

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

Case no: 2025-180517

In the matter between:

THE SPAR GROUP LIMITED

APPLICANT

and

THE OLD MUTUAL SUPERFUND

PROVIDENT FUND

FIRST RESPONDENT

OLD MUTUAL LIFE

ASSURANCE COMPANY

SECOND RESPONDENT

MORRIS TAWANA FUSIRANTUBA

THIRD RESPONDENT

Neutral citation: *Spar Group Limited v Old Mutual Superfund Provident Fund and Others* (Case no 2025-180517) [2025] ZAWCHC ____
(3 December 2025)

Coram: Davis AJ

Heard: 6 October 2025

Order granted: 10 October 2025

Reasons given: 3 December 2025

ORDER

- 1 The First Respondent, the Old Mutual Superfund Provident Fund, is interdicted and restrained from making any payments, whether by way of a lump sum, monthly annuity, or otherwise, to the Third Respondent, Mr Morris Tawana Fusirantuba (member reference number A[...]), from the First Respondent's fund (scheme reference R[...]), or any associated benefits or entitlement, pending the final determination of the action proceedings instituted by the Applicant in the Gauteng High Court under case number 095726/2025.
- 2 The Third Respondent shall pay the Applicant's costs occasioned by his opposition to this application, on the party and party scale, such costs to include the cost of two counsel, where employed, with the costs of senior

counsel being payable on Scale C and the costs of junior counsel being payable on Scale B.

REASONS

DAVIS AJ:

- [1] On 10 October 2025, while presiding as the duty judge for urgent applications, I granted an order for an interdict *pendente lite*. These are my reasons for doing so.
- [2] The applicant (**‘Spar’**) is the former employer of the third respondent (**‘Fusirantuba’**), who was dismissed from his employment on 2 June 2025 due to various findings of misconduct and dishonesty.
- [3] The first respondent is a provident fund registered in terms of the Pension Funds Act 24 of 1956. The Second Respondent is an approved pension and provident funds administrator and authorised financial services provider, which administers the first respondent. In this judgment I shall refer to the first and second respondents collectively as **‘the Fund’**.
- [4] Spar maintains a provident fund with and through the first respondent in favour of its employees. Through his employment with Spar, Fusirantuba

was a member of the first respondent. As at 10 June 2025, the value of Fusirantuba's provident benefits was R 6 577 073,18.

- [5] Pursuant to Fusirantuba's dismissal, Spar on 24 June 2025 instituted action against Fusirantuba in the Gauteng Division, Johannesburg under case number 2025-085726, claiming payment of the amount of R 8 208 430.92 as damages allegedly suffered as a result of various breaches of Fusirantuba's contract of employment and/or fiduciary duties, and gross misconduct on his part (**'the action'**).
- [6] On 2 October 2025, Spar launched an urgent application in this court to interdict the Fund from releasing and paying out Fusirantuba's provident fund benefits to him pending the final determination of the action.
- [7] The application was founded on the provisions of section 37D(1)(b) of the Pension Funds Act 24 of 1956 (**'the Pension Act'**), which provides as follows:

'37D Fund may make certain deductions from pension benefits

(1) A registered fund may-

(a) ...

(b) deduct any amount due by a member to the member's employer on the date of retirement, the date on which the member ceases to be a member of the fund or the date on which the member's employment with a participating employer in a retirement fund is terminated in accordance with the Income Tax Act and the Tax Administration Act, 2011 (Act 28 of 2011), in respect of compensation, including any legal costs recoverable from the member in a matter contemplated in subparagraph (ii), **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-

(i) the member has in writing admitted liability to the employer; or

- (ii) judgment has been obtained against the member in any court, including a magistrate's court, and includes a compensation order granted in terms of section 300 of the Criminal Procedure Act, 1977 (Act 51 of 1977), from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay that amount to the employer concerned;
- (bA) permit a member to take a savings withdrawal benefit where there is a judgment contemplated in paragraph (b) (ii) or a written admission of liability in favour of the employer that has not yet been executed: Provided that the withdrawal will not result in there being insufficient remaining funds to repay the loan or guarantee or to comply with the judgment;
- (bB) suspend a savings withdrawal benefit where the employer has not obtained a judgment contemplated in paragraph (b) (ii), and the withdrawal will result in there being insufficient remaining value to comply with the pending order, if granted, for a period of 12 months pending the judgment by any court including a magistrate's court.' [Emphasis added]

The relevant factual background

The disciplinary enquiry

- [8] Fusirantuba was employed by Spar in a managerial position as a “Category Buyer – Perishables”. He was responsible for purchasing goods for Spar, establishing sources of supply with competitive pricing, ensuring that Spar did not overpay for goods and services. In terms of his employment contract, he was under a duty to act in good faith in the best interests of Spar at all times, to avoid conflicts of interest, to refrain from receiving gifts or benefits by virtue of his employment, and to disclose to Spar any interest in any contracts with Spar.
- [9] Spar’s complaint against Fusirantuba, which led to his dismissal, was that he had utilised a ‘middleman’ entity, namely Gift Barrel CC (‘Gift Barrel’) as a supplier of products for Spar instead of purchasing the products directly

from the primary supplier, namely Otima Plastics (Pty) Ltd ('Otima') – this in circumstances where Fusirantuba was aware of the existence of Otima.

