

What constitutes 'misconduct' for purpose of section 37D of the Pension Funds Act?

In terms of section 37D(1)(b)(ii) of the Pension Funds Act, and subject to meeting certain other prescribed requirements, an employer may claim compensation for damages suffered due to the theft, dishonesty, fraud or misconduct of an employee by requesting a deduction from the fund benefit of the erring employee.

For purposes of section 37D(1)(b)(ii), damages caused to an employer due to an employee's *theft* usually refers to stealing anything that is the property of the employer or stealing from clients or co-workers. The use of corporate credit cards for unauthorized purchases and inflated/bogus reimbursement claims are examples of *fraud* in the workplace. Intentionally violating non-disclosure agreements and releasing confidential employer information for public use could be examples of *dishonesty*. For example, in the High Court case of *Gradwell v Bidpaper Plus (Pty) Ltd, Alexander Forbes Financial Services (Pty) Ltd and Bidcorp Group Pension & Provident Fund*, the employer submitted that the member, while being in its employ, had given confidential trade information to a competitor and entered into an agreement with a competitor with regard to pricing and terms and conditions of sale to its detriment. The court held that an employee, who passes confidential trade information to his employer's competitors, invariably acts in a clandestine and underhanded manner, and with full knowledge of the potential harm that his actions may cause the employer. The court held that it is difficult to conceive of circumstances where such conduct will not contain some element of dishonesty. In the High Court case of *South African Broadcasting Corporation SOC Limited v South African Broadcasting Corporation Pension Fund and Others*, the employer alleged that the member knowingly and intentionally accepted a payment that was on the face of it irregular and invalid, without disclosing same (which served to unjustly enrich him) and then appropriating it to himself, which caused the employer to suffer a loss. The court found that the employer had established a *prima facie* right of recovery within the meaning of section 37D(1)(b)(ii).

Damages caused to an employer due to the *misconduct* of an employee is however more tricky to establish and can result in difference of opinion between an employer and the board of the FundsAtWork Umbrella Fund when the employer requests the withholding and/or deduction of an erring employee's retirement benefit in terms of section 37D(1)(b)(ii) and the board refuses to accede to the request.

Misconduct is generally considered to be the unacceptable or inappropriate behaviour of an employee. Types of misconduct may differ and as our Labour Court jurisprudence shows, there is no complete list of the types of misconduct an employee can commit. Typical examples of misconduct (other than theft, dishonesty and fraud) could include physical assault on a co-worker or client, negligent or reckless conduct, failure to adhere to company policy and protocols, intentional damage to the employer's property, wilful endangering of the safety of others, intimidation, gross insubordination, unauthorised absenteeism and being under the influence of drugs or alcohol.

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Therefore, if one looks at the word “misconduct” in isolation, the meaning of the word is ambiguous in the sense that it is a word of general or wider import, used in connection with misdemeanours of both a serious and a less serious nature. It is understandable that it could easily create uncertainty and difference of opinion. The critical issue for funds and employers is what is contemplated by the term “misconduct” in section 37D? In this regard, the High Court brought clarity in 2000 as to the correct interpretation of the word misconduct in section 37D(1)(b)(ii) in *Moodley v Scottburgh/Umzinto North Local Transitional Council and Another*. The court confirmed that the word misconduct must be interpreted in light of the words *theft, dishonesty and fraud* that precede it and thus must be interpreted to include dishonest conduct, or conduct that at least contains an element of dishonesty. This reasoning was confirmed in various subsequent high court rulings, for example in *EH Charlton and 4 Others v the Tongaat-Hulett Pension Fund, Tongaat-Hulett Sugar Ltd and the Pension Funds Adjudicator*, where it was held that, for purposes of section 37D(1)(b)(ii), dishonest misconduct is required and it is not sufficient if the employee was merely negligent or even grossly negligent.

Accordingly, only intentional misconduct that contains an element of dishonesty will qualify as one of the grounds upon which the board of the FundsAtWork Umbrella Fund may deduct an amount from an erring employee’s retirement benefit.

When deciding whether an erring employee’s misconduct was negligent and thus not intentional for purposes of section 37D(1)(b)(ii), one has to determine if the erring employee’s conduct fell short of the standard of the reasonable person. The Labour Appeal Court held in the case of *Drs Dietrich, Voigt and MIA v Bennet CM N.O and Others*, that in the workplace context the “reasonable person” would be the reasonable employee with experience, skill and qualifications comparable to the erring employee. In this case, the erring employee was dismissed on charges of dishonest conduct and/or falsification of overtime claim forms. The erring employee alleged that his actions were not dishonest and intentional and he attributed it to pure human error. The Labour Appeal Court found that the erring employee did not act intentionally but acted negligently in his completion and submission of the overtime claim forms and that he clearly did not exercise the degree of care, which can reasonably be expected of an employee in his position of responsibility when claiming his overtime at the incorrect rate.

