IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case no: **#2023-002990**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) (FURTHER) REVISED.

Signature: ..... **Date: 6 February 2023**

In the matter between:

HANSEN + GENWEST (PTY) LTD	Applicant
and	
CORPORATE SELECTION UMBRELLA RETIREMENT FUND NO 2	First Respondent
LIBERTY GROUP LIMITED	Second Respondent
CLAUDIA WILKINSON	Third Respondent
SHAUN WILKINSON	Fourth Respondent
SELOANE INDUSTRIES (PTY) LIMITED	Fifth Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' legal representatives by e-mail and by uploading the signed copy to Caselines.

Pension — Benefits — Withholding — Nature and requirements of employer's application to compel fund to withhold payment of benefits pending determination of member's liability to employer for damage caused by reason of theft, dishonesty, etc. — Requirements for anti-dissipation interdict not required to be met — Irreparable harm assumed, and absence of alternative remedy not required — Relevance of the likely *quantum* and apportionment of damages in evaluating *prima facie* right — Relevance of pension fund's reasonable exercise of discretion — application of the standard of the *arbitrium boni viri*.

MOULTRIE AJ

[1] The third respondent and her husband (the fourth respondent) are both ex-employees of the applicant. The fourth respondent was a service technician who resigned from his employment in December 2021. The third respondent was employed as the applicant's Assistant Financial Manager until she was dismissed on 26 May 2022 following a disciplinary enquiry in which she had been charged and found guilty of misconduct. The third respondent has not challenged the fairness of her dismissal.

[2] In April 2022, the applicant instituted an action against the third and fourth respondents as joint wrongdoers together with the fifth respondent, a company of which the fourth respondent (but not the third respondent) is a director. In the action, the applicant seeks *inter alia* an order requiring the defendants to pay damages in the sum of R1,360,030.63 arising out of alleged breaches by the third and fourth respondents of their contractual and fiduciary duties in assisting the fifth respondent to compete with their employer. The damages amount is calculated on the basis that it represents the gross profit that the applicant would have earned had it exploited ten specific transactions that it contends were unlawfully diverted to the fifth respondent by the defendants.

[3] The applicant contends that the damages that it claims from the third

respondent in the action were caused to it "*by reason of any theft, dishonesty, fraud or misconduct*" on her part as contemplated in section 37D(i)(b)(ii)(bb) of the Pensions Funds Act, 24 of 1956 and that should it ultimately be successful in this regard, the first respondent (a pension fund administered by the second respondent) will be entitled in terms of the section to deduct the amount of damages found to be payable from the third respondent's pension benefit and to pay them over to the applicant.

[4] In view of the fact that they are no longer employed by the applicant, the third and fourth respondents are withdrawing from the pension fund and are seeking payment of their accrued pension benefits (amounting to R387,926.98 and R449,219.30 respectively). The applicant, on the other hand has requested the fund to withhold payment of their pension benefits in terms of Rule 12.4.5 of its rules, which provides that:

> *Where the Employer or the Fund seek to recover an amount referred to in Section 37D(1)(b)(ii)(bb) of the Act by obtaining a judgement in value against the Member from any competent court, notwithstanding anything to the contrary stated in these Rules, the Fund shall be entitled to withhold the amount to be recovered until the earlier of the date on which proceedings are determined, settled or withdrawn, provided that:*
>
> *(a) the Board of Trustees is satisfied that the Employer or Fund has established a prima facie case against the Member;*
>
> *(b) the Board of Trustees are of the opinion that the Employer or Fund has a reasonable chance of succeeding in the proceedings instituted against the Member; and*
>
> *(c) the Employer or Fund has taken all reasonable steps to enter the case on the rolls of the court at the earliest possible date and is not responsible for any undue delays in the prosecution of the proceedings.*

[5] On 30 November 2022, the pension fund indicated that, while it had decided to withhold the fourth respondent's pension benefits in terms of

this rule,

> *We confirm that the Board has reviewed the continued withholding of the benefits for Mrs C Wilkinson and a decision has been made to NOT continue withholding of her benefits.*
> *The decision is based on the fact that:*
> - *the amount being withheld does not exceed the amount being claimed - R 387,926.98 vs R1,3 m*
> - *The members response to the allegations has also been reviewed.*
> - *there was no undue delay in the proceedings caused by the employer,*
> - *however, the allegations against the member are that of misconduct which the OPFA has expressly indicated is not covered by section 37D of the Act (fraud, theft, dishonesty) - the fact that the member used company time to issue invoices or follow up on outstanding payments in respect of her husband's business does not constitute fraud, theft or dishonesty as provided for in the Act.*
>
> *Based on the documentation received, The board is of the view that the conditions of Rule 12.4.5 has **not** been met, and that the Fund is not entitled to withhold the member's benefit.*
> *Please ensure that the Employer is advised accordingly, and failing any further action from the employer, that the members benefit be released.*

[6] The applicant now approaches this court on an urgent basis seeking an order "*interdicting and restraining*" the pension fund from paying out the whole or part of the third respondent's pension benefit pending the outcome of the action.