[10] A disciplinary enquiry was held on 26 May 2025. The minutes of the enquiry (which have not been challenged and can therefore be accepted as correct) show that evidence was led on behalf of Spar that: Fusirantuba arranged for Otima to supply Gift Barrel and for Gift Barrel to supply Spar at a mark-up of 25% on average; in January 2016 Fusirantuba received an amount of R 43 619.29 from Gift Barrel, which was not disclosed to Spar; Fusirantuba arranged for his son to be employed by Gift Barrel, also not disclosed to Spar; based on the average mark-up of 25%, Fusirantuba caused Spar to pay R 8 208 430.92 more for goods purchased from Gift Barrel than it would have paid had it purchased the same goods directly from Otima.

[11] The minutes of the disciplinary enquiry show that Fusirantuba did not challenge or cross-examine any of the witnesses who testified on behalf of Spar. Indeed, the minutes show that:

- a) Fusirantuba admitted that he had failed to disclose that his son was working for Gift Barrel (part-time, he claimed) and that his failure to disclose was a breach of the Spar code of ethics. He said, '*I can admit and see my fault here.*'
- b) With regard to the use of Gift Barrel as a middleman, Fusirantuba stated, '*I am aware that the best thing I could have done was to list Otima directly. This was not for my personal benefit. It was to see if*

he could get work as he was at home for over three years and [I] wanted to keep him busy. When Gift Barrel asked if I know someone and I volunteered my son.'

- c) Fusirantuba stated further that, *'I know that mistakes have been made and that I have breached the policy. It was for the sake of my son. I wanted to avoid him sitting at home and doing the wrong things. It was a risk I took as a parent. I am not making excuses. I am deeply sorry. This is why I did not make any effort to defend myself or gather witnesses and I deeply regret my actions. It will be within company right to take action.'*

[12] To my mind these statements amount to admissions on the part of Fusirantuba that he breached his fiduciary duty by placing his own familial interests above the best interests of Spar.

[13] While Fusirantuba insisted that he did not benefit personally from using Gift Barrel as a middleman, his evidence under cross-examination leaves one in doubt in this regard. He was not able to explain why the salary which Gift Barrel allegedly paid to his son for part-time work as a driver exceeded the salary which Fusirantuba himself was paid for his employment in a managerial position at Spar.

[14] Fusirantuba did not challenge the evidence presented by Spar that Spar had paid R 8 208 430.92 more for goods purchased from Gift Barrel during 2020 to 2024, than it would have paid if it purchased the goods directly from Otima.

- [15] The chairperson of the disciplinary enquiry found Fusirantuba guilty on all four charges of misconduct, namely: 1) breach of the Spar code of Ethics due to a failure to declare a conflict of interest in employing a middleman with whom his child was employed; 2) breach of the Spar gift policy in that he and/or his family members accepted cash from a Spar supplier; 3) abuse of position and/or acting dishonestly in that he listed Gift Barrel as a supplier for personal benefit, resulting in a loss of R 8 208 430.92 to Spar; 4) dishonesty in that Fusirantuba gave false statements during the investigation of his relationship with Gift Barrel.
- [16] On the strength of the outcome of the disciplinary proceedings, Spar dismissed Fusirantuba on 2 June 2025. Fusirantuba did not appeal the disciplinary hearing outcome. Nor did he refer the matter to the Commission for Conciliation, Mediation and Arbitration ('CCMA').
- [17] Spar then instituted the action against Fusirantuba for damages, as mentioned above.

Spar's engagement with the Fund

- [18] On 2 June 2025, following the dismissal of Fusirantuba, Spar's attorneys ('CDH') addressed correspondence to the Fund advising of Fusirantuba's misconduct and dismissal, and requesting that Fusirantuba's pension benefits be withheld in terms of s 37D(1)(b) of the Pension Act. On 10 June 2025, at the request of the Fund, CDH submitted a duly completed form requesting the withholding of Fusirantuba's benefits.

