Financial Services Tribunal

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA24/2025

In a matter between:

OVERNIGHT LOGISTICS (PTY) LTD	**APPLICANT**

and

SIMON MAYIMELA	**FIRST RESPONDENT**
THE PENSION FUNDS ADJUDICATOR	**SECOND RESPONDENT**
M.A. LUKHAIMANE N.O.	**THIRD RESPONDENT**
10X INVESTMENTS (PTY) LTD	**FOURTH RESPONDENT**

TRIBUNAL PANEL: Adv G Goedhart SC, Adv W Ndinisa & Ms P Maseko

Appearance for Applicant:	Mr G Moodley
Date of hearing:	8 September 2025
Date of Decision:	20 October 2025

Summary: Application for Reconsideration in terms of Section 230 (1) of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") of the decision of the Second Respondent dismissing the Applicant's request for the First

Respondent's withdrawal benefit to be withheld in terms of section 37D(1)(b)(ii)(bb) of the Pension Funds Act 24 of 1956.

DECISION

Introduction

1. The Applicant seeks a reconsideration of a decision of the Second Respondent dated 28 March 2025, and the further reasons dated 8 May 2025.

2. The principal issue is whether the Second Respondent erred in finding that section 37D(1)(b)(ii)(bb) of the Pension Funds Act 24 of 1956 (***the Act***) required an element of dishonesty in order for the Fund to accede to the Applicant's request to withhold a portion of the first respondent's withdrawal benefit.

3. The First Respondent is Mr Simon Mayimela an erstwhile employee of the Applicant.

4. The Second Respondent is the Pension Funds Adjudicator (***the Adjudicator***). The Third Respondent is cited *nomino officio* in her capacity as the Adjudicator.

5. The Fourth Respondent is cited as the "care of" entity of the 10X Umbrella Provident Fund (***the Fund***). Although the Fund is not cited, the Adjudicator communicated with the Fund and obtained the Fund's responses to the Applicant's complaint.

Background

6. The First Respondent commenced his employment with the Applicant from 17 July 2010.

7. On/or about 12 February 2023, the First Respondent, whilst driving a forklift, collided with a shuttle and damaged a sensor at the back of the shuttle. The damage caused

amounted to R95 418.38. There were no other damages to property or persons arising from the collision.

8. On 23 November 2023, the First Respondent was notified that he would be charged with two offences relating to gross dereliction of duty and gross negligence in that he failed to keep a proper look-out whilst driving the forklift, and that he drove the forklift with the forks raised. More particularly, the First Respondent had committed a Category B transgression of the Applicant's disciplinary code and procedure in that he had failed to carry out routine instructions and showed acts of carelessness (i.e neglect of duties) and a Category C transgression of the Applicant's disciplinary code and procedure in that he did not obey routine instructions and caused major but unintentional damage to property.[1]

9. A disciplinary inquiry was held on 27 November 2023. The First Respondent was found guilty on both charges and was summarily dismissed.

10. The First Respondent was a member of the Fund from 1 April 2018 until about 30 November 2023 when his service with the Applicant was terminated. As at 21 November 2024, the First Respondent had a fund credit of R259 889.09 representing contributions from April 2018 to December 2023.

11. The Applicant obtained default judgment against the First Respondent on 20 September 2024 arising from the incident which gave rise to his dismissal for an amount of R95 418.38 accruing interest at a rate of 10.75% from 12 February 2023.

12. The Applicant's attorneys addressed a letter to the Fund attaching the default judgment on 6 November 2024 and sought payment in favour of the Applicant of the amount of R112 392.39 from the First Respondent's withdrawal benefit.

13. On 19 November 2024, the Fund declined the Applicant's claim on the basis that the misconduct contemplated by section 37D(1)(b) of the Act required an element

[1] Record, part B, p98, paras 5.1.2.3 and 5.1.2.4.

of dishonesty with reference to the judgment in *Moodley v Scottburgh/Umzinto North Local Transitional Council 2000 (4) SA 524 (D) (**Moodley**)*.

14. The Applicant lodged a complaint with the Adjudicator.

15. The Adjudicator obtained and considered the responses to the complaint from the First Respondent, the Applicant and the Fund. In the walk-in consultation held with the First Respondent on 16 January 2025, he submitted that he did not cause the damage intentionally and that it was a mistake.

16. On 28 March 2025, the Adjudicator held that whilst the First Respondent is liable for payment of damages he caused to the Applicant because of his gross negligence, the Applicant is not entitled to claim the First Respondent's pension benefit as it is protected by section 37A, and the damage caused to the applicant was not because of theft, dishonesty, fraud or misconduct with an element of dishonesty as contemplated by section 37D(1)(b)(ii)(bb).

