South African Law Journal* [forthcoming].

Matotoka D, Nevondwe L & Odeku KO "Withholding of pension benefits in South Africa: a nightmare for pension fund members" (2014) 15(5) *Mediterranean J of Social Sciences* 647.

Mhango MO "The right to equality and access to courts for government employees in South Africa: Time to amend the Government Employees Pension Law" (2019) 19 *African Human Rights L J* 340.

Moleko N & Ikhide S "Pension funds evolution, reforms and trends in South Africa" (2017) 9(2) *International J of Economics and Finance Studies* 134.

Mothupi S 'Some practical effects of the Financial Services Laws General Amendment Act 2008 on amending section 37D(4) of the Pension Funds Act' (2010) 22 *SA Merc LJ* 214.

Nevondwe L "South African social security and retirement reform: a long journey towards the redrafting of the new Pension Funds Act' (2010) 15(4) *Pensions* 287.

Rajapakse PJ "Assignment of mortgage loans to the special purpose vehicle in securitisation programs" (2005) 24(1) *University of Tasmania LR* 49.

Shrosbree L "To what extent does section 37D of the Pension Funds Act protect employers from dishonest conduct by their employees?" (2005) 26 *ILJ* 17.

Sigwadi M "Pension-fund benefits and child maintenance: the attachment of a pension-fund benefit for purposes of securing payment of future maintenance for a child' (2005) 17 *SA Merc LJ* 340.

Willows GD, Burgers T & West D "A comparison of retirement saving using discretionary investment and Regulation 28" (2018) 21 (1) *South African Journal of Economic and Management Sciences* 1.

Yuh Y "Assessing adequacy of retirement income for US households: a replacement ratio approach" (2011) 36(2) *The Geneva Papers on Risk and Insurance. Issues and Practice* 305.

**Legislation**

General Pensions Act 29 of 1979.

Government Employees Pension Law (Proclamation 21 of 1996).

Income Tax Act 58 of 1962.

Pension Funds Act 24 of 1956.

Post and Telecommunication-Related Matters Act 44 of 1958.

Taxation Laws Amendment Act 23 of 2020.

Transnet Pension Fund Act 62 of 1990.

**Case law**

*Brayton Carlsward (Pty) Ltd & another v Brews* 2017 (5) SA 498 (SCA).

*Butters v Mncora* 2012 (4) SA 1 (SCA).

*Charlton & others v Tongaat-Hulett Pension Fund & others* [2006] 2 BPLR 94 (D).

*Fourie v Eskom Pension and Provident Fund* (18/1355) [2019] ZAGPJHC 188 (6 June 2019).

*Government Employees Pension Fund v Naidoo & another* [2006] 3 All SA 332 (SCA).

*Gradwell v Bidpaper Plus (Pty) Ltd & others* 2012 ILJ 33 2794 (ECG).

*Gundwana v Steko Development CC & others* 2011 (3) SA 608 (CC).

*Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (2) All SA 225 (SCA).

*Johnston v Pencare Pension Fund & another* [2019] JOL 41112 (PFA).

*Joint Municipal Pension Fund v Grobler & others* [2007] 1 BPLR 1 (SCA).

*LTA Engineering Co Ltd v Seacat Investments* (Pty) Ltd 1974 (1) SA 762 (A).

*M v M & another* (230/2016) [2016] ZAFSHC 132 (4 August 2016).

*Mmileng v Government Employees Pension Fund and Others* (7397/16) [2016] ZAGPPHC 1067 (15 December 2016)

*National Tertiary Retirement Fund v Registrar, Pension Funds* [2009] 2 BPLR 97 (SCA).

*Ndaba v Ndaba* 2017 (1) SA 342 (SCA).

*Pezzuto v Dreyer* [1992] ZASCA 46; 1992 (3) SA 379 (A).

*Phekiso & others v SACCAWU National Provident Fund & others* [2019] JOL 42008 (PFA) .

*S v S* 2018 (6) SA 528 (WCC).

*Securicor (SA)(Pty) Ltd & others v Lotter & others* [2005] 4 All SA 464 (E).

*Sentinel Retirement Fund & another v Masoanganye* (1003/2017) [2018] ZASCA 126 (27 September 2018).

*Sentinel Retirement Fund v Mtambo & others* (75404/2013) [2015] ZAGPPHC 423 (1 June 2015).

*Simon v Air Operations of Europe AD & others* 1999 (1) SA 217 (A).

*Tek Corporation Provident Fund and others v Lorentz* [2000] 3 BPLR 227 (SCA).

**Internet sources**

Taylor Commission Committee Report no 7: Retirement and Old Age available at http://www.treasury.gov.za/publications/other/ssrr/General%20Papers/Taylor%20Report%20%20Chap%207.pdf (accessed 10 January 2021).

National Treasury "Strengthening retirement savings: An overview of proposals announced in the 2012 Budget" (14 May 2012) available at http://www.treasury.gov.za/publications/RetirementReform/20120314%20-%20Strengthening%20retirement%20savings.pdf (accessed 10 January 2021).

National Treasury "Strengthening retirement savings: An overview of proposals announced in the 2012 Budget" (14 May 2012) 3 available at http://www.treasury.gov.za/publications/RetirementReform/20120314%20-%20Strengthening%20retirement%20savings.pdf (accessed 10 January 2021).

National Treasury "Preservation, portability and governance for retirement funds" (21 September 2012) 5 available at http://www.treasury.gov.za/comm_media/press/2012/Preservation%20portability%20and%20governance%20%2021%20Sept%202012%20.pdf (accessed 10 January 2020).

National Treasury "Charges in South African retirement funds" (11 July 2013) 18 available at http://www.treasury.gov.za/public%20comments/Charges%20in%20South%20African%20Retirement%20Funds.pdf (accessed 10 January 2021).

National Treasury "Retirement fund reform: A discussion paper" (December 2004) 4 available at http://www.treasury.gov.za/public%20comments/Retirement%20Fund%20Reform%20A%20Discussion%20Paper.pdf (accessed 10 January 2021).

SAICA https://www.saica.co.za/integritax/1998/524_The_living_annuity_and_estate_duty.htm (accessed 08 February 2020).

**Theses**

Manamela T *South Africa's occupational retirement system: a comparative social security perspective* (unpublished LLD thesis, Unisa, 2015).