

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 28767/17

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES / NO	
(3)	REVISED.	
	<u>28/02/2019</u>	<u>[Signature]</u>
	DATE	SIGNATURE

In the matter between:-

MOKETE HERBERT MASHAMAITE

Applicant

and

MORGAN BEEF INVESTMENTS (PTY) LTD
(Registration No: 2001/023826/07)

First Respondent

LIBERTY CORPORATE

Second Respondent

M V MAKELAARS CC

Third Respondent

JUDGMENT

SELEKA AJ:

[1] The applicant in this matter is a former employee of the first respondent (Morgan Beef Investments (Pty) Ltd), formerly known as Morgan Abattoir (Pty) Ltd. The applicant was employed by the first respondent from 7 January 2011 to September 2016 when he resigned from his employment with the first respondent as a Blockman.

[2] He pursues the present application in terms of an amended notice of motion, which was further amended during argument to abandon paragraph 4 thereof. The relief now sought in the notice of motion (as amended) reads:

- “1. *The second respondent be ordered to compute the late payment interest on the amount of R26 636.39 by the first respondent in terms of Section 13A(7) of the Pension Funds Act, 24 of 1956 (as amended), within fourteen (14) days of receipt of the Court Order.*
2. *The second respondent is ordered to transmit to the first respondent its computations in prayer 1 above, within three (3) days of completing it.*
3. *The first respondent is ordered to pay to the second respondent an amount of R26 636.39 as arrear contributions together with late payment interest as computed in accordance with prayer 1 above, within seven (7) days of receiving the computations from the second respondent.*
4. ...
5. *That the first respondent be ordered to pay the costs of the application on attorney and client scale.”*

[3] This relief is sought against the backdrop of the facts that follow.

[4] In May 2012, and apparently by virtue of his employment with the first respondent, the applicant became a member of a provident fund administered by the second respondent ("Liberty"). To that end, monthly deductions were made from the applicant's salary for a period of 4 years and 4 months, from May 2012 to September 2016. These deductions were described on his salary slip as "*PROVIDENT FUND*". The amount of deductions started at R438.37 and increased annually to more than R600.00. In view of the terminology used by the first respondent to define the deductions, i.e. provident fund, the applicant understood that the deductions were being made to pay for his member contribution to the provident fund.

[5] Following his resignation, the applicant made enquiries, on two occasions, with the first respondent regarding his provident pay-out, but received no assistance. He then enlisted the services of his attorneys of record to submit a claim, on his behalf, directly with Liberty. On 6 February 2017, his attorneys addressed a letter to Liberty requesting a statement of balances of the applicant's pension benefits (p24). Liberty responded by letter dated 7 February 2017 to which was attached what Liberty referred to as "*member investment summary for the period 03/02/2017 to 06/02/2017*". The document shows the closing investment value as R17 100.63 (p26). It bears the scheme name as "Morgan Abattoir (Pty) Ltd, the scheme number: 0030262701, the member name: Mr MH Mashamaite (being the applicant), and member number: M203160B.

[6] On 10 February 2017, the applicant's attorneys send a letter to the third respondent (MV Makelaars) in which they complained that the provident fund benefits were far lower than what the applicant had contributed, and requested the third respondent to account on certain information (p31).

[7] The third respondent replied and provided some information which included a letter from Liberty dated 7 March 2017, to which was attached another member investment summary, but for the period 01/05/2012 to 30/09/2016, showing a closing investment value of R16 469.08, as well as a statement in relation thereto (p35).

[8] The member investment summary for the period 3/2/2017 to 6/2/2017, with a closing value of R17 100.63, shows the investment portfolio as Liberty Institutional Money Market Fund, comprising contributions only from the employer recorded as "*Employer AVC: R1 151.11*" and "*Employer Contributions: R15 949.52*" (p26).

[9] The member investment summary for the period 1/5/2012 to 30/9/2016, with a closing value of R16 469.08, shows three (3) investment portfolios namely Multi Manager Growth, Liberty Institutional Money Market Fund and Liberty Stable Growth Fund, comprised of contributions in the same manner as above, namely: "*Employer AVC: R1 128.80*" and "*Employer Contributions: R15 340.28*" (p35).