The basis of the third respondent's opposition

[7] Although the third respondent's answering affidavit disputes the urgency

of the matter, Ms Grobler appropriately indicated at the hearing that the third respondent no longer pressed her contention in this regard.

[8] I am satisfied that the application is urgent, and that the urgency is not self-created. It was only on Sunday, 11 December 2022 that the applicant became aware that the pension fund intended to release the third respondent's pension benefits unless the applicant obtained a court order prohibiting it from doing so by no later than Tuesday, 7 February 2023. Although it was suggested by the pension fund itself that the application for such an interdict might be launched on 24 January 2023, the applicant in fact served the application on it and the third respondent approximately a week earlier, on 18 January 2023, and afforded them until 24 January 2023 to deliver their answering papers. In the event, the third respondent was able to file a fulsome answering affidavit on 26 January 2023.

[9] In relation to the merits of the application, the third respondent essentially resists the application on the following four bases:

(a) Firstly, that the applicant has not shown that its damages claim against her is based on the kind of conduct contemplated in section 37D(1)(b)(ii) of the Pension Funds Act, namely "*any theft, dishonesty, fraud or misconduct*". Essentially, this echoes the reason given by the pension fund for declining to accede to the applicant's request.

(b) Secondly, that the amount of damages claimed from her is "*excessive and inflated*" (i) because a number of the allegedly diverted corporate opportunities never in fact resulted in work or services being rendered by the fifth respondent; (ii) because "*the total sum of work and/or services rendered by the fifth respondent for the period of complaint and having regard to the profits made … reflects a more realistic amount of not more that R200,502.79*"; and (iii) because the pension benefits of the fourth respondent in the amount of R449,219.30 are already being

withheld.

(c) Thirdly, because the applicant has already admittedly withheld the sum of approximately R62,963.45 (net of tax) from her in respect of accrued leave pay as well as an amount of R10,908.65 in respect of tax deductions which were not due. While the third respondent contends that these amounts have both been unlawfully withheld, the applicant contends that it was entitled to withhold these sums pursuant to clause 4.4 of her employment contract, which authorises the applicant to deduct from her remuneration "*all amounts which may be due by the employee to the employer for any reason*".

(d) Finally, the third respondent contends that the effect of the order will be to allow the applicant to "*jump the queue*" of creditors and become a preferent creditor to the determinant of other creditors in the event that damages are awarded against her in the application and she is unable to satisfy the judgment.

Relevant legal principles

Introduction

[10] Section 37D(1)(b)(ii) of the Pension Funds Act contains a limited exception to the principle that "*pension benefits are sacrosanct*"[1] and may only be dealt with strictly in accordance with the provisions of the Act and the Rules of the fund in question. It provides that that a pension fund …

> *…. may deduct any amount due by a member to his employer ... in respect of ... compensation (including any legal costs recoverable…) ... [for] any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which ... the member has in writing*

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1 *SA Metal Group (Pty) Ltd v Jeftha* 2020 JDR 2379 (WCC) para 9.

admitted liability to the employer; or .... judgment has been obtained against the member in any 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.

[11] In *Highveld v Oosthuizen*[2] a pension fund had resolved "*at the behest"* of the employer not to pay the benefits due to a member pending the final determination of a damages action to be instituted by the employer. 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 (although this was not persisted with on appeal). 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 to mean that a pension fund also "*has the discretion to accede to [a] request*"[3] made by an employer to withhold payment of a member's benefits pending an acknowledgement by the member or a determination by a court that she is liable to the compensate the employer in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct.

[12] But it does not follow axiomatically from the Supreme Court of Appeal's holding (that a pension fund is not prohibited by the Pension Funds Act from exercising a discretion to accede to an employer's request to withhold

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2 *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA). See also *Charlton and Others v Tongaat-Hulett Pension Fund* [2006] ZAKZHC 14 at pp. 4 – 6, in which it was observed that the Pension Funds Adjudicator had on several earlier occasions ruled that such withholding was not prohibited by the section and that "*in the absence of any rule expressly regulating this power, the fund has the implicit power to withhold the benefit*".

