FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 1140/2011

In the matter between:-

JOHANNES HENDRIKUS BOSHOFF Applicant

and

ILIAD AFRICA TRADING (PTY) LIMITED
t/a BUILDERS MARKET WELKOM Respondent
Registration number: 1997/010059/7

HEARD ON: 15 DECEMBER 2011

JUDGMENT BY: RAMPAI, J

DELIVERED ON: 26 JANUARY 2012

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[1] The matter came to court by way of motion proceedings. The applicant seeks the relief whereby the respondent is ordered to pay an amount of R219 944,16 and costs. The application is opposed.

[2] There are certain undisputed facts in this matter. The applicant was previously in the employ of the respondent. His contract of employment was terminated through his resignation with effect from 30 November 2010. He was the

managing director of the respondent at the time. His length of service was nine years. He expected to receive certain outstanding amounts in respect of salary and leave pay from the respondent as well as certain proceeds of the retirement pension benefits from the pension fund.

[3] The respondent had a customer called Hanlein Boerdery BK. The respondent and the customer were parties to a certain credit agreement signed in Welkom on 12 June 2007. The applicant was the sole member of the close corporation. The applicant and the respondent were parties to a certain suretyship agreement. The applicant contractually bound himself in favour of the respondent as surety and co-principal debtor for and on behalf of the close corporation.

[4] The applicant warranted that the close corporation would duly perform its contractual obligations towards the respondent in terms of the credit agreement and that the applicant, as the co-principal debtor, would be liable towards the respondent should the close corporation, as the principal debtor, fail to pay for the goods supplied.

[5] The respondent subsequently sold and delivered certain goods to the close corporation from time to time, prior to the applicant's resignation. Seemingly, the close corporation was still indebted to the respondent at the time these proceedings were instituted.

[6] So far the applicant has not received the salary from the employer as he had expected. Similarly, from the pension fund the applicant has not received the full benefits. The pension fund has paid to the respondent almost 48% of the pension benefits due to the applicant. It is that payment which is the bone of contention in the current application.

[7] The following historical background helps to illuminate some blind spots of the matter: On 8 March 2011 a summons was issued out of this court under case number 1140/2011. The plaintiff sued the defendant for payment of the capital amount of R208 139,93. The action is defended and it is still pending. The plaintiff and the defendant in those action proceedings are the respondent and the applicant respectively in these motion proceedings. It is alleged that Hanlein Boerdery BK, the principal debtor, owes the sum of

money to the respondent. The applicant is sued in his capacity as a surety and co-principal debtor.

[8] On 16 March 2011 the sheriff served the respondent's summons at 30 Grasvlei Crescent, Jim Fouché Park in Welkom. The method of serving the summons was by affixing to the main door. The address was described by the sheriff as the defendant's *domicilium citandi et executandi*. There was no reaction on the part of the applicant.

[9] On 23 May 2011 the respondent applied for default judgment against the applicant. The request was considered. On 10 June 2011 default judgment was granted. On 21 June 2011 a writ was issued. The writ was not satisfied. On 6 July 2011 the deputy sheriff reported that he could not serve the writ since the applicant no longer resided at the given address, according to a certain Mr. J.P. Vermeulen, who identified himself as the resident occupier.

[10] On 16 July 2011 the applicant applied to this court to have the default judgment granted on 10 June 2011 rescinded. He alleged that he first became aware of such judgment on

29 June 2011. The respondent opposed the application for the rescission. The rescission application was issued under the same case number 1140/2011.

[11] On 17 August 2011 the provident fund paid an amount of R219 944,16 to the respondent being the applicant's pension benefits. The provident fund made the payment on the strength of the judgment of 10 June 2011 which the respondent took against the applicant by default. The writ was never served on the provident fund. The funds were, therefore, not judicially attached.

[12] On 27 September 2011 the applicant caused a summons to be issued against the respondent out of the Welkom Magistrate Court under case number 7103/2011. There the applicant claimed an amount of R67 134,41 from the respondent in respect of outstanding salary. The action was defended. The respondent filed its plea on 30 September 2011. The action was still pending at the time the current application was heard.

[13] On 3 November 2011 the rescission matter was argued

before my brother Kruger, J. He found in favour of the applicant. The court order he made reads as follows:

> "1. Die vonnis deur hierdie hof verleen teen Applikant op 10 Junie 2011 onder saaknommer 1140/2011 word tersyde gestel.
>
> 2. Die lasbrief uitgereik na aanleiding van vermelde vonnis word tersyde gestel.
>
> 3. Die Applikant word geleentheid gegun om binne 10 dae na verlening van hierdie bevel verdediging aan te teken.
>
> 4. Koste van hierdie aansoek staan oor."

