



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED



SIGNATURE

10 November 2021

DATE

Case Number:65635/2020

In the matter between:

SCIENTIA OPTIMATE FINANCIAL SERVICES (PTY) LTD

Applicant

And

M.A. LUKHAIMANE N.O.

First Respondent

JOHAN ETTIENE JANSE VAN RENSBURG

Second Respondent

LIFESENSE FINANCIAL SERVICES ADMINISTRATION

DIVISION (PTY) LTD

Third Respondent

KEYSTONE UMBRELLA PROVIDENT FUND

Fourth Respondent

Delivered. This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand down is deemed to be 10h00 on 10 November 2021.

JUDGMENT

BARNARDT (AJ)

[1] The applicant in this matter brought a review application to challenge the determination of the Pension Funds Adjudicator (*"the PFA"*) in finding that Keystone Umbrella Provident Fund (*"the Fund"*) withholding of the complainant's withdrawal benefits in terms of section 37D(1)(b)(ii) of the Pension Funds Act (*"The Act"*) was unjustified and that the funds should partially be paid out and transferred to another preservation fund.

[2] The applicant applied for the review and setting aside of the abovementioned determination, and an order that the matter be referred back to the Fund for a fresh consideration of the applicant's request that the benefit of the second respondent in the Fund, being the fourth respondent, be withheld.

Background

[3] The second respondent was an employee of the applicant since May 2010, he signed the contract of employment on 28 April 2010, and he resigned on 3 February 2020, his last day of employment to be 29 February 2020.

[4] The following terms of his employment agreement are important in this application:

“10.3 The disclosure of confidential information about the Company, its employees or its clients either internally or in the market place can compromise the Company’s competitive position and a breach of this confidentiality is regarded as serious.

...

By signing this letter, you record that you are fully aware of the fact that copyright in all artwork, photographs, films, letters, reports, memoranda, written table and compilations and all other material (both electronic and hard copy form) and confidential information including our way of business, is the property of the Company and you undertake that you will not infringe such copyright or commit a breach of trust on confidence in regard thereto. Company property may only be removed from the company premises with specific authorization from the manager with at least director status.”

[5] During March 2020, after the employment relationship between the applicant and second respondent was terminated, the second respondent forwarded e-mails to Sanlam regarding clients of the applicant, terminating the services of the applicant and appointing himself, under SFP as the new consultant for the clients. These e-mails were, according to the applicant, in breach of the confidentiality clause of the second respondent’s employment contract.

[6] On 12 May 2020 the second respondent was informed by the applicant’s attorneys that the applicant requested that his pension benefit be withheld in terms of section 37 of the Pension Fund Act.

[7] The second respondent forwarded an email to the Fund on 29 May 2020, requesting certain information pertaining to the withholding of his pension benefit, but received no response.

[8] On 29 June 2020 the second respondent lodged a complaint about the Fund's decision to withhold his benefit to the PFA.

[9] The PFA received submissions from the applicant, third and fourth respondents in answer to the second respondent's complaint and concluded as follows:

"5.17 In the *Jefftha* decision it was held that the duties placed on a board in terms of section 7C envisages careful scrutiny of claims made against benefits by employers, and a weighing of the competing interests of the parties after affording the member an opportunity to place his case properly before the fund. The Failure by the board of the fund to comply with its duties constitutes an inability by the board of the fund to comply with their legally prescribed fiduciary duties.

5.18 The benefit accrued to the complainant when he exited the services of the third respondent (applicant). In terms of section 7C(2)(f) of the Act, the first respondent owed the complainant a fiduciary duty in respect of his accrued benefit. The first respondent failed in its duty by depriving this member his right to receive his accrued benefit when it decided to without hearing from him.

5.19 Considering the above, the board of the fund acted in breach of their fiduciary duties towards the complainant. It failed to comply with basic procedural requirements before exercising its duty to withhold."

[10] The PFA made the following order:

"[6] ORDER

6.1 In the result, the order by the Adjudicator is as follows:

6.1.1 The first respondent (being the Fund) is ordered to pay to the complainant (second respondent) a cash lumpsum amount of R25 000 and transfer the balance of his fund credit to the Sygnia Preservation Fund, inclusive of fund return earned on such benefit calculated from 1 March 2020 to date of payment, within four weeks of this determination; and

6.1.2 The first respondent is ordered to pay the complainant interest in terms of section 30N of the Act on the complainant's benefit in 6.1 above at the rate of 7 percent per annum calculated from 1 March 2020 to date of payment."