- [19] On 19 June 2025, CDH addressed further correspondence to the Fund advising that Spar would imminently be instituting action against Fusirantuba to recover damages in excess of R 8 million.
- [20] The Fund did not respond to the communications of 10 and 24 June 2025.
- [21] On 24 June 2025, CDH again wrote to the Fund requesting that Fusirantuba's benefits be withheld. On the same day, the Fund was furnished with a copy of the action as well as all documents relating to Fusirantuba's dismissal, including the minutes of the disciplinary enquiry.
- [22] On 30 June 2025, the Fund replied to CDH requesting that it be provided with certain documents within 30 Days, failing which Fusirantuba's benefits would be paid out to him. In the letter, the Fund communicated its requirement that Spar indemnify the Fund or Old Mutual '*in respect of any legal proceedings or payout of the benefits*', failing which it reserved the right immediately to pay out the benefits to Fusirantuba.
- [23] It bears emphasis that the information and documentation requested by the Fund in its letter of 30 June 2025 had already been furnished to it on 24 June 2025. It is clear that the documents furnished on 24 June 2025 had not been considered by the fund when it requested the self-same information on 30 June 2025. One gets the distinct impression that Spar's withholding request was being met with bureaucratic filibustering rather than responsive engagement.

- [24] This notwithstanding, on 25 July 2025, CDH wrote to the Fund and furnished the information which the Fund had requested on 30 June 2025, which had already been provided to it. CDH again requested the Fund to confirm that Fusirantuba's benefits would be withheld.
- [25] On 31 July 2025, the Fund responded to CDH and yet again requested evidence of Fusirantuba's misconduct (over and above what had already been furnished by way of the action and documents), as well as a breakdown of how the damages claimed by Spar were calculated (despite the fact that the basis for the quantum claimed was clearly pleaded in the particulars of claim).
- [26] Worse still, the Fund went so far as to require that Spar's particulars of claim in the action be amended. The Fund asserted that, *'the current version [of the particulars of claim] refers to a breach of policy and gross misconduct. However, in terms of section 37D(1)(b) of the Pension Funds Act, a benefit may only be withheld where the member has committed offences involving theft, fraud, dishonesty, or misconduct with an element of dishonesty. The current POC does not make reference to any of these specified grounds. Until such time as the POC is appropriately amended and the evidential documentation is provided, the Fund will not be in a position to process the withholding request.'*
- [27] In my view, the Fund erred in its approach. It is clear on any intelligent reading of Spar's particulars of claim that the allegations against Fusirantuba regarding the use of a middleman to supply goods to Spar at a 25% mark-up, the receipt by Fusirantuba of monies from Gift Barrel and the employment

of Fusirantuba's son by Gift Barrel without disclosure thereof to Spar, are allegations involving dishonesty. The particulars of claim cannot reasonably be interpreted otherwise. The essential nature of the allegations against Fusirantuba will not change merely because an amendment is introduced to state the obvious – which is that the allegations involve dishonest conduct, as contemplated in section 37D(1)(b) of the Pension Funds Act.

[28] In my view, the Fund failed properly to apply its mind to the particular of claim. It adopted a blinkered, box-ticking approach instead of a sensible, holistic interpretation of the particulars of claim, which, properly construed, leave one in no doubt that the allegations levelled against Fusirantuba involve dishonesty and/or misconduct with an element of dishonesty.

[29] Returning to the sequence of events, CDH had in the interim briefed a forensic accountant to prepare a detailed calculation of the loss suffered by Spar as a result of Fusirantuba's misconduct. On 14 August 2025, CDH notified the Fund that CDH was in the process of amending Spar's particulars of claim, and that a forensic accountant had been briefed to quantify Spar's claim with the high degree of particularity required by the Fund. CDH also provided the Fund with another copy of the minutes of the disciplinary enquiry, and highlighted aspects of the evidence which provided clear proof of dishonest conduct on the part of Fusirantuba. CDH again requested the Fund to confirm that Fusirantuba's benefits would continue to be withheld, as requested.

[30] The contents of CDH's letter of 14 August 2025 were evidently ignored by the Fund, for on 19 September 2025, the Fund wrote to CDH advising that, unless the amended particular of claim were provided to it by close of

business on 25 September 2025, the Fund would *be left with no alternative* but to pay the full provident fund benefit to Fusirantuba.

- [31] The Fund's response is startling; it evinces mindless intransigence which can only be explained by a failure to have proper regard to, or to understand the import of, the information furnished to the Fund by CDH in relation to the requirements of s37(D)(1)(b) of the Pension Act and the Fund's own rules governing the exercise of its discretion to withhold benefits, which are based on s 37(D)(1)(b). Having been guilty of overreach in the first place by insisting on an amendment of Spar's particulars of claim, and having been told that time was required to quantify Spar's claim with the particularity required by the Fund (in which regard the Fund also overstepped), it was patently unreasonable for the Fund to set a deadline of less than one week for the amendment to be delivered.
- [32] On 22 September 2025, CDH responded to the Fund pointing out that the amended particulars of claim could not be delivered by 25 September 2025 because: the forensic accounting was still busy preparing his report; the detailed quantum analysis required by the Fund, which would in the ordinary course be prepared by the expert as part of the trial preparation, was a significant exercise requiring an analysis of over 700 invoices raised over 10 (ten) years; Otima had not co-operated in producing the invoices required by Spar for this exercise, so that a subpoena had had to be issued to obtain the documents from Otima.
- [33] In these circumstances, CDH requested an undertaking from the Fund, based on the ample information and documentation already furnished to it, that it

would not release Fusirantuba's provident fund benefits at least until the forensic accountant had completed his quantum schedule and workings. The Fund was warned that, should it not provide the requested undertaking by 23 September 2025, Spar would seek urgent interdictory relief to be heard in the week of 6 October 2025.