[14] On 16 November 2011 the applicant launched the current application. The application was issued and served on the same day. The applicant claimed an amount of R219 944,16 from the respondent, being the pension benefits due to the applicant which amount the respondent had intercepted on 17 August 2011 by virtue of the default judgment of 10 June 2011. The application was enrolled for argument on 24 November 2011.

[15] On 17 November 2011 the respondent paid an amount of R117 952,02 to the applicant and retained an amount of

R101 992,14 in respect of the applicant's capital claim of R219 994,16. The outstanding balance is mathematically calculated as follows: R219 994,16 – (minus) R117 952,02 = R101 992,14.

[16] On 24 November 2011 my brother Jordaan, J was seized with the matter. He determined the deadlines of 1 December 2011 and 8 December 2011 for the filing of the answering affidavit and the replying affidavit respectively. He then postponed the matter to 15 December 2011 for argument. He reserved the costs. The respondent missed the deadline. The answering affidavit was filed on 2 December 2011.

[17] On 6 December 2011 the respondent served and filed a condonation application in order to have its lateness for the filing of the answering affidavit condoned. The condonation application was unopposed.

[18] On Thursday 15 December 2011, I granted the respondent's condonation application, because the application was not opposed; the delay of one day was not excessive; the explanation was reasonably satisfactory; the belated

answering affidavit was not substantially prejudicial to the applicant and the corrective action was swift - **MELANE v SANTAM INSURANCE CO LTD** 1962 (4) SA 531 (AD) at 532.

[19] The current matter was then argued before me. Having heard argument, I reserved judgment to consider the verdict.

[20] The issue in the matter was whether the two parties were reciprocally indebted to each other. Mr. Grewar, on behalf of the applicant, contended that they were not. However, Mr. Cilliers, on behalf of the respondent, contended that they were.

[21] A provident fund is entitled to pay any monies, otherwise due to its member, to a third party provided a legally binding document exists between the parties which warrants such payment or provided a court order authorises such payment – section 37D(1)(b)(ii) Pension Funds Act 24/1956 as amended provides that a registered pension fund may deduct any amount due by a member, in other words an employee, to his employer on the date of such employee's

retirement in respect of: compensation of any damage caused by such retiring employee to the employer by reason of any theft, dishonesty, fraud or misconduct committed by the employee provided the employee has signed a written admission of liability in favour of the employer or the employer has obtained court judgment for compensation against such a delinquent employee.

[22] The respondent had no legally binding document by virtue of which it could have the pension monies due to the applicant by the provident fund intercepted and paid over to the respondent. Therefore, the first leg of the section created no debt due to the respondent by the applicant. In the absence of such a legal document, I have to ascertain whether the respondent can rely on the second leg of the section. In this connection an aggrieved employer is allowed to rely on a court order to claim compensation direct from the provident fund.

[23] The applicant resigned from the respondent's employment on 30 November 2010. Thirteen weeks later, the provident fund had still not paid out to him the cash pension benefits.

It will be recalled that on 8 March 2011 the respondent initiated action legal proceedings against the applicant, obtained default judgment against him on 10 June 2011 and on the strength of such judgment received payment of R219 944,16 from the applicant's provident fund on 17 August 2011, some 34 months since the applicant's resignation. The applicant's suspicion that the respondent apparently used undue influence to delay payments of the pension money to the applicant by the provident fund so as to enable the respondent to obtain judgment on which to rely was not baseless in these circumstances.

[24] 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.

[25] The section authorises the provident fund to deduct such compensation from any pension benefit payable to such employee and to pay it to the employer concerned. It has to be stressed that not any employer armed with any civil judgment can lawfully have recourse against the provident fund for the pension benefit of a retiring employee. The section is exclusively reserved only for those employers who can show that they are legitimate victims of specific dishonourable workplace transgressions. Obviously the respondent *in casu* did not qualify as such a victim. Therefore, the respondent was not entitled to the special protection as evisaged.

