

Dispute Resolution



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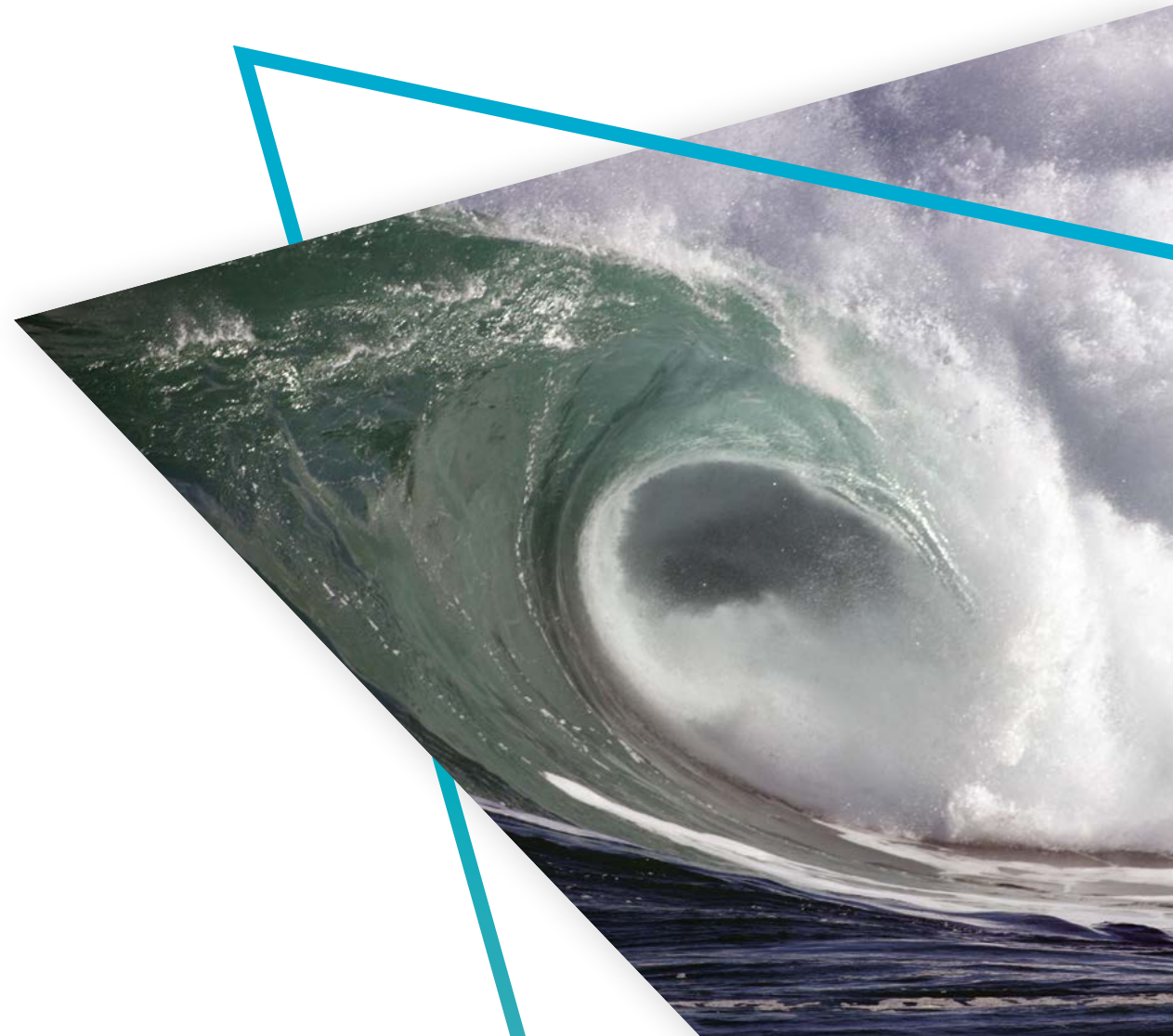
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(Un)confirmatory

Affidavits are the lifeblood of motion proceedings – the evidentiary foundation of a party's case rests squarely on these documents. Think of it this way: if trials are theatrical performances where witnesses testify orally, motion proceedings are the “*paper stages*”, where affidavits are the principal performers. Every fact, every piece of evidence, and every measure of credibility must be captured in writing (in the affidavit) because a case stands and falls based on the content of those papers. An integral member of the cast of these “*paper stages*” is the confirmatory affidavit.

In practice, confirmatory affidavits (which support the founding affidavit) are required in respect of evidence that is within the personal knowledge or experience of the witness providing the confirmatory affidavit. The purpose of these confirmatory affidavits, while narrow, is critical – that purpose being to verify the accuracy of facts attributed to them without necessarily providing independent argument or additional evidence. Without confirmatory affidavits, statements attributed to a witness (other than the deponent to the founding affidavit) risk being qualified as hearsay (and hearsay evidence cannot be relied upon).

