

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **1237/2024P**

In the matter between:

NEIL JEREMY MCPHERSON HILLHOUSE

APPLICANT

and

PIDELTA (PTY) LTD

FIRST RESPONDENT

ALEXANDER FORBES

SECOND RESPONDENT

Coram: Mossop J

Heard: 24 July 2024

Delivered: 29 July 2024

ORDER

The following order is granted:

1. The urgent application is enrolled.
2. The urgent application is dismissed.

3. The applicant shall pay only the first respondent's costs, taxable on scale B.

JUDGMENT

MOSSOP J:

Introduction

[1] This application involves a herd of cattle, a failing kidney and an accumulated pension benefit. The herd of cattle belongs to the first respondent. The failing kidney belongs to the applicant. The accumulated pension benefit also belongs to the applicant, but is held by a pension fund, which has decided, for the time being, not to pay those benefits out to the applicant. How those facts coincide requires a consideration of the broader factual matrix applicable to this matter.

The facts

[2] The applicant is a former employee of the first respondent, having commenced his employment with it in October 2015. He was initially employed as its livestock manager but later also became the manager of one of its crop farms.

[3] Whilst employed by the first respondent, the applicant was obliged in terms of his contract of employment to contribute to a pension fund in which his employer, the first respondent, was a participating member. The name of the retirement fund was the AF Retirement Fund, which has two components, namely the AF Access Retirement Fund (Pension Section) and the AF Access Retirement Fund (Provident Section). I shall refer to this entity simply as 'the pension fund'. This is the pension fund mentioned in the introduction to this judgment.

[4] During November 2021, and after several years of employment with the first respondent, the applicant had the great misfortune of suffering end-stage kidney failure and was compelled to first undergo regular kidney dialysis and then to

undergo a kidney transplant. In his founding affidavit, the applicant speculates that his health challenges ultimately proved to be unattractive to his employer, who then allegedly fabricated a reason to dismiss him from its employment. There is, however, no evidence to this effect. On the contrary, there is sufficient evidence that the first respondent was sympathetic to his condition and did all that it could to assist him in his moment of need and in the performance of his obligations to it.

[5] That notwithstanding, the first respondent did institute disciplinary proceedings against the applicant in June 2023, arising out of his alleged unsatisfactory performance as manager of its herd of cattle. The allegations made against him at the disciplinary hearing were threefold, namely:

- (a) A failure to adequately manage the herd of cattle entrusted to him;
- (b) The unauthorised use of the first respondent's property by permitting 70 of his personal herd of cattle to graze on the first respondent's land; and
- (c) Undertaking business in direct competition with the business of his employer.

[6] It appears that the applicant admitted his guilt on all three of the charges at his disciplinary hearing. A copy of the judgment of the chairman of the disciplinary hearing forms part of the papers in this matter and records that fact. On 28 June 2023, the applicant was consequently found guilty on all three charges, with the recommended sanction being that his employment with the first respondent be summarily terminated. The first respondent accepted that recommendation and the applicant's employment with it came to an end. The applicant has at no stage attempted to overturn the findings and recommendations of the disciplinary hearing, which accordingly remain undisturbed.

[7] His dismissal by the first respondent left the applicant without an income. He has stated in his founding affidavit that he still requires medical treatment arising out of his condition. I am not entirely sure what that treatment encompasses, besides the removal of an AV fistula, about which more later, for no expert medical evidence has been adduced by the applicant. Having lost his income, the applicant states that he

has no way of paying for his future medical treatment. He, however, believed that he would be able to utilise his accumulated pension benefit held by the pension fund to meet both his living expenses and his future medical expenses.

[8] That expectation was dashed when the first respondent reported to the pension fund at the end of July 2023 that it had suffered certain financial losses due to the conduct of the applicant. It indicated to the pension fund that it had preferred criminal charges against the applicant with the South African Police Services (the SAPS) relating to the theft of cattle from its herd to the value of approximately R4 million and requested that the pension fund exercise its discretion in terms of the provisions of s 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 (the Act) to withhold payment to the applicant of his pension benefit, pending the finalisation of an action that it intended bringing against him for the losses that it had allegedly suffered.