- [34] The Fund did not revert by 23 September 2025. Instead, on 30 September 2025, the Fund wrote to CDH advising that it had received feedback from its legal team and that:

'The Fund regrets to inform you that it is no longer able to withhold the member's withdrawal benefit, as the continued delay is prejudicial to the member. The timeline for the submission of the required documents has long passed, and it appears that there is no certainty as to when the documents are to be recovered by the Fund.'

Accordingly, the Fund will have to cancel the lien within 5 working days, unless a valid interdict is received within this period. In the absence of such an interdict, the Fund will be obliged to release the benefit to the member.'

- [35] Thus, the deadline imposed by the Fund for Spar to obtain an interdict was 7 October 2025, failing which the benefits would be paid out to Fusirantuba. The ultimatum presented by the Fund on 30 September 2025 precipitated the launching of this application on 2 October 2025.

- [36] It regrettably has to be said that the conduct of the Fund leaves much to be desired. It was required, in terms of Rule 9.2(2) of its own rules,¹ to consider

¹ Rule 9.2(2) of the Master Rules of the Fund reads as follows:

whether or not Spar had established a *prima facie* case against Fusirantuba, and it had to be satisfied that Spar was not responsible for any delay in the prosecution of the action. The conclusions reached by the Fund in these regards are simply wrong. As already mentioned, the insistence that Spar amend its particulars of claim betrayed a fundamental lack of understanding of the import of the allegations in the particulars of claim. And the conclusion that Spar was guilty of delaying the matter was nonsensical in circumstances where it was the Fund which had insisted on an amendment to Spar's particulars of claim, and Spar had explained why this would take some time - given the Fund's unreasonable insistence on a level of precision in the quantification of Spar's claim at an early stage in the action which is entirely out of kilter with ordinary trial practice. In short, the Fund failed to appreciate the proper nature of its enquiry. It impermissibly elevated the degree of proof required to a level way beyond the threshold of a *prima facie* right and *prima facie* proof of the quantum.

- [37] As a consequence of the Fund's flawed approach, Spar has had to incur costs in seeking an interim interdict application, which could have been avoided had the Fund exercised its discretion properly. The Fund is not exposed to

'The fund may also reasonably withhold payment of a portion or the whole of any benefit payable in respect of a Member or a Beneficiary provided that:

- (a) The amount of the benefit so withheld does not exceed the amount that may be so deducted in terms of the Act;*
- (b) The fund is satisfied that the Participating Employer has established a prima facie case against the Member concerned;*
- (c) The Fund is satisfied that the Participating Employer is not at any stage responsible for any undue delay in the prosecution of the proceedings;*
- (d) Once the proceedings have been finally determined by a competent court of law, or settled or withdrawn, any benefit amount to which the Member or Beneficiary is entitled, and which was withheld, is paid immediately.'*

costs because it has not opposed the application, and Spar only sought costs in the event that the application was opposed. The Fund avoids accountability for costs by virtue of the indemnity which it insisted that Spar sign as a precondition for withholding payment of Fusirantuba's benefit. (It is open to doubt whether the Fund acted lawfully in so doing, but that is a question for another day.)

[38] Had Spar sought the costs of the application in its notice of motion, I would have been inclined to grant a costs order against the Fund. In the absence of such a prayer, I cannot. That is unfortunate, for, if the action succeeds, the costs which the Fund caused to be incurred will ultimately be borne by Fusirantuba (or by Spar, if there are insufficient funds to meet its claim and costs – as may well be the case).

The issues for determination

[39] The Fund did not oppose the application for an interim interdict. Fusirantuba opposed the relief sought on the grounds that:

- a) the matter was not urgent;
- b) Spar had not met the requirements for the granting of an interim interdict.

Urgency

[40] Ms Tait, who appeared on behalf of Fusirantuba, argued that the matter was not urgent as Spar had threatened to launch interdict proceedings if the Fund

failed to provide the necessary undertaking by 23 September 2025, and that Spar should not have waited until the Fund responded on 30 September 2025 before taking action.

[41] I do not consider it unreasonable for Spar to wait beyond the deadline of 23 September 2025, given the Fund's history of delayed responses to correspondence. CDH put up compelling reasons in its letter of 22 September 2025 for why the Fund's insistence on receiving amended particular of claim by 25 September 2025 was unreasonable. It was not unreasonable to cherish the hope that common sense would prevail and that the Fund would come around and furnish the requisite undertaking.

[42] I therefore do not regard Spar's failure to spring into action on 23 September 2025 as a culpable delay which renders the urgency of the application self-created. What matter is that, when all hope of a sensible response from the Fund was dashed on 30 September 2025, Spar took immediate action to launch this application.