17. Consequently, the Applicant's request for the Fund to withhold a portion of the First Respondent's withdrawal benefit could not be upheld and was dismissed. The Fund was ordered to pay the First Respondent his withdrawal benefit and to provide the First Respondent with a breakdown of the withdrawal benefit paid within certain specified time periods.

The relevant provisions of section 37 of the Act

18. Pension benefits are protected in section 37A, against any deduction or attachment in execution of judgment except in the limited circumstances provided for in section 37D. Section 37D(1)(b)(ii) allows a fund to deduct compensation for the employer from a pension benefit in respect of damage caused to the employer by reason of theft, fraud, dishonesty or misconduct.

19. Section 37A provides:

> "***37A. Pension benefits not reducible, transferable or executable***

(1) Save to the extent permitted by this Act, the Income Tax Act, the Tax Administration Act, 2011 (Act No. 28 of 2011) and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof…"

20. Section 37D(1)(b)(ii)(bb) stipulates:

"*(1) A registered fund may—*

(a) …

(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—

(i) …

(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 respect of which—

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

Grounds for reconsideration

21. The Applicant submits that he Adjudicator's decision was flawed insofar as there was a determination that misconduct must include an element of dishonesty. On a proper interpretation of section 37D(b)(ii)(bb), the section already mentioned dishonesty, and it would be tautologous to have the element repeated. On the one hand, dishonesty has a subjective element of intent whereas misconduct has an objective element of negligence. Misconduct therefore does not require dishonesty as an element. The Adjudicator has thus misinterpreted the relevant section.

22. The Applicant submitted that a more accurate reflection of the legal position was to be found in *Metal Industries Benefit Fund Administrator (Pty) Ltd v Engineering and Related Services Staff Pension Fund and Another [2019] 3 BPLR 767 PFA* and that this decision by the Adjudicator constituted legal precedent for an instance where misconduct, even without explicit dishonesty, lead to a ruling in favour of the employer.

23. The First Respondent had acted recklessly and failed to exercise proper care in a volatile production site warehouse which led to the Applicant suffering pure economic loss. The First Respondent's conduct constituted wilful misconduct, and that wilful misconduct involves deliberate and intentional wrongdoing.

24. The video evidence presented at the disciplinary inquiry contradicted the First Respondent's version of events, such that it clearly demonstrated an intentional dishonesty on his part.

25. Further, the First Respondent was "*intentionally dishonest in that he failed to admit that his gross negligence caused the accident*" and that he knowingly denied responsibility during the disciplinary inquiry despite the existence of video evidence demonstrating a violation of the relevant safety protocols. The Applicant's submission is that the dishonesty (the failure to admit responsibility) further compounded the seriousness of the First Respondent's misconduct.

26. The Adjudicator failed to take into account the case of *South African Broadcasting Corporation SOC Ltd v South African Broadcast Corporation Pension Fund and Others 2019 (4) SA 608 (GJ) [2019] 2 All SA 512 (GJ) (**SABC**)*[2] in which, so it was submitted, the court held that the relevant section permitted the deduction sought by the Applicant in the present case.

27. The Adjudicator's interpretation is leading to "absurd results" and that on a proper application of the law relating to interpretation of statutes,[3] misconduct constitutes a stand-alone ground.

28. The Applicant further submitted that it had obtained default judgment against the First Respondent and that was sufficient as contemplated by section 37D(1)(b)(ii)(bb). The fact that it had obtained default judgment satisfied the statutory requirement for deduction arising from misconduct as contemplated by the section.

Analysis

29. At issue is whether the Adjudicator correctly applied the prevailing law to the facts. The crux of the Applicant's submissions is that section 37D(1)(b)(ii)(bb) does not require dishonesty as an element of misconduct. Further, that the judgment of

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[2] Also at [2019] 2 All SA 512 (GJ).

[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

Moodley in which the court found that misconduct contemplated by section 37D must have an element of dishonesty was incorrectly decided, and that the Fund and the Adjudicator erred in relying on this judgment.

30. As a fall-back position, the Applicant's submission was that the First Respondent's denial of responsibility in the plea to the two charges against in the face of clear video evidence amounted to dishonesty. No authority was provided for this proposition. The Tribunal finds that the submission is without merit.

31. Thus, the question remains whether, in circumstances where the First Respondent was found guilty of gross negligence and gross dereliction of duty, which contained no element of dishonesty, the decision by the Adjudicator upholding the Fund's refusal to pay the withdrawal benefit to the Applicant was correct.

