

## Legal update 8 of 2022: Deduction in favour of an employer

### Introduction

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This update focuses on whether an amount due to an employer by the employee following the employee's negligent conduct may be deducted from his retirement benefit in terms of section 37D of the Pension Funds Act. Below is a summary and more details on the case.

### Summary

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#### Case: Anderson Transport (Pty) Ltd v PFA and Others – Financial Services Tribunal (FST)

- **The finding:** The Financial Services Tribunal (the FST) found that the employee's conduct was negligent but not intentional and dishonest. It therefore does not give rise to a permissible deduction under section 37D of the Pension Funds Act (the Act).
- **Practical application:** The board of trustees of a pension or provident fund must use its discretion equitably and with care, while balancing the interests of all parties in permitting a section 37D deduction.

The trustees must ensure that deductions are only made for conduct which is intentional and dishonest.

**Note:** Deductions in favour of an employer are not permitted in retirement funds where there is no participating employer, such as a retirement annuity or preservation fund.

### More detail about the case

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#### Case: Anderson Transport (Pty) Ltd v PFA and Others – Financial Services Tribunal (FST)

- **The facts:** Mr Skosana, an employee of Anderson Transport (Pty) Ltd, was found guilty in a disciplinary hearing for driving while under the influence of alcohol, lying about the fact that he was under the influence (which constitutes dishonesty) and transgressing the company's policy regarding the driving of a vehicle whilst under the influence of alcohol. His employer claimed damages for this gross misconduct to be deducted by the fund under section 37D(1)(b)(ii) of

the Act, which permits deductions from a member's retirement benefit for damages caused to the employer due to the theft, fraud or misconduct of the member.

Following the dismissal of the employer's application by the Pension Funds Adjudicator, the employer applied to the FST for the matter to be reconsidered.

- **The finding:** The FST stated that as a general principle of law, pension benefits are not reducible, transferable or executable, save for certain exceptions found in section 37D of the Act. It referred to the following cases relied on by the fund:

- o *Moodley v Local Transitional Council of Scottburgh Umzinto North and Another* 2009 9 BPLR 945 (D) where the High Court held that 'misconduct' in section 37D(1)(b)(ii) must be interpreted to include '*dishonest misconduct*' that at least contains an '*element of dishonesty*';
- o *EH Carlton and 4 Others v Tongaat-Hullett Pension Fund, Tongaat-Hullett Sugar Ltd and the Pension Funds Adjudicator* where it was held that for purposes of this section, mere negligence or even gross negligence is not sufficient, and
- o *DF Jones v Corporate Selectin Retirement Fund & Pallucci Home Depot (Pty) Ltd (PFA/WE/5721/05/CN)* where it was held that the breach of an employer's policies and

procedures do not give rise to the deduction under this section. Even if such a breach can be classified as misconduct, the breach does not involve an element of dishonesty.

The FST held that in deciding whether Mr Skosana's conduct was negligent and not intentional, for purposes of section 37D(1)(b)(ii), it should be considered whether the conduct falls short of that of a reasonable person. It found that Mr Skosana's misconduct was only of a negligent nature and did not qualify as a deduction under section 37D(1)(b)(ii).

The application was dismissed.

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