[26] The debt by Hanlein Boerdery BK which gave rise to the suretyship agreement signed by the applicant in favour of the respondent was, in my view, not underpinned by the requisite *causa* as envisaged in section 37D. Since the

respondent was not procedurally entitled to recover such a pure commercial debt from the provident fund, the provident fund was not legally obliged to pay over to the respondent any pension money due to the applicant. It would seem, for this reason alone, that the court order in question was erroneously sought and erroneously granted. That specific judgment by default has, on different grounds, since been rescinded. Accordingly no valid *causa* exists for the respondent's continued retention of the applicant's pension money.

[27] The respondent's defence of a set-off cannot be sustained. The ill-gotten funds cannot be lawfully retained any longer. The alleged defence of set-off is tainted by an illegality. The respondent's continued retention of the applicant's pension money flagrantly undermines the legal effects of the rescission of the default judgment. The legal effect of the rescission was that payment to the respondent by the provident fund was retrospectively nullified. Therefore, the respondent no longer had a right to hold the proceeds of the applicant's pension. The payment in question was irregularly

made and it was no longer recognised as a legally valid transaction in law.

[28] The *status quo* had to be immediately restored. So far the respondent has frustrated the restorative process. In the light of the rescission the respondent was not entitled to continue enjoying any resultant benefits derived from the rescinded court order. The second leg of the section does not assist the respondent either. The respondent contention that the applicant owed it some money, was based on a wrong premise.

[29] Notwithstanding the aforegoing, the respondent would not release the applicant's pension money. The claim which the respondent seeks to set-off against the applicant's claim for the recovery of the pension money is the subject of the pending dispute. The respondent has already initiated such legal proceedings. The applicant has already delivered his plea. Since the applicant disputed such a claim, there is no proven and claimable debt owed by the applicant to the respondent. If that is the case, and I believe it is, then the

principle of set-off does not come into the picture - **<u>ABSA BANK LTD v STANDARD BANK OF SA LTD</u>** 1998 (1) SA 242 (SCA) at 251 G – H.

[30] The principle of set-off comes into operation in a case where two parties unconditionally acknowledge that they are mutually indebted to each other and that both debts are liquid, fully due and payable – **<u>JOINT MUNICIPAL PENSION FUND (TRANSVAAL) v PRETORIA MUNICIPAL PENSION FUND</u>** 1969 (2) SA 78 (T).

[31] It is important to remark that neither in the action proceedings instituted by the respondent against the applicant in this court nor in the action proceedings instituted by the applicant against the respondent in the district magistrate's court is there any averment made by the respondent that set-off was applicable. I may add that in the rescission application as well there was no such an averment. After those three previous legal battles between the parties, the respondent invoked the defence of set-off for the first time in these current proceedings. The respondent

relied on certain statements made by the applicant in his founding affidavit pertaining to the rescission application to the defence of set-off.

[32] The applicant said the following in the rescission application about the respondent's claim as particularised in the summons. At paragraph 16 of the founding affidavit he said:

> "Daar bestaan by my geen twyfel dat die bedrag van Hanlein Boerdery BK " betaal moet word nie aangesien dit 'n kredietrekening is by die Respondent wat deur Hanlein Boerdery BK vereffenbaar is. **Aangesien ek egter sedert die datum van my bedanking geen verdere insae in die boeke van die Respondent het nie, kon ek nog nie die finale saldo wat verskuldig is op hierdie rekening vasstel nie.** Ek het egter in my besit die mees onlangse staat tot my beskikking van Hanlein Boerdery BK gedateer 4 November 2010. **Gemelde staat toon aan dat die uitstaande balans verskuldig deur Hanlein Boerdery BK die bedrag van R101 992.14 beloop.** Geen verdere aankope is gedoen na my bedanking nie. Ek heg hierby aan die gemelde staat gemerk aanhangsel '**JH4**'."

[33] The second passage on which the respondent relies for claiming that the applicant admitted his indebtedness to the respondent is to be found at paragraph 17 of the same founding affidavit.

> "Op die datum van my bedanking sou die volgende gelde my derhalwe toegeval het:

17.1	Salaris en verlof	R88 000.00
17.2	Voorsorgfonds	<u>R480683.51</u>
	TOTAAL	**R568683.51**
	MIN: Verskuldig ten opsigte van Hanlein Boerdery	**<u>R101 992.14</u>**
	NETTO BETAAL	**<u>R466691.37</u>**"

[34] In the third place, the passage relied upon, is to be found at paragraph 31 of the founding affidavit.