3 *Highveld Steel* (above) paras 15 and 19.

benefits) that a pension fund may be compelled by a court to do so – especially where, as in the current instance, the rules of the fund expressly stipulate the circumstances under which such a discretion may be exercised. Neither section 37D(1)(b)(ii) nor the fund's rule purport to constitute, in and of themselves, a source or basis of the relief sought by the applicant in the current application.

The nature and basis of the relief sought: No need to show irreparable harm or absence of an alternative remedy

[13] What then, is the nature and basis of the relief sought by the applicant?

[14] Counsel for both parties approached this matter on the basis that the relief would be competent as long as the applicant could establish all the standard requirements for an interim interdict, namely (i) a *prima facie* right; (ii) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (iii) a balance of convenience in favour of the granting of the interim relief; and (iv) the absence of any other satisfactory remedy.

[15] This is perhaps unsurprising as this also seems to have been the approach taken by both courts in the only two reported cases that I have been able to locate in which similar relief has been sought, namely *Msunduzi Municipality*[4] and *SABC v SABC Pension Fund*.[5]

[16] At the hearing, I briefly debated with Mr Hollander who appeared on behalf of the applicant whether the interdict sought in this case is of the *sui generis* type loosely (but controversially)[6] referred to in South Africa as an "*anti-dissipation*" interdict, as had been suggested by the court in

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4 *Msunduzi Municipality v Natal Municipal Pension Provident Fund and Others* 2007 (1) SA 142 (N) paras 12 - 20.

5 *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ) paras 77 – 78

6 See Van Loggerenberg *et al.* Superior Court Practice. Looseleaf RS18 (Juta, 2022) at D6-11 fn 84.

*Msunduz*i.[7]

[17] Anti-dissipation interdicts serve to preserve property of the respondent "*to which the applicant can lay no special claim*"[8] pending an action to be brought to determine the existence of a debt. In *Knox D'Arcy Ltd v Jamieson*, the Appellate Division held that an applicant for such an interdict must (except possibly in exceptional cases), "*show a particular state of mind on the part of the respondent, i.e. that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors*" and observed that "*there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him*".[9]

[18] In my view the interdict sought in the current matter is not of this kind, and an applicant does not have to demonstrate the existence of the state of mind required for the purposes of an anti-dissipation interdict. I say this because section 37D(1)(b) of the Pension Funds Act itself establishes a claim by an employer to the pension funds of an employee in the special circumstances identified therein. It therefore seems to me that this case is similar to those alluded to by Innes JP (as he then was) in *Driefontein Consolidated Gold Mines Ltd v Schlochauer* when he said:

> *The mere fact that a plaintiff intends to bring an action against a defendant does not warrant him in asking that the latter should be interdicted from dealing with his property. It would be different if it could be shown that the property sought to be interdicted was actually the subject of the dispute between the parties, or that it was*

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7 *Msunduzi* (above) paras 19.

8 *Carmel Trading Co Ltd v Commissioner, South African Revenue Service and Others* 2008 (2) SA 433 (SCA) para 3.

9 *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372F-H.

clearly the proceeds of other property stolen from the applicants.[10]

[19] In view of the nature of the employer's right under section 37D(1)(b)(ii) to claim money that "*is identifiable with or earmarked as a particular fund to which the plaintiff claims to be entitled*",[11] it is my view that applications of the type at issue in the current matter fall into the exceptional category of "*applications for interim relief pending … 'quasi-vindicatory' actions … when delivery of specific property is claimed under some legal right to obtain possession*".

[20] In such claims, "*the applicant need not allege irreparable loss inasmuch as there is a presumption, which may be rebutted by the respondent, that the injury is irreparable … nor need the applicant show that it has no other satisfactory remedy*".[12]

The relationship between the prima facie right and the amount to be withheld

[21] It bears repeating at this juncture that in considering the existence of a *prima facie* right, the correct approach is …

> *… to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant [should] on those facts, obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown upon the case of the applicant he could not succeed in obtaining temporary relief, for his right,*

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[10] *Driefontein Consolidated Gold Mines Ltd v Schlochauer* 1902 TS 33 at 37. See also *Gernholtz and Another NNO v Geoghehan* 1953 (2) PH F102 (O).