[9] In response to the sharing of this information with it, the pension fund states, in an affidavit that it delivered (the explanatory affidavit), that it advised the first respondent that the laying of a charge with the SAPS was insufficient, on its own, to persuade the pension fund to withhold the applicant's pension benefits. It advised the first respondent that it required to be satisfied that the first respondent had made out a prima facie case against the applicant and that the first respondent had a reasonable chance of succeeding in the proceedings that it instituted against the applicant. The pension fund furthermore advised that it had to be satisfied that the first respondent was not unduly delaying the prosecution of the civil proceedings and was proceeding with all due haste to complete them. The pension fund, finally, pointed out to the first respondent that it had to consider the interests of the applicant and the interests of the first respondent and to weigh each up when exercising its discretion. As these interests are not perpetually static and might change from time to time, it advised that a decision to withhold a pension benefit is not a permanent decision and is susceptible to revision and change.

[10] In its explanatory affidavit, the pension fund sets out in exquisite detail all the steps that it took when considering the matter. It points out that the applicant's matter served before its Benefits Subcommittee (BSC), being the appropriate body to

consider the issue. It narrates that the BSC regularly held meetings at which the applicant's matter featured on the agenda of issues and was considered and discussed.¹ The pension fund has been entirely transparent in its approach to the matter and has readily made available the minutes of its meetings.

[11] Rather than displaying a subservient, slavish willingness to do as was asked of it by the first respondent, as was alleged by the applicant, the BSC's minutes demonstrate that it displayed an independent mind in considering the first respondent's request. Indeed, it is possible to discern from the minutes the evolution of a growing disquiet by the BSC with the lack of action, at least initially, by the first respondent in commencing with its civil action against the applicant. Thus, for example, at the meeting on 29 November 2023, the BSC's minutes recorded that a copy of the first respondent's summons had not yet reached it and that if it had not been received by the date of the BSC's next scheduled meeting, the first respondent would be placed on terms to deliver a copy to it within 30 days, failing which the pension benefit would be released by the pension fund to the applicant.

[12] A copy of the summons was, however, received by the pension fund a few days later, on 4 December 2023. The summons was comprised of a principal claim and three alternatives to it, being the following:

(a) A claim for the physical return of 350 head of cattle allegedly unlawfully removed from the first respondent's herd by the applicant, or their value in the amount of approximately R4 million;

(b) Alternatively thereto, a claim that the applicant failed to exercise control over the herd or to effectively monitor it and, as a consequence, 350 head of cattle went missing;

(c) Further alternatively thereto, a claim that the applicant owed the first respondent a fiduciary duty and breached that duty by allowing 350 head of cattle to be removed from the first respondent's land; and

¹ Meetings were held on 30 August 2023, 27 September 2023, 25 October 2023, 29 November 2023 and 13 December 2023.

(d) Finally, an alternative claim that the applicant breached his fiduciary duty to the first respondent by speculating in cattle for his own account and utilised the first respondent's resources to, inter alia, feed and medicate the cattle that he speculated with and thus during his period of employment, the applicant made a secret profit of approximately R3,2 million.

[13] The summons was accompanied by a letter from the first respondent's attorneys. The BSC took into account what was stated therein, namely that:

(a) The applicant had previously admitted to speculating in cattle, which was allegedly a breach of his fiduciary duties owed to the first respondent;

(b) The applicant had been found guilty at his disciplinary hearing on three counts of gross misconduct; and

(c) The applicant had admitted permitting his own cattle to graze on the first respondent's land.

[14] Four days later, on 8 December 2023, the applicant responded to the first respondent's attorney's letter that accompanied the summons and made his own representations to the BSC. The BSC noted in its records that the applicant stated that he required his pension benefits urgently for medical purposes and further noted that the applicant:

(a) Complained that the matter had been delayed excessively by the first respondent;

(b) Disputed the outcome of the disciplinary hearing; and

(c) Denied that s 37D(1)(b) applied to the facts of his matter.

