



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

21/01/2016

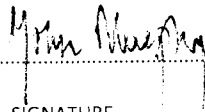
CASE NO:91954/2015

In the matter between:

UNIVERSITY OF LIMPOPO

Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHERS JUDGES: YES/NO
(3)	REVISED
21/01/2016	
DATE	SIGNATURE

GOVERNMENT EMPLOYEES PENSION FUND

First Respondent

JAFTA KODUPO MAPHATANE

Second Respondent

JUDGMENT

MURPHY J

1. The applicant, the University of Limpopo, as a matter of semi-urgency, seeks an order restraining the first respondent, the Government Employees Pension Fund

("GEPF"), from making payment to the second respondent of any funds held on his behalf as a benefit, pending finalisation of an action instituted by the applicant against the second respondent. Only the second respondent opposed the application. The second respondent was employed by the university as a logistics manager.

2. The applicant's summons instituting the action was issued on 2 July 2015. The particulars of claim allege that the Deputy Vice Chancellor, Prof Mashike, during 2008, orally instructed the second respondent, in his capacity as an employee of the university, to create a photographic association on behalf of the university. The purpose of the photographic association was the taking of photographs at graduation ceremonies. The second respondent was authorised to sell photographic packages to students and to receive payment of moneys which the university claims were owing to it.

3. It is common cause that during the period 2008 to 2014, the second respondent collected and received from students various sums of money in respect of the sale of photographs. The applicant alleges in the particulars of claim that it was a term of the agreement between the parties that the second respondent would "from time to time" render to the university accounts supported by vouchers in respect of the amounts collected by him and would pay such amounts within a reasonable time of collection. According to the applicant, at least 3786 photographic packages were sold to students at a rate that varied from R320 to R450. It therefore maintains that the second respondent would have received an amount of R1 482 930, which amount it seeks to recover in the action.

4. As stated, the present application is for an interdict restraining payment to the second respondent of his pension benefit pending the resolution of the action. In its founding affidavit, the applicant provides few details regarding the formation or terms of the contract which it alleges exists between it and the second respondent. Other than the say so of the deponent to the founding affidavit, there is no evidence in the

form of correspondence, invoices, demands for payment, financial statements or the like which confirm that such a contractual arrangement was in place for the 6 year period. It is common cause that no payments were made by the second respondent to the applicant during the 6 year period, in respect of the photographic work he performed.

5. Prior to instituting action against the second respondent, and while he was still in its employ, the applicant instructed its attorneys to direct a letter to the GEPPF calling for an undertaking that it would not pay the second respondent his pension benefits pending the finalisation of the action. The letter, dated 26 June 2015, alleges, without any specificity, that the funds allegedly misappropriated are those the second respondent received in respect of the photographic packages. In the letter, the attorneys referred to the provisions of section 37D of the Pension Funds Act¹ which *inter alia* permits a pension fund to deduct any amount due by a member to his employer on the date he withdraws from the pension fund in respect of compensation 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 admitted liability or a judgment has been obtained against the member. The parties subsequently have discovered that the Pension Funds Act does not apply to the GEPPF. The relevant law is the Government Employees Pension Law, 1996² which contains a provision similar to section 37D of the Pension Funds Act.

6. The GEPPF did not give the undertaking sought by the applicant. This did not present a problem to the applicant while the second respondent remained in the employment of the applicant, as he could only access his pension benefits on leaving employment. The second respondent was dismissed by the applicant, subsequent to a disciplinary hearing, on 4 November 2015. With the termination of his employment, the second respondent became entitled to withdraw his pension benefit from the GEPPF. The applicant provides scant detail regarding the reasons for

¹ Act 24 of 1956

² Proclamation No.21 of 1996

and the circumstances surrounding the second respondent's dismissal. In paragraph 8 of the founding affidavit, it states:

"Dismissal of the Second Respondent was based on findings of guilt relating to misconduct and/or gross negligence and intimidation linked with threats of bodily harm. Furthermore, there was a destruction of trust in the employment relationship."

The second respondent in his answering affidavit merely denies these allegations. There are no other averments regarding the dismissal. Accordingly, it is not clear whether the second respondent's dismissal related solely to the dispute about the photographic packages or was based also on other issues.