[11] *Stern and Ruskin NO v Appleson* 1951 (3) SA 800 (W) at 811F–G, per Millin J: "*It is quite true that money, like any other species of property, may be interdicted; but then it must be shown that the money to be interdicted is identifiable with or ear-marked as a particular fund to which the plaintiff claims to be entitled*." See also *Absa Bank Ltd v Intensive Air (Pty) Ltd* 2011 (2) SA 275 (SCA) para 24.

[12] *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd* 2003 (3) SA 268 (W) paras 27 to 33 (and the cases cited there). See also *Saharawi Arab Democratic Republic v Owners & Charterers of the Cherry Blossom* 2017 (5) SA 105 (ECP) para 49.

> *prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.*[13]

[22] It stands to reason that an applicant seeking relief of this nature can logically not be entitled to an order restraining a greater sum than it is able to show (albeit merely on a *prima facie* basis) that the employee is likely to be ordered to pay in the action. If the employee is able to demonstrate serious doubt regarding the quantification of damages in the claim, the amount that the court may order to be withheld should be reduced accordingly.

The pension fund's discretion: "jurisdictional facts", reasonableness and fairness

[23] There is a further aspect to be taken into account by a court in matters of this kind. In my view, it is significant that in *Highveld Steel* Maya JA (as she then was) considered it necessary to opine that the pension' fund's discretion had been "*properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent*",[14] and stressed that:

> *Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case.*

[24] In view of the importance attached by the Supreme Court of Appeal to the

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[13] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 as qualified in *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688E.

[14] *Highveld Steel* (above) para 19.

exercise of a discretion on the part of the pension fund, the provisions of the pension fund's rules are of relevance in considering the circumstances under which a court would be prepared to grant relief such as that sought in the current matter.

[25] While there was no suggestion in the *Msunduzi* case that the rules of the pension fund in that case imposed any limitation whatsoever on the power of the fund to withhold pension benefits, let alone specific provisions such as those applicable in the present case specifying the functionaries who would be entitled to exercise such a discretion, and the requirements that would have to be met under which such a discretion could be authorised, this was an issue that exercised the court extensively in *SABC*, where the rule in question was almost identical to the one that applies here.[15] Thus for example:

(a) the court was at pains to refute the pension fund's contention that it would be prejudiced by the fact that a number of new factual allegations were raised by the applicant in reply, and that it "*could not exercise its discretion on the basis of new facts that were raised*" in the replying affidavit;[16] and

(b) when it considered costs, the court accepted that "*the Fund was under a duty to ensure that the Act and its rules were complied with, and that it was concerned about the lack of jurisdictional facts required to trigger the exercise by it of its discretion under rule 15.2 in the SABC's papers*", and remarked critically on the found that it had adopted a "*wavering stance in relation to the exercise by it of a discretion in the matter*".[17]

[26] In this regard, it should be recalled that employers such as the applicant

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[15] *SABC* (above) para 86.

[16] *SABC* (above) paras 20 and 57.

[17] *SABC* (above) paras 117 – 120.

participate voluntarily in pension funds, and may at the least be assumed to be well-aware of their rules, if not bound thereby.[18] As such, I do not consider that it would ever be appropriate to grant an order compelling the fund to undertake conduct that would involve a breach its own rules.

[27] In the current instance, apart from requiring the employer to satisfy the board of trustees that it has established a *prima facie* right to recover damages from the member, the rule in question provides that the fund may only accede to a request to withhold the amount to be recovered under section 37D(1)(b)(ii)(bb) where the Board of Trustees is "*of the opinion that the employer has a reasonable chance of succeeding in the proceedings instituted against the Member*" and the "*employer … has taken all reasonable steps to*" advance its claim and is not responsible for any undue delays in the prosecution thereof.

[28] Furthermore, given their quasi-contractual nature, it seems to me that where the rules of a fund allow for the exercise of a discretion to withhold pension benefits, similar principles should apply as where a contract affords one of the contracting parties a discretion to make a decision of this nature:

> *It is … a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made* arbitrio bono viri.[19]

[29] The Supreme Court of Appeal has held that "*[a] fair translation in the current-day context would be 'with the judgment of a fair-minded*

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[18] *Chemical Industries National Provident Fund v Sasol Ltd* 2014 (4) SA 205 (GJ) para 43: "*it is trite in matters of this nature that the rules of a pension fund are binding on the fund itself, its board, its members and any employer who participates in the fund. As such, any act which is implemented outside the ambit of the rules is ultra vires and null and void*", approved by the full bench in *Joint Municipal Pension Fund v Ehlanzeni District Municipality* 2018 (6) SA 197 (GP) para 36.

