IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 7187/2022P

In the matter between:

UMGUNGUNDLOVU DISTRICT MUNICIPALITY **Applicant**

and

NATAL JOINT MUNICIPAL PENSION FUND **First Respondent**

MSAWAKHE PHINDAKUPHI JOHANNES BHENGU **Second Respondent**

ORDER

The following orders are issued:

1. The second respondent is granted condonation for the late filing of his heads of argument.
2. The rule *nisi* of 17 June 2022 is confirmed and varied to read as follows:

   'That the First Respondent is hereby interdicted and restrained from paying the amount of R416 213.82 or any lesser amount held by it as a pension

benefit to the Second Respondent pending the First Respondent making a final decision on the applicant's written request to withhold such monies.'

3. The second respondent is directed to pay the costs occasioned by the application.

JUDGEMENT

HENRIQUES J

Introduction

[1] This opposed application concerns the confirmation of a *rule nisi* granted on 17 June 2022 by Mlotshwa AJ and is opposed by the second respondent.

[2] The rule *nisi* of 17 June 2022 reads as follows:

'2.1 That the First Respondent **NATAL JOINT MUNICIPAL PENSION FUND**, be and is hereby interdicted and prevented from paying the amount of R416 213.82 or any lesser amount held by the First Respondent as a pension benefit to the Second Respondent;

2.2 That First Respondent be interdicted and restrained from realising and/or making a payment to an amount of R R416 231.82 of the Second Respondent's pension benefits pending the finalisation of the civil claim for damages instituted by the Applicant against the Second Respondent in the KwaZulu-Natal High Court in Pietermaritzburg.

2.3 That the First Respondent is directed to withhold the Second Respondent's pension benefit in the amount of R416 231.82 pending finalisation of the claim for damages referred to in prayer 2.2 above, provided that the First Respondent is not required withhold any amount over and above the amount due to the Second Respondent in terms of its registered rules.'

[3] In respect of costs although paragraph 3 of the rule *nisi* in the notice of motion made provision for costs to be paid by any of the respondents who unsuccessfully opposed the application, the rule *nisi* which was issued did not make provision for such costs and merely reserved costs. On the subsequent adjournments and extension of the

rule *nisi* costs were ordered to be costs in the cause.

Issues for determination

[4] The sole issue for determination is whether the applicant is entitled to the final interdictory relief pending the outcome of the action instituted by the applicant against the second respondent in this court under case number 6152/2022P. The action relates to a claim for damages arising from an overpayment of R416 213.82 to the second respondent arising from his misconduct.

Background to the application

[5] It is perhaps useful at this juncture to set out the common cause, alternatively undisputed, facts which preceded the application. The second respondent had commenced his employment with the applicant on a permanent basis on 2 May 2007 as a Manager: Human Resources. In 2021, the internal audit division of the applicant conducted an audit to determine the cause of the exorbitant travel allowances which had been paid, and to provide a report to the accounting officer with recommendations in terms of the Local Government: Municipal Finance Management Act 56 of 2003.

[6] The report revealed that there were a number of overpayments made in respect of the travel allowances of certain employees including the second respondent which overpayment emanated from the pre-existing travel allowance policy. As a consequence, and after consultation with employees, a new travel allowance policy was drafted and approved by the applicant's council for the payment of travel allowances. The adoption of such new travel allowance policy put an end to the payment of excessive travel allowances.

[7] In July 2022, the applicant addressed correspondence to all its employees who qualified for car allowances, including the second respondent, informing them of the newly approved travel allowance policy for car allowances of R14 777.73. Pursuant to such correspondence the second respondent and 22 employees embarked on an illegal strike in July 2022 protesting against the new travel allowance policy as well as the new car

allowance amounts approved by council.

[8] In October 2021 the Labour Court dismissed an urgent application by the second respondent and other employees based on what they termed the unilateral change to the terms and conditions of their employment in which they demanded that the old travel allowance policy be reinstated. After the dismissal of the urgent application in the Labour Court, the second respondent and other employees pursued an unfair labour practice dispute which is pending arbitration.

[9] In the interim, on 18 November 2021 pursuant to disciplinary proceedings the second respondent was charged with 10 counts involving *inter alia* gross dishonesty, gross misconduct, gross dereliction of duty. After a disciplinary hearing on 22 February 2022, the Chairperson of the disciplinary enquiry, Ms Hlengwa, found the second respondent guilty of 8 of the 10 misconduct counts and recommended the summary dismissal of the second respondent. Pursuant to such recommendation the applicant terminated the second respondent's employment on 4 March 2022.

