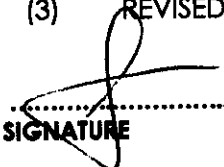




REPUBLIC OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

CASE NO: 50395/2015

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
	
SIGNATURE	24/3/2016
	DATE

24/3/2016

In the matter between:

WINDYBROW CENTRE FOR THE ARTS

Applicant

and

SANLAM LIFE INSURANCE LIMITED

First Respondent

VUYO MAPHELA

Second Respondent

ALLIE ACHMAT

Third Respondent

J U D G M E N T

MALI AJ

- [1] This is an application for an interim interdict against the respondents. The relief sought by the applicant is based upon the provisions of section 37D(b)(ii) of the Pension Funds Act, 24 of 1956 ("the Pension Fund") which provides an employer a right to access pension fund benefits of an employee to recover damages suffered by the employer by reason of any theft, dishonesty, fraud or misconduct by the employee member of the Fund.
- [2] The applicant is a public entity registered under Schedule 3(a) of the Public Finance Management Act, 1 of 1999 ("PFMA") with its business address at number 161 Corner Nugget and Pietersen Streets, Hillbrow, 2001.
- [3] The first respondent is Sanlam Employee Benefits, a division of the Sanlam Umbrella Fund ("Fund"), a pension fund with its principal place of business at c/o Alkantrant & Sanlam Streets, Lynwood, Pretoria, 0081.
- [4] The second respondent is a major male person and a former employee of the applicant.
- [5] The third respondent is a major male person and a former employee of the applicant, residing at 15 Beryl Drive, Fleurhof, Roodeport.
- [6] The first respondent will abide by the ruling of the court. The second and third respondents oppose the application.

- [7] I first had to deal with a point in *limine* raised by the second and third respondents. The respondents' complaint is that the citation of the applicant and the first respondent is incorrect as it does not appropriately identify the parties. On 27 July 2015 the applicant issued notice of amendment to the effect that the word "Theatre" be deleted after Windybrow and be replaced with "Centre for the Arts"; thus, the correct citation of the first respondent is **WINDYBROW CENTRE FOR THE ARTS**. Secondly, the notice sought to amend the citation of the first respondent from "The Sanlam Umbrella Fund" to **SANLAM LIFE INSURANCE LTD**. The respondents' affidavits to oppose same were filed out of time. I find it in the interests of the administration of justice that the amendments be effected accordingly.
- [8] The only issue left for determination is whether the applicant is entitled to the interim interdict.
- [9] It is common cause that both second and third respondents were employed by the applicant on 7 February 2005 and on 7 January 2008 respectively.
- [10] The applicant's theatre building fell into disrepair and in 2010 required renovations. The second and third respondents were responsible for the procurement of contractors, payments thereof for work done and which suppliers and/or contractors were entitled. It later transpired that there were issues and or disputes in the handling of procurement and payments spent on renovations to the theatre. The applicant

appointed the auditing firm of Ernst and Young ("E&Y") to conduct the forensic investigation.

- [11] A copy of the draft report was released in May 2014 and on 27 May 2014, the applicant dismissed the second and third respondents due to alleged misappropriation of over R60 million of the applicant's funds. A final report was circulated in June 2014. On 25 July 2014, on the basis of the forensic report, the applicant laid a criminal charge against the respondents. At the date of hearing of this application, the matter had not yet been finalised.
- [12] The respondents approached the Commission for Conciliation, Mediation and Arbitration ("CCMA"). On 1 October 2014, the CCMA found that the respondents' dismissal was unfair and they were awarded compensation. On or about 12 November 2014, the applicant served and filed an application to review and set aside the arbitration award.
- [13] On or about 20 November 2014, the respondents caused a writ of execution to be issued against the applicant. As a result, a sum of approximately R161 000.00 was distributed to the second respondent. The applicant approached the Labour Court on an urgent basis to stay and set aside the writ, the Sheriff from further distribution of the applicant's monies, and an order for the payment of the monies irregularly paid to the second respondent. The applicant was successful in the stay and setting aside the writ and interdicting the sheriff from further distribution of monies. The applicant was not

successful in obtaining the order for the repayment of the money. The matter has been taken on appeal to the Labour Appeal Court. At the date of hearing of this matter, the appeal was still pending.

[14] On 20 February 2015, the applicant instituted a damages claim in the Labour Court against the respondents on the basis of the findings of the E&Y forensic report. At the date of the hearing of this case, the Labour Court claim was still pending.

[15] The applicant seeks relief as follows-

15.1 payment in the sum of R39 194 012.60 for overpayment and/or irregular payments; alternatively

15.2 payment in the sum of R21 101 660.80 for overpayments and/or irregular payments; alternatively

15.3 payment in the sum of R19 739 434.55 for overpayments and or irregular payments; and

15.4 payment in the sum of R7 779 095.41 for fruitless and wasteful expenditure.

[16] It is not disputed that the second and third respondents have accrued pension benefits in the first respondent in the amounts of R614 472.91 and R1 256 079.87 respectively. The applicant now

seeks an interdict that the first respondent preserves the amounts in question.