[19] *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) para 25.

person"".[20]

[30] In *Benlou Properties*, Van Heerden JA writing on behalf of the unanimous Appellate Division described the standard of the *bonus vir* as being "*a reasonable man in the position of"* the party afforded the discretion.[21] More recently, the Supreme Court of Appeal has also held that an obligation to act *arbitrio boni viri* obliges the person in question to "*act reasonably and to exercise a reasonable discretion*".[22]

[31] In the *Machanik* case, Juta J (as he was at the time) held that the party in question was required to exercise its discretion "*as a reasonable man would, under all the circumstances*"[23] or "*to the satisfaction of a reasonable man*".[24] It is only in circumstances where the contract clearly allows the party an unfettered discretion that he could act "*arbitrarily or capriciously*".[25]

[32] In *Joosub Investments v Maritime & General Insurance*, Seligson AJ stated the principle as follows:

> *Even where a provision in a contract gives a party a discretion or allows a party's opinion or satisfaction to determine the parties' rights and obligations, it is either interpreted as importing the standard of the arbitrium boni viri, or at least as precluding such party from making an unreasonable decision. In both classes of case, an objective standard is taken to be implied and the decision*

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[20] *Nedcor Bank Ltd v SDR Inv Holdings Co (Pty) Ltd* 2008 (3) SA 544 (SCA) para 8, fn 1.

[21] *Benlou Prop (Pty) Ltd v Vector Graphics (Pty) Ltd* 1993 (1) SA 179 (A) at 187 – 188.

[22] *Juglal NO v Shoprite Checkers (Pty) Ltd ta OK Franchise Division* 2004 (5) SA 248 (SCA) para 26.

[23] *Machanik v Simon* 1920 CPD 333 at 335.

[24] *Machanik at* 337.

[25] *Machanik at* 341.

is justiciable by the Court.[26]

[33] A similar approach was followed in:

(a) *Remini v Basson*, where the court observed that what was required for a proper exercise of the discretion according to the *arbitrium boni viri* standard was "*a reason which can be measured objectively*";[27] and

(b) *Unilever v Jepson*, in which the court held that for the purposes of applying the principle, "*[i]n deciding whether the discretion was exercised reasonably an objective standard is to be applied*".[28]

[34] Finally in this regard, as logic would suggest, it has been pointed out that, unless the information upon which the *"fair-minded"* pension fund bases its decision is clearly known to it, it will sometimes be necessary for it to give the other party an opportunity to be heard that is appropriate in the circumstances. Thus, in *ABSA Makelaars v De Lange*, this issue was decided in relation to a contractual provision that allowed an insurer to make a decision that might render a broker liable to reimburse it for 'damages' which the insurer had paid out to its client or clients in certain circumstances.[29] The High Court had held that the applicability of *audi alteram partem* depended on the nature of the decision being made, but:

> *…die audi alteram partem-beginsel nie outomaties by die arbitrium boni viri inbegrepe is nie. Onder bepaalde omstandighede sal die feite waarop die bonus vir sy besluit moet grond, slegs vasgestel kan word indien die ander kontraksparty gekonsulteer moet word. Indien die feite egter vasgestel kan word sonder sodanige*

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[26] *Joosub Investments (Pty) Ltd v Maritime & General Insurance Co Ltd* 1990 (3) SA 373 (C) at 383E-F.

[27] *Remini v Basson* 1993 (3) SA 204 (N) at 210H-211B.

[28] *Unilever South Africa Ice Cream (Pty) Ltd (known as Ola South Africa (Pty) Ltd) v Jepson* 2008 (2) SA 456 (C) para 25.

[29] *De Lange v Absa Makelaars (Edms) Beperk* 2010 JDR 0274 (SCA) para 1.

> *konsultasie, sal daar geen plig op die bonus vir rus om die ander kontraksparty te raadpleeg nie.*[30]

[35] On appeal, Van Heerden JA disagreed, holding that the applicability of *audi* in the context of the principle of the *arbitrium boni viri* did not turn on the classification of the decision being made, and that "*[i]n given circumstances [even] valuers may, by virtue of a tacit term, have at least to hear both sides*".[31] The Supreme Court of Appeal went on to hold that the insurer was indeed obliged to give the broker a hearing before making its decision, particularly because the clause in question