[10] It was only during the course of the disciplinary proceedings in December 2021, the applicant discovered that the second respondent had received an overpayment of his travel allowance in the amount of R416 213.82 and had unduly benefitted at the applicant’s expense. On 27 May 2023, the applicant discovered that the second respondent had resigned his membership of the first respondent and had on 23 April 2022 filed a claim to withdraw his pension benefits. At no stage prior to this had the applicant been informed by the second respondent that he intended to withdraw his pension benefits from the first respondent.

[11] Subsequently, after confirming with the first respondent that the applicant had filed a claim to withdraw his pension benefits, on 30 May 2022 the applicant wrote to the first respondent invoking the provisions of s 37(D) of the Pensions Fund Act 24 of 1956 (the Act) requesting the first respondent to withhold payment of his pension benefits pending the finalisation of its civil claim for damages.

[12] On 3 June 2022 a response was received from the first respondent merely repeating the provisions of s 37(D)(1)*(b)*(ii). All the letter did was reiterate what the requirements for a deduction of pension benefits were in terms of s 37(D)(1)*(b)*(ii) for monies to be withheld. Such letter did not in any way deal with the merits of the request.

[13] On 13 May 2022 the applicant instituted an action against the second respondent which action is being defended.

[14] In opposition to the application the second respondent disputes that his membership terminated with the first respondent due to his dismissal by the applicant. In addition, he challenges the lawfulness of the dismissal. The basis for seeking the interdict has also been disputed and that he will not be able to pay or satisfy any damages claim should the applicant succeed in its action against him. He denies that any damages which the applicant suffers is due to dishonesty or misconduct on his part. He submits that the reason for proceeding with the withdrawal of his benefit was as he needed to fund the litigation instituted by the applicant against him.

[15] In addition, he pleads that the application is premature and ought to be referred and dealt with by the Pension Funds Adjudicator and seeks to have the application dismissed on an attorney and own client scale.

[16] In reply, the applicant submits that the order being sought is for a preservation of funds limited to an amount of R416 213.82 and that such order is premised on the provisions of s 37(D)(1)*(b)*(ii) of the Act. It does not seek to preserve all the pension funds due to the second respondent, but only a limited amount to ensure that it will obtain redress in due course.

[17] Prior to the hearing of the opposed application the matter served before Acting Judge Wallis who directed a query to the parties which read as follows:

‘2. Acting Judge Wallis requests that the parties be in a position to address the following

questions:

(a) Does the First Respondent's letter of 3 June 2022 (annexure DRMN6) constitute a final refusal to withhold?

(b) What do the parties contend is the test for relief when the Court is moved for interdictory relief in respect of pension fund benefits. In this regard, the parties are referred to:

i. *SA Metal Group Pty Ltd v Jeftha and others* [2020] (1) BPLR 20 (WCC);

ii. *Tongaat Hulett Sugar South Africa Ltd v Tongaat Hulett Pension Fund 2010 and others* (AR 27/2022) [2023] ZAKZPHC 34 (3 March 2023);

iii *Hansen + Genwest Pty Ltd v Corporate Selection Umbrella and others* [2023] JOL 57697 (GJ);

(c) If it should be determined that annexure DRMN 6 is not final, then depending on the test against which the claim is to be assessed, whether the existing relief is competently formulated.'

[18] The court provided the parties an opportunity to file supplementary written submissions. Only the applicant took up the invitation. Regrettably, such further submissions did not pertinently deal with queries raised by the acting judge.

The legal position

[19] The requisites for a final interdict are trite but it may be helpful to remind ourselves of what they are. The requisites are a clear right, an injury actually committed or reasonably apprehended and the absence of some similar protection by any other ordinary remedy.[1] The requirement for establishing a clear right involves proof on a balance of probabilities and the applicant has to show that he has a clear or definitive legal right. In relation to the second requirement an applicant must show that the clear right has been infringed by the respondent to his prejudice, prejudice being actual or potential. In respect of the third requirement, an applicant must establish that a final interdict is the only appropriate form of relief and that there is no other alternate remedy.

[20] The section upon which the applicant relies to protect its right to pursue the recovery of money allegedly misappropriated by its employee is section 37D(1)*(b)*(ii) of the Act. This section provides as follows:

[1] *Setlogelo v Setlogelo* 1914 AD 221 at 227

'*(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-

(i) . . .