[11] This application, to have the above determination reviewed and set aside, was brought in terms of section 30P of the Act. It should be mentioned that although the applicant, in its founding affidavit only referred to section 30P of the Act, it argued that this was a review application in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

[12] It is common cause between the parties that the PFA's finding that the Fund failed to follow due process and should have considered submissions from the second respondent before it granted the applicant's request to withhold the second respondent's pension benefit, was correct.

Provisions of the pension fund act

[13] Section 37D(1)(b)(ii) of the Pension Funds Act, 24 of 1956 allows a fund to deduct from a member's benefit, on withdrawal of the member, an amount due by the member to his or her employer under specified circumstances, inter alia the amount must have been due on the date of the member's retirement or the date on

which he ceased to be a member of the fund. The amount must be owed to the employer as compensation for the recovery of any damage caused by the employer by reason of theft, dishonesty, fraud or misconduct by the member and:

- i. the member must have acknowledged liability in writing; or
- ii. a judgment must have been obtained against the member in any court.

[14] Although section 37D(1)(b) does not specifically provide for the withholding of a benefit. The Supreme Court of Appeal in ***Highveld Steel & Vanadium Corporation v Oosthuizen***¹ held that in order to give effect to the purpose of the section, which is to protect an employer's right to recovery of money misappropriated from it, the wording must be interpreted to include the power to withhold payment of a member's benefits pending the determination or acknowledgment of such member's liability.

[15] In terms of section 30A of the Act, any person who has a complaint, as defined in section 1 of the Act, may lodge a written complaint with the fund for consideration by the board of the fund, which complaint must be properly considered and be responded to within 30 days.

[16] If the complainant is not satisfied with the reply received, or the fund failed to reply within 30 days, the complainant may lodge a complaint with the PFA, who, in

¹ 2009 (4) SA 1 (SCA) at para 19; See also *Charlton and others v Tongaat-Hullet Pension Fund* (2001) 12 BPLR 2870 (PFA).

terms of section 30D of the Act, shall dispose of complaints in a procedurally fair, economical and expeditious manner.

[17] Section 30E of the Act mandates the PFA to “investigate any complaint and (may) make the order which any court of law may make” and section 30F specifically provides that “when an adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations”.

[18] It is important to note that Section 30J provides that the PFA “may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner”.

[19] In terms of section 30O(1) of the Act any determination of the adjudicator shall be regarded as a civil judgment of any court of law and section 30O(2) provides an avenue for the enforcement of the adjudicator's award.

[20] In terms of Section 30P of the Act, any party who is dissatisfied with the outcome of the adjudicator's process, may apply to the division of the High Court, which has jurisdiction, for relief and the High Court may consider the merits of the complaint made to the adjudicator and on which the adjudicator's determination was based and may make any order it deems fit.

Discussion

[21] In *Sligo v Shell Southern Africa Pension Fund and Another*² the court discussed adjudications by the PFA as follows:

“The complaints adjudication process established by chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an interventionist instrument of policy enacted in the interests of greater social security.... The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of [pension benefits]. To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner.”

[22] It is clear that the PFA is recognised as an independent entity acting as a referee between the parties, tasked with finding the relevant evidence and deciding the issues in the same way a court of law will do.

[23] The PFA was therefore, in accordance with the principles as set out above, entitled to investigate the complaint and to make an order which any court of law may make.

[24] The PFA obtained input from all the parties; investigated all the evidence and was in the same position the Fund would have been if the matter was to be referred back for reconsideration, and therefore it was not necessary to refer the matter back.

² [1999] 11 BPLR 299 (PFA) at 309A-C.

[25] In *Meyer v Iscor Pension Fund*³ the powers of the High Court in terms of Section 30P of the Act was set out as follows:

“From the wording of Section 30P(2), it is clear that the appeal to the High Court contemplated is an Appeal in the wide sense. The High Court is therefore not limited to the decision whether the Adjudicator’s determination was right or wrong. Neither is it confined to the evidence or grounds upon which the Adjudicator’s determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court’s jurisdiction is limited by Section 30P(2) to a consideration of “the merits of the complaint in question”. The dispute submitted to the High Court for Adjudication must therefore still be a complaint as defined. Moreover, it must be substantially the same complaint as the one determined by the Adjudicator”.

