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Contracts of employment

When do they come into being ?

by P.A.K. le Roux

When does a contract of employment come into existence? In this contribution we discuss two interesting decisions dealing with this issue.

The decision in **Southgate v Blue IQ Investment Holdings** [2012] 8 BLLR 824 (LC) is probably the most interesting of the two. The applicant in this matter had initially been employed by Blue IQ Investments Holdings in terms of a fixed term contract that commenced in January 2007. It appears that shortly after the commencement of this contract the parties negotiated and entered into a second fixed term contract which replaced the first contract. It was agreed that this second contract would run from 1 May 2007 until 14 February 2008.

Prior to the expiry of the second fixed term contract the employee and the CEO of Blue IQ again entered into negotiations with the aim of entering into a third fixed term contract. It was envisaged that this would commence from a date prior to the expiry of the second contract and would run for a period of three years. The negotiations had reached the stage where the employer's legal advisor had been requested to draft a formal contract of employment. However it also appears that the precise duties of the applicant, in the form of a "job profile", may not have been finalised. Prior to the written agreement being finalised and signed the CEO was suspended. The new CEO and the board of the employer refused to recognise the validity of the contract allegedly entered into between the applicant and the old CEO.

The applicant argued that a new contract of employment had come into existence and that the refusal of the employer to abide by it constituted a breach of contract. He referred a dispute to the Labour Court.

The Court therefore had to decide whether a valid contract of employment had come into existence. The employer argued that agreement

In this issue..

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"Provided the parties have reached agreement on all essential elements of a contract of employment and intend that the contract to commence and be implemented prior to and without agreement having been reached on these subordinate matters the contract will be enforceable on those terms which have been agreed."

Wallis, **Labour and Employment Law** at 2-21

had not been reached on a material term of the contract of employment, namely the employee's key performance indicators and his job description. No contract of employment had therefore come into existence.

The Court considered whether it was a requirement for validity that the contract of employment should have been reduced to writing. The general legal principle is that no legal formalities (including that the contract must be in writing) need be met prior to a contract of employment coming into effect. Oral agreements are just as binding as written contracts. However, the Court accepted that the negotiating parties can agree "up front" that no contract will be binding until such time as it has been reduced to writing and signed by the parties. Nevertheless, in this case there was no evidence to show that the parties had agreed that the agreement had to be reduced to writing as a requirement for validity.

The main issue to be determined by the Court was therefore whether an oral agreement had in fact been entered into. The Court accepted that a contract comes into existence if the parties have reached agreement on the essentials of the contract. It is not necessary that the parties have agreed on every single detail that would apply to the relationship. It relied in the main on the following excerpt from Wallis **Labour and Employment Law** at 2-21 –

> *"Although the actual negotiations between prospective employer and prospective employee may, as we have seen, be extremely limited, they are nonetheless critical to the question whether any contract at all comes into existence. The terms offered by the employer and accepted by the employee must be sufficient to encompass the essentials of a contract of employment. It is necessary in a contract of employment, like any other contract, that agreement should be reached on all material terms and that the agreement should be sufficiently clear to be enforceable.*
>
> *It is not necessary that there be agreement on every single detail concerning the conditions of employment. A contract may be concluded on the basis that the parties will subsequently enter into discussions and agree upon subordinate terms. It has been held that this requires the parties to enter into discussions on the outstanding matters and make proposals which are neither unreasonable nor inconsistent with that which has already been agreed. Provided the parties have reached agreement on all essential elements of a contract of employment and intend that the contract to commence and be implemented prior to and without agreement having been reached on these subordinate matters the contract will be enforceable on those terms which have been agreed. In that case the contract can stand without agreement having been reached on the subordinate matters. Where, however, the parties have only reached agreement in principle and intend that there be agreement on other terms for the agreement to be complete there is no binding contract. An agreement to reach agreement on these matters at a future stage will be unenforceable."*