[43] Given the deadline of 7 October 2025 imposed by the Fund in its letter of 30 September 2025, there can be no doubt that the matter was urgent. The fact that Fusirantuba was afforded very little time to respond is an unfortunate by-product of the unreasonable conduct of the Fund.

[44] For these reasons, I dismissed the objection based on urgency and entertained the matter as one of urgency on 6 October 2025, in the exercise of my discretion in terms of Rule 6(12). I granted a 'holding order'

preserving the status quo until 10 October 2025, in order to give me further time to consider the matter.

The requirements for an interim interdict pending a claim based on s 37D(1)(b)

[45] The requirements for an interim interdict are trite. An applicant is required to show:

- a) a right which, though *prima facie* established, may be open to some doubt;
- b) a well-grounded apprehension of irreparable harm;
- c) a balance of convenience in favour of granting the interim relief;
- d) the absence of an alternative remedy.

[46] A number of principles are particularly germane to applications for an interim interdict pending the determination of a claim based on s 37D(1)(b) of the Pension Act.

[47] Firstly, there are two well-known exceptions to the requirements referred to above in applications for interim relief pending vindicatory and ‘*quasi-vindicatory*’ claims, (a quasi-vindicatory claim being one in which the plaintiff claims delivery of specific property under some legal right to obtain

possession). The first is that it is not necessary for the applicant to allege irreparable harm, as there is a rebuttable presumption that the harm is irreparable. The second is that an applicant need not show that it has no other satisfactory remedy. See *Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd* 2003 (3) 268 (W) paras 27 – 28 and cases cited there.

[48] Secondly, it is well-established that money may be interdicted pending a vindicatory or quasi-vindicatory claim for that money, provided that the money to be interdicted is identifiable with or earmarked as a particular fund to which the plaintiff claims to be entitled (*Fedsure Life Assurance Co Ltd v Worldwide African Investment Holdings (Pty) Ltd (supra)* paras 29 – 30 and cases there cited).

[49] Section 37D(1)(b) of the Pension Act establishes a claim in favour of an employer to the pension fund benefits of an employee in the defined circumstances. Applying the principles referred to above, it seems to me that the claim in question is quasi-vindicatory in nature. Moreover, the money in the pension fund is capable of being interdicted, as it is identifiable with or earmarked as a fund to which the employer claims to be entitled. (See *Hansen + Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund No 2* (2023-002990) [2023] ZAGPJHC 100 (6 February 2023) paras 18 and 19.)

[50] I therefore consider that, where an applicant for an interim interdict relies on a statutory claim in terms of s 37D(1)(b) of the Pension Act, all that is required to be alleged and proved for purposes of securing an interim interdict is that

the applicant has a *prima facie* right and that the balance of convenience favours the granting of the relief. It is not necessary to allege irreparable harm, or to show the absence of an alternative remedy.

- [51] I stress these requirements, for Ms Tait contended that, in addition to the usual requirements for an interim interdict, Spar was also required to show that the Fund had exercised its discretion unreasonably in refusing to withhold Fusirantuba's provident fund benefits. In this regard, reliance was placed on the dictum of Moultrie AJ in *Hansen + Genwest (supra)* at para 36, where the learned judge mentioned a third requirement for relief in cases of this nature, namely:

'that the applicant has requested the pension fund to exercise its discretion to withhold the pension benefits but the pension fund has unreasonably refused to grant such a request (with such finding of unreasonableness taking into account any specific requirements laid down by the rules of the pension fund regarding the circumstances under which such a discretion may be exercised and the requirements of procedural fairness).'

- [52] It seems to me that this statement calls for qualification and clarification.
- [53] It is so that a pension fund has a discretion, based on s 37D(1)(b) of the Act, to withhold payment of a member's pension benefits pending the determination of a member's liability. That follows from the decision in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) in which it was held that, although s 37D(1)(b) of the Pension Act contemplates a written admission of liability or a judgment or compensation order against the member, the section must be interpreted purposively to

include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of the member's liability.

[54] In *Highveld Steel* (supra), at paragraph 20, Maya JA (as she then was), stated that:

'Considering the potential prejudice to an employee who may urgently need access to his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim.'

[55] The balancing exercise referred to by Maya JA is essentially the same as the enquiry into the balance of convenience which a court is required to undertake in deciding whether or not to grant an interim interdict.

[56] It is not surprising, therefore, that Rule 9.2(2) of the Master Rules of the fund (supra n1) mirrors the requirements for an interim interdict. Rule 9.2(2)(b) requires the Fund to be satisfied that the employer has established a *prima facie* case against the member. Rule 9.2(2)(c) requires the fund to be satisfied that the employer is not responsible for any undue delay in prosecuting the proceedings, a consideration which relates to the balance of convenience and the exercise of the discretion whether or not to grant the relief.