The common trend in recent practice is that confirmatory affidavits are drafted by means of a prepopulated template, which offers no factual substance or averments for the court to consider (and potentially rely on) save for the standard phrasing of “*I confirm the contents of the affidavit of Mr John Doe insofar as it relates to me.*”

The contents of confirmatory affidavits came before the court in the matter of *Blue Crane Route Municipality v Storm and Others* (1582/2023) [2023] ZAECKMHC 119. In that matter, the court dismissed the applicant's reliance on confirmatory affidavits because the deponents to those confirmatory affidavits merely stated that they “*confirmed the replying affidavit insofar as it pertain[ed]*” to them, without identifying or describing the specific conduct that pertained to them. This left the affidavits devoid (in the court's view) of evidentiary value and weight.

The court held that confirmatory affidavits, if they are to carry weight, must provide personal observations or factual detail and cannot simply rubber-stamp what is said in another affidavit. The practice of using template confirmatory affidavits was described by the court as “*a slothful means of placing evidence before a court*”. This echoed the Supreme Court of Appeal's rebuke in *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others* (210/2014) [2014] ZASCA 90, which similarly criticised the casual deployment of confirmatory affidavits in motion proceedings, emphasising that actual witnesses should depose to the facts, with particulars, especially where multiple people allegedly witnessed the conduct.

This case is a cautionary tale: confirmatory affidavits are not a procedural box-tick. They must contain substance, or they risk being disregarded entirely. Confirmatory affidavits are essential supporting tools in motion proceedings, but they carry weight only if they provide substantive, first-hand evidence.

Tim Smit, Serisha Hariram and Lavious Sedibane

**DISPUTE RESOLUTION
ALERT**

The dishonesty threshold for withholding a pension withdrawal benefit

In the matter of Overnight Logistics (Pty) Ltd v Simon Mayimela and Others (PFA24/2025), the Financial Services Tribunal (Tribunal) considered whether an employer could withhold an employee's pension withdrawal benefit under section 37D(1)(b)(ii)(bb) of the Pension Funds Act 24 of 1956 (Pension Funds Act) in the absence of proven dishonesty.

The applicant and employer, Overnight Logistics, sought reconsideration of a decision by the Pension Funds Adjudicator (Adjudicator) dismissing its request to withhold a portion of the withdrawal benefit of its former employee, Simon Mayimela. The application was brought in terms of section 230(1) of the Financial Sector Regulation Act 9 of 2017.

Facts

Mayimela was employed by Overnight Logistics from July 2010 until November 2023 and was a member of the 10X Umbrella Provident Fund (Fund). In February 2023, Mayimela failed to follow routine instructions and safety procedures while operating a forklift and caused damage to company property.

A disciplinary inquiry was held in November 2023, where Mayimela was found guilty of (i) failing to carry out routine instructions and carelessness and (ii) not obeying routine instructions, which failure resulted in damage to property. As a consequence of the findings, Mayimela was summarily dismissed.

Following on from his dismissal, Overnight Logistics instituted proceedings against Mayimela, and obtained default judgment against him arising from the incident. Based on this, Overnight Logistics sought to withhold part of Mayimela's pension benefit to recover the loss, and addressed a letter to the Fund seeking payment of Mayimela's benefit.

The Fund declined Overnight Logistics' request on the basis that the misconduct contemplated by section 37D(1)(b) of the Pension Funds Act required an element of dishonesty, with reference to the judgment in *Moodley v Scottburgh/Umzinto North Local Transitional Council* [2000] (4) SA 524 (D). The Fund averred that there was no element of dishonesty in the findings made against Mayimela.

Consequently, Overnight Logistics lodged a complaint with the Adjudicator.

On 28 March 2025, the Adjudicator held that while Mayimela was liable for payment of damages he caused to Overnight Logistics because of his gross negligence, the employer was not entitled to claim Mayimela's pension benefit as it was protected by section 37A, and the damage caused to the employer was not because of theft, dishonesty, fraud or misconduct with an element of dishonesty, as contemplated by section 37D(1)(b)(ii)(bb) of the Pension Funds Act.

The Adjudicator dismissed the request, finding that the misconduct did not meet the threshold of dishonesty required under section 37D(1)(b)(ii)(bb) of the Pension Funds Act, and ordered the Fund to pay Mayimela his withdrawal benefit.

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The dishonesty threshold for withholding a pension withdrawal benefit

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Following on from the Adjudicator's finding, Overnight Logistics applied to the Tribunal for a reconsideration of the Adjudicator's finding.

The Tribunal's decision

The crux of Overnight Logistics' submissions to the Tribunal was that section 37D(1)(b)(ii)(bb) of the Pension Funds Act does not require dishonesty as an element of misconduct.

Put differently, the issue for determination was whether the Adjudicator's decision to uphold the Fund's refusal to pay the withdrawal benefit to the employer was correct, in circumstances where Mayimela was found guilty of gross negligence and gross dereliction of duty, which contained no element of dishonesty.

