

MARCH 2023: EDITION 2 of 2023

In case you missed it...

1. [February 2023: Budget summary 2023/2024 Tax Year](#)

DEDUCTIONS IN TERMS OF SECTION 37D (1) (B) (II) OF THE PENSION FUNDS ACT AND RELEVANT CASE LAW

1. What does Section 37D (1) (b) (ii) of the Pension Funds Act allow?

Section 37D (1) (b) (ii) of the Pension Funds Act (“the PF Act”) provides that deductions may be made from a member’s benefit as compensation to the employer in respect of any damage caused to the employer due to the member’s:

- Theft;
- Dishonesty;
- Fraud;
- Misconduct.

However, case law (Moodley v Local Transitional council of Scottburgh Umzinto North) has confirmed that the term “misconduct” must be interpreted to include an element of **dishonesty**.

Therefore the misconduct must relate to **wilful, reckless and intentional** conduct which would exclude **negligent misconduct**. For example, if an employee crashes the employer’s car due to negligent driving, the misconduct does not constitute dishonesty and the fund may therefore not deduct from the benefit.

2. The Anderson Case

This principle was reaffirmed in the case of Anderson Transport versus F Skosana and the Pension Funds Adjudicator (“the PFA”). Anderson Transport appealed to the Financial Services Tribunal (“the Tribunal”) for a reconsideration of a decision against it by the PFA.

The facts of the Anderson case were as follows:

- Mr Skosana, a long distance lorry driver had caused his truck to overturn on the N1 highway.
- Prior to the accident he had been driving on the wrong side of the road and was under the influence of alcohol at the time of the accident.
- Anderson Transport obtained a judgement against Mr Skosana in the Magistrates Court, who found him liable to repay Anderson Transport an amount of R400 000.
- The PFA found that his actions were not dishonest and therefore the requirements for the employer to deduct from his retirement benefit were not present.
- The PFA’s determination was supported by the Tribunal, on the grounds that:

“The accident was caused by Mr Skosana’s reckless and/or negligent driving. Reckless and/or negligent driving does not constitute misconduct as envisaged in Section 37 (1) (b) (ii) of the Act”.

3. What processes must be followed to effect a deduction in terms of Section 37D (1) (b) (ii)?

The Pension Funds Act provides that a deduction may be made where the member has admitted liability in writing to the employer or if judgement has been obtained against the member in any court, including a magistrate’s court.

3.1 Admission in Writing to the Employer

The admission of liability in writing must:

- Specify the Rand value of the compensation owed to the employer;
- Stipulate that the damage was caused due to the member’s theft, fraud, dishonesty or misconduct, with a brief description of such theft, fraud, dishonesty or misconduct;
- Be signed by the member.



3.2 Judgement by a Court

The Pension Funds Act refers to “judgement in any court” which implies that a deduction may be made if either a civil or a criminal court has delivered a judgement against the member and in favour of the employer’s claim. Previously, if the judgement had been made in a criminal court, the employer would only be entitled to compensation if the employer had obtained a compensation order from such court in terms of Section 300 of the Criminal Procedure Act, 1977.

However, the recent decision by the Tribunal in the case of FundsAtWork versus Ngobeni and the PFA, the Tribunal insisted that a deduction could only be made if the employer had opened a civil case against the member, since:

“A conviction (by a criminal court) is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted”.

4. Highveld Steel & Vanadium Corporation Ltd v Oosthuizen

The decision by the Supreme Court in Highveld Steel & Vanadium Corporation Ltd v Oosthuizen (“the Highveld Steel case”) in 2008 confirmed that a retirement fund may withhold payment of the member’s benefit, subject to certain conditions. The extract from the judgement quoted below confirms the fund’s right to withhold payment:

“To give effect to the manifest purpose of section 37D(1)(b) of the Pension Funds Act 24 of 1956, its wording must be interpreted purposively to include the power of a pension fund to withhold payment of a member’s pension benefits pending the determination or acknowledgment of such member’s liability for compensation in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member. A pension fund therefore has the discretion to withhold payment of the respondent’s pension benefit in those circumstances.”