[15] After receipt of the applicant's representations, the pension fund states that the BSC resolved to meet again on 13 December 2023. The day before the

scheduled meeting, a representative of the pension fund's legal department circulated an email to members of the BSC to assist them in their deliberations the next day. In that email, a copy of which is before the court, the legal advisor drew the attention of the members of the BSC to the applicable legal principles. The legal advisor stressed that the BSC was required to have regard to all the facts before it and advised that claim four of the first respondent's particulars of claim inferred dishonesty on the part of the applicant.² I differ with this conclusion to the extent that only claim four alleges dishonesty. In my view, the principal claim, which deals with the disappearance of 350 head of cattle from the first respondent's land, is also potentially infused with an element of dishonesty. The advice contained in the email was tendered to the BSC members in a neutral, well-balanced fashion and displayed no evidence of being slanted in favour of any one of the parties.

[16] The next day, the BSC met, considered the matter and the facts before it and resolved to provisionally withhold the applicant's pension benefits. It was therefore satisfied that a prima facie case had been made out against the applicant and that the first respondent had a reasonable chance of succeeding with that case.

[17] Those are the facts that constitute the matrix against which this matter must be considered.

The nature of the relief claimed

[18] This application was launched as an urgent application in February 2024. It is immediately apparent that it does not seek to review the pension fund's decision. It does, however, seek the release of the applicant's pension benefit, strangely, by primarily focussing upon the first respondent. In its original form, the notice of motion claimed the following relief:

'1. The ordinary forms and service provided for in the Rules and allowing the matter to be heard as one of urgency in terms of Rule 6(12).

² The third alternative to the principal claim, and marked as claim four, related to the generation by the applicant of a secret profit at the expense of the first respondent.

2. The applicant be entitled to withdraw his pension fund interest held through the first (sic) respondent and administered by the second respondent.

4. The first respondent be ordered to immediately attend to the processing of all required documentation to enable the applicant to withdraw his aforesaid pension monies.

4. First respondents (sic) to pay the costs of this application on an attorney-client scale.'

[19] In this form, the notice of motion appeared to contemplate that the decision not to pay out the applicant's pension benefit was taken by the first respondent and could be reversed simply by securing an order directing the first respondent to complete the necessary documentation that would have to be presented when a request is made to the pension fund to pay out a pension benefit. That, however, was factually incorrect, for the first respondent did not make the decision to withhold the applicant's pension benefit.

Urgency

[20] Before proceeding further, it is appropriate to consider the issue of urgency. As the notice of motion indicated, the application was initially brought as an urgent application. Whether the matter was truly urgent was disputed both by the first respondent and the second respondent. That issue was not addressed by the pension fund when it later became involved in the matter because of the neutral approach that it ultimately adopted to the matter. I am of the view that the application was not urgent and no objective grounds of urgency were established.

[21] The applicant has known of his health condition since before he was dismissed. He was diagnosed with kidney failure in November 2021 and had his kidney transplant during February 2023. He was dismissed at the end of June 2023 and thereafter took no steps to challenge that dismissal nor did he take any formal steps regarding the pension benefit. That he only did at the end of January 2024. There is no real explanation for this significant delay. Mr Cohen, who appeared for the applicant, argued that the applicant only came to know of the decision to withhold

his pension benefit on 22 January 2024 and had not thereafter delayed unnecessarily in launching his application. Mr Prinsloo, who appeared for the first respondent, disputed this and drew my attention to paragraph 27 of the founding affidavit, where the applicant stated the following:

‘On 3 August 2023, I received an email from George Nefdt (“Nefdt”) on behalf of the first respondent, to the extent that the second respondent had been instructed to withhold my pension fund benefit. I annex the email herewith and mark same as annexure **FA 6**.’

The application was ultimately launched on 29 January 2024. The period between 3 August 2023 and that date needs to be explained by the applicant, but has not been.