32. In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA (1) (SCA), the employer had instituted disciplinary proceedings against the employee for bribery, fraud, theft and other transgressions involving dishonesty. The employee had pleaded guilty to some of the charges and at the conclusion of the disciplinary proceedings he was dismissed. He sought to withdraw his pension benefits shortly thereafter, and the pension fund resolved not to pay the benefits due to the employee pending the final determination of the action which the employer intended to institute for the recovery of its damages. The employee sought an order compelling the fund to pay out his pension benefits and the employer applied to intervene in the application, initially seeking an interdict restraining the employee from withdrawing the benefits. The court *a quo* refused the intervention application and granted the employee's application. Having concluded that the intervention application should have been granted, the Supreme Court of Appeal held that while section 37D(1)(b)(ii) only expressly refers to the deduction of pension benefits *after* there has been an admission of liability or a judgment has been obtained, it must (in view of its purpose — which is to protect an employer's right to recovery of money misappropriated from it) be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the

determination or acknowledgement of such member's liability for compensation for damages caused to the employer by theft, dishonesty fraud or misconduct, and that the pension fund had a discretion to withhold such payment. On the facts, there was a glaring absence of any serious challenge to the detailed allegations of dishonesty and the discretion was properly exercised. The question of whether the misconduct contemplated in the section contemplated an element of dishonesty was not directly considered or decided, as the employee's dishonesty was not materially disputed.

33. In *SABC,*[4] the applicant had instituted interdictory proceedings against Mr Motsoeneng, its erstwhile employee, following an unlawful acceptance and retention of a success fee. The court found that the applicant had established a *prima face* case that Mr Motsoeneng was liable to it in light of the allegations of dishonesty against him. The conduct of Mr Motsoeneng also involved dishonesty which the court found had been *prima facie* established. This judgment therefore is not support for the Applicant's proposition because the question as to whether misconduct requires an element of dishonesty was not directly determined.

34. In *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund 2007 (1) SA 142 (N),* Pillay J expressed doubt as to the correctness of the *Moodley* decision, but he did not have to directly decide the issue as he found, in an application for an interim interdict by the employer, that the fourth respondent's conduct had facilitated fraud by the second, third and fifth respondents such that his conduct did reveal an element of dishonesty.

35. Despite the *obiter* doubt expressed in *Msunduzi,* the requirement that the misconduct contemplated in section 37D(1)(b)(ii)(bb) must have an element of dishonesty as set out in *Moodley* has been consistently applied in our courts. See *SA Metal Group (Pty) Ltd v Deon Jeftha [2020] 1 BPLR 20 (WCC)* [5] citing *Meyer v Provincial Department of Health and Welfare and other*s (9092/05) [2006] ZAGPHC

[4] See para 26 and fn 2 above.

[5] *SA Metal Group (Pty) Ltd v Jeftha and others* [2020] 1 BPLR 20 (WCC); [2020] JOL 46715 (WCC) at paras 69-71.

(27 January 2006)[6] and *Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom [2012] JOL 29400 (FB).*[7]

36. In *Metal Industries Benefit Fund Administrator (Pty) Ltd v Engineering and Related Services Staff Pension Fund and Another [2019] 3 BPLR 767 PFA*, the case upon which the Applicant relies, the member had amended the bank account details and was unable to provide an explanation for her conduct. The Adjudicator found that this conduct was wilful and not an incidence of mere negligence.

37. In *Royal Bafokeng Platinum Limited and others v Pension Funds Adjudicator and others PFA 81/2020* this Tribunal held that section 37D(1)(b)(ii) is exclusively reserved for the employer who can demonstrate that a dishonourable workplace transgression has taken place.[8]

38. The First Respondent was found guilty of having caused unintentional damage to property.[9]

39. On the facts, the conduct of which the First Respondent was found guilty does not meet the threshold contemplated by 37D(1)(b)(ii)(bb). The default judgment obtained in September 2024 does not change the position.[10]

40. The Tribunal finds that there is no reason to interfere with the Adjudicator's decision.

WHEREFORE the following order is made:

1. The Applicant's reconsideration application is dismissed.

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[6] *Meyer v Provincial Department of Health and Welfare and other*s (9092/05) [2006] ZAGPHC (27 January 2006); [2007] 1 BPLR 108 (T); 27 ILJ 2055 (T) at para 42.
[7] At paras 24-25.
[8] See also *Bauermeister v Bokamoso Retirement Fund and another* [2024] JOL 65275 (PFA) at para 5.15.
[9] See paragraph 8 above.
[10] See *Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom* [2012] JOL 29400 (FB) at para 24.

SIGNED on behalf of the Tribunal on this 20th day of **OCTOBER 2025**.

Adv G Goedhart SC (Chair)

Assisted by:

Ms P Maseko

Adv W Ndinisa