In other words, given that it may take months if not years to obtain a court judgement in favour of the employer, in practice it is usually necessary for the fund to withhold payment of the benefit before the deduction can be effected. However, the benefit may only be withheld in the following circumstances:

- The rules of the fund must allow for the benefit to be withheld;
- There must be a benefit due from the fund;
- There must be an amount due by a member to his employer on the date of his withdrawal from the fund, or on which he ceases to be a member of the fund;
- The member must be in service with the employer and a member of the fund when the infringement is committed;
- The amount must be in respect of compensation resulting from any damage caused to the employer;
- The employer must have a prima facie case against the member;
- The damage must be due to theft, fraud, dishonesty or misconduct by the member;
- After a request by the employer to withhold payment of the benefit, the trustees of the fund must apply their minds to the circumstances of the case and must make an impartial, reasonable and lawful decision to withhold payment of the benefit;
- The court in the Highveld Steel case held that the employer must also open a civil case, since this indicated a serious intention by the employer to obtain compensation and not merely a wish to punish the employee by withholding payment of his or her benefit.

5. The Jeftha Case, the Audi Alterem Partem rule and Weighing Competing Interests

- 5.1 The decision by the High Court in the case of SA Metal Group (Pty) Ltd v Deon Jeftha in December 2018 (“the Jeftha case”) confirmed that the benefit may only be withheld if the trustees have observed the rule of natural justice known as the **audi alterem partem** rule.
- 5.2 The audi alterem partem rule in the context of Section 37D deductions means that the affected member must be made aware of the employer’s request to the fund to withhold payment of the benefit and must be given the chance to state his case and present his side of the story to the trustees.
- 5.3 The High Court in the Jeftha case also required that in taking a decision to withhold payment of the benefit, the trustees must weigh up the competing interest of the member, due to the financial prejudice withholding the benefit could



cause the member, versus the damage suffered by the employer.

5.4 After the High Court decision in the Jefftha case, the principles mentioned in 5.2 and 5.3 above were accepted by the PFA with the result that her office ruled against applications from funds and employers to withhold payment of benefits in circumstances where these principles had not been observed. If the employer applied to the Tribunal for a reconsideration of such a determination by the PFA, the application was generally unsuccessful. The Tribunal also held that the fund had to demonstrate that it had offered the member a chance to state his or her case and that it had taken into account financial prejudice to the member.

5.5 Further, recent cases before the Tribunal have supported the principle established in the Highveld Steel case that the employer must have opened a civil case against the member before the benefit may be withheld.

6. The Hansen case - if the trustees refuse to withhold payment of the benefit, does the employer have any recourse?

In a recent case, Hansen and Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund No 2 ("the Hansen case"), February 2023, the High Court confirmed the grounds an employer must satisfy to interdict a retirement fund from paying out the member's benefit.

These are as follows:

- The employer does not need to prove irreparable damage has been suffered and therefore the employer need not establish the absence of other satisfactory remedies;
- The law requires that the former employee must be given a chance to state his case. However, if the employee merely contradicts the employer's case without substantial evidence, or offers an unconvincing explanation, the matter should be left for the court to decide and in the meantime the benefit should be withheld in order to protect the employer's interest;

- The balance of convenience, which means weighing up the advantages and disadvantages to the employer and employee of granting the interdict, must be demonstrated to favour withholding payment of the benefit;
- The employer must demonstrate that its request to the retirement fund to withhold payment of the benefit has been unreasonably refused and/or that the employer was not granted an opportunity to be heard.

Conclusion:

The board of trustees should not lightly take a decision to withhold payment of a member's benefit or to effect a deduction. The trustees must apply their minds, balance competing interests and take all the factors mentioned above into consideration. The case law cited requires the employer to open a civil case and the employer can no longer rely on opening a criminal case and then obtaining a compensation order in terms of Section 300 of the Criminal Procedure Act.

However, the cost of opening a civil case may deter some employers from pursuing a request to the fund to withhold the retirement benefit, especially if the amount involved is relatively small. Nevertheless, the Hansen case provides some support to the employer, as it provides clarity on the requirements for the employer to interdict the fund if it believes the trustees' refusal to withhold payment of the benefit is unreasonable, and in particular relaxes the requirement that the employer must prove that it has suffered irreparable loss or damage.

Should you have any questions regarding the above, please contact your consultant to assist you.

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