7. After the dismissal, the applicant's attorneys on 9 November 2015 again sought an undertaking from the GEPP not to pay the second respondent his pension benefit pending the finalisation of the action. When no undertaking was forthcoming, the applicant launched this application for an interdict.

8. In September 2015, prior to his dismissal, the second respondent filed his plea in the action proceedings. In it he raised a special plea that any claim for payments received by him between 2008 and July 2012 would have prescribed by reason of the summons only being issued in July 2015. He also pleaded over on the merits. His defence to the action is that he was approached by the applicant to perform the photographic services not as an employee of the university but as an independent contractor and that the amounts received by him from the students constituted remuneration for services rendered by him to the students in his personal capacity. He admitted that he had refused to render an account to the applicant, or to pay over any money to it, on the ground that he had no obligation to do so.

9. The second respondent elaborated on his defence in paragraphs 15-30 of his answering affidavit in this application. His version is as follows. During 2008 he was commissioned by the Deputy Vice Chancellor, Prof Mashike, to serve as an independent contractor to take photographs at university events, especially at graduation ceremonies and that he would be paid by the students directly. Prof Mashike was aware that the second respondent enjoyed photography in his leisure time and this was probably the reason he was approached. The second respondent started rendering the services to students during 2008, operated under the name of University of Limpopo Student Photographic Association and opened a bank account in the name of the Association. The second respondent utilised his own resources and know-how and trained various students to assist him. He purchased operational equipment out of his own pocket and was not compensated for his capital outlay by the applicant. The Association also incurred operational expenses including: student salaries, uniforms, catering and equipment maintenance.

10. During 2012, an investigation was mandated into the activities of the photographic association. The second respondent understood the imputation to be that he had been awarded a tender in an irregular fashion. Ernst and Young were appointed to investigate, and, according to the second respondent, all involved were ultimately vindicated, without any wrongdoing having been established. Therefore, business continued as usual until December 2014 when the Executive Director: Marketing and Communications, Mr. Mohuba, the deponent to the founding affidavit, initiated a further investigation. The second respondent again asserted that the photographic business was his own enterprise. He further averred that the business did not interfere with his ordinary duties as logistics manager at the university. Arising out of the second investigation, summons was issued against him.

11. During the course of the second investigation, the second respondent's file containing all the association's vouchers of expenditure etc. disappeared "mysteriously" from his office.

12. The second respondent averred also that he had never been requested by the applicant to account in respect of the earnings yielded by the photographic association or to make payment of the income generated by the photographic business to the applicant. He also pointed out that in claiming the proceeds earned by the photographic business, the applicant failed to take into account the operational expenditure incurred by the Association and that a substantial portion of the funds was appropriated towards community development and student aid initiatives.

13. The applicant did not deal in its replying affidavit with many of the specific averments of the second respondent. Thus, it did not challenge, deny or even deal with the following averments: i) the second respondent did the photographic work as an independent contractor; ii) received the income as remuneration for his services; iii) invested his personal capital in the project; iv) had no obligation to render an account or pay over the money to the university; v) incurred substantial running costs; vi) applied the proceeds of the venture for community development and student aid initiatives; and vii) had received a clean bill of health from Ernst and Young pursuant to the first investigation in 2012.

14. With regard to the second respondent's plea of prescription, the applicant merely denied prescription, without setting out any factual basis for its denial, and additionally contended that the portion allegedly owing after July 2012 has not prescribed. There is no evidence of any kind indicating that the applicant ever made any demand in respect of any monies owing to it by the second respondent either before or after 2012. And likewise, there is no evidence that prior to the second investigation it ever called upon the second respondent to account to it in respect of any amounts paid to the Association.

15. It is trite that in order to succeed in obtaining an interim interdict the applicant is required to show that it has i) a *prima facie* right, ii) a well-grounded apprehension of

irreparable harm if the interim relief is not granted; iii) the balance of convenience favours it; and iv) it has no other satisfactory remedy.