LAW

[17] In **Webster v Mitchell** 1948 [1] SA 1186 (W), the court stated:

"In the grant of a temporary interdict, apart from prejudice involved, the first question for the Court in my view is whether, if interim protection is given, the applicant could ever obtain the rights he seeks to protect. Prima facie that has to be shown. The use of the phrase 'prima facie established though open to some doubt' indicates, I think, that more is required than merely look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take 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 could on those facts obtain final relief at a trial. The facts set up in contradiction by respondent should then be considered. If serious doubt is thrown on the case of applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left for trial and the right protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief. Although the grant of a temporary interdict interferes with a right which is apparently possessed by the respondent is protected because, although the applicant sets up a case which prima facie establishes that the respondent has not the right apparently exercised by him, the test whether or not the temporary relief is to be granted is the harm which will be done. And in a proper case it might well be that no relief would be granted to the applicant except on conditions which would compensate the respondent for interference with his right, should the applicant fail to show at the trial that he was entitled to interfere."

[18] In **Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (SA) (Pty) Ltd** [1995] 1 All SA 414 (T) 417-418; 1995 (1) SA 725 (T) 729 I-730 G, it was stated:

"The applicant seeks interim relief. The applicant must therefore establish:

- (1) a clear right or, if not clear that it has a prima facie right;*
- (2) that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief (by way of the summons issued) is eventually granted;*
- (3) that the balance of convenience favours the grant of an interim interdict; and*
- (4) that the applicant has no other satisfactory remedy (L F Boshoff Investments (Pty) Ltd v Cape Town Municipality; Cape Town Municipality v L F Boshoff Investments (Pty) Ltd 1969 (2) SA 256 (C) at 267 B- E)."*

[19] In **Beecham Group Ltd v B-M Group (Pty) Ltd** 1977 (1) SA 50 (T) at 55 B-E), the court said, with regard to the various factors which must be considered:

"I consider that both the question of the applicant's prospects of success in the action and the question whether he would be adequately compensated by an award of damages at the trial are factors which should be taken into account as part of a general discretion to be exercised by the Court in considering whether to grant or refuse a temporary interdict. Those two elements should not be considered separately or in isolation, but as part of the discretionary function of the Court which includes a consideration of the balance of convenience and the respective prejudice which would be suffered by each party as a result of the grant or refusal of a temporary interdict."

[20] "Where the applicant's right is clear and the other requisites of an interdict are present no difficulty presents itself about granting an interim interdict. Where, however, the applicant's prospects of success are nil, obviously the Court will refuse an interdict" (*Olympic Passenger Services (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (D) at 383 C-D).

[21] Section 37D of the Pension Fund provides;

"A registered fund may... (b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of... (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb) in respect of any damages caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which (aa) the member has in writing admitted liability to the employer; or (bb) judgment has been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned;..."

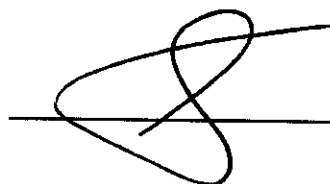
[22] The applicant *in casu* believes it has a *prima facie* right to have the funds of the second and third respondents preserved on the basis of the auditor's report. The auditor's report led to the second and third respondents' dismissal. The applicant's contention is fatal because it is not in dispute that the respondents' dismissal was found to be unfair. As a result, the applicant had to compensate the respondents for the unfair dismissal. The appeal by the applicant has not yet been decided.

- [23] It was argued on behalf of the applicant that there are no prospects of recovering monies from the respondents in the event that the applicant is successful. The respondents do not have sufficient realisable assets to satisfy the claim of damages. It was further stated that the applicant will be caused irreparable harm as the prejudice is absolute; therefore, the balance of convenience weighs in their favour.
- [24] The applicant's basis for the above argument is that the respondents by their own admission have stated that they are facing financial challenges. They need the same money the applicant wants preserved to survive. I believe that something more is required. The applicant should have proved that it has a right to the money in question because of theft or dishonesty proven against the second and third respondents.
- [25] In determination of this matter, it is important that the applicant proves a *prima facie* right to the funds, amongst other things. The applicant's alleged right should satisfy the requirements of the legislation providing for the withholding of funds. On the facts before me, the applicants have not proven any fraud, dishonesty or theft and any of the elements required in section 37D.
- [26] The applicant's case on the basis of a *prima facie* right; as long as it is intended to be established on the actions of the first respondent, has no merit. The first respondent had to be satisfied that there is fraud, dishonesty and/or theft in order to withhold funds. I reiterate same

has not been proven. I find that the applicant has not proven a *prima facie* right.

ORDER

[27] The application is dismissed with costs.

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**MALI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION**

Counsel for the Applicant:

Adv Greg Fourie

Instructed by:

Cliffe Dekker Hofmeyr Inc

Counsel for the Second and
Third Respondents:

Adv P A Wilkins

Instructed by:

F Rudolph Attorneys

Date of Hearing:

30 November 2015

Date of Judgment:

24 March 2016