

SOUTH AFRICA / JUDGMENT

Gradwell v Bidpaper Plus (Pty) Ltd and Others (EL46/2012) [2012] ZAECHGC 64; (2012) ILJ 33 2794 (ECG) (21 August 2012) [2012] ZAECHGC 64

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Smith

CASE / FILE NUMBER

EL46/2012

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REPORTABLE/NOT REPORTABLE
IN THE
HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE, GRAHAMSTOWN)

Case no:

EL46/2012

Date

heard: 7 August 2012

Date

delivered: 21 August 12

In the

matter between

CAMPBELL

GRADWELL

.....Applicant

vs

BIDPAPER

PLUS (PTY) LTD

.....First

Respondent

ALEXANDER

FORBES FINANCIAL

SERVICES

(PTY) LTD

.....Second

Respondent

BIDCORP

GROUP PENSION &
PROVIDENT
FUND

.....Third
Respondent

JUDGMENT

SMITH J:

- [1] The applicant's previous employer, Bidpaper Plus (Pty) Ltd ("Bidpaper"), has instituted civil action against him in the East London Magistrate's Court for damages suffered as a result of his alleged breach of a restraint of trade agreement. Bidpaper has subsequently also arranged for the second respondent, who is the administrator of its Group Pension and Provident Fund, to withhold pension benefits due to the applicant pending the finalisation of that civil claim.
- [2] The applicant now seeks an order declaring that the second and third respondents are not entitled to withhold, or deduct, any monies from the pension benefits due to him, and compelling the respondents to pay him the full benefits.
- [3] When the applicant joined Bidpaper during 2002, he signed a restraint of trade agreement which contained the usual clauses. His employment with Bidpaper terminated on 30 June 2011, although he had tendered his resignation on 31 May 2011.
- [4] On 21 June 2011 Bidpaper instituted disciplinary proceedings against the applicant in terms of which he was charged with having

breached his duty of good faith to the company, in that he had passed confidential information to a third party in breach of the restraint of trade agreement. On 28 June 2011 he was found guilty of a breach of his duty of good faith to the company and of the restraint of trade agreement, and of being "involved in business activities involving a third party" while still being in the employ of Bidpaper.

- [5] Bidpaper instituted the civil action against the applicant during December 2011. Its particulars of claim have undergone various

mutations and now state the gravamen of the claim to be as follows:

"The defendant breached the aforementioned material terms of the agreement and the restraint of trade agreement by providing the Plaintiff's confidential information to a competitor and by engaging in an agreement and/or arrangement with a competitor in regard to price, terms or conditions of sale and by actively taking up employment and/or becoming associated with the competitor during the restricted period."

[6] The respondents contend that they are entitled to withhold the applicant's pension benefits in terms of section 37D of the Pension Funds Act, 24 of 1956 ("the Act"). That section provides as follows:

"Funds may make certain deductions from pension benefits –

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 (bb)) in respect of any damage

caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which –

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

(bb) judgment has been obtained against the member in any Court, including the 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."

[7] In *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 SCA, Maya JA held that the wording of this section must be interpreted to include the power to withhold payment of a member's pension benefits pending the determination of liability, or acknowledgment thereof by the member.

[8] The word "misconduct", as used in this section, must however be interpreted to refer to conduct of which dishonesty is an element or component. (*Moodley v Scottsborough v Umzinto North Local Transitional Councillor and Another* 2000 (4) SA 524 (D & CLD) at 532.)

[9] It has also been held in a number of cases that the object of section 37D is to protect an employer's right to recover money misappropriated by its employees. This view has since been upheld by the Supreme Court of Appeal. (*Highveld Steel & Vanadium Corporation Ltd* (supra), at para. 16.)

[10] In summary then; our law in this regard is to the effect that a pension fund has discretion to withhold pension benefits due to an employee, pending the finalisation of civil action instituted by an employer; and which is based on allegations of theft, dishonesty, fraud or misconduct on the part of the employee.

[11] Mr. De la Harpe, who appeared for the applicant, has submitted that Bidpaper's particulars of claim do not contain any

allegations relating to theft, dishonesty, fraud or misconduct. He argued that its civil action is therefore founded solely on

allegations of breach of contractual obligations and consequential loss of revenue and profit.

[12] Mr. Cole, who appeared for the respondents, on the other hand, submitted that Bidpaper's cause of action, in so far as it is alleged that the applicant passed on confidential information to its competitors, implies serious misconduct and dishonesty by the applicant. He submitted that an employee who acts in breach of a restraint of trade agreement by wrongfully passing confidential

information to his or her employer's competitor in order to make a personal profit, or to advance the business of a commercial

competitor, acts in a dishonest way and is guilty of misconduct as contemplated by s. 37D of the Act.

[13] In my view it is axiomatic that where an employer seeks to retain pension benefits due to an employee under circumstances where there is no judgment or acknowledgment of liability by the employee, and pending finalization of a civil claim, a pension fund can only accede to that request if the employer avers facts which, if proved at the trial, will result in a finding that the employee had been guilty of theft, fraud, dishonesty or misconduct as contemplated by

s. 37D.

[14] Bidpaper has averred that the applicant, while being in its employ, had given confidential trade information to a competitor and entered into an agreement, or arrangement, with a competitor with regard to pricing and terms and conditions of sale to its detriment. If it proves these allegations at the trial, there can be little doubt that the trial court's findings will imply serious misconduct and dishonesty on the part of the applicant. An employee who passes confidential trade information to his or her employer's competitors, invariably acts in a clandestine and underhanded manner, and with full knowledge of the potential harm that his or her actions may cause the employer. It is indeed difficult to conceive of circumstances where such conduct will not contain some element of dishonesty. And in my view it matters not if these actions are motivated either by malicious intent to spite the employer, or by a desire for personal gain. I therefore agree with Mr. Cole that such actions must necessarily imply dishonest conduct as contemplated by

s. 37D of the Act.

[15] Under these circumstances I am satisfied that the second and third respondents properly exercised their discretion to accede to Bidpaper's request to retain the applicant's pension benefits pending the finalisation of the civil action instituted by Bidpaper. In the result the application must fail.

[16] The following order shall therefore issue:

The application is dismissed with costs.

J. SMITH

JUDGE OF THE HIGH COURT

Appearing on behalf of applicant: Advocate De La Harpe

Instructed by: Bax Kaplan Incorporated

Appearing on behalf of respondents: Advocate Cole

Instructed by: Don Maree Attorneys

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