[26] Although the relief claimed by applicant, was for a review of the PFA’s determination, it brought the application in terms of section 30P and I am entitled to consider all the evidence afresh and make an order I deem fit.

[27] Even if this application is regarded to be a review in terms of PAJA, I am of the view that to refer the matter back for reconsideration would serve no purpose, but only jeopardise the aim of the Act to ensure procedurally fair and economical and expeditious resolutions of disputes regarding pension benefits.

[28] On consideration of the wording of section 37D(1)(b) of the Act, it is evident that the amount must have been due on the date of the member’s retirement or the date on which he ceased to be a member of the fund and in respect of damage

³ 2003 (2) SA 715 (SCA) at 725 I - 726 A.

caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member.

[29] The second respondent sent the emails which caused the applicant's request that his pension benefit should be withheld in March 2020 after he already left his employment with the applicant but before the benefit due to him has been paid out.

[30] In *ABSA Bank Ltd v Burmeister and Others*⁴ the SCA interpreted section 37D(1)(b) with reference to 'a member' as follows:

"[9] Section 37D(1)(b) refers to 'a member' of a registered fund.

'Member' is defined in s 1 as meaning —
'... in relation to —

(a) a fund referred to in paragraph (a) of the definition of "**pension fund organization**", any member or former member of the association by which such fund has been established;
(b) a fund referred to in paragraph (b) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established, but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund; . . . '.
The two categories set out in the definition of 'pension fund organization', in so far as they are relevant, are —

'(a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates,

⁴ (647/02) [2004] ZASCA 16; [2005] 3 All SA 409 (SCA) (26 March 2004).

or for the dependents of such members or former members upon the death of such members or former members; or (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependents of such persons upon the death of those persons, . . .’.

It emerges from the foregoing that ‘member’ in s 37D(1)(b) includes a former member (or former member of a class) who has not received all the benefits that may be due to him or her from the fund. Expressed differently, a member remains such until he or she has received all the benefits and that person’s membership is terminated according to the rules of the fund.”

[31] With due regard to the abovementioned interpretation, the second respondent was still a member of the fund when the emails were sent, although he was no longer an employee of the applicant.

[32] *In Kwacha Pension Fund and Another v Pension Fund Adjudicator and Another*⁵ the employee, as part of the termination of her employment, undertook to return to her employer, inter alia the company car. However, despite this undertaking, she failed to return the car and the employer instituted its Rei Vindication to recover the vehicle and action against the employee for damages suffered. The employee’s pension Fund was requested to withhold her pension benefit, pending the finalisation of the litigation.

⁵ (76484/2013) [2014] ZAGPPHC 481 (23 May 2014).

[33] De Vries AJ in par. 23 found as follows:

“There is in my view no doubt that the actions of the 2nd respondent in retaining the employer’s vehicle after having undertaken to return same, thereby placing the employer in a position where it had to institute action to recover its asset falls four square within the ambit of misconduct by the member and against the background of the correspondence between the parties, the member had, in writing, admitted liability, and that the amount thereof was fixed by order of Court is an allowable deduction.

[34] The conduct complained about in the Kwacha-matter was, like the conduct *in casu*, committed after the employment contract was terminated, but whilst he was still a member of the Fund and I therefore conclude that the provisions of section 37D(1)(b) of the Act are applicable to the conduct of the second respondent.

[35] The parties *in casu* did not conclude a Restraint of Trade Agreement and the applicant relies, I assume, on certain common law duties which it alleges are owed by the respondent as well as on the provisions of his employment contract as quoted above, especially

“10.3 The disclosure of confidential information about the Company, its employees or its clients either internally or in the market place can compromise the Company’s competitive position and a breach of this confidentiality is regarded as serious.”

[36] The confidentiality clause was an express clause in the employment contract, and it is an established principle that employment contracts are binding on parties and are therefore enforceable unless it can be shown that the parties were not on an equal footing when entering into the contract, or that the employment contract was invalid *ab initio*, or that it is contrary to public policy, or it is an illegal contract.

The second respondent *in casu* did not raise any concerns with regards to the employment contract and I therefore conclude that the contract is binding on both parties.

[37] The applicant argued that the respondent's conduct in forwarding the emails, is a direct breach of the confidentiality clause and that it was therefore entitled to request that section 37D(1)(b)(ii) of the Act be invoked.

