

## Legal update

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### Changes to the Pension Funds Act: Payment of benefits

#### Summary

The Financial Services Laws General Amendment Act No.45 of 2013 was published in Government Gazette No. 37237 on 16 January 2014. It amends the Pension Funds Act and creates a number of new requirements regarding the payments of benefits. The effective date of the Act has not yet been promulgated.

#### 1. Payment of a benefit where the member does not have a bank account

##### Current position

A fund is not allowed to pay a benefit to anybody other than a member or beneficiary. Funds are often faced with the situation where a member or beneficiary who is entitled to payment from the fund does not have a bank account and is not able to open one. Some members only have joint bank accounts with their spouses. Banks generally don't allow a member to open a bank account if they only want to do so to receive payment of their benefit and then immediately withdraw the total benefit.

##### Position once the Amendment Act comes into effect

Once the amendment to section 37A comes into effect, the fund will be permitted to pay a member's or beneficiary's benefit into the bank account of a third party, if they can give sufficient proof that they are not able to open a bank account.

Payment to the third party will be regarded as a payment made directly to the member or beneficiary and the fund will have discharged its duties in relation to that member or beneficiary.

##### Impact on Momentum FundsAtWork

FundsAtWork will change its process to accommodate payment to a third party as foreseen by the amendment. Once the member or beneficiary can prove that they cannot open a bank account, they will be required to sign a document authorising payment to the third party and indemnifying Momentum against any claim resulting from such payment.

However, this amendment still does not allow a fund to pay a member's or beneficiary's benefit into a joint account. Where a member or beneficiary only has a joint account, FundsAtWork will not be able to make the payment into the joint account. FundsAtWork will allow payment to a third party if the conditions set out in the previous paragraph are met.

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## 2. Payment of death benefits where no dependants can be traced

### Current position

A fund has 12 months from the member's death within which to trace dependants of a deceased member. If the fund is unable to trace any dependants and if the member has not nominated a beneficiary, or if the member nominated a beneficiary to receive only a portion of the benefit, the benefit or remaining benefit must be paid into the estate of the deceased member. If there is no estate, the benefit must be paid into the Guardian's Fund.

### Position once the Amendment Act comes into effect

Section 37C is amended to also allow for payment into an unclaimed benefit fund. Once the amendment comes into effect, a fund will be able to pay a death benefit in the circumstances above into an unclaimed benefit fund if, after 12 months from the member's death, the fund has been unsuccessful in tracing a dependant, there are no nominees and there is no estate.

### Impact on FundsAtWork

FundsAtWork goes to great lengths to trace dependants in order to avoid payment of a member's death benefit to the Guardian's Fund. FundsAtWork will still do their best to trace beneficiaries in order not to pay a benefit to an unclaimed benefit fund. However, if there is no beneficiary, FundsAtWork will pay the benefit to an unclaimed benefit fund rather than to the Guardian's Fund, as the trustees of the unclaimed benefit fund has an obligation to trace beneficiaries on a regular basis.

## 3. Unclaimed benefits and unclaimed benefit fund

### Current position

The definition of "unclaimed benefit" *excludes* a death benefit not paid within 24 months from the date of the member's death. It is not clear from the definition exactly when a death benefit would be included as an unclaimed benefit. It also does not provide for the amount payable to a non-member spouse following a deduction under a divorce order under section 37D to qualify as an unclaimed benefit.

The current Pension Funds Act does not define an unclaimed benefit fund.

### Position once the Amendment Act comes into effect

The definition of "unclaimed benefit" has been amended to *include* a death benefit payable to a beneficiary under section 37C that is not paid within 24 months from the date on which the fund became aware of the death of the member, or a longer period as long as the board can reasonably justify it in writing.

The definition has also been expanded to include any amount that remains unclaimed or unpaid to a non-member spouse within 24 months after the date on which a section 37D deduction was made.

A new definition for "unclaimed benefit fund" has been included. An unclaimed benefit fund is a preservation fund set up to receive unclaimed benefits.

### Impact on FundsAtWork

If one reads this amendment together with the amendment to section 37C which is discussed under paragraph 2 above, FundsAtWork will be able to deal with death claims as follows:

- Pay to the member's dependants or nominated beneficiaries.
- Pay to the estate if there are no dependants or nominated beneficiaries.
- Pay to an unclaimed benefit fund where, 12 months after the member's death, no dependant or nominated beneficiary could be found, and there is no estate.

- If the benefit has not been paid within 24 months after the fund became aware of the member's death, pay the benefit into an unclaimed benefit fund. This will generally be the case where a dependant or nominated beneficiary that has been identified (and awarded a portion of the benefit) cannot be traced.

FundsAtWork will change its death claims payment process to take these changes into account.

It will also change its process to allow for the payment of the amount deducted in favour of a non-member spouse under a divorce order into an unclaimed benefit fund if it has not been paid 24 months after the deduction has been made.