[22] It is undoubtedly so that there is a clamant human element at play, namely the state of health of the applicant. It would be heartless not to acknowledge this. Urgent applications that deal with life or death matters must obviously enjoy the attention of the courts without being made to unnecessarily stand in line for a hearing. But whether this is such an application is not clear. No expert evidence has been presented by the applicant on this aspect. All that is before the court is a brief letter from a specialist physician and nephrologist, Dr B Naidoo. The letter is unconfirmed by an affidavit and covers a mere nine lines. It, for the most part, sets out the applicant’s medical history with regard to his kidney complaint. All that is stated about his future medical treatment appears in the final line of the document, which reads as follows:

‘Ideally, he will require a procedure for his AV Fistula,³ as soon as possible.’

Whether this is a critical procedure, and if it is urgently required, remains unexplained.

[23] The appropriate order when a point of a want of urgency has been taken, as it has been in this application, and the point has been sustained, is to strike the matter

³ An arteriovenous fistula is a connection that is made between an artery and a vein in order to permit a dialysis machine a point of access to the human body.

off the roll. In *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and others*,⁴ Cameron JA, observed that:

‘Where the application lacks the requisite element or degree of urgency, the Court can, for that reason, decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the Court’s roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance.’ (Footnotes omitted.)

[24] In the view that I take of this matter, it is undesirable to simply strike it from the roll and permit it to return at a later date. The application has been poorly conceived and constructed. Notwithstanding the want of urgency, I intend enrolling it and dealing with it on its merits.

Joinder and mis-joinder

[25] Paragraph 2 of the notice of motion acknowledged that the party cited as being the second respondent, which is identified simply as being ‘Alexander Forbes’,⁵ was only the administrator of the pension fund. In other words, it was not the pension fund itself.

[26] The application was served on the first respondent and upon an entity with the name of ‘Alexander Forbes’. In response, an entity with the name of Alexander Forbes Financial Services (Pty) Ltd (AFFS) delivered an answering affidavit. In its answering affidavit, AFFS tellingly made the point that it was not the pension fund. It explained that it was a separate and distinct legal entity to the pension fund and was simply its administrator, as the applicant himself had alleged in his notice of motion. AFFS stated that the pension fund was duly registered in terms of s 4 of the Act and

⁴ *Commissioner, South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Service v Hawker Aviation Partnership and others* [2006] ZASCA 51; 2006 (4) SA 292 (SCA); [2006] 2 All SA 565 (SCA) para 9.

⁵ The description of the second respondent as it appears in the founding affidavit is the following: ‘The second respondent is Alexander Forbes a company duly incorporated in terms of the laws of the Republic of South Africa, and inter alia, a financial and intermediary services provider in terms of Act 37 of 2002, with registered alternatively principal address situate at 115 West Street Sandton Johannesburg.’

the applicant was a member of the pension fund by virtue of his employment with the first respondent, which was a participating employer in the pension fund. But AFFS had no involvement at all in the decision to withhold the payment of the applicant's pension benefit. It lacked the power to withhold, or make, payments of its own volition, and was required merely to do the bidding of the pension fund, which held all such powers.

[27] In his replying affidavit to this answering affidavit, the applicant unreservedly and unequivocally accepted this to be the case. He thereby acknowledged that he had cited and served the incorrect entity. Implicit in this acknowledgment was an admission that the pension fund, which had taken the decision to withhold the applicant's pension benefit, was not before the court. This placed the applicant in a difficult position: he had joined a party that ought not to have been joined and he had failed to join a party that ought to have been joined.

[28] To overcome this, the applicant simply delivered an amended notice of motion. In so doing, besides amending the relief sought, he also added Alexander Forbes Access Retirement Fund as the third respondent. No attempt, however, has been made to formally add the pension fund to the citation of the parties participating in this application. The amended notice of motion now reads as follows:

'1. The ordinary forms and service provided for in the Rules and allowing the matter to be heard as one of urgency in terms of Rule 6(12).

2. Pending the final determination of the action proceedings by the First Respondent in this court under case number 17687/24P⁶:

2.1 The applicant be entitled to withdraw his pension fund interest held through the first respondent and administered by the second respondent.

⁶ The notice of motion incorrectly refers to the case number as being 17687/24P when it should be 17687/23P.

2.2 Directing the third respondent to make payment of the sum of **R546,577.48** to the applicant comprising the applicant's pension benefits currently in the custody of the Fund.