[38] The second respondent's defence is that he was already familiar with the applicants' clients before he commenced his employment with the applicant, through his father who was an erstwhile founder and director of the applicant. He admitted that he sent the emails, but that

“(H)e did so without any intent to mislead the recipients or to misrepresent himself to them. The recipients in any event are familiar with the Second Respondent and were already well aware that he had resigned from his employment with the Applicant.”.

[39] In determining whether there are protectable customer connections the Court does not merely look at the fact that the employee had contact with the customer but the connection “must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.”⁶ In other words, the employee's interactions with its employer's clients are not enough to create a customer connection that is worthy of protection. However, a restraint covenant would be enforceable if the employee “had access to the company's customers and

⁶ Den Braven S.A. (Pty) Limited v Pillay and Another 2008 (6) SA 229 (D).

could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company.”⁷

[40] It is common cause that the respondent had the intention to “deal” with the applicant's clients and in my view the second respondent was able to act to the detriment of the applicant and therefore his conduct may be considered as “misconduct” with an element of dishonesty as defined in ***Moodley v Local Transitional Council of Scottburgh Umzinto***.⁸

[41] However, this is not the only factor to consider. The PFA in his consideration, correctly alluded to the Fund's responsibilities regarding its decision to withhold the funds. More specifically, it referred to the duties placed on the board of a Fund in terms of section 7C of the Pension Funds Act, which required a careful scrutiny of the claims made against the benefits by the employers.

[42] The Board is required to uphold its fiduciary duties, which includes balancing the competing interest of the parties by considering the harm that will be suffered by the employee if the funds are withheld against the harm to the employer if the remedy is not granted.

[43] Moreover, it is a well-established principle that the employer cannot be allowed to withhold the benefit indefinitely. Should the employer's liability not be

⁷ *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjies and Another* (2012) 33 ILJ 629 (LC) (*Continuous Oxygen Suppliers*).

⁸ 2000(4) SA 524 D.

determined within a reasonable period, the Fund is not entitled to withhold the benefits.

[44] The PFA in his determination, summarised the chronology of events as follows:

“5.12 The complainant’s employment terminated with effect from 29 February 2020. In a letter dated 12 May 2020, the third respondent’s legal representative advised the complainant of its instruction to withhold the payment of his withdrawal benefit due to damages caused in the amount of R150 000. The third respondent indicated that it attempted to institute legal proceedings against the complainant. However, due to the Covid 19 pandemic it could not do so. On 5 October 2020 the first respondent only provided the Adjudicator with copies of correspondence between the complainant and the first respondent and between the second and third respondent in respect of the withholding of the complainant’s benefit. The first respondent failed to provide the Adjudicator with a formal response indicating whether it had applied its mind to the withholding of the complainant’s benefit. Further, it appears that the third respondent has not yet instituted any civil or criminal proceedings against the complainant as the first respondent only attached the letter dated 12 May 2020, addressed to the complainant wherein he was advised of his alleged misconduct and the instruction given to the first respondent to withhold the payment of his benefit. The complainant’s employment terminated in February 2020, more than 9 months have passed, and the complainant has not been formally charged.”

[45] It is common cause that the applicant issued summons against the second respondent on 23 November 2020, claiming payment in the amount R1 907 598, 00 as loss of income over a period of three years. This amount differs vastly from the amount of R150 000, 00 referred to in the letter forwarded to the second respondent by the applicant’s attorneys.

[46] It is trite that withholding of benefits must be for a reasonable period and that the Fund had a fiduciary duty to contact the second respondent within a reasonable time period, which did not happen *in casu*.

[47] Further, the Fund was required to investigate if there were unreasonable delays in bringing the matter to finalisation. From the evidence before me it is evident that these delays continued and the summons was only issued on 23 November 2020, being almost nine months after the second respondent's resignation.

[48] With due consideration of all the relevant aspects of this matter, I cannot fault the PFA's finding that the second respondent was not given an opportunity to present his case before the fund.

[49] I had the opportunity to consider submissions by both the applicant, being the employer, and the second respondent, being the employee, as well as the determination of the PFA and I agree with the PFA's finding that the applicant did not institute the necessary legal steps timeously.

[50] In the premises, the review application cannot succeed.

[51] I therefore order as follows:

1. The application is dismissed with costs.



JF BARNARDT (AJ)
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT
PRETORIA

Appearances

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Date of judgment: 10 November 2021