When deciding whether an erring employee’s conduct amounts to dishonest conduct as required by section 37D(1)(b)(ii), the FundsAtWork Umbrella Fund can refer to the various rulings of the Pension Funds Adjudicator, the Financial Services Tribunal and the High Court. A summary of the key rulings appear below, which contains several examples of what does not constitute dishonest misconduct for purposes of the section:

- **Unauthorised absence** - In *WM Sebola v Johnson Tiles (Pty) Ltd and Others*, the Adjudicator held that the unauthorised absence from duty of an employee did not constitute misconduct for purposes of a section 37D(1)(b)(ii) deduction as it did not contain an element of wilful dishonesty.
- **Failing to serve notice period** – In *KCD Motshepe v Bokamoso Retirement Fund and Akani Retirement Fund Administrators (Pty) Ltd*, the erring employee resigned without serving her prescribed notice period. The Adjudicator found that the member did indeed commit breach of contract by failing to serve her notice period but this did however not entitle the employer to make a deduction from the member’s retirement benefit in terms of section 37D(1)(b)(ii).
- **Breaching employer policy and procedures** - In *DF Jones v Corporate Selection Retirement Fund (Participating employer: Pallucci Home Depot (Pty) Limited) and Pallucci Home Depot (Pty) Limited*, the employee’s contract was terminated as a result of not following company procedures by using the store’s money for petty cash which resulted in a loss to the employer.

The Adjudicator found that the offence that the erring employee was found guilty of did not fall within any of the section 37D(1)(b)(ii) categories. Furthermore, even if it could be classified as misconduct, it was not the type of misconduct that had an element of dishonesty in it, but was rather of a negligent nature.

In *AM Ngobeni v Bokamoso Retirement Fund and Akani Retirement Fund Administrators (Pty) Ltd*, the Adjudicator ruled that the alleged loss that the employer suffered as a consequence of the member not following correct procedures in paying a death benefit to a deceased member's beneficiaries, did not meet the criteria for a section 37D(1)(b)(ii) deduction and was therefore unlawful.

In the High Court matter of *SA Metal Group (Pty) Ltd v D Jeftha and Others*, it was found that the alleged non-adherence to the employer's procurement policies and protocols did not per se constitute dishonest misconduct for purposes of the withholding of retirement benefits.

In the High Court case of *JD Meyer v Provincial Department of Health and Welfare and Others*, the employer alleged that the erring employee caused it damage by ordering scanners to a value that exceeded his financial signing mandate in terms of the employer's tender and quote procedures. The court found that the misconduct of the erring employee of exceeding his signing-off mandate, did not involve any dishonesty and thus did not warrant a deduction in terms of section 37D(1)(b)(ii).

- **Contractual breach and disputes** - In the ruling of the Financial Services Tribunal in *Oos Vrystaat Kaap Bedryf Limited v VP Nkhema and Others*, it was held that damages suffered as a result of a breach of contract by an employee is not based on theft, fraud or misconduct and thus does not warrant a section 37D(1)(b)(ii) deduction.

In *PM de Kock v Compass Group Southern Africa Pension Fund and Others*, the employer submitted that the loss of its stock resulted from an employer-employee contractual agreement, in terms of which the employee failed to meet the required managerial standard by failing or neglecting to properly manage, record or account for the stock. It submitted that the employee's actions of dishonestly concealing the loss prevented it from taking action to improve profitability and prevent further losses. The Adjudicator held that it was not the intention that section 37D(1)(b)(ii) must be extended to contractual disputes, including those of which the failure was concealed as submitted by the employer. If the legislature intended such an interpretation it would have clearly stated so.

In *MN Seme v Corporate Selection Retirement Fund: Participating Employer Davies Diagnostics (Pty) Ltd and Others*, the employer submitted that by accepting employment with another company, the erring employee violated its policies and procedures and thus breached his contract of employment. The Adjudicator found that although the member's conduct amounted to a breach of contract of employment it did not fall within the ambit of section 37D(1)(b)(ii) as it did not amount to theft, dishonesty, fraud or misconduct.

In the case of *A Pillay V RFS Umbrella Provident Fund and Others*, the erring employee used information obtained during his employment for his own benefit, despite his employment contract providing for a restraint of trade against using such information. The Adjudicator found that a deduction relating to a breach of contract is not permissible in terms of the categories of section 37D(1)(b)(ii).

- **Study loan** - In *Moletsane v Bokamoso Retirement Fund and Akani Retirement Fund Administrators (Pty) Ltd*, the employer submitted that the member owed it an amount relating to inter alia a study loan. The Adjudicator ruled that such deduction can only be made from an employee's remuneration and not from the employee's retirement benefit.

- **Advance payment** - In *KCD Motshepe v Bokamoso Retirement Fund and Akani Retirement Fund Administrators (Pty) Ltd*, the erring employee was granted an advance payment provided she remained employed for a period of one year. The Adjudicator found that the member did indeed commit breach of contract by failing to honour the conditions for the advance payment she received from the employer. This did however not entitle the employer to make a deduction from the member's retirement benefit in terms of section 37D(1)(b)(ii).

In summary

It is clear from the various rulings by the High Court, the Pension Funds Adjudicator and the Financial Services Tribunal, that the word 'misconduct' in section 37D(1)(b)(ii) must be interpreted to mean that for the FundsAtWork Umbrella Fund to be allowed to effect a deduction of a member's benefit, the conduct of the member must be considered to be dishonest misconduct. Conduct that does not amount to dishonesty or that relates to a breach in contract cannot fall within the meaning of section 37D(1)(b)(ii). An employer's recourse against the FundsAtWork Umbrella Fund in terms of section 37D(1)(b)(ii) is thus only available in limited cases.