> *… effectively makes it possible for ABSA to impose a potentially unlimited liability upon De Lange simply by forming the 'opinion' that ABSA is legally liable vis à vis a client who has allegedly suffered loss or damage as a result of intentional or negligent incorrect or incomplete advice given by De Lange, and by paying out to the client such loss or damage as ABSA may determine the client has sustained. In my view, the importation of the tacit term pleaded by De Lange would ensure that clause 16.6 'functions efficiently' and fairly.*[32]

Summary

[36] In summary, I conclude that in order to obtain relief of the kind sought in the current matter, an applicant is required to establish:

(a) on a *prima facie* basis (though open to some doubt) that the member will by reason of any theft, dishonesty, fraud or misconduct be ordered in the action to pay a sum of damages to the employer that exceeds the value of the pension fund benefit sought to be withheld;

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30 *ABSA Makelaars (Edms) Bpk v De Lange* [2009] ZAWCHC 54 (10 March 2009) para 24.

31 *De Lange* (SCA) (above) para 18 – 19.

32 *De Lange* (SCA) (above) para 22.

(b) that the balance of convenience favours the withholding of the third respondent's pension fund benefits in the meantime; and

(c) that the applicant has requested the pension fund to exercise its discretion to withhold the pension benefits but the pension fund has unreasonably refused to grant such a request (with such finding of unreasonableness taking into account any specific requirements laid down by the rules of the pension fund regarding the circumstances under which such a discretion may be exercised and the requirements of procedural fairness).

Analysis

[37] I have considered the particulars of claim in the action in order to determine whether it encompasses a cognisable claim against the third respondent for "*damages caused to the applicant by reason of any theft, dishonesty, fraud or misconduct*" on her part.

[38] While there can be no doubt that the applicant's pleaded "claim B" against the third respondent is one for damages caused by alleged breaches of her contractual undertakings and fiduciary duties to the applicant,[33] it is a little more difficult to identify precisely what conduct of the third respondent is alleged to have constituted such breaches. Upon careful analysis, however, it is apparent that the specific conduct of the third respondent relied upon by the applicant is pleaded in paragraph 18 (read with paragraphs 16, 17 and 19) of the particulars of claim.

[39] In paragraph 18, it is alleged that the third respondent "*assisted*" the fifth respondent, a competitor of the applicant, "*by processing [its] invoices and submitting them to its customers; and following up with [its] customers regarding payments and other matters relating to [its] business*". In particular, the applicant's case is that by engaging in this conduct, the third respondent "*assisted*" her husband or the fifth respondent to:

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[33] Paragraph 27 of the applicant's particulars of claim.

(a) divert to the fifth respondent the following six corporate opportunities which ought to have been available to and secured by the applicant:

i. the five transactions referred to in paragraph 16 of the particulars of claim (paragraph 16.17.4 of the particulars of claim, read with paragraph 19.1 thereof); and

ii. the transaction referred to in paragraph 17 of the particulars of claim (paragraphs 17.6.1 and 17.6.2 of the particulars of claim, read with paragraph 19.1 thereof);

(b) unlawfully make use of customer connections established during her employment with the applicant (paragraph 19.2 of the particulars of claim);

(c) provide the fifth respondent with the applicant's confidential intellectual property (paragraph 19.3 of the particulars of claim); and

(d) give the fifth respondent an unlawful advantage in competing with the applicant (paragraph 19.4 of the particulars of claim).

[40] I am satisfied that the conduct identified in paragraph 18 would, if proven, constitute conduct contemplated in section 37D(1)(b)(ii) – even applying the standard set in *Moodley*, where the word "*misconduct*" was interpreted in context as requiring an element of dishonesty.[34] As the court in *Gradwell* observed:

> *[the employer] has averred that the [employee], while being in its employ, had given confidential trade Information to a competitor*

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[34] *Moodley v Scottburgh / Umzinto North Local Transitional Council* 2000 (4) SA 524 (D) at 532D. While the correctness of this decision was accepted in *SABC* (above) para 81 and in *Gradwell v Bidpaper Plus (Pty) Ltd & others* (2012) 33 ILJ 2794 (ECG) para 8, it was questioned in *Msunduzi* (above) para 17. As in *Msunduzi*, however, it is unnecessary for me to decide the controversy for the purposes of the current matter, in view of the fact that I am satisfied that the misconduct at issue in this instance does indeed involve an element of dishonesty.

> *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.*[35]

[41] In the circumstances, I consider that the applicant has established the third requirement set out in paragraph 36 above. The pension fund did not act reasonably when it refused the applicant's request to withhold any portion of the third respondent's pension benefits: its contention that the misconduct relied upon by the applicant is limited to allegations that the third respondent "*used company time to issue invoices or follow up on outstanding payments in respect of her husband's business*" is unreasonable in light of the content of the particulars of claim, and is an indication that it failed to properly consider the request.