16. The onus is upon the applicant to put forward sufficient evidence to establish a *prima facie* right, albeit open to some doubt. It will never be enough for the court to merely accept the applicant's allegations. The applicant must set out the facts in as complete a way as the circumstances demand. The stating of bald, unsubstantiated allegations poses the risk to the applicant that significant doubt will be cast on its version. The proper approach is for the court to consider the facts as set out by the applicant together with any facts set out by the respondent which the applicant cannot or does not dispute and to decide whether, with regard to the inherent probabilities and the ultimate onus, 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 and if they throw serious doubt on its case the applicant cannot succeed.³

17. The applicant bases its claim of a *prima facie* right on its assumed entitlement to deduct an amount from the second respondent's pension benefits in respect of any loss which it has sustained as employer as a consequence of theft, fraud, negligence or any misconduct on the part of the second respondent. The relevant provision is section 21 of the Government Employees Pension Law, 1996,⁴ which provides that pension benefits generally are not liable to be attached or to be subjected to any form of execution. Section 21(3)(c) however provides for the exception upon which the applicant seeks to rely. The pertinent part of the section reads:

"21. Prohibition on cession and attachment of benefits. – (1) No benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or, save as is provided in section 26 or 40 of the Maintenance Act, 1998, and section 7(8) of the Divorce Act, 1979 (Act No. 70 of

³ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1184.

⁴ Proclamation No 21 of 1996

1979), be liable to be attached or subjected to any form of execution under a judgment or order of a court of law.

(2)

(3) Notwithstanding the provisions of subsection (1) or of any other law –

(a) any amount which is payable to the employer or the Fund by any member in the employment of such employer on the date of his or her retirement or discharge, or which the employer is liable to pay in respect of such member;

(b) any amount which has been paid to any member, pensioner or beneficiary in accordance with the provisions of this Law and to which such member, pensioner or beneficiary was not entitled;

(c) the amount of any loss which has been sustained by the employer through theft, fraud, negligence or any misconduct on the part of any member, pensioner or beneficiary which has been admitted by such member or pensioner in writing or has been proved in a court of law;

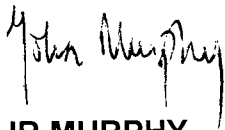
(d) any amount, plus interest at the rate determined by the Board after consultation with the actuary, due to the Fund in respect of an amount for which the Fund becomes liable under a guarantee furnished in respect of a member for a loan granted by some other person to that member in terms of the rules,

may be deducted from the benefit payable to such member, pensioner or beneficiary under this Law in a lump sum or in such instalments as the Board may determine."

18. The question to be answered in determining if the first requisite for an interim interdict has been met is whether the applicant has put forward *prima facie* proof of facts that establish the existence of its entitlement to deduct an amount from the benefit. Do the averments in the affidavits in the application before me establish *prima facie* that the applicant sustained any loss through theft, fraud, negligence or misconduct by the second respondent? In my judgment they do not. There are simply two bald and unsubstantiated allegations: firstly, that the second respondent failed to render an account, and secondly refused to pay over monies. There is nothing beyond that. The second respondent sets up a number of facts in contradiction of those bald allegations. He explained that he set up business as an independent contractor, expended his own money, ran up running costs, and most

importantly was never asked to render an account in the first 6 years he ran the business. None of that has been challenged or contradicted by the applicant. Moreover, had the second respondent been obliged from 2008 to pay over the monies received by the photographic business to the university, it is inherently improbable that steps would not have been taken to recover the monies before 2015. The probabilities accordingly favour the second respondent's version that he had no obligation to make any such payment. In the premises, in view of the serious doubt thrown on the applicant's case, the applicant has failed to establish that it has a *prima facie* right to deduct any amount from the second respondent's pension benefits on the grounds of it sustaining any loss from the alleged misconduct of the second respondent. The applicant moreover has not made out any case in its founding affidavit for an anti-dissipation interdict.

19. In the premises the application for an interim interdict cannot succeed, with the result that the application is dismissed with costs.



JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard:	27 November 2015
Counsel for Applicant:	Adv P Venter
Instructed by:	Van Zyl Le Roux Inc
Counsel for Respondent:	Adv SG Gouws
Instructed by:	Verveen Attorneys
Date of Judgment:	21 January 2016