[57] But the fact that the rules of a pension fund may call upon it to perform an enquiry similar to that undertaken by a court in regard to an interim interdict does not mean that the court's jurisdiction is ousted, or that it has to defer to

the decision of the fund, or that it may only interfere with the fund's exercise of its discretion on limited grounds.

[58] There is nothing in the wording of s 37D(1)(b) of the Pension Act which precludes an employer from seeking an interim interdict to preserve the pension benefit pending the determination of the member's liability under the section (*Voltex (Pty) Ltd v Bidvest South Africa Retirement Fund and Others* [2025] ZAGPPHC 368 (29 April 2025) para 14). Had the legislature intended to preclude resort to the common law remedy of an interim interdict, it would have said so expressly (see *Casserley v Stubbs* 1916 TPD 310 at 312). Moreover, applying the purposive construction of s 37D(1)(b) adopted in *Highveld Steel*, it seems to me that the availability of the remedy of an interim interdict supports the attainment of the object of s 37D(1)(b) of the Pension Act, which is to protect the employer's right to recover monies lost due to theft, dishonesty, fraud or misconduct by an employee (see *Highveld Steel (supra)* para 16).

[59] An application for an interim interdict pending a claim under s 37D(1)(b) should not be confused with a review of the pension fund's exercise of its discretion. A court seized with such an interdict application is entitled to substitute its decision for that of the pension fund on the grounds that the pension fund was wrong. It is for the court, and the court alone, to determine whether or not an applicant employer has made out a *prima facie* case for a claim under the section, and whether or not the balance of convenience favours the granting of the interdict to withhold payment of the benefit. Simply put, the court's judgment trumps that of a pension fund.

[60] I would add that it is not desirable, in my view, to have an inflexible rule that an employer should always first approach a pension fund to withhold a member's benefit before approaching the court for interdictory relief based on s 37D(1)(b). There may be urgent circumstances which do not allow for engagement with the pension fund before seeking relief.

[61] To sum up, then, I conclude that an employer seeking an interim interdict pending determination of a claim under s 37D(1)(b) of the Pension Act is not required to show that the fund has acted unreasonably or irrationally in refusing to withhold the employee's pension benefit. The employer is only required to show:

- a) the existence of a *prima facie* right to recover an amount which exceeds the amount of the employee's pension fund benefits sought to be interdicted;
- b) a balance of convenience favouring the granting of the relief.

[62] If the court agrees with the pension fund's assessment, it will refuse the interdict. If the court is of the view that the pension fund was wrong in the requirements for an interim interdict have been met, it will grant the interdict.

A prima facie right

[63] Spar's *prima facie* right is founded on the statutory entitlement under s 37D(1)(b) of the Pension Act to recover and deduct from Fusirantuba's

provident fund benefits, damages caused to it by Fusirantuba by reason of any theft, dishonesty, fraud or misconduct.

[64] In *Moodley v Scottburgh / Umzinto North Local Town Council and Another* 2000 (4) SA 524 (D) it was held that ‘misconduct’ for purposes of s 37D(1)(b) had to be interpreted to mean dishonest conduct, or at least conduct involving an element of dishonesty. Pillay J expressed doubts about the correctness of the decision in *Msunduzi Municipality v Natal Joint Municipal Pension / Provident Fund and Others* 2007 (1) SA 142 (N), but the decision was followed in *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 608 (GJ). For purposes of this judgment I accept, without deciding, that ‘misconduct’ as contemplated in s 37D(1)(b) is intentional conduct which requires at least an element of dishonesty.

[65] As I have already indicated, Spar’s particulars of claim in the action contain allegations of conduct involving a dishonest breach on the part of Fusirantuba of his fiduciary duties to act in the best interests of Spar at all times, not to put his personal interests above those of Spar, not to receive secret benefits, and to disclose any personal interest in a contract with a supplier of Spar. The particulars of claim set out the basis on which the amount of R 8 208 430.92 is claimed as damages, being the amount that Spar overpaid for the products purchased from Gift Barrel as a result of the average mark-up of 25% on the prices charged by Otima.

[66] The evidence relied on by Spar appears from the minute of the disciplinary enquiry. Having regard to the uncontested evidence contained in the minute,

I am of the view that Spar should succeed in obtaining relief at trial in the action.

[67] In his answering affidavit, Fusirantuba resists the interim interdict on the following grounds:

- a) Spar's claim, as formulated in its particulars of claim, does not fall within the ambit of s 37D(1)(b) of the Pension Fund Act;
- b) Fusirantuba has delivered an exception to Spar's particulars of claim in the action;
- c) Fusirantuba disputes the *quantum* of the loss claimed by Spar, alleging that its claim is not based on specific invoices, but on assumptions and estimations;
- d) Fusirantuba attempts to explain why he did not cross-examine Spar's witnesses in the disciplinary enquiry;
- e) Fusirantuba alleges that he did not personally benefit from the listing of Gift Barrel as a supplier, as the amounts paid were for his son;
- f) Fusirantuba is 57 years old, unemployed and without an income, and needs his pension fund benefits to live on and fund his defence of the action.