> "Ek verwys die Hof eerbiedliglik daarna **dat die vonnis** wat toegestaan is deur die Agbare Hof nadat 'n beëdigde verklaring gelewer is, **die bedrag van R208 139.93 beloop** tesame met rente en koste. **Ek kan met gemelde bedrag geensins saamstem nie aangesien die laas bekende uitstaande**

> **balans aan my die bedrag van slegs R101 992.14 beloop het.** Verder is Respondent ook nog aan my verskuldig die laaste salaris asook my uitstaande verlof. Ek kan nie anders as om te vermoed dat respondent opsetlik en agter my rug gehandel het ten einde 'n vonnis teen my te bekom nie."

[35] On the strength of the aforegoing averments the respondent strenuously contended that the applicant admitted that he owed an amount of R101 992,14 to the respondent as surety for and on behalf of Hanlein Boerdery BK. The amount of the respondent's rescinded claim was R219 944,16. The respondent was therefore obliged to fully repay that amount. Instead, the respondent repaid only a portion thereof in the amount of R117 952,02 but withheld the balance of R101 992,14. The respondent reckoned that the latter amount represented a reciprocal debt owed to the respondent by the applicant.

[36] The aforegoing was, with respect, a shallow argument. In my view, the respondent was not entitled to off-set the amount of R101 992,14 from the proceeds of the pension benefits which it had, after all, irregularly received from the pension fund. Upon an integrated reading of the applicant's

aforesaid three averments, it cannot be concluded that the applicant unequivocally acknowledged that he was indebted to the respondent in that amount. At best for the respondent, the applicant conceded liability but questioned the quantum of the respondent's claim.

[37] It followed, therefore, that in those circumstances the elementary requisite for the operation of set-off – *viz* reciprocal or mutual acknowledgement of indebtedness by each of the parties in favour of the other, was missing. Accordingly there can be no talk of off-setting one debt against the other. This is so because the applicant has a mature debt against the respondent whereas the respondent seemingly has a nascent debt against the applicant.

[38] In **SCHIERHOUT v UNION GOVERNMENT** 1926 AD 286 the court held that opposing debts should be claimable. In this instance the respondent paid back a substantial portion of the applicant's claim a day after the launching of these proceedings. In so doing, the respondent implicitly acknowledged its indebtedness to the applicant. In the

circumstances there are no two opposing debts which are both claimable. There is only one such debt and it is in favour of the applicant. The applicant's debt against the respondent is ripe but the respondent's alleged claim against the applicant is not. A premature debt is not claimable. Since it is unclaimable, it cannot be relied upon in order to raise the defence of a set-off.

[39] There is nothing new in the respondent's contention of set-off. It was earlier, considered and rejected by my bother Kruger J. His finding that the respondent was obliged to repay the full amount of R219 944,16 without any deduction is one which I cannot hold to be wrong.

[40] Nothing of substance turns on various other defences raised by the respondent. I would, therefore, dismiss each one of them and grant the application.

[41] I have come to the conclusion that the applicant has, on a balance of probabilities, discharged the onus of proving that

he was entitled to the full amount of R219 994,16 which the respondent had earlier received from the provident fund in terms of an incompetent default judgment that has since been set aside.

[42] As regards the respondent's defence, I am not persuaded that the respondent has acquitted himself of the onus of proving that a reciprocal debt was owed by the applicant to the respondent in order to trigger off the operation of the principle of set-off.

[43] These proceedings were precipitated by the respondent's defiance of the rescission court order. Although the respondent's condonation application was successful, it has to be borne in mind that such an application was a direct sequelae of the respondent's failure to obey a court order. In my view, it cannot be in the interest of justice to have the costs relative to the condonation application borne and paid by the applicant merely because the applicant had insisted that the respondent should bring a condonation application which application the applicant did not oppose in the end. In

the exercise of my discretion I am not inclined to make any costs order relative to the condonation application. As regards the main application the applicant is entitled to the fruit of his success.

[44] Accordingly I make the following order:

44.1 The respondent is directed to pay the amount of R219 994,16 less the previous payment of R117 952,02 to the applicant within 14 days of this order.

44.2 The outstanding balance of R101 992,14 shall bear interest at the rate of 15,5% p.a. from 3 November 2011 being the date on which the rescission order was made.

46.3 The respondent pays the costs of this application including those that were reserved on 24 November 2011.

M.H. RAMPAI, J

On behalf of applicant:	Adv. D.M. Grewar Instructed by: Vosloo Prokureurs BLOEMFONTEIN
On behalf of respondent:	Adv. H.J. Cilliers Instructed by: Hill McHardy & Herbst Inc BLOEMFONTEIN

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