2.3 The first respondent be ordered to immediately attend to the processing of all required documentation to enable the applicant to withdraw his aforesaid pension monies.

3. Alternatively, (sic) to the above:

3.1 The applicant be entitled to withdraw his pension fund interest held through the first respondent and administered by the second respondent.

3.2 Directing the third respondent to make payment of the sum of **R546,577.48** to the applicant comprising the applicant's pension benefits currently in the custody of the Fund.

3.3 The first respondent be ordered to immediately attend to the processing of all required documentation to enable the applicant to withdraw his aforesaid pension monies.

5. First respondents (sic) to pay the costs of this application.

6. Ordering that Alexander Forbes Financial Services (Pty) Ltd pay the costs of this application jointly and severally only in the event that they oppose this application.

7. Further and/or alternative relief.'

The sum of R546 577.48 is the value of the applicant's pension benefit held with the pension fund.

[29] The amended notice of motion introduces some additional specificity to the relief claimed by the applicant but, essentially, continues to seek an order that the

applicant be permitted to withdraw his pension benefit without actually challenging the decision of which complaint was made.

[30] There are, however, a number of further observations that arise out of the amended notice of motion. Firstly, it does not appear that any notice of intention to amend was issued, as contemplated by Uniform rule 28. Secondly, the Uniform rules require a joinder application to be brought when a new party is sought to be joined to an existing application. This, too, was not done. Thirdly, notwithstanding the fact that the applicant conceded that the second respondent had been incorrectly joined, he nonetheless still sought a costs order against it in the event that it opposed the application. The applicant knew that the second respondent had opposed his application by virtue of its answering affidavit, in response to which the applicant had conceded the correctness of the second respondent's opposition. Why costs should be sought against the second respondent is therefore not apparent.

[31] Perhaps the most significant of these issues is the improper joinder of the pension fund as a respondent. I need not, however, dwell on this because the pension fund took an entirely practical, and commendable, approach to the matter. Without acknowledging the correctness of the procedure invoked by the applicant to draw it into the matter, which, indeed, the pension fund disputed to be correct, it consented to be joined to the application on three conditions:

- (a) Neither the pension fund nor the applicant would seek costs from each other arising out of the application;
- (b) The pension fund would be permitted to deliver the explanatory affidavit already referred to, in which it would merely detail the steps that it took in terms of s 37D(1)(b) of the Act; and
- (c) The pension fund would not formally oppose the application and would abide the decision of this court.

[32] The applicant agreed to these conditions and the pension fund consequently delivered a notice to abide the decision of this court. Simultaneously, it delivered its

explanatory affidavit, in which it simply set out the steps that it took, and the process that it followed, in deciding to withhold the pension benefit due to the applicant. It should, however, be noted that in doing as it did, the pension fund did not agree that the applicant's application should succeed. It appears to adhere to the view that the application should not be granted based upon the following statement in its affidavit: 'In the event that the Applicant is successful on the merits (a position for which the Fund does not contend) ...'.

[33] With the pension fund now a party to the matter, the applicant finally withdrew its application against the second respondent at the end of February 2024 and, by agreement with that party, avoided having to pay its costs for being incorrectly cited. I consequently need not say anything further about this issue.

The Act

[34] The general approach is that pension benefits are regarded as being untouchable and sacrosanct.⁷ However, s 37D(1) of the Act abrades some of the impregnability of a pension benefit, albeit in a measured and discrete fashion, where it states that:

'(1) A registered fund may –

(a) ...

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –

(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 –

⁷ *SA Metal Group (Pty) Ltd v Jefftha* 2020 JDR 2379 (WCC) para 9; see also s 37A(1) of the Act.

(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's 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...'

[35] The purpose of this section, unashamedly, is to protect the interests of employers against the dishonest conduct of employees. It is now settled law that s 37D allows a pension fund to withhold a pension benefit, even where an employee has not admitted liability to the employer or where a judgment has not yet been obtained against an employee. This was the approach adopted in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*,⁸ where the Supreme Court of Appeal, per Maya JA, stated the following:

'It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. I dare say that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent.' (Footnote omitted.)

