

FMT

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

26 MARCH 2010

NOT REPORTABLE

CASE NO: 23650/08

In the matter between

MALUNGISA LEO SKENJANA

APPLICANT

And

THE MINISTER OF HEALTH

1ST RESPONDENT

THE GOVERNMENT

EMPLOYEES PENSION FUND

2ND RESPONDENT

JUDGMENT

MSIMEKI, J

INTRODUCTION

[1] The Applicant, in this application, sought an order in the following terms:

“1. That the respondents’ actions of unilaterally deducting the applicant’s pension benefits be declared unlawful and set aside.

2. That the respondents be and are hereby ordered and directed to pay the applicant’s pension benefits to the applicant forthwith.

That the respondents be and are hereby ordered to pay the costs of this application.

That the court grant such further and or alternative relief as it deems appropriate.”

BACKGROUND FACTS

[2] The application was brought about by the deductions that were made from the Applicant's pension benefits resulting in the Applicant receiving no benefits at all. The Applicant had been employed by the first Respondent. He, during such employment, contributed to the second Respondent by way of monthly deductions that were made from his salary. On 19 March 2004 the Applicant resigned from his employment. He alleges that he, on the last day of his employment, completed the necessary documents for the processing and payment of his pension money by the Respondents. He instructed his lawyers to pursue the matter when he did not receive the money. Upon enquiring, his lawyers were informed that the pension money had been utilised to pay the money that he at the time had been owing. The money, the first Respondent contended, had been used to pay for:

settlement of a debt for leave without pay, the bursary debt, settlement of a debt in respect of a library book that he had failed to return, salary overpayment and for settlement of garnishee orders that had been obtained against him. The debts, according to the first Respondent, amounted to R34.651.73.

THE ISSUES

- [3] The Applicant contends that the Respondent acted wrongfully and unlawfully when the deductions were made while the first Respondent averred that the deductions had been lawfully made. It is also to be determined whether the Applicant should have been informed of the deductions before such deductions were made.

- [4] Only the first Respondent opposed the application. The second Respondent did not file its opposing documents.

COMMON CAUSE FACTS

- [5] The following facts are common cause:

- 5.1 The Applicant had been employed by the first Respondent;
- 5.2 Contributions were made to the second Respondent on behalf of the Applicant;
- 5.3 The Applicant resigned from the first Respondent's employment;
- 5.4 Deductions were made from the Applicant's pension benefits;
- 5.5 The Applicant had a bursary debt;
- 5.6 The Applicant used a book which he did not return to the information centre;
- 5.7 The Applicant was overpaid;
- 5.8 There were garnishee orders against the Applicant;
- 5.9 The Applicant was aware that money was deducted from

his salary to pay those who had obtained the garnishee orders.

[6] It is the first Respondent's contention that the Applicant was duly notified of his debts and that the Applicant was in any event aware of such debts as deductions were made from his salary in respect of some of the debts. The deductions, according to the first Respondent, were perfectly lawful. The Applicant denies this.

[7] Government employees pensions are regulated by the Government Employees Pension Law, 1996. ("The Act"). The relevant section of the Act that Mr Matebese and Mr Ngobese on behalf of the Applicant and the first Respondent respectively, have referred to is section 21.

Section 21(3) provides:

"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;*

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;

b);

c) *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” (my emphasis)*

[8] To support his submission, Mr Matebese, on behalf of the Applicant, heavily relied on section 21(1) of the Act while, Mr Ngobese, on the other hand, contended that section 21(3)(a) and (b) of the Act support his view and submission.

[9] The Applicant agrees that he has been overpaid. This is so because he resigned on 19 March 2004 yet he had been paid for the whole month. He accepts the debt for the library book which he did not return. He knows about the garnishee orders and was aware that deductions were made from his salary in respect thereof.

[10] Section 21 (1) of the Act provides:

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

Section 21 (3) excludes section 21(1) in its operation. Section 21(1) deals with what should not be done. This is what is prohibited. The prohibition does not extend to the provisions of section 21(3)(a) and (b). Section 21 (3)(a) and (b) deal with the deductions from a members pension benefits that are allowed. These are amounts which are payable to the employer or the Fund by any member in the employment of an employer or which the employer is liable to pay in respect of an employee or a member.