[42] Although the applicant does not in its pleading elaborate precisely what activities the third respondent is alleged to have engaged in when assisting the fifth respondent by "*following up with its customers regarding … other matters relating to its business*" or exactly how this related to the consequences identified in paragraph 39 (a) to (d) above, it is not required

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35 *Gradwell* (above) para 14.

to plead evidence.[36]

[43] But the mere allegation of such conduct in the particulars of claim is insufficient to establish a *prima facie* right on the applicant's part to compel the pension fund to withhold the third respondent's pension benefits – especially in view of the content of Rule 12.4.5(b), which stipulates that the fund may only withhold the third respondent's benefits if the pension fund's board is "*of the opinion that the employer has a reasonable chance of succeeding in the proceedings instituted against the member*".

[44] In considering whether the applicant has a reasonable chance of succeeding in the action against the third respondent, it is necessary to consider the evidence that it indicates it will adduce in support of its claim at the trial.

[45] It is apparent from the founding affidavit that the evidence in question is the evidence that was led at the disciplinary enquiry and accepted by the chairperson thereof, combined with the fact that the third respondent has not sought to challenge the fairness of her dismissal. This includes the following evidence and findings:

(a) The third respondent was the Assistant Financial Manager of the applicant and thus occupied a position of trust, and had access to confidential information such as the mark ups on the products sold by the applicant.

(b) The third respondent was "*obviously conflicted and ought not to have assisted her husband in any way relating to competitive activities vis-à-vis*" the applicant.

(c) The fifth respondent was in competition with the applicant.

(d) The third respondent assisted with invoices that the fifth respondent issued and "*was doing a substantial amount of work*

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[36] *Rabinowitz v Van Graan* 2013 (5) SA 315 (GSJ) at para 41.

for the fifth respondent", as is evidenced by documents which were sent by her to her own computer, and the fact that she had access to and operated on the fifth respondent's banking system and attended to its VAT registration issues.

(e) The third respondent concealed and failed to disclose the fact that she knew the fifth respondent was competing with the applicant and in fact was assisting the fifth respondent administratively at the time of such concealment and non-disclosure.

[46] While I accept that proof of these facts at the trial will not necessarily establish <u>all</u> of aspects identified in paragraph 39 (a) to (d) above, I am satisfied (subject to what is said below) that the applicant has at least established that it has a reasonable chance of establishing that the third respondent "*assisted*" the fifth respondent to divert the corporate opportunities identified in paragraph 39 (a) above to the respondent. These transactions are "*the First Letitone transaction*"; "*the Second Letitone transaction*"; "*the First BP Nhleko transaction*"; "*the Second BP Nhleko transaction*"; and "*the Msobo transaction*".[37]

[47] However, I am of the view that the third respondent has by means of paragraph 63 of her answering affidavit created more than merely "*some doubt*" in my mind regarding the ability of the applicant to show diversion of the "*first BP Nhleko transaction*", "*the Msobo transaction*" and "*the Springlake Colliery transaction*". The applicant's response (in paragraph 24.4 of the replying affidavit) to her allegation that these engagements never proceeded beyond the stage of quotation is unconvincing: it does not contain a pertinent denial, and instead merely criticises the third respondent for not attaching the quotations themselves (which would be irrelevant either way). The applicant proceeds to draw an unsupportable

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[37] The particulars of claim contain no suggestion that the third respondent was involved in assisting with the diversion of the remaining opportunities listed in paragraphs 24.1 to 24.4 thereof.

inference that the third respondent's ability to deal with these matters in her affidavit indicates that she had full knowledge of the fifth respondent's affairs at the relevant time, rather than having subsequently investigated the matters.

[48] In the circumstances, I am satisfied that the applicant has only succeeded at this stage in demonstrating that it has a reasonable chance of succeeding in implicating the third respondent in the diversion of the following transactions:

(a) "*the First Letitone transaction*";

(b) "*the Second Letitone transaction*" and

(c) "*the Second BP Nhleko transaction*".

[49] Finally, while I am satisfied that the applicant's lost gross profit (as opposed to the fifth respondent's gross profit) is an appropriate measure of damages, and that the total lost profit in relation to these transactions is approximately R380,000 (which is coincidentally comparable to the current value of the third respondent's pension benefit), I consider it extremely unlikely that the third respondent will be held liable for 100% of the plaintiff's damages arising from the diversion of these corporate opportunities.