The rules of the pension fund

[36] The pension fund itself is governed by its own internal rules, which were put up by the second respondent as an annexure to its answering affidavit. The two relevant rules are sub-rule 11.1 and sub-rule 11.3.

[37] Sub-rule 11.1 provides as follows:

⁸ *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2008] ZASCA 164; 2009 (4) SA 1 (SCA) para 19.

'The TRUSTEES shall have the right to make such deductions from the benefit to which a MEMBER or other beneficiary is entitled in terms of the RULES as are permitted in terms of section 37D(1)(a), (b) and (c) of the ACT and in respect of which a claim has been lodged in writing within such a reasonable time of the event giving rise to the benefit as the TRUSTEES may from time to time fix for making such claims.'

[38] Sub-rule 11.3 states as follows:

'Notwithstanding any other provisions of these RULES, the TRUSTEES may, where an EMPLOYER has instituted legal proceedings in a court of law and/or laid a criminal charge against the MEMBER concerned for compensation in respect of damage caused to the EMPLOYER as contemplated in section 37D of the ACT, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn; provided that:

(a) the amount withheld shall not exceed the amount that may be deducted in terms of section 37D(1)(b)(ii) of the ACT;

(b) the TRUSTEES in their reasonable discretion are satisfied that the EMPLOYER has made out a *prima facie* case against the MEMBER concerned and there is reason to believe that the EMPLOYER has a reasonable chance of success in the proceedings that have been instituted;

(c) the TRUSTEES are satisfied that the EMPLOYER is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;

(d) once the proceedings have been determined, settled or withdrawn, any benefit to which the MEMBER is entitled is paid forthwith; and

(e) the TRUSTEES, at the express written request of a MEMBER whose benefit is withheld, may, if applicable and practical, permit the value of the MEMBER'S

benefit as at the time of such request to be isolated, in whatever manner the TRUSTEES believe appropriate, from the possibility of a decrease therein in as a result of poor investment performance.’

I shall collectively refer to these two sub-rules as ‘the sub-rules’.

[39] The discretion afforded to pension funds generally to withhold pension benefits by the Act is mirrored by the specific sub-rules governing the pension fund. The applicant, as a member of the pension fund, is bound by the sub-rules.⁹

The pension fund’s discretion

[40] There was no dispute in argument before me that the pension fund had a discretion to withhold the applicant’s pension benefits. That point, in my view, was correctly conceded by Mr Cohen. I shall therefore accept that to be the case.

[41] A discretion is not simply a choice. It is more nuanced than that. Where a discretion exists, it will be comprised of a number of interrelated factors which must all be considered. These factors overlap and are not always individually considered: they may, however, be individually considered, but it is not invariably so that they are. When the party possessing the discretion exercises it, it considers a range of available, and relevant, alternative courses of action. After weighing up the options and the merits and demerits associated with each course of action, one is selected. In doing so, it is expected that the party exercising the discretion will do so in a judicious or sagacious manner. The exercise of a discretion is therefore a process and does not simply involve the random making of a choice.

[42] In *NBS Boland Bank Ltd v One Berg River Drive CC and others; Deeb and another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd*,¹⁰ the Supreme Court of Appeal observed that:

⁹ Section 13 of the Act provides as follows: ‘Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.’

¹⁰ *NBS Boland Bank Ltd v One Berg River Drive CC and others; Deeb and another v ABSA Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) para 25.

‘It is ... a rule of our common law that unless a contractual discretionary power was clearly intended to be completely unfettered, an exercise of such a discretion must be made *arbitrio bono viri*...’

[43] I accept that the power afforded to the pension fund by the Act is not a contractual power and is a statutory power given to it by the legislature. But the rules of the pension fund are contractual in nature and the applicant has subscribed to them through his membership of the pension fund. In my view, it follows that the pension fund’s discretion ought to be exercised in a fair and reasonable manner.

[44] It is clear from the wording of s 37D(1)(b) of the Act that the touchstone for the existence, and exercise, of the discretion is the presence of allegations of theft, dishonesty, fraud or misconduct on the part of the member of the pension fund. Absent the existence of any of these allegations, the discretion is illusory and ceases to exist and the pension fund may not retain any funds.