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph *(bb)*) in respect of any damage 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'.

[21] The second respondent has neither admitted liability, nor has he pertinently dealt with the serious allegations made against him by the applicant. On the other hand, the applicant has not obtained judgement against the second respondent in any court of law.

[22] The *locus classicus* in relation to the provisions of section 37 is the decision in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*.[2] The issue in *Highveld Steel* was whether the board of the respective pension funds had the power to withhold payment of pension benefits due to an employee, pending the outcome of the damages action to be instituted. Maya JA writing for a full court held that:

'. . . the object of s 37D(1)*(b)* is to protect the employer's right to pursue the recovery of money misappropriated by its employees.' (footnote omitted)

[23] Such approach was supported by the plain wording of the section and was correct. The court recognised the practical difficulties which may render the efficacy of such a remedy meaningless as employers may only suspect dishonesty after termination of an employee's service and fund membership with the consequence that pension benefits are often paid out before the suspected dishonesty can be properly investigated. In

[2] *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* [2008] ZASCA 164; 2009 (4) SA 1 (SCA) para 16.

addition, it may only be in a small number of cases that an employer is able to obtain judgement against an employee at the time the latter's employment is terminated. Maya JA disagreed with the contention that either proof of liability must be available on termination of employment or a judgement obtained.

[24] Later in the judgment the court held the following:[3]

'[19] Such an interpretation would render the protection afforded to the employer by s 37D(1)*(b)* meaningless, a result which plainly cannot have been intended by the legislature. It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. I daresay that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent.

[20] 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 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.' (footnote omitted)

[25] During the course of argument various criticisms were levelled in relation to the manner in which the applicant pleaded its case. It is correct that the charge sheet indicating the various charges which the second respondent faced was not annexed. One is not able to discern from such document apart from the allegations in the founding affidavit and in the replying affidavit that the dismissal of the second respondent related to allegations of misconduct and/or dishonesty. In addition, only the first two pages of the summons are annexed. The full particulars of claim have not been annexed so the court is not aware of the averments and the cause of action which the applicant relies on for its claim in the action. Once again inferences must be drawn from the affidavit and oral submissions.

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[3] *Highveld Steel supra* paras 19 – 20.

[26] Our courts have been critical of legal practitioners who annex annexures to affidavits without dealing with the contents thereof. This has been pertinently been dealt with in *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others*[4] where the court said the following:

'Regard being had to the function of affidavits, it is not open to an applicant or a respondent to merely annexe to its affidavit documentation and to request the Court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met.'

[27] These sentiments were echoed in *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others*[5] where the court said the following:

'A party cannot be expected to trawl through lengthy annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. Trial by ambush cannot be permitted.'

[28] A further cause of concern relates to annexure DRMN 6 and the query submitted by Acting Judge Wallis. The parties were invited to file supplementary heads. Only the applicant took up the invitation. It was submitted on behalf of the applicant that the letter of 3 June 2022 by the first respondent constituted a final refusal to withhold the monies. Ms Ntuli indicated that the first respondent had elected not to enter the proceedings and the applicant was at a loss as to what to do. She submitted however, that the applicant had requested the first respondent to withhold the pension benefits and has obtained an order in that regard. The first respondent has either failed to respond or unreasonably refused to acquiesce necessitating the obtaining of the interim order.

[29] The applicant takes the stance that the first respondent was required to ask the second respondent to make representations relating to the applicant's request to withhold a portion of his pension benefits. It concedes that it is not in a position to explain whether

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[4] *Swissborough Diamond Mines (Pty) Ltd and others v Government of the Republic of South Africa and others* 1999 (2) SA 279 (T) at 324F – G.

[5] *Minister of Land Affairs and Agriculture and others v D & F Wevell Trust and others* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) para 43 at 200D-E.

the first respondent had made such enquiries as the first respondent has not filed an affidavit nor has it opposed the proceedings. In addition, Ms Ntuli could not explain why any follow up correspondence was not sent by the applicant's attorney requesting a final decision.

[30] There was however, a concession in the supplementary written submissions and during the course of argument by the applicant, that all that the first respondent did in such correspondence was repeat the requirements of section 37D(1)*(b)*(ii) and therefore it could have been construed as a final refusal.

