



The Verdict

November 2015

“It is only when an employer is in possession of such a (compensatory) order, deemed to be a civil judgment, that a fund may deduct from a member’s benefit and pay to such employer in terms of section 37D of the Act.”

MA Lukhaimane
Pension Funds
Adjudicator

CRIMINAL CONVICTION ALONE NOT ENOUGH TO MAKE A DEDUCTION FROM A MEMBER’S BENEFIT – COMPENSATORY ORDER REQUIRED

In a recent Pension Funds Adjudicator determination, the Adjudicator confirmed that conviction in a criminal court without a compensatory order is insufficient to make a deduction from a member’s benefit where the employer has suffered a loss due to the member’s theft, dishonesty, fraud or misconduct.

In this case, *S Ndumiso v Auto Workers Provident Fund and others (2015)*, the member was convicted of theft and granted a suspended sentence coupled with three years community service.

The member requested payment of his withdrawal benefit, but was told that the employer had claimed his pension benefit. He complained to the Adjudicator.

The Adjudicator had to determine whether or not a criminal conviction and sentence in the Magistrate’s Court allows the fund to deduct and pay the complainant’s benefit to the employer in lieu of the money that was stolen.

The Adjudicator confirmed that payment of any benefit that is due to a member of a fund is regulated by the rules of the fund. In this case, the fund rules authorized the fund to make deductions from a member’s benefit in terms of section 37D of the Pension Funds Act.

Section 37D(1)(b) of the Act states that a registered fund may deduct any amount due by a member to his employer, on termination of employment, in respect of compensation in respect of any damage caused to the employer by reason of the member’s theft, dishonesty, fraud or misconduct. It is a requirement, before the deduction can be made, that the member has in writing admitted liability to the employer or judgment has been obtained against the member in any court, including a magistrate’s court.

The judgment referred to above must be:

- a) a civil judgment resulting in an amount being payable by the member to the employer; or
- b) 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.

In this case, the employer did not apply for a compensatory order in terms of section 300 of the Criminal Procedure Act. This section provides relief to a party who has suffered a loss and provides that they be compensated for such loss.

The Adjudicator held that the fund cannot deduct the damages suffered by the employer from the complainant's benefit. The fund was ordered to pay the complainant his full withdrawal benefit.

Lessons to be learnt from this case:

- The type of judgement that is required before a section 37D deduction may be made is either:
 1. a civil judgment resulting in an amount being payable by the member to the employer; or
 2. a compensatory order made by a criminal court in terms of section 300 of the Criminal Procedure Act No. 51 of 1977.
- Conviction in a criminal court without a compensatory order is insufficient.

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