REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 7|8|15

CASE NO: 1224/14

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 07/08/2015

DAPHNEY PATRICIA MSIMANGO **APPLICANT**

and

EKURHULENI METROPOLITAN MUNICIPALITY **1st RESPONDENT**

MUNICIPAL EMPLOYEES PENSION FUND **2nd RESPONDENT**

JUDGMENT

KHUMALO J

[1] The Applicant in this matter is seeking payment of her pension benefits from the 1st Respondent, her erstwhile employer, and the 2nd Respondent, subsequent to her dismissal on 22 November 2013 due to misconduct and embezzlement of money she collected that was due to the 1st Respondent.

[2] Applicant was employed as a cashier at the 1st Respondent's offices and during that time the 1st Respondent accused her of failing, alternatively neglecting to bank in the 1st Respondent's account proceeds of sale of prepaid electricity amounting to R635 142.00 (Six Thousand and Thirty Five Thousand One Hundrend and Forty Two Rand) ("the amount"). A disciplinary enquiry set up by the 1st Respondent found her guilty of gross negligence and misconduct, leading to her dismissal.

[3] Following the dismissal, the 1st Respondent sent Applicant an acknowledgement of debt for the amount for her signature that Applicant refused to sign. 1st Respondent also instituted against her proceedings in the criminal court for theft and fraud and in the civil proceedings for determination of liability. Both proceedings are still ongoing. Applicant

alleges though that she is still to be served with the civil summons issued against her. In the interim she has not been paid her pension benefits.

[4] As a result the Applicant alleges that since the 1st Respondent is not in possession of an acknowledgement of debt and there is no judgment against her, she is entitled to the payment of her pension benefits as the 1st Respondent has no right in terms of s 37D of the Pension Funds Act, 24 of 1956 ("the Act"), to deduct any amount therefrom.

[5] The Respondent contends that the Applicant is entitled to her pension benefits, alleging that her claim for payment is premature due to the pending proceedings instituted to determine her liability.

APPLICABLE LAW

[6] Section 37 of the Act reads:

> "A registered fund may-
>
> (a) deduct any amount due by a member to his employer on the dsate of his retirement or on which he ceases to be a member of the fund, in respect of-
>
> (b)
>
> (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 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."

[7] Applicant's contention was based on the restrictive interpretation of the relevant statute as propagated in *Absa Bank Ltd v Burmeister 2004 (50 SA 595 (SCA) at par 14,* that that the provisions of s 37D that regulates the deductions from pension funds must be interpreted restrictively. Mr Basson, Applicant's counsel then referred to a passage in *Highveld Steel & Vanadium Corporation Ltd v v Oosthuizen* 2009 (4) SA 1 (SCA) on [6] where Maya JA referred to the Absa Bank decision where the court pronounced that in its view the legislature would have said so expressly had it intended to vest courts with the implicit power to protect an employer by preserving its right pending an action to ascertain whether or not it is owed money. The court then concluded that a finding that such implicit power existed would allow employers to cause tremendous hardship to ex-employees by instituting and then delaying actions.

[8] This is what the Applicant's Counsel actually alleged of the 1st Respondent, that it issued summons since Applicant's dismissal in November 2013 however by the time the

Applicant deposed to an affidavit the summons has not been served. This resonated with the premise of Mr Basson's argument that the Applicant has been dismissed since 2013 and therefore is being prejudiced by the 1st Respondent's delay in not proceeding with the action that it has instituted.

[9] However reliance on Maya JA's reference to *Absa Bank* was not done cogently as when due regard is placed on her further analysis and considerations in the matter, it becomes evident that Maya JA, after testing the efficacy of the remedy that is afforded by section, concluded that s 37D created a scope for the Fund to exercise its discretion whether or not to accede to a request to withhold a members benefits pending resolution of the employer's claim. The practicalities of the environment under which such cases take place was considered. Specifically, the fact that in many cases the employers only suspect dishonesty on the date of termination of an employee's service with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated. Also that, it has to be accepted as a matter of logic that it is only in few cases that an employer will have obtained a judgment against its employee by the time the latter's employment is terminated because of the lengthy delays in finalising cases in the justice system. It would then result in the employer finding it difficult to enforce an award made in its favour by the time judgment is obtained against the employee.

[10] Maya JA then disagreed that the tense used by the legislature in s 37 D (1) (B) (ii) (aa) and (bb), in the words 'has in writing admitted liability' and 'judgment has been obtained' reflects an intention that either proof or liability must be available on termination of the employment contract. Similarly having a difficulty with the contention that the words 'as soon as possible' in rule 7.3 require payment of the pension benefits to be effected immediately upon termination of an employee's service.

[11] She further argued that to give effect to the manifest purpose of the action, its wording must be interpreted purposely to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability. The Fund in that instance was found to have a discretion to withhold payment of the Respondent pension benefit in the circumstances.

[12] Therefore having accepted that the Fund has a discretion we must determine if in this instance such a discretion was properly exercised in view of the Applicant's complaint that the summons were delayed and the 1st Respondent seem to want to await the findings of the criminal court before proceeding with the determination of liability. Counsel for the 1st Respondent, although confirming that they are waiting for the outcome of the criminal matter refuted the allegation that the civil proceedings are being delayed for that purpose. He argued that the matter is being proceeded with.

[13] The submission on awaiting the criminal proceedings is ill advised as that cannot determine the liability of the Applicant, therefore the matter should proceed simultaneously with proceedings in the civil court to determine liability.

[14] The fact that the proceedings have commenced notwithstanding the delay is to be taken into consideration in weighing the prejudice that each party may suffer as a result of the court's decision. It is evident that the 1st Respondent is taking the matter seriously as it has also taken legal steps to get the matter prosecuted as well. As the proceedings for the

determination of liability has been commenced with, it would not be unjust for the payment of the benefits to be delayed and await the outcome of the civil proceedings.

[15] On the other hand since the Applicant was entitled to come to court as it had seemed at the time of instituting these proceedings the 1st Respondent was delaying the finalization of the proceedings determining her liability, it would therefore be unjust to saddle her with costs. Under the circumstances

It is therefore ordered

1. The Application is dismissed each party to pay its own costs.

N V KHUMALO J

JUDGE OF THE HIGH COURT GAUTENG DIVISION: PRETORIA

For the Applicant:	J L BASSON
Instructed by:	MAENETJA ATTORNEYS
	PRETORIA
For the 1st Respondent:	M C MAKGATHO
Instructed by	PRINCE MUDAU & ASSOCIATES
	C/O MASHEGO ROMAGAGA
	PRETORIA