[10] None of these documents show contributions by the employee, i.e. the applicant, even though they both reflect him as a member, with member number M203160B.

[11] It was this realisation that triggered the dispute in the present application, with the applicant contending that the provident fund deductions from his salary had not been paid to Liberty and, therefore, demanding to know where were the deductions went to (FA14/19 & p47).

[12] The issue was raised with the first respondent by letter dated 10 March 2017. (p47). The response from the first respondent was that the matter has been escalated to its broker and the first respondent will get back to the applicant's attorneys no later than 22 March 2017 (p50).

[13] However, the first respondent failed to respond, necessitating another letter from the applicant's attorneys dated 24 March 2017, complaining of the first respondent's failure to respond and affording it a further time to respond, until 28 March 2017. The applicant's attorneys warned that another failure to respond would leave the applicant with no option but to take legal action (p52).

[14] There seems to have been no response again from the first respondent.

[15] On 5 April 2017, the applicant's attorneys addressed another letter to the first respondent providing it with certain documentation relating to 'member benefits statement as at 1 May 2012' from Liberty, a detailed statement of contributions (which is the same as the second of the two member investment summaries referred to above for the period 1/5/2012 to 30/9/2016) and copies of two (2) of the applicant's payslips reflecting provident fund deductions (p54). The applicant's attorneys requested to be provided with the name of the fund into which the provident fund deductions were paid. There seems also to have been no response to this letter from the first respondent (FA16/24).

[16] In its answering affidavit, and as explanation for the failure to respond, the first respondent simply states that it was seeking legal representation, as it was entitled to (AA105/45). However, this response fails to explain the first respondent's failure to respond as it had undertaken to do "*no later than 22 March 2017*" and the continued silence thereafter.

[17] In any event, the explanation that the first respondent was already seeking legal representation during the correspondence in March/April 2017, lacks credibility when read with the allegation in paragraph 7 of its own answering affidavit, which shows that it was only after the present application had been instituted that the first respondent

managed to brief legal representatives on 15 May 2017 regarding the matter. There is no explanation as to what transpired between March 2017 and this date regarding legal representation that the first respondent says was entitled to seek.

[18] Furthermore, the reasons proffered for the late filing of the answering affidavit show that the above allegation cannot be true. On the first respondent's version, contact with Liberty and Discovery to obtain information was only made in June 2017 (AA87/11). There is not allegation or evidence tendered to show that steps to obtain information from Liberty and Discovery were taken during the correspondence in March/April 2017.

[19] Mr Louw, for the first respondent, submitted during argument that there were attempts by the first respondent before and after the application was instituted to engage with the applicant in order to resolve the matter. However, his submission is not borne out by the facts in the papers.

[20] In the papers, the delay in filing the answering affidavit is said to have been caused by the first respondent's failed attempt to obtain the fund rules. It is not said to have been as a result of attempts to amicably resolve the matter with the applicant. In any event, it is odd that the employer would subscribe its employees to a fund of which the employer has no rules.

[21] According to the papers, as appears from the applicant's replying affidavit, settlement discussions between the parties were initiated in July 2017, after the first respondent had filed its answering affidavit (RA221/4-5).

[22] The present application was served on the first respondent on 26 April 2017 (p76), after its repeated failure to respond to the applicant's attorneys. On 15 May 2017,

the first respondent delivered its notice of intention to oppose and on 27 June 2017 served its opposing affidavit (pp79 & 81). There is no an iota of evidence to show that at any time during this period the first respondent addressed the queries raised by the applicant's attorneys.

[23] Only the first respondent opposes the application.

[24] In its answering affidavit, the first respondent alleges that the provident fund deductions were indeed paid over to the fund administered by Liberty and to Discovery Life (p92/19).

[25] The first respondent seeks to substantiate this averment by relying on calculations made by it in a document marked "annexure B" (p96/31). As stated, annexure B is a document generated by the first respondent itself. The document does not originate from Liberty or Discovery and its contents are not confirmed by either of the two entities. More importantly, annexure B simply records the amount of deductions made against the applicant's salary from 2012 to 2016. It contains no explanation as to where the provident fund deductions were paid and why the member investment summary from Liberty does not show contributions by the member. It is also not disclosed who exactly of the first respondent prepared this annexure B and where and how the other figures thereon were derived and accounted for.