Ultimately, the Tribunal held that the requirement that misconduct, as set out in section 37D(1)(b)(ii)(bb) of the Pension Funds Act, must have an element of dishonesty has been consistently applied in our courts. In the present case, Mayimela was found guilty of having caused unintentional damage to property, and therefore his conduct did not meet the threshold contemplated by section 37D(1)(b)(ii)(bb).

Therefore, the Tribunal found that there was no reason to interfere with the Adjudicator's decision. Accordingly, the Tribunal dismissed the reconsideration application.

Conclusion

This decision reinforces the principle that pension benefits are sacrosanct and may only be interfered with in narrowly defined circumstances. In order to be entitled to proceed in terms of section 37D(1)(b)(ii)(bb) of the Pension Funds Act, employers will need to ensure that internal disciplinary findings are supported by clear evidence of dishonesty.

Tim Smit and Loyiso Bavuma



DISPUTE RESOLUTION
ALERTWhose international
customary law
applies?

The first genocide of the 20th century, perpetrated against the OvaHerero and Nama peoples in what is now Namibia, remains unresolved in international and domestic courts. The communities continue to seek reparations for atrocities committed under German colonial rule. On 2 October 1904, General Von Trotha issued an extermination order, with the following chilling directive:

"I the great general of the German troops send this letter to the Herero people, the Hereros are no longer German subjects. All Hereros must leave the land. If the people do not want this, then I will force them to do so with a great gun. Any Herero found within the German borders with or without a gun, with or without cattle, will be shot. I shall no longer receive any women and children. I will drive them back to their people or I will shoot them. This is my decision for the Herero people."

Efforts to obtain restorative justice have encountered significant legal obstacles. In *Rukuro v Federal Republic of Germany*, the OvaHerero and Nama communities sought damages for the unlawful seizure of property between 1885 and 1909. Germany invoked the Foreign States Immunities Act, arguing that it was immune from prosecution because its actions did not violate international law as understood at that time. Germany relied on the doctrine of intertemporal law, which holds that actions must be judged by the legal standards in force when they

occurred, not by contemporary norms. Article 28 of the Vienna Convention on the Law of Treaties, 1969 codified the principle of intertemporal law. In turn, the International Court of Justice affirmed the application of the doctrine of intertemporal law in 1975.

The US Supreme Court, in *Bolivarian Republic of Venezuela v Helmerich & Payne International Drilling Co.* 137 S. Ct 1312, 1317, 197 L.Ed2d 663 (2017), reinforced the legal principle that a sovereign's regulation of its own nationals' property is generally immune from suit. The court in *Rukuro* found it lacked jurisdiction, as the OvaHerero and Nama were subjects of the German Reich, and the expropriation of their property without compensation was considered lawful under its laws at the time.

Joint declaration

Negotiations between the Namibian and German Governments led to a joint declaration titled "*United in Remembrance of Our Colonial Past, United in Our Will to Reconcile, United in Our Vision of the Future*" (Joint Declaration). Clause 10 of the Joint Declaration acknowledges that the atrocities committed during the colonial war would, from today's perspective, be called genocide. The Joint Declaration references the United Nations Convention on the Prevention and Punishment of the Crime of Genocide, 1948, which recognises that genocide has inflicted great losses on humanity throughout history.

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The Joint Declaration has sparked debate over its consistency with Article 63(2)(i) of the Constitution of the Republic of Namibia, which states that:

"The National Assembly shall further have the power and function, subject to this Constitution:

(i) to remain vigilant and vigorous for the purposes of ensuring that the scourges of apartheid, tribalism and colonialism do not again manifest themselves in any form in a free and independent Namibia and to protect and assist disadvantaged citizens of Namibia who have historically been the victims of these pathologies ..."

The OvaHerero and Nama communities have challenged the Joint Declaration in the High Court of Namibia, invoking the territorial tort exception. This exception allows courts to hear cases of human rights violations committed in the territory of Namibia by a foreign state, even when acting in a sovereign capacity.

The term "*genocide*," coined by Raphael Lemkin in 1944, was later codified in international law through the United Nations Convention on Genocide.

The High Court has been asked to decide on several critical issues, including whether:

- the Joint Declaration is consistent with Articles 1, 5, 32, 45, 59, 63, and 144 of the Constitution;
- the Joint Declaration violates the 2006 House Motion on Genocide; and
- the extermination order of 2 October 1904 by General Von Trotha constituted genocide and, if so, whether reparations should be paid to the OvaHerero and Nama people or development aid to Namibia.

The struggle for justice for the OvaHerero and Nama genocide victims highlights the tension between historical legal doctrines and contemporary human rights standards. The outcome of the current legal challenge will determine whether Namibia's constitutional protections and international law can provide meaningful remedies for colonial-era atrocities, or whether reconciliation efforts will fall short of true accountability.

Esther Shigwedha
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