[31] During the course of the submissions on behalf of the second respondent Mr Mahlobo indicated that there is no clear indication from the papers that the requirements of s 37(1)*(b)*(ii) have been met. There is no direct evidence that the amount owing to the applicant emanates as a consequence of theft, dishonesty, fraud or misconduct by the second respondent. He conceded that based on the judgement in *Highveld Steel* the section was wide enough to cover cases still pending before court, provided however that the requirements of the section were met.

[32] He submitted that there was insufficient evidence before the court that the amount due to the applicant emanated from misconduct by the second respondent. In support of this submission he relied on the decision in *Boshoff v Iliad Africa trading (Pty) Ltd t/a Builders Market Welkom*[6] where the court stated the following:

'I pause to point out that it is not every civil judgment that can be enforced by an employer against an employee through the provident fund. The section specifies the genus of claims that may be enforced by the employer against the employee and directly recovered by the employer from the provident fund. An employer's recourse against the provident fund is an avenue available only in very rare cases. The golden thread which runs through all such exhaustively classified genus of debts or claims is a *causa* tainted by an element of discreditable or untrustworthy conduct on the part of an employee towards his employer – *vide* ss (1)(b)(ii) of section 37D.'

[6] *Boshoff v Iliad Africa Trading (Pty) Ltd t/a Builders Market Welkom* [2012] ZAFSHC 4 para 24.

[33] The basis for the applicant's interdict as pleaded against the second respondent arises from an overpayment for travel expenses, rather than it suffering a loss as a consequence of dishonest conduct. Consequently, it cannot invoke the section.

[34] As an alternate argument he submitted that there was a dispute of fact and that the court cannot grant a final order given the circumstances.[7] He submits that the basis for the claim once again is that the second respondent unduly benefited at the expense of the applicant in the amount claimed emanating from an overpayment of travel allowances.

[35] The second respondent has indicated that on the applicant's own version the travel allowance policy was amended after an audit report and investigation submitted to council. This new policy was challenged by the second respondent and other employees of the council on the basis that it constituted an unfair labour practice as it constituted a unilateral change to the terms and conditions of their employment. Although they were unsuccessful in the Labour Court in the urgent application, it is common cause that the unfair labour practice is pending as a dispute currently awaiting arbitration and has not been finally determined.

[36] In the result he submitted that there was a dispute of fact and the court could not in those circumstances grant a final interdict. It is correct that the second respondent has contented himself with a bare denial and has not specifically set out facts to challenge the allegations in the founding affidavit. He has merely denied that the amount owing was as a consequence of misconduct and indicates rather that it was as a consequence of an overpayment of travel allowances by the applicant.

[37] He refrains from engaging with any substantive allegations made in the applicant's affidavit, firstly in relation to the fact that the amount owing arises from any misconduct, theft or dishonesty on his part, although he admits that he was dismissed pursuant to a disciplinary enquiry pertaining to misconduct. Secondly, he does not indicate that the

[7] *Plascon-Evan Paints Pty Ltd v Van Riebeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

applicant if successful in the action will be able to recover the monies owing from him in the event of it obtaining a judgement. All he says is that he is presently unemployed and denies that he will not be able to satisfy any judgement if obtained.

[38] In essence, what the applicant seeks is an order that a portion of the pension benefit due to the second respondent is withheld pending resolution of its claim against the second respondent.

[39] The purpose of section 37D(1)*(b)* of the Act is to protect an employer's right to pursue recovery of misappropriated monies.[8]

[40] Although s 37D(1)*(b)* does not specifically make provision for the withholding of a benefit, having regard to *Highveld Steel*[9] it is evident that to give effect to the purpose of s 37, which is to protect an employer's right to recovery of misappropriated monies, the wording in the section must be interpreted to include the power to withhold payment of the member's pension benefits pending the determination of an action or acknowledgement of such member's liability. Whilst s 37D of the Act must also be read in conjunction with the relevant rules of the applicable fund, a member also includes a former member who has not received all his benefits that may be due to him or her from the fund.[10]

[41] In my view, given the *prima facie* facts alluded to in the founding affidavit and the annexures it is evident that the allegations made by the applicant point to the fact that the second respondent received payment of the amount claimed arising from dishonesty and misconduct. The second respondent has not disputed this pertinently in his affidavit and has not put up any contrary evidence to challenge this. In my view, the allegations and annexures to the founding affidavit are sufficient to *prima facie* point to the second

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[8] *South African Broadcasting Corporation Soc Ltd v South African Broadcasting Corporation Pension Fund and others* 2019 (4) SA 608 (GJ); *Twigg v Orion Money Purchase Pension Fund and another (1)* [2001] 12 BPLR 2870 (PFA); *Highveld Steel supra* para 16.
[9] *Highveld Steel supra* para 19.
[10] *Absa Bank Ltd v Burmeister and others* 2004 (5) SA 595 (SCA).

respondent's misappropriation of funds. There is no dispute of fact.