[26] When I asked Mr Louw why the member's contribution is not reflected in the member investment summary from Liberty, he said that he did not know, but also that his client cannot be expected to interpret Liberty's document. This is indeed an unfortunate response by the employer's representative. The first respondent, as the employer, should have taken the trouble to understand the document and, if necessary,

obtain explanations from Liberty that will clarify the position. One can infer from the response that the first respondent did not care to do so.

[27] The first respondent's averments that the applicant became a member of Group Life Insurance Policy with Discovery, are not substantiated. The first respondent has not attached any documentation to show that the applicant was a member of Group Life Insurance Policy with Discovery. The documents marked E1 to E5, to the answering affidavit, fail to prove this averment, as the documents do not bear any reference to Discovery or Discovery Group Life Insurance Policy, are not on Discovery's letterhead and have not been confirmed by Discovery. In reply, the applicant disputes their authenticity on the basis that the documents do not have any letterhead whatsoever to show that they were indeed received from Discovery Life. The applicant further states that he was never advised or consulted by the first respondent on any contribution to Discovery Life (p230/27.5).

[28] The only documents provided in the papers with any measure of certainty are those in relation to the provident fund with Liberty. However, those are the documents that show no contribution by the member. Annexure B, furnished by the first respondent, does not explain this anomaly, nor is it explained in the answering affidavit.

[29] Further, the first respondent seeks to make averments on how contributions were calculated based on the fund rules, but has failed to provide those rules. The first respondent correctly acknowledges that it cannot make any submission in regard to the fund rules when it does not have the rules and has not produced them. In any event, the first respondent has not shown anywhere that provident fund deductions made against the applicant's salary were indeed paid over to Liberty.

[30] The first respondent's case takes a bizarre twist when the first respondent, whilst contending that payment was made to Liberty, alleges at the same time that there is uncertainty as to whether the provident fund imposed an obligation on both the employer and the employee to make contributions. The first respondent cannot have it both ways. Either the member, i.e. the applicant, made contributions to the provident fund or did not. If he did not make contributions, the question is why did the first respondent continue making deductions from his salary and where did the money go to, if it is not been accounted for in Liberty's own records. The first respondent's allegation and, indeed, contention that the first respondent has paid the provident fund deductions over to Liberty is irreconcilable with the alleged uncertainty (p103/40).

[31] Although the applicant accepts that annexure B may correctly reflect a record of so-called provident fund deductions made against his salary, he contends that annexure B is still deficient as it fails to explain the zero-contribution shown against his name on Liberty's records.

[32] The first respondent only makes an allegation that payment was made to Liberty, but has not provided any evidence to show this allegation. It is common cause that the documents from Liberty only show employer contributions. In the absence of evidence to show that provident fund deductions from the applicant's salary were indeed paid over to Liberty, the first respondent's opposition to the relief sought must fail.

[33] As regards Discovery life policy, the first respondent's case is a non-starter. Deductions alleged to have been made for this policy are not reflected and/or itemised in the applicant's payslip. The applicant does not even know whether the policy exists. He was never informed of such policy and never consented to signing up for it. There is no a single trace in the papers of a document from Discovery confirming its existence. As the first respondent is the one who has made the allegation of the existence of this

policy, it was incumbent on it to establish its existence. The first respondent has failed to do so.

[34] In the result, I make the following order:

- 34.1 The first respondent is ordered to pay to the second respondent an amount of R26 636.39 as arrear contributions for the applicant's provident fund, together with late payment interest.
- 34.2 The second respondent is ordered to compute the late payment interest on the said amount of R26 636.39 within 14 days of service of this order on the second respondent.
- 34.3 The first respondent is to pay the said amount within seven (7) days of receipt of interest calculations from the second respondent.
- 34.4 The first respondent is ordered to pay the costs of this application.



P G SELEKA
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA