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**LEGAL UPDATE 10/2010: DEDUCTIONS FROM PENSION BENEFIT – DAMAGES TO EMPLOYER**

**Legislation**

Section 37D(1)(b)(ii) of the Pension Funds Act, No. 24 of 1956, determines as follows:

“ (1) A registered fund may –

.....

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

.....

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in terms of which–

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate’s court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;”.

**Requirements**

In his determination of the matter of *DM Razlog v PLJ Pension Fund and Another* in 2002, the Pension Funds Adjudicator set out the following requirements that have to be met before a deduction in terms of section 37D(1)(b)(ii) shall be permissible:

- “ - an amount must be due by a member of a fund to his or her employer;
- the amount must be due at the date of retirement or on which the member ceases to be a member of the fund;
- the amount must be in respect of compensation payable;
- the compensation must be in respect of any damage caused to the employer;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must have furnished a written admission of liability to the employer in respect of the compensation in respect of the delictual damages caused to the employer; or

- alternatively, the employer ought to have obtained a judgment in a court in respect of the compensation.”

### **Misconduct**

In the case of *Moodley v Local Transitional Council of Scottburgh Umzinto North and Another* the High Court held that the words *theft, dishonesty and fraud* as referred to in section 37D(b)(ii) all describe wrongful and intentional conduct causing harm. The principle of restrictive application has to be applied in interpreting the meaning of 'misconduct'. This means that where words which have a limited or particular meaning are followed by a phrase of general application, the meaning of the said phrase is restricted to the generic meaning of the preceding words. 'Misconduct' as referred to in that section must therefore be interpreted as referring to wilful, reckless and intentional conduct, which would exclude negligent misconduct. Furthermore, the common denominator of the preceding words is dishonesty. Accordingly, only 'misconduct' that contains an element of dishonesty will qualify as one of the grounds upon which a fund may deduct an amount from the employee's benefit.

### **Admission of liability or judgement**

The member's written admission of liability or the judgment obtained against the member must relate to one of the four causes of action referred to in section 37D(1)(b)(ii): theft, dishonesty, fraud or misconduct.

In the matter of *Consol Ltd t/a Consol Glass v Momentum FundsAtWork Umbrella Provident Fund* the Pension Funds Adjudicator confirmed that *a written acknowledgement of debt should be clear and must amount to an unequivocal admission of guilt to the employer*. It must also be signed by the member concerned and should specifically allow for a deduction to be made in respect of a wrongdoing committed by the member against their employer.

The judgement must be a civil judgement resulting in an amount being payable by the member to the employer, or a compensatory order made by a criminal court in terms of section 300 of the Criminal Procedure Act No. 51 of 1977, awarding compensation to the member's employer for the financial loss suffered.

### **Other debt**

Section 37D(1)(b) makes it clear that only damages caused to the member's employer relating to one of the four causes of action are deductible from the member's benefit. It does not apply to any other debt.

The following are examples of contractual debts owed by a member to their employer that may not be deducted under section 37D(1)(b): car loans, personal loans, study loans, computer loans, over-paid salary, hospital expenses and funeral expenses.

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