[42] The applicant is constitutionally enjoined when it involves public monies in keeping with the principles of good corporate governance and administration, to take all necessary steps to recover monies inadvertently paid over or misappropriated in the public interest. The applicant has indicated the monies due are as a result of misconduct. Interestingly enough, the second respondent has not challenged the allegations of misconduct relied on by the applicant in this application. Thus, the applicant has satisfied the first requirement for a final interdict.

[43] In relation to the irreparable harm the applicant has indicated that the second respondent is unemployed and does not have any assets to satisfy any judgement it may obtain in due course. The second respondent has merely denied this and has not placed any facts before the court to gainsay this. Thus the applicant has satisfied the requirement for irreparable harm.

[44] Turning now to consider the balance of convenience, the applicant submits that the balance of convenience favours the grant of the interdict pending finalisation of the action. It relies on the fact that the first respondent has not indicated that it would withhold the amounts due pending the finalisation of the action. The applicant is not without an alternate remedy. Once the first respondent has made a final decision on whether or not to withhold such benefits the procedure relating to a referral to the Pensions Fund Adjudicator can be invoked. Consequently, it has not satisfied the requirement that it has no alternate remedy.

[45] The second respondent was found guilty in a disciplinary enquiry and dismissed and he was unjustifiably enriched at the expense of the applicant as a consequence of his misconduct. An action has been instituted against the second respondent, which has not been finalised. The applicant has not been able to obtain an admission of liability in writing from the second respondent, nor does it at this stage have a judgement. The amount sought to be withheld represents the amount owing to the applicant as a

consequence of the second respondent's misconduct and the applicant does not have any alternative remedy should the order not remain extant until the finalisation of the action.

[46] I disagree. Once the applicant acknowledges that DRM6 is not a final decision, then it has regrettably not established the requirements for final relief. At best for the applicant, it is entitled to an order, pending a final determination from the first respondent as to whether it intends to withhold or not withhold the benefits. This final decision by the first respondent is not the end of the matter. The Act and regulations contain a procedure which involves the Pension Funds Adjudicator, which the parties will be entitled to invoke depending on the decision.

Costs

[47] The usual rule in relation to costs is for the costs to follow the result. When the urgent application was instituted, the applicant did not seek an order in which the costs formed part of the rule *nisi* as is the practice in this Division. The notice of motion however contained a separate order for costs. Consequently, given that the second respondent has been unsuccessful in his opposition there is no reason to depart from the usual rule relating to costs.

Order

[48] There is what can only be a typographical error in the amounts reflected in the rule *nisi* issued. Having regard to the annexures the correct amount is R416 213.82.

[49] In the result the following orders are issued:

1. The second respondent is granted condonation for the late filing of his heads of argument.
2. The rule *nisi* of 17 June 2022 is confirmed and varied to read as follows:

> ‘That the First Respondent is hereby interdicted and restrained from paying the amount of R416 213.82 or any lesser amount held by it as a pension benefit to the Second Respondent pending the First Respondent making a

final decision on the applicant's written request to withhold such monies.'

3. The second respondent is directed to pay the costs occasioned by the application.

Henriques J

Case Information

Date of Hearing	:	24 May 2023
Date of Judgment	:	23 November 2023

Appearances

Counsel for the Applicant	:	NTL Ntuli
Instructed by	:	Mhlanga Inc. C/O Stowell & Company 295 Pietermaritz Street Pietermaritzburg sumayan@stowell.co.za Ref: SNorgot/MHL264/0027
Counsel for the Second Respondent:		LA Mahlobo
Instructed by	:	Austen Smith Inc 1 Highgate Drive Redlands Estate 1 George McFarlane Lane Wembley Pietermaritzburg cathy@austensmith.co.za (Ref: E3B0108/22)

This judgment was handed down electronically by circulation to the parties' representatives by email, and released to SAFLII. The date and time for hand down is deemed to be 09h30 on 23 November 2023.