The applicant’s argument

[45] After some rumination, Mr Cohen submitted that what the applicant sought was not an interim interdict but a final interdict. With that, he acknowledged, went an elevated onus of proof.

[46] In his heads of argument, Mr Cohen made the submission that the true dispute between the parties is that the first respondent has refused to complete the necessary documentation that would permit the applicant to withdraw his pension benefits from the pension fund. The applicant therefore seeks an order that it must do so. He submitted further that what is sought by the applicant was a mandatory interdict which requires:

‘... a person to do some positive act to remedy a wrongful state of affairs for which he is responsible.’

[47] The heads of argument go on to make the further point that:

‘In toto, the precise relief claimed in the urgent [application] was directed only at Pidelta [the first respondent] entitling the Applicant to receive his Pension Fund Benefit, the necessary corollary being Prayer 3 where the First Respondent was ordered to immediately attend to the processing of all required documentation to enable the Applicant to withdraw the Pension monies.’

[48] In response to a question from the court, Mr Cohen acknowledged that both the first respondent, in making the request that the applicant’s pension benefit be retained, and the pension fund, in ultimately agreeing to that request, had acted perfectly lawfully. That appears to me to be correct.

The first respondent’s argument

[49] In a brief argument, Mr Prinsloo submitted that, in light of the concession by Mr Cohen that neither the first respondent nor the pension fund had acted unlawfully, this was the end of the matter. There was, thus, no need for a ‘positive act to remedy a wrongful state of affairs’, to use Mr Cohen’s own words. This was because there was no wrongful state of affairs: no clear right had been established by the applicant and therefore no right attaching itself to the applicant had been infringed by the first respondent and a final interdict could, in the circumstances, not be granted.

[50] Mr Prinsloo also submitted that the applicant had not established the third requirement for the final interdict sought. He argued that the applicant had an alternative remedy available to him, namely to approach the pension fund adjudicator (the adjudicator) for relief. Mr Cohen had previously argued that the door to the adjudicator had been slammed shut and bolted and was therefore not an alternative remedy available to the applicant. His reasoning in this regard was that the first respondent had commenced its civil action against the applicant before a complaint could be registered by the applicant with the adjudicator. Section 30H(2) of the Act provides as follows:

‘The Adjudicator shall not investigate a complaint if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.’

Thus, an approach to the adjudicator was not possible.

[51] That wording, at first reading, would appear to buttress Mr Cohen's submission. But Mr Prinsloo saw it in a different way and submitted that, on the facts of this matter, the only complaint that the applicant could have made to the adjudicator about the pension fund was that it had not properly exercised its discretion in coming to its decision to withhold his pension benefit. That, however, was not the subject matter in the civil proceedings instituted by the first respondent, which sought to hold the applicant liable for the loss of the 350 head of cattle. The adjudicator would not be required to determine the truth of those, or any other, allegations made in the first respondent's particulars of claim, and thus, so Mr Prinsloo's argument went, the door to the adjudicator remained very much open. The applicant thus had an alternative remedy available to him.

Analysis

[52] The requirements of a final interdict are well known.¹¹ It appears to me that the applicant has not established any of the three requirements necessary for such an interdict to be granted, as was submitted by Mr Prinsloo.

[53] The applicant has not established a clear right to the relief that he seeks. But for the existence of s 37D of the Act, and sub-rules 11.1 and 11.3 of the pension fund rules, the applicant's argument may have been more attractive and the existence of the right contended for more certain and definite. But that section of the Act and the sub-rules exist and they prohibit the applicant's right to claim payment of his pension benefit in the face of allegations of dishonest conduct by him. Those allegations have been made and properly assessed by the pension fund and have been accepted for the time being by it. The right to claim payment is therefore not a clear right. In fact, it is not a right at all. Absent a clear right, it follows that the second requirement for a final interdict, an act of interference with a clear right, has also not been established.

