

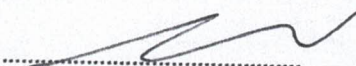
**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**



Case number: 64286/2021

Date of hearing: 15 June 2023

Date delivered: 19 June 2023

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES /NO	
(2) OF INTEREST TO OTHERS JUDGES: YES /NO	
(3) REVISED	
19/6/23	
DATE	SIGNATURE

In the matter between:

**ROYAL BAFOKENG PLATINUM LIMITED
BAFOKENG RASIMONE MANAGEMENT
SERVICES (PTY) LTD
ROYAL BAFOKENG RESOURCES
PROPERTIES (RF) (PTY) LTD**

First Applicant

Second Applicant

Third Applicant

and

MOMENTUM METROPOLITAN LIFE LTD

First Respondent

FUNDSATWORK UMBRELLA	
PENSION FUND	Second Respondent
FUNDSATWORK UMBRELLA	
PROVIDENT FUND	Third Respondent
THE PENSIONS FUNDS ADJUDICATOR	Fourth Respondent
SEFAKO ABIOT LUCAS DIKGOLE	Fifth Respondent
KHOMEDI SIMON MOHAPI	Sixth Respondent
LAWRENCE LUCKY KHUNOU	Seventh Respondent
OPPURTUNIA TSHEBOENG RANTSHO	Eighth Respondent
THERESA BAILE LEHOBYE	Ninth Respondent
OTHUSITSE EDWARD MABUDI	Tenth Respondent
KGOTLAETSILE JERRY SEBOGODI	Eleventh Respondent
ITUMELENG JONATHAN SENNE	
(AND THE LATE ESTATE)	Twelfth Respondent
MPOLOKENG SUZAN MATSOSO	Thirteenth Respondent

JUDGMENT

SWANEPOEL J:

[1] Applicants seek leave to appeal against the dismissal of their application in which they sought the setting aside of the Pensions Fund Adjudicator's ruling in respect of fifth to thirteenth respondents' pension interest.

[2] Applicants take issue with the interpretation placed by this Court on the word "dishonesty" in section 37 D (1) (b) (ii) (bb) of the Pension Funds Act, 1956. Applicants contend that it is reasonably possible that another Court would come to a different interpretation of the word, and that leave to appeal should be granted in terms of section 17 (1) (a) (i) of

the Superior Courts Act, 2013 ("the Act"). This issue was extensively argued, and I have not heard any new argument which would move me to believe that another Court would come to a different finding. Therefore the application should fail on that ground.

[3] Applicants also seek leave to appeal in terms of section 17 (1) (a) (ii) of the Act. They do so on the basis that there are allegedly conflicting views on the issue of whether misconduct, within the meaning of section 37 D of the Pension Funds Act must contain an element of dishonesty. In *Moodley v Local Transitional Council of Scottburgh Umzinto North and Another*[1999] JOL 5652 (D) the Court held that the common denominator of the words used in section 37 D was the element of dishonesty. That interpretation was followed in *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 606 (GJ) at para 81.

[4] However, in *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others* 2007 (1) SA 142 (N) the Court said the following:

"Counsel for the fourth respondent relies on what was said in *Moodley v Scottburgh/Umzinto North Local Transitional Council and another*..... to the effect that 'misconduct' must have an element of dishonesty. I have been invited to disagree with that decision. I am, with respect, by no means convinced it is right. I hold no firm views on it because it is not necessary for current purposes."

[5] Not only was the above remark obiter, in fact the learned Judge merely expressed her reservations about *Moodley*, without expressing a firm view one way or the other. Leave to appeal has been granted in cases where there were express judgments which contradicted one another¹. This is not such a case. In *Msunduzi* the learned Judge did not make a finding on the issue, and even if she had, it would have been obiter. Against this tentative remark in *Msunduzi* one finds the various cases in which the dishonesty element has been emphasized. In my view this is not a matter in which certainty requires the attention of the Supreme Court of Appeal.

[6] Finally, applicants say that the judgment has implications for its contractual relations with its employees, and that they should therefore be allowed to appeal the judgment in terms of section 17 (1) (a) (ii) of the Act. There is little to no evidence in the papers what these implications may be, and Mr Franklin did not pursue this argument with any vigour. Suffice it to say that I do not believe that applicants' contractual relationship with its employees constitutes, in the circumstances of this case, a compelling reason to grant leave to appeal.

[7] I make the following order:

[7.1] The application for leave to appeal is dismissed with costs.

¹ Nova Property Group Holdings Ltd and Others v Cobbett and Another 2016 (4) SA 317 (SCA) (MandG Centre for Investigative Journalism NPC as amicus curiae)

SWANEPOEL J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

COUNSEL FOR PLAINTIFF: Adv A. Franklin SC

ATTORNEY FOR PLAINTIFF: Webber Wentzel Attorneys

COUNSEL FOR DEFENDANT: Adv. V. Makofane

ATTORNEYS FOR DEFENDANT: Kubayi and Kubayi Inc

DATE HEARD: 15 June 2023

DATE OF JUDGMENT: 19 June 2023