[68] Ground a): As to the formulation of Spar's claim, I have already indicated that, in my view, Spar's claim clearly falls within the ambit of s 37D(1)(b) of the Pension Act. I do not agree with the Fund's assertion to the contrary, and I regard the Fund's assessment of Spar's particulars of claim as

blinker and blind to the obvious. In short, I consider that the Fund failed properly to apply its mind to the case made out in the particulars of claim, and that it acted unreasonably in demanding that Spar amend its particulars of claim as a precondition for the continued withholding of payment of Fusirantuba's pension benefit.

[69] Ground b): As to the exception, Fusirantuba alleges that he has delivered an exception to Spar's particulars of claim, and that his legal team has done everything necessary, including drafting of heads of argument and applying for a date for the hearing of the exception, which is awaited at present. He alleges that Spar has not filed any heads of argument, or taken any other steps in regard thereto, and that the exception effectively stands as an unopposed matter at this time.

[70] Spar, however, alleges that CDH has not been served with the exception or heads of argument, and that it has never previously seen the notice of set down annexed to the answering affidavit, which did not appear on Caselines or Court Online as at 5 October 2025. Spar alleges that all Fusirantuba's attorneys did deliver a notice to remove the cause of complaint in terms of Rule 23(1), and that CDH wrote to them explaining that Spar was in the process of compiling the necessary documentation in order to amend its particulars of claim, and that it would seek condonation in term of Rule 27(3) for the late response to the Rule 23(1) notice.

[71] In the light of Spar's response, Fusirantuba's allegations regarding the status of the exception, which can only emanate from his legal representatives, are a cause for concern. No copy of the exception and/or the heads of argument

has been annexed to the answering affidavit. This is a fundamental omission given that Fusirantuba seeks to rely on the exception to cast doubt on Spar's *prima facie* case.

[72] All that has been annexed to the answering affidavit is a notice of set down with the date left blank, which tells one nothing. No proof is provided of anything having been uploaded onto Caselines or Court Online. This is a highly unsatisfactory state of affairs. Courts should be able to reply implicitly on the accuracy of the information presented by legal practitioners with regard to matters under their control.

[73] Be that as it may, I do not consider it necessary for present purposes to resolve the mystery surrounding the status of the exception. Not having had sight of the contents of the exception, I cannot take it into account in the evaluation of the strength of Spar's *prima facie* case.

[74] As I have already indicated, I am satisfied that Spar's particulars of claim in their present form do indeed disclose a cause of action in terms of s 37D(1)(b) of the Pension Act. The exception is therefore irrelevant for purposes of this application.

[75] Ground c): As to the disputes raised by Fusirantuba's regarding the quantum of damages claimed by Spar, I am of the view that the challenges to quantum do not afford a defence to this application for interim relief. All that Spar is required to show, for purposes of the interim interdict sought, is that it has a *prima facie* claim for damages which exceed the value of Fusirantuba's provident fund benefit, which was R 6 577 073,18 as at 10 June 2025.

- [76] Spar has put up a rational basis for the avowedly provisional quantification of its damages claim. It has explained that the amount claimed is based only on the years 2020 to 2024, and that its claim will likely increase when it obtains access to further documentation to enable to substantiate its claim with effect from 2016.
- [77] In my view Fusirantuba's attacks on the method of calculation of the quantum are misconceived in the context of interim relief. The challenges which he raises are the sort which fall to be ventilated and determined at the trial. And in any event, even on Fusirantuba's version, he only manages to reduce Spar's claim by some R 2 million. He has not succeeded in casting serious doubt on the quantum of Spar's claim.
- [78] I consider that there is sufficient evidence on the papers to show *prima facie* prospects that Spar will recover damages of more than R 6 577 073,18 on trial in the action.
- [79] Ground d): Fusirantuba attempts to explain his failure to cross-examine Spar's witnesses in the disciplinary enquiry, and to 'walk back' the damaging admissions which he made there, by claiming that he was unrepresented at the hearing and did not understand the process of the consequences thereof.
- [80] However, the notice to appear at the disciplinary informed Fusirantuba that he was entitled to be assisted at the hearing by a colleague. He was also informed of the right to cross-examine witnesses, to call witnesses, and to make use of an interpreter.