#### **4. Beneficiary fund can receive unapproved benefits**

##### Current position

A beneficiary fund is defined as a fund referred to in paragraph (c) of the definition of “pension fund organisation”, which in turn refers to a fund established with the object of receiving, administering, investing and paying benefits referred to in section 37C on behalf of beneficiaries, payable on the death of a member of a pension fund. In short, a beneficiary fund can only receive death benefits payable from a pension fund.

##### Position once the Amendment Act comes into effect

Paragraph (c) of the definition of “pension fund organisation” has been changed by substituting the phrase “referred to in section 37C” with “in terms of the employment of a member”. This means that any benefit payable to a beneficiary that became payable in terms of the member’s employment can be paid to a beneficiary fund. An employer would therefore be able to pay a benefit payable under a free-standing, employer-owned death benefit (unapproved) policy into a beneficiary fund.

An unforeseen consequence of this change is that a death benefit that did *not* become payable in terms of the member’s employment, such as a benefit from a retirement fund such as a retirement annuity fund and a preservation fund, can now not be paid into a beneficiary fund. This is in conflict with section 37(2)(iii), which allows for payment to a beneficiary fund. It is expected that this anomaly will be corrected soon.

##### Impact on FundsAtWork

FundsAtWork is in the process of investigating the impact of this change on the wording of the lump sum death benefit insurance policies with the view to allow employers to pay unapproved benefits into a beneficiary fund. The impact of this change on the payment method of fund provided (approved) death benefits will be investigated at the same time. As soon as the effective date of this amendment has been promulgated, a communication will be sent to all employers who have unapproved policies with FundsAtWork.

#### **5. Deductions allowed from a pension benefit**

##### Current position

The Pension Funds Act allows a fund to make certain deductions from a member’s benefit or minimum individual reserve. The fund is restricted to making these deductions from the member’s benefit and is not permitted to make any deductions from a deferred pension or from a living annuity.

In terms of section 37D(1)(d) the fund is permitted to make the following deductions from a member’s benefit or individual reserve:

- any amount awarded to a non-member spouse under a divorce order;
- any amount payable in terms of a maintenance order, and
- income tax.

For amounts awarded to a non-member spouse, the wording of section 37D(1)(d) read together with the definition of “pension interest” in the Divorce Act seems to imply that the deduction must be made only from the benefit that a member would have been entitled to receive had they resigned on the date of the divorce. This would mean that the fund cannot deduct any such amounts from a deferred pension or a living annuity.

The Pension Funds Act only allows for deductions in favour of a non-member spouse following a divorce order under the Divorce Act.

Section 37D(4)(b) of the Pension Funds Act stipulates the following periods applicable to divorce orders:

1. Within **45 days** of the submission of the court order to the fund, the fund must request the non-member spouse to elect if the amount to be deducted must be paid directly to them or if it must be transferred to a fund on their behalf.
2. Within **120 days** of being requested to make an election, the non-member spouse must inform the fund of their election. If they elect that the amount must be paid to them directly, they must provide the fund with the details of how payment must be made. If they elect that the amount must be transferred to a fund on their behalf, they must provide the fund with the details of that pension fund.
3. If the non-member spouse makes an election, the fund must within **60 days** of being informed of how the amount must be dealt with, pay or transfer the amount.
4. If the non-member spouse does not make an election, the fund must within **30 days** of the expiry of the 120 day period, pay the amount directly to the non-member spouse.
5. If the fund cannot reasonably ascertain how the payment to the non-member spouse must be effected, it must retain the amount as well as the interest on the amount in the fund until details of how the payment must be effected is provided to the fund by the member, the non-member spouse or any other person.

The non-member spouse is only entitled to fund return (interest) on their benefit from the expiry of the 120 day period referred to in paragraph 2 above until date of payment.

#### Position once the Amendment Act comes into effect

Section 37D has been expanded to include a deduction in favour of a non-member spouse following a divorce order under Islamic law.

It further allows for the deductions provided for in section 37D(1)(d) to be made from either a member’s or deferred pensioner’s benefit or a member’s interest or minimum individual reserve, or the capital value of a pensioner’s pension after retirement.

This provision means that a fund may deduct from a pensioner’s or deferred pensioner’s benefit any amount awarded by the court to a non-member spouse, any amount in respect of maintenance or any employees’ tax due.

Section 37D(4)(c) has been amended to change the period from which the non-member spouse is entitled to interest on their benefit. Once the Amendment Act becomes effective, interest will be calculated from the date of the deduction, which is the date on which an election is made or, if no election is made within the 120 day period referred to in paragraph 1 above, the date on which that 120 day period expires.

#### Impact on FundsAtWork

FundsAtWork will make deductions to non-member spouses if there is a valid divorce order, both under the Divorce Act and under Islamic law.



The Rules of the FundsAtWork Umbrella Pension and Provident Funds do not provide for deferred pensions or annuities. The changes accordingly currently do not have any direct impact on FundsAtWork.

With regards to the calculation of fund return on the non-member spouse's portion of a divorce benefit, FundsAtWork will make the necessary system changes to give effect to the change.

Natasha Marhye and Hettie Joubert  
Legal Advisers  
Momentum Employee Benefits – FundsAtWork