The Court accepted that there had been agreement on key performance areas and a job profile but came to the conclusion that, even if this was not the case, this issue was not a material term of the contract. The evidence had shown that the applicant and the CEO had agreed to enter into a contract and that the applicant would be employed in a specified capacity. It had also been agreed that the contract would be for a three

year period and that the applicant would be employed on the same salary level as that agreed to in the second contract. The Court was of the view that even if the employee and the CEO had still been in the process of finalising the key performance indicators this did not prevent the contract of employment from coming into existence. The Court also pointed out that there was authority to the effect that a contract of employment could still come into effect even if the parties had not agreed on the remuneration to be paid, provided that the parties had intended that the employee would be paid remuneration. In these circumstances the employee would be entitled to a reasonable wage.

The employer also relied on the fact that the second contract of employment contained a non-variation clause. This provided that no agreement to amend the contract would be valid unless it was reduced to writing. The Court rejected this argument the basis that the contract that was the subject of the dispute had not been an amendment to the second contract but rather a completely new contract.

In **City of Tshwane Metropolitan Municipality v SA Local Government Bargaining Council & Others** (2012) 33 ILJ 191 (LC) two employees who worked in the employer's community safety department had resigned in order to immigrate to New Zealand. Less than four weeks later they sent an email to their previous employer in which they asked whether their resignations could be withdrawn and reversed. A series of emails between various members of management then ensued. These indicated that it had been decided that the two employees could be re-employed – this on the basis that no monies arising from their resignation had been paid to them and on the basis that they would be regarded as being on unpaid leave for the period from the date of their resignation until the date that they resumed their duties.

A few days after the two employees reported for duty a senior manager indicated that he had not authorised the re-employment of the employees and that he was of the view that the re-employment process was irregular. The employees were informed that it was not possible to reverse their resignations and to re-appoint them without following the selection, placement and recruitment policy. They were asked to vacate the premises.

They claimed that they had been unfairly dismissed and referred an unfair dismissal dispute to the relevant bargaining council. The employer argued at the arbitration that they had not been employees. The arbitrator decided that they had been employees. The employer took the award on review.

The Labour Court agreed with the approach adopted by the arbitrator. It rejected the argument that a formal written contract had to have been entered into. It came to the conclusion that the decision that the two employees could be re-employed had been communicated to them and that they had therefore become employees again. Interestingly, and importantly, the Court also accepted the view expressed in the decision in **Discovery Health Ltd v CCMA & Others** (2008) 29 ILJ 1480 (LC) that a person could fall within the definition of an employee as contained in the Labour Relations Act, 66 of 1995 even if no contract of employment (whether oral or otherwise) had been entered into. ■

PAK le Roux

Discipline and inconsistent penalties

The requirement that an employer must act consistently when applying discipline has been a controversial aspect of our law relating to unfair dismissal. This issue has been discussed in several contributions to **CLL** in recent years – see especially CLL 18.4 and 19.6

It is apparent from the decisions that the requirement of consistency has not always been applied with the same degree of rigour. Some decisions have applied the requirement strictly, others less strictly. In this contribution we discuss two recent decisions where a less strict approach was adopted.

In **Comed Health CC v National Bargaining Council for the Chemical Industry & Others** (2012) 33 ILJ 623 (LC) the facts were that several employees were subjected to disciplinary proceedings

on the basis that they had committed serious acts of misconduct during the course of a strike. They were found guilty of these offences. However, in some cases the employees were dismissed and in other cases they were given final written warnings.

The dismissed employees challenged the fairness of their dismissals. The commissioner found that the dismissals were unfair. This was based on a finding that the evidence established that other employees who were identified as being guilty of misconduct had not been charged with disciplinary offences. In addition, and as indicated above, differing disciplinary sanctions had been imposed for employees committing the same offences.