- [81] The minute of the disciplinary enquiry shows that Fusirantuba was proficient in English, and reveals him to be a person of sophistication who understood the nature of the proceedings. His recent version that he did not understand the proceedings is at odds with his own explanation for why he did not challenge the evidence led at the enquiry, which was, *‘I am deeply sorry. This is why I did not make any effort to defend myself or gather witnesses and I deeply regret my actions. It will be within company right to take action.’*
- [82] Fusirantuba alleges that he did refer the matter of his dismissal to the CCMA, but he claims that, when he attended the CCMA, he was unrepresented while Spar was represented, and that the Commissioner, having posed questions to the parties, suggested that Fusirantuba withdraw his matter, stating that, *‘she knows Spar and their cases are always well prepared.’* For that reason, he withdrew his complaint. He claims that he did not appreciate at the time that the Commissioner was manifesting bias against him.
- [83] Spar denies the contents and accuracy of Fusirantuba’s allegations in this regard. It persists that, as a matter of fact, Fusirantuba has not challenged any of the findings of misconduct made against him in the disciplinary enquiry.
- [84] I have great difficulty in believing Fusirantuba’s version as to what the Commissioner of the CCMA is alleged to have said. But whatever the reason for his failure to pursue the case at the CCMA, the fact of the matter is that

he has done nothing to challenge the findings made against him in the disciplinary enquiry.

[85] It is significant that Fusirantuba has not sought in this application to challenge the correctness of the minute of the disciplinary enquiry, or the substance of the evidence which was led at the disciplinary enquiry (save for his challenge to the quantification of Spar's claim). He does not deny that he made the statements attributed to him in the minute. Fusirantuba rather seeks to dispute the conclusions reached by the chairperson of the disciplinary enquiry.

[86] By virtue of the rule in *Hollington v Hewthorn Co Ltd* [1943] KB 587 (CA) [1943] 2 All ER 35, I am not bound by the findings of the chairperson of the disciplinary enquiry as they amount to an expression of opinion, which is inadmissible. But I can have regard to the statements made by Fusirantuba in the disciplinary enquiry, which he does not deny having made. I can also have regard to the evidence presented by Spar's witnesses at the disciplinary enquiry, as they have deposed to confirmatory affidavits in this application in which they confirm the evidence which they gave at the enquiry.

[87] Based on Fusirantuba's own version in the disciplinary enquiry, I consider that Fusirantuba did indeed admit to dishonest conduct, and that his belated attempt to distance himself from his admissions with reference to an alleged lack of understanding of the process is disingenuous.

[88] Ground e): Fusirantuba alleges that he is not guilty of theft because he did not personally benefit from using Gift Barrel, and that the monies paid by Gift Barrel were for his son.

[89] Even if one accepts, for purposes of argument, that Fusirantuba did not receive money from Gift Barrel, and that all payments from Gift Barrel in fact went to Fusirantuba's son, there is still clear evidence of a dishonest non-disclosure to Spar of an involvement with Gift Barrel which benefited Fusirantuba's son, which amounted to a breach of Fusirantuba's contract of employment and of his fiduciary duties to Spar, and which dishonest conduct caused Spar to suffer loss.

[90] But, as I have already indicated, I have doubts about the veracity of Fusirantuba's version that Gift Barrel paid his son more for part-time work as a driver than he, Fusirantuba, earned at Spar in a managerial position. In my view, Spar enjoys good prospects of being able to demonstrate, with the aid of cross-examination, that Fusirantuba did indeed benefit personally from his scheme with Gift Barrel.

[91] Ground f): As to the balance of convenience, Fusirantuba alleges that the balance of convenience favours him as he is a fifty-seven-year-old person without employment or an income, and he needs the provident fund money to survive and to defend himself in the litigation.

[92] While I can appreciate the predicament in which Fusirantuba finds himself, his admission that he needs the funds to survive, and to pay for legal expenses, provides clear proof that Spar will suffer irreparable harm if an

interim interdict is not granted to preserve the funds, and it ultimately succeeds in the action. There can be little doubt that, without an interdict, the funds will be spent by the time the matter gets to trial, and Spar, if successful, would be left with a hollow judgment.

[93] Fusirantuba, on the other hand, will not suffer irreparable harm if the interim relief is granted and the action is ultimately dismissed, at which stage he will receive the funds, with accrued interest. He may well experience inconvenience in the intervening period, but, given that this is an interlocutory order, he is at liberty to approach the Court to amend or discharge the interdict if circumstances change and undue hardship results therefrom.

[94] In my view, therefore, the balance of convenience clearly favours the granting of the relief sought by Spar.

Conclusion and costs

[95] For all the reasons set out above, I concluded that Spar had met the requirements of a *prima facie* right and a balance of convenience, and that it was appropriate to grant an interim interdict as prayed.

[96] Spar sought costs only in the event that the application was opposed. Fusirantuba elected to oppose the application, and did so on grounds which were, in my view, misconceived and doomed to fail. In the circumstances, I considered it appropriate that Fusirantuba be ordered to bear the costs occasioned by his opposition to the application.

D M DAVIS
ACTING JUDGE OF THE HIGH COURT

Appearances:

For applicant: P Van Der Berg SC (with MN Ndlovu)
Instructed by Cliffe Dekker Hofmeyr Inc.
(Tim Smit / Loyiso Bavuma)

For third respondent: C Tait
Instructed by James Attorneys (R James)