[50] As I have noted above, the third respondent is cited in the action as a joint wrongdoer together with the fourth and fifth respondents. Under section 2(8)(a)(ii) of the Apportionment of Damages Act, 34 of 1956, the Court may apportion the damages awarded against them in "*such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff*", and give judgment separately against each of them for the amount so apportioned.

[51] Taking into account all of the evidence marshalled by the applicant, I am of the view that the applicant only has a reasonable chance of establishing

that the third respondent was involved in dishonestly assisting the fourth and fifth respondent to a very limited extent. Although it is undoubtedly dishonest conduct when viewed in context, the processing and submitting invoices and following up with customers regarding payments and other matters relating to the fifth respondent's business can hardly be described as being the key activities involved in diverting corporate transactions to it. In my view, any apportionment of damages based on the third respondent's degree of fault would be very unlikely to exceed 20% of the damages suffered by the applicant flowing from the three diverted transactions in which she has been implicated.

[52] The third respondent's contentions in relation to the withholding of her salary and deduction of tax are irrelevant. To the extent that she is correct that the applicant's failure to pay these amounts is unlawful, nothing prevents her from claiming payment thereof. There is no basis to simply 'set them off' against the amount to be withheld. In addition, I am not persuaded that the fact that the applicant has persuaded the pension fund to withhold the fourth respondent's pension benefit is of any assistance to the third respondent – even on the reduced basis set out above, the amount is unlikely to be insufficient to meet his liability. Lastly, neither of the parties advanced any basis upon which I am able to decide one way or the other whether the third respondent's argument regarding preferential treatment of creditors upon insolvency has any merit. This is a matter that must await further careful examination in another case.

[53] Finally, the third respondent did not suggest, and I see no basis to find that the applicant failed to commence its action within a reasonable time or that it is not pursuing it with alacrity[38] – to the contrary, it appears that it is the respondents that are currently delaying its final determination, by delivery

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[38] *Charlton and Others v Tongaat-Hulett Pension Fund* [2006] ZAKZHC 14 at p. 8; *Jacobs v Telkom and Others* 2022 JDR 1114 (GP) paras 9 - 11, referring with apparent approval to MQ Seakamela "*Withholding of Pension Fund Benefits under South African Law*" (unpublished LLM thesis, University of Limpopo, 2013), in which it is suggested that continued withholding of pension funds following unreasonable delay on the part of the employer in instituting and prosecuting its claim could result in unjustified prejudice to the member.

of successive exceptions.

[54] I therefore conclude that the applicant has established the required *prima facie* right in the sum of R76,000 (being 20% of R380,000).

Balance of convenience (prejudice to the respondent)

[55] In my view, while it will no doubt be prejudicial to the respondent not to have immediate access to the portion of her pension benefit that is to be withheld, the funds remain preserved and continues to earn returns that will accrue to her in the event that they are not paid over to the applicant pursuant to an award of damages.

Costs and order

[56] While the applicant has technically succeeded in obtaining the relief that it seeks, the amount that it sought to have restrained has been dramatically decreased. Although I have found that the pension fund's approach to the applicant's request was unreasonable, there is no suggestion that the applicant ever indicated that it might be satisfied with a lesser amount. I therefore see no reason to mulct the pension fund in costs, especially since it did not oppose the current application.

[57] It seems to me that it will not be possible to tell whether it is the applicant or the third respondent that has achieved substantial success in this application until such time as the quantum of any damages awarded against the third respondent, if any, is finally determined. In my view, the most appropriate order regarding the costs of this application is that they should be reserved for determination by the trial court, which will have a better view of the matter.

[58] I make the following order:

1. The application is enrolled as an urgent application under the provisions of Uniform Rule 6(12) and the applicant's non-compliance with the rules of court relating to time periods and

manner of service is condoned.

2. Pending the final determination of the action instituted by the applicant against the second, third and fourth respondents under case number 22/14643, the first respondent is interdicted and restrained from paying out the sum of R76,000, comprising a portion of the pension benefit held by the first respondent and standing to the credit of the third respondent.

3. The costs of this application are reserved for determination in the action under case number 22/14643.

RJ Moultrie AJ

Acting Judge of the High Court

Gauteng Division, Johannesburg

DATE HEARD: 31 January 2023
JUDGMENT DELIVERED: 6 February 2023

APPEARANCES

For the Applicant: L Hollander Instructed by LDA Inc Attorneys

For the Respondent: L Grobler instructed by Alice Swanepoel Attorneys