The employer took this decision on review to the Labour Court. The Court summarised the applicable legal principles as follows –

> *"[8] As stated previously by this court the parity rule does not take away the right of the employer to impose different sanctions on employees who were involved in the same act of misconduct. The issue when faced with the complaint that the employer has applied discipline inconsistently is to consider the fairness of such inconsistent application of discipline. In other words, the differential sanctions do not automatically lead to the conclusion that the dismissal was unfair. The fairness of the dismissal has to be determined on the basis of whether the employer, in imposing differential sanctions, acted unfairly. In assessing the fairness of a dismissal in a case involving the imposition of differential sanctions, the commissioner has to consider whether there is an objective and fair reason for imposing different sanctions for misconduct arising from the same offence.*
>
> *[9] The objective of the parity principle as formulated by authorities is to ensure that fairness prevails in imposing differentiated sanctions on employees who have participated in and/or have been found guilty of the same or similar offences. Thus the gravity of the offence, personal circumstances and the employment history of each employee play an important part in balancing the considerations of fairness to both the employer and employees when determining whether it was fair to differentiate in imposing sanctions on employees who may have been accused of the same offences.*
>
> *[10] It is trite that the employee who seeks to rely on the parity principle as an aspect of challenging the fairness of his or her dismissal has the duty to put sufficient information before the employer to afford it (the employer) the opportunity to respond effectively to the allegation that it applied discipline in an inconsistent manner. One of the essential pieces of information which the employee who alleges inconsistency has to put forward concerns the details of the employees who he or she alleges have received preferential treatment in relation to the discipline that the employer may have meted out."*

Whilst the above formulation is a fairly standard formulation of the relevant principles, what is of interest is the following –

- The Court agreed with the contention raised by the employer's legal representative that the requirement of consistency must be applied "with caution".

- The Court also appears to have quoted with approval a passage from the decision of the Labour Appeal Court in **Chemical Energy Paper Printing Wood & Allied Workers Union v National Bargaining Council for the Chemical Industry & Others** (2010) 31 ILJ 2836 (LAC) where it was stated that –

"*Hence, where a number of employees are dismissed consequent upon collective wrongful conduct, a wrong decision by the employer resulting in an acquittal of an employee who did commit the wrong can only be unfair if it is a result of some discriminatory management policy"*

The decision in **Mphigalale v Safety & Security Sectoral Bargaining Council & Others** (2012) 33 ILJ 1464 (LC) is perhaps even more far-reaching. The employee in this matter, an inspector in the SA Police Service, had been dismissed for corruption in accepting

R500 from an illegal immigrant. He challenged the fairness of his dismissal .The arbitrator found that the dismissal had been fair. The employee sought to review the award. One of the grounds on which he relied was that the arbitrator had erred in not making a finding that the dismissal was unfair on the ground that the employer had applied discipline inconsistently.

In two previous cases involving corruption, the employer had imposed a final written warning. No evidence had been tendered at the arbitration hearing which would have distinguished this case from the cases where a final written warning had been imposed. In addition, no evidence was led to show that the employer had sought to "reinstate" the disciplinary rule prohibiting corruption and to indicate to employees that dismissal was the normal sanction. The commissioner concluded that the error of the chairperson in imposing a sanction short of dismissal in previous instances of corruption did not justify the reinstatement of the employee and that there was no evidence that the third respondent had habitually or frequently condoned such misconduct in the past. He took into account that the employer would not be able to trust the employee to perform his duties without constant supervision as well as efforts to stamp out corruption amongst its employees.

The Court rejected the employee's contention. It accepted the general principle that like cases should be dealt with alike. But it also stated that an employer is not required to repeat a decision made in error or one which is patently wrong. This was especially so given the nature of the misconduct committed in this matter. Corruption by a police officer, employed in a position of trust and with a duty to perform his or her functions in the interests of society and in accordance with the fundamental values of the Constitution was, in the view of the Court a material factor to be considered in determining the appropriateness of the sanction imposed. The Court found that, given the serious misconduct committed by the employee, his position as a police officer and the impact of the misconduct on society, the arbitrator's finding that dismissal was a fair sanction was a reasonable one.