¹¹ They are: a clear right, an act of interference and no other adequate remedy. See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[54] As regards the third requirement for a final interdict, it seems to me that the applicant indeed has an alternative remedy. The purpose of s 30H(2) of the Act:

‘... is to deal with the fact that civil courts, usually the high court, and the adjudicator have concurrent jurisdiction over the same legal disputes’.¹²

The Act, in s 1, defines a complaint to mean:

“complaint” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund,

but shall not include a complaint which does not relate to a specific complainant.’

[55] In *Cape Town Municipality v South African Local Authorities Pension Fund and another*,¹³ Mthiyane AP observed that the role of s 30H(2) of the Act:

¹² *Cape Town Municipality v South African Local Authorities Pension Fund and another* [2013] ZASCA 175; 2014 (2) SA 365 (SCA) para 29.

¹³ *Ibid* para 30.

‘... is to deal with concurrence of jurisdiction in circumstances where the matter to be investigated by the adjudicator is a matter already before the civil court having jurisdiction. In determining what the matter is before the civil court and comparing it with the matter which would be the subject of an investigation by the adjudicator it is appropriate to adopt the same approach as that in the case of a plea of *lis alibi pendens* as discussed by Wallis JA in *Caesarstone Sdot-Yam Ltd v World of Marble and Granite 2000 CC and Others* 2013 (6) SA 499 (SCA).’

[56] The exercise of a discretion has no presence in the first respondent’s claim against the applicant. It seems to me that, given the definition of the word ‘complaint’ employed in the Act, in any complaint made to the adjudicator, the adjudicator would not be required to determine whether the applicant was liable to the first respondent, unlike the court hearing the civil trial. It appears that Mr Prinsloo’s argument is, therefore, sound and that the applicant does have an alternate remedy.

[57] The applicant has thus failed to establish any of the grounds that must be present for the granting of a final interdict.

[58] The difficulty for the applicant is that he has not directly challenged the decision of the pension fund itself. In none of the affidavits delivered by him are grounds advanced that strike at the discretion exercised by the pension fund. As pointed out earlier, the focus of the applicant’s relief has consistently been directed at compelling the first respondent to complete the requisite pension benefit documentation and not at challenging the decision taken by the pension fund. Even when the matter was argued, he still sought his primary relief against the first respondent.¹⁴

¹⁴ In a third and final reworking of the notice of motion, attached to the applicant’s heads of argument was the following proposed order:

- ‘1. Pending the outcome of civil proceedings instituted by the First Respondent in this Court, the First Respondent is ordered to immediately attend to the processing of all required documentation to be addressed to the Third Respondent to enable the Applicant to withdraw his Pension monies presently held by the Third Respondent in the sum of R546,577,48.
2. Ordering the Third Respondent to so make payment to the Applicant in the sum of R546,577.48 after having received the necessary instruction from the First Respondent.
3. Declaring that the Applicant withdraw his Pension Fund interest held by the Third Respondent and that the Third Respondent so make payment to the Applicant.
4. Costs of Suit against the First Respondent.’

[59] In focussing his relief on the first respondent, the applicant appears to have misconceived where his real cause of complaint lay and what his true remedy was. The first respondent itself took no decision to withhold the applicant's pension benefit: it simply drew certain facts to the attention of the pension fund and requested it to consider making such a decision. The pension fund acceded to this request after exercising its discretion. Whether or not documentation is completed by the first respondent is entirely irrelevant in the face of the pension fund's decision. Indeed, the pension fund itself threatened to pay out the applicant's pension benefit, despite the absence of such documentation prepared by the first respondent, if a copy of the first respondent's summons was not timeously received by it, thus giving an indication of the real value of such documentation. The decision to withhold the pension benefit is thus not that of the first respondent but that of the pension fund. Until such time as that decision is overturned (or varied, as the pension fund has indicated that the decision that it has taken is not permanent), the pension benefit will not be paid to the applicant. The application therefore cannot succeed.

Costs

[60] In my view, it would be fair, as suggested by Mr Prinsloo, to order that the costs that must be awarded should be taxed on scale B.

Order

[61] I accordingly make the following order:

1. The urgent application is enrolled.
2. The urgent application is dismissed.
3. The applicant shall pay only the first respondent's costs, taxable on scale B.

MOSSOP J

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