Clearly any amount which a member was not entitled to which was paid to the member in accordance with the provisions of the Act may be deducted from the benefit

payable to such member. The amount to be deducted may be in a lump sum or in such instalments as the Board may determine. The section has thus given the Board the discretion to exercise when such deductions are made. This is denoted by the use of the word 'may' in the section.

[11] It must be borne in mind that the deductions were made in order to settle the Applicant's debts. These are the debts that the Applicant, in any event, would have had to pay. Surely the settlement of the debts ought to be welcome news. The Applicant, in the circumstances of his case was perfectly aware that deductions were made from his salary and that the money so deducted was used to settle the debts to which the garnishee orders related. These are the debts which the Applicant was obliged to pay. He, no doubt, had consented that such deductions be made from his salary. The first Respondent was liable to pay the money deducted from the Applicant's salary in

accordance with what the garnishee order provided or directed. The resignation of the Applicant from his employment with the first Respondent in no way extinguished the Applicant's debts covered by the garnishee orders. The fact that the first Respondent did not, in the "withdrawal from the Fund" form specify what the Applicant's liability to the State or the employer was in respect of, in my view, does not mean that there was misrepresentation on the part of the first Respondent. The submission, on behalf of the Applicant, that the first Respondent misrepresented to the second Respondent by stating in item 22 of the form "SWP1" that the R38.636.67, represented salary debt, in my view, has no substance.

Annexure "B" to the Founding affidavit clearly shows the amounts that were deducted and the items in respect of which such deductions were made.

[12] The proper reading of Section 21(3) of the Act clearly

evinces that no consent is required from a member before deductions are made from the benefit payable to such member. The section only gives the Board the discretion to make such a deduction either in a lump sum or in such instalments as the Board may deem fit. The submission by Mr Matebese on behalf of the Applicant, that the Applicant's consent was needed before the deductions were made, has no merit.

It seems to me that the items in respect of which the deductions were made do not surprise the Applicant. He knows about the bursary, the library book, the overpayment and the garnishee orders. The leave without pay and the leave credits appear to be familiar to the Applicant. The Applicant's unhappiness seems to be based on the fact that consent was not first sought and found before the deductions were made. As I have already pointed out the unhappiness is not supported by section 21 (3) of the Act which seems to exclude the consent of a

member in such instances. Mr Ngobese's submission that the Applicant's consent is rendered unnecessary by section 21 (3) is, in my view, correct. A court order, in my view is also unnecessary. I do not think it is necessary to deal with the issue of consent any further. The deductions, in any event, were made to settle the debts that the Applicant had. This, in my view, was proper.

- [13] Some of the Applicant's contentions seem to be empty denials as it can clearly be verified from the first Respondent's annexures that money was paid on behalf of the Applicant. The nearest example is the amount of R9245.00 which the first Respondent paid in respect of the Applicant's bursary. The first Respondent has produced proof while the Applicant has produced none. According to him the Department paid on his behalf an amount 'in the region of R2.500.00.' This can never be convincing to anyone. The deductions that were made from the Applicant's pension benefit were properly made

in terms of section 21(3) (a) and (b). The consent that the Applicant alleges was necessary before the deductions were made was unnecessary.

[14] If, indeed, the Applicant avers that there are serious and material disputes of fact, which cannot be resolved on the papers, then and in that event, the Applicant should not have followed the route that he took that of motion proceedings. It is clear from what I have said above that the Applicants' application should fail.

[15] In the result the order that I make is as follows:

The application is dismissed with costs.

MW. MSIMEKI

JUDGE OF THE HIGH COURT

Heard on: 10 February 2009

For the Applicant: Adv. Z. Z. Matebese

Instructed by: Z. S. Jojo Attorneys C/O Ngomane Inc.

For the I^S' Respondent: Adv. I. P. Ngobese

Instructed by: The State Attorney