> *"(24) ...Given the nature of the serious misconduct committed, his position as a policeman and the impact of the misconduct on society, I am satisfied that the finding of the commissioner that dismissal was a fair sanction was a reasonable conclusion made with regard to and based on the evidence before him. Dismissal amounted to a 'sensible operational response to risk management' given that the misconduct is 'completely indefensible on any ground' (as per Toyota SA Motors (Pty) Ltd v Radebe & others), more so when perpetrated by an employee from whom an employer is entitled to expect trust and honesty in the performance of its functions.*
>
> *[25] This court, in numerous previous decisions, has viewed dishonesty in a serious light and has come to the conclusion in most instances that it results in a breakdown of the trust relationship between the parties. I am accordingly satisfied that the decision of the commissioner that the dismissal of the applicant was fair, in spite of the existence of a previous inconsistent sanction imposed on two policemen previously for the same misconduct and mitigating factors, was reasonable. It follows, therefore, given the nature of the misconduct committed by the applicant that the SAPS 'cannot be expected to continue repeating a wrong decision in obeisance to a principle of consistency', even in spite of there being no evidence of notice by the employer to its employees that employees who were found guilty of corruption would henceforth face dismissal. This is particularly so given the criminal nature of the misconduct, the fact that it was committed by a person employed in the trusted office of policeman, as a result of the severe impact that corruption has upon society and the importance of an appropriate operational response when imposing an appropriate sanction in the current circumstances. Objectively, there exists little need to remind those officials employed in positions of trust and responsibility in society that fundamentally dishonest practices may result in dismissal. This must logically follow from employment in such responsible a position. Were this court to find that it was incumbent upon the*

commissioner to have imposed a lesser sanction only due to two previous incorrect decisions (even when other employees may have been dismissed for corruption) and simply because no notice to employees had been given by the employer that in future corruption will lead to dismissal, it would suggest that employees need to be reminded of the very core values of honesty and integrity so fundamental to the performance of their functions. I am satisfied that such a conclusion would be unwarranted and would only serve to minimize the seriousness and effect of the scourge of corruption currently faced by our society."

PAK le Roux

New Labour Court Practice Manual

A new Practice Manual will be issued in the near future by the Judge President of the Labour Court. Although many of its provisions are similar to the current practice directive (see the **Industrial Law Journal** (2010) 31 2301) there are some important changes that bear mentioning, especially those which are aimed at ensuring the expeditious finalisation of disputes. These will dealt with in this contribution.

Referrals in terms of Rule 6

Case management

The Practice Manual envisages the introduction of a case management system for certain referrals in terms of Rule 6 of the Rules of the Labour Court (ie matters that will be determined through trial procedures).

This applies in cases which deal with the dismissal of ten or more employees and if the remedy sought by them is reinstatement.

In this case the referring party must, simultaneously with the filing of the Statement of Case, deliver a letter to the Registrar of the Labour Court which is marked for the attention of the Judge President in which certain details are provided. These are –

- The names of the parties to the trial and the case number;
- The nature of the dispute; and
- An estimation of the probable duration of the trial.

The Judge President may (but is not required) to appoint a Judge to "undertake the case management of the file in order to ensure an expeditious hearing". If a Judge is appointed, the parties will be informed of this fact. All interlocutory applications will, as far as is possible, be heard by the Judge appointed to case manage the file and any party to the matter may apply to the Judge for directions as to how the case should be conducted. Matters that have been designated for case management will, after consultation with the Judge President, be set down for trial on an expedited basis by the Judge managing the file.

The purpose of these provisions seems to be to expedite the finalisation of disputes concerning "mass dismissals" arising from especially unprotected strikes and retrenchments.

Interlocutory applications

If a party to a dispute which is not the subject of case management raises a preliminary point this point will be dealt with on an interlocutory basis. Any party to the dispute may request that the matter be set down for a consideration of a preliminary point "without delay". However, if the interlocutory application brought by a party is not opposed by the other party or parties, or where the order is sought by consent of all the parties, the application may be heard in Chambers. The term "preliminary point" is defined to include applications for condonation of the late filing of a statement of claim or statement of response, as well as special pleas and exceptions.

Pre-trial conferences

In cases where the matter is not the subject of case management, a pre-trial conference must be held and a minute of the proceedings of the pre-trial conference must be filed within the time periods prescribed by the Rules of the Labour Court. If a minute of the pre-trial conference is not filed within the prescribed period of time, the Registrar of the Labour Court must set the matter down in the motion court for a formal pre-trial conference to be held before a Judge.

The Judge may issue an order in respect of the filing of a pre-trial minute and the failure to comply with the order may result in the file being archived. The applicant will only be able to retrieve the file if application is made to the Judge concerned and good cause is shown.

Once a pre-trial minute has been filed, a Judge in chambers will provide directions as to how that matter will be dealt with. For example, the Judge may require that a further and/or better minute be filed and/or that the matter be set down for trial. A trial date must be allocated as soon as possible.

Postponements and removals from the role

The Practice Manual clearly envisages that, once a matter has been set down for trial, it should proceed without delay and with as few postponements as is possible. This is evident from the following –

- It is provided that a trial will "ordinarily continue in one sitting until conclusion of all the evidence".
- The practice note required in terms of the Practice Manual must set out "any issue or consideration that would interfere with the immediate commencement and the continuous running of the trial to its conclusion …".
- Once a matter has been set down, it cannot be removed from the role without the consent of the Judge President or, if the matter is subject to case management, by the appointed Judge.
- A postponement will not be granted on the ground that a representative is not available for the trial or for the entire duration of the trial.
- No trial should commence if any party's representative knows of any issue or consideration that would interfere with the completion of the trial.
- A Judge hearing a trial will not, "unless this becomes necessary", postpone a trial which will result in a part-heard trial.
- If a trial does become part heard, a date for the continuation of the trial must be applied for by delivering a letter to the Registrar of the Labour Court marked for the attention of the Judge President. This letter must contain certain information, including: the date when the trial became part-heard, an estimate of the number of days necessary to complete the trial and whether a copy of the record of the part-heard portion of the trial will be necessary and available. However, the presiding Judge, after consulting with the Judge President, may decide on other arrangements.

Settlement agreements and draft orders.

If the parties have entered into a settlement agreement prior to the trial date the Registrar of the Labour Court must be informed as soon as the settlement agreement is concluded. A settlement agreement will only be made an order of court if representatives of all the parties are present in court and confirm the signatures of their respective clients to the settlement agreement and that their clients want the settlement agreement to be made an order of court. Alternatively, proof must be provided of the identity of the persons who signed the settlement agreement and that the parties want the settlement made an order of court.

If the parties to a trial have settled the dispute on the terms set out in a draft order, a judge will only make such a draft order an order of court if the representatives of all the parties are present in court and confirm that the draft order correctly reflect the terms agreed upon. Alternatively, proof must be provided that the draft order correctly reflects the terms agreed upon.

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Motion court proceedings in terms of rules 7 and 7A

Case management

Special provision is made for the case management of applications made in terms of s 189A(13) – ie where employees or a trade union are challenging the fairness of the consultation process being followed by an employer that may result in a dismissal on the grounds of the employer's operational requirements. When such an application is filed the applicant must also deliver a letter to the Registrar of the Labour Court marked for the attention of the Judge President in which the names of the parties, a summary of the facts and the relief sought are set out. The Judge President may then appoint a Judge to undertake the case management of the matter.

Applications to review arbitration awards and rulings

One of the requirements that cause the most delays in review applications is the requirement that a record of the proceedings must be filed with the Labour Court. The Practice Manual seeks to ensure that applicants comply with this requirement more expeditiously.

- It is required that an applicant must collect the record within seven days of being notified by the Registrar of the Labour Court that the record has been received. The Applicant must then file a record within 60 days of being informed by the Registrar of the Court that the record has been received.
- If the applicant fails to file the record within the 60 days the applicant will be deemed to have withdrawn the application unless the applicant has requested the respondent's consent for an extension of time and this has been agreed to. If consent is refused the applicant may apply to the Judge President in Chambers for an extension of the 60 day time period. The Judge President will then allocate the file to a Judge who will rule on the matter in chambers.
- If the record of the proceedings under review has been lost, or if the tape recording of the arbitration proceedings is inaudible, the applicant may approach the Judge President for a direction on the further conduct of the review application. The file will then be allocated to a Judge for a direction which may include an order to the effect that the matter be remitted back to the person or body whose award or ruling is subject to review or, where practicable, a direction to the effect that the relevant parts of the record be reconstructed.
- An applicant must ensure that all the necessary papers (excluding heads of argument) are filed within 12 months of the date that a case number is allocated. The Registrar of the Labour Court must also be informed in writing within this time period that the application is ready to be allocated a date for a hearing. Failure to comply with this requirement will lead to the application being archived and it being regarded as lapsed, unless the applicant can show good cause why this should not occur.

It is also stated that review applications should "ordinarily" not be brought if the proceedings under review are incomplete and that applicants are only required to deliver those portions of the record that are necessary for the purposes of the review. It is also provided that an application, whether opposed or unopposed, will "generally not be postponed, and certainly not for reason related to the convenience of the representatives".

General

The emphasis that the Practice Manual places on the expeditious finalisation of disputes is also illustrated in its provisions dealing with the archiving of court files. Files will be archived in the following circumstances -

- Applications made in terms of Rule 7 or Rule 7A of the Rules of the Labour Court will be archived if a period of six months has lapsed without any steps being taken by the applicant from the date of the filing of the application or the date of the last process filed.

- Referrals made in terms of Rule 6 of the Rules of the Labour Court will be archived if a period of six months has lapsed from the date of delivery of the statement of case without any steps being taken by the referring party, or if further steps are not taken within 6 months of the date of the last process being filed.
- Files will be archived if a party fails to comply with a direction issued by a Judge within the stipulated time period. ■

Deductions from pension benefits

Section 37D of the Pension Funds Act, 24 of 1956 authorises the trustees of a pension or provident fund to deduct certain monies owed to an employer by an employee from any monies payable to the employee by the fund when that employee retires or ceases to be a member of the fund. This will be the case where the monies deducted constitute –

> *" ...compensation .... in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct .."*

- of the employee.

These deductions can only be made if the employee has admitted in writing that he is liable to pay the amount to the employer, or if a judgment has been obtained against the employee in any court, including the Magistrate's Court. It has also been held that the trustees of a fund may withhold the payment of benefits due to an employee pending the determination of the question by a court whether the employer is indeed entitled to be compensated by the employee.

This section has been discussed in various contributions to **CLL.** (See Vol 14 No 7, Vol 16 No 7 and Vol 18 no 8.) In this contribution we deal with two recent decisions in which the question of what constitutes misconduct as envisaged in the section was considered.

The first is the decision in **Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom**(2012) 33 ILJ 2785 (FSB). The employee in this case had been employed as the managing director of the employer. He was also the sole member of a close corporation called Hanlein Boerdery BK. Hanlein Boerdery was a customer of the employer and the employer had sold and delivered certain goods to Hanlein Boerdery. The employee had entered into an agreement with the employer in terms of which he would stand security for any debts owed to the employer by Hanlein Boerdery. It seems that Hanlein Boerdery failed to pay certain monies owed to the employer for goods delivered and the employer then instituted civil proceedings for the recovery of this amount. A default judgment was obtained against the employee in his capacity as surety. The trustees of the employee's provident fund then paid certain monies to the employer. The trustees relied on the provisions of s 37D to do so and had deducted this amount from the benefits due to the employee in terms of the rules of the provident fund.

The employee argued that the trustees had not been entitled to make the deduction from the benefits due to him and to pay this to the employer. He instituted proceedings to recover this amount from the employer. Various issues were dealt with in the Court's decision; but of relevance here was whether the trustees were entitled to have made the deduction and payment. The Court found that this was not the case. The debt owed to the employer had not arisen from the misconduct of the employee.

The following excerpt sets out the Court's views –

> *"[24] I pause to point out that it is not every civil judgment that can be enforced by an employer against an employee through the provident fund. The section specifies the genus of claims that may be enforced by the employer against the employee and directly recovered by the employer from the provident fund. An employer's recourse against the provident fund is an avenue available only in very rare cases. The golden thread which runs through all such exhaustively classified genus of debts or claims is a causa tainted by an element of discreditable or untrustworthy conduct on the part of an employee towards*

his employer – vide ss (1)(b)(ii) of section 37D.

[25] The section authorises the provident fund to deduct such compensation from any pension benefit payable to such employee and to pay it to the employer concerned. It has to be stressed that not any employer armed with any civil judgment can lawfully have recourse against the provident fund for the pension benefit of a retiring employee. The section is exclusively reserved only for those employers who can show that they are legitimate victims of specific dishonourable workplace transgressions. Obviously the respondent in casu did not qualify as such a victim. Therefore, the respondent was not entitled to the special protection as evisaged.

[26] The debt by Hanlein Boerdery BK which gave rise to the suretyship agreement signed by the applicant in favour of the respondent was, in my view, not underpinned by the requisite causa as envisaged in section 37D. Since the respondent was not procedurally entitled to recover such a pure commercial debt from the provident fund, the provident fund was not legally obliged to pay over to the respondent any pension money due to the applicant."

The second decision is that of the High Court in **Gradwell v Bidpaper Plus (Pty) Ltd & Others** (2012) 33 ILJ 2794 (ECG). In this case the employer had instituted civil proceedings against its ex-employee for the recovery of losses suffered as a result of an alleged breach of a restraint of trade agreement. In particular it was alleged that the employee had provided confidential information to a competitor and had done business with the competitor. The employer had persuaded the administrators of the employee's provident fund to withhold the payment of benefits due to the employee pending the finalisation of the proceedings. The employee then approached the High Court for an order declaring that the trustees were not entitled to withhold payment of the benefits due to him.

At issue was whether the actions of the employee constituted misconduct as envisaged in s 37D.

The Court came to the conclusion that there had been misconduct. It argued as follows -

"[13] In my view it is axiomatic that where an employer seeks to retain pension benefits due to an employee under circumstances where there is no judgment or acknowledgment of liability by the employee, and pending finalization of a civil claim, a pension fund can only accede to that request if the employer avers facts which, if proved at the trial, will result in a finding that the employee had been guilty of theft, fraud, dishonesty or misconduct as contemplated by s. 37D."

[14] Bidpaper has averred that the applicant, while being in its employ, had given confidential trade information to a competitor and entered into an agreement, or arrangement, with a competitor with regard to pricing and terms and conditions of sale to its detriment. If it proves these allegations at the trial, there can be little doubt that the trial court's findings will imply serious misconduct and dishonesty on the part of the applicant. An employee who passes confidential trade information to his or her employer's competitors, invariably acts in a clandestine and underhanded manner, and with full knowledge of the potential harm that his or her actions may cause the employer. It is indeed difficult to conceive of circumstances where such conduct will not contain some element of dishonesty. And in my view it matters not if these actions are motivated either by malicious intent to spite the employer, or by a desire for personal gain. I therefore agree with Mr. Cole that such actions must necessarily imply dishonest conduct as contemplated by s. 37D of the Act."

These decisions indicate that, although debts arising for "commercial transactions" will usually fall within the ambit of s37D, there will be situations where it will apply if a form of dishonest conduct is involved. ■

PAK le Roux