

SOUTH AFRICA / JUDGMENT

Jacobs v Telkom and Others (17342/2021) [2022] ZAGPPHC 551; (2022) 43 ILJ 1902 (GP) (1 April 2022) [2022] ZAGPPHC 551

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

17342/2021

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IN THE HIGH COURT OF

SOUTH AFRICA

(GAUTENG DIVISION,

PRETORIA)

Case number: 17342/2021

REPORTABLE: YES/NO

OF INTEREST TO OTHERS

JUDGES: YES/NO

REVISED

1 April 2022

In the matter between:

ANDRE JOHANNES

JACOBS

APPLICANT

And

TELKOM RESPONDENT

TELKOM

SA

1st INTERESTED PARTY

MOMENTUM

2nd INTERESTED PARTY

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The applicant (Mr Jacobs) launched an application requesting that his retirement fund held at first respondent (TRF) be paid to him together with ancillary relief. It is common cause that Mr Jacobs resigned from the first interested party (Telkom) on 31 October 2012 and that his pension benefits have yet to be paid to him. TRF did not oppose the application. Telkom, as the first interested party, opposed the application and instituted a counter-application seeking an interim order that TRF be interdicted from paying the retirement withdrawal benefits pending the finalization of an action

that Telkom instituted against Mr Jacobs.

ISSUES TO BE DECIDED

[2] The issues to be decided are whether Mr Jacobs is entitled to payment of the pension benefits or, in the counter-application, whether Telkom is entitled to an interim interdict pending the final determination of the action instituted against Mr Jacobs under case number 10516/2014.

THE LAW PERTAINING TO THE WITHOLDING OF PENSION BENEFITS

[3] Section 37D(1)(b) of the Pension Funds Act 24 of 1965 (“the Act”) provides as follows:

“37D Fund may make certain deductions from pension benefits

- (1) A registered fund may-
 - (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, fraud, or misconduct by the member, and in respect of which –
 - (aa) the member has in writing admitted to the employer,
 - (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;”

[4] The Rules of TRF as set out in Rule 9.5(2)(b) provides that a benefit may be retained where legal proceedings have been instituted and/or a criminal charge has been laid until the matter has been determined by a competent court of law, provided that a prima facie case has been made out and there is reason to believe that the employer has a reasonable chance of success.

[5] In *Highveld Steel & Vanadium Corporation Limited v Oosthuizen*[1] the Supreme Court of Appeal (“SCA”) considered the question of whether the board of a retirement fund has the power to withhold payment of the pension benefits due to an employee, pending the outcome of a claim of damages to be instituted by the employer. The court a quo held that a court has no such power, but the SCA stated the following:

*“The result of the order in the event of the respondent’s success in the main application is that the appellant would most probably end up with a hollow judgment, precluded from enforcing the future compensation award it may obtain against the respondent in the pending action. As I see it, the refusal of the intervention application, which obviously cannot be altered by the court below, is the end of the road for the appellant in so far as seeking the relief in issue is concerned. In my view, the decision of the court below is a ‘judgment or order’ as envisaged in *Zweni*. It is therefore appealable.”*[2]

[6] The SCA proceeded to interpret section 37(D)(1)(b) and stated as follows:

“It has been stated in a number of cases that the object of s 37D(1)(b) is to protect the employer’s right to pursue the recovery of money misappropriated by its employees. This approach is, in my view, supported by the plain wording of the section and is, with respect, correct.”

However, a practical problem threatens the efficacy of the remedy afforded by the section. In many a case employers only suspect dishonesty on the date of termination of an employee’s service and fund membership with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated. Furthermore, it has to be accepted as a matter of logic that it is only in a few cases that an employer will have obtained a judgment against its employee by the time the latter’s employment is terminated because of the lengthy delays in finalizing cases in the justice system. The result, therefore, is that an employer will find it difficult to enforce an award made in its favour by the time judgment is obtained against him.

Such an interpretation would render the protection afforded to the employer by s 37D(1)(b) meaningless, a result which plainly cannot have been intended by the legislature. 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 acknowledgement of such member’s liability. The Funds therefore had the discretion to withhold payment of the respondent’s pension benefit in the circumstances. I daresay 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.

Considering the potential prejudice to an employee who may urgently need to access 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. They may also impose conditions on employees to do justice to the case.” [3]

- [7] In *SABC v SABC Pension Fund*[4] the court applied the principles enunciated in *Highveld* and considered the employers right to apply for an interim interdict in circumstances, similar to those in this case, and concluded that there is nothing in the Act or Rules preventing an employer from interdicting payment of the benefit and stated that the law relating to interdicts will be applicable.[5]
- [8] It would seem that Mr Jacob's legal representatives did not differ on the law, but he stressed that the delay in this case was unreasonable, and that Mr Jacobs is therefore entitled to payment of the benefits due to him, despite the allegations against him.
- [9] I was in this regard referred to a thesis by Seakamela Mmopa Queen titled “Withholding of Pension Fund Benefits under South African Law”[6] where the writer opines inter alia that the employer must take all reasonable steps to enter the case on the court roll at the earliest possible date and not be responsible for the delays in the prosecution of the proceedings. It was emphasised that the fund must exercise its discretion in such a way as to avoid unjustified prejudice of the employee.[7] However the situations where the delay is out of the control of the employer, where the delay is largely to be attributed to failures in the criminal law system or where both parties contribute to an inordinate delay must be distinguished from a situation where the employer does not act reasonably.
- [10] What is reasonable will be determined by both the period and the circumstances of a particular case. Whether the relief is to be granted will depend on whether a *prima facie* case is made against the employee.[8] No specific time limit is prescribed in the Pension Fund Act, in *Buthlezi v Municipal Gratuity Fund & Another*[9] a delay of just less than two years were deemed unreasonable.
- [11] In *Maritz v Bidcorp Group Retirement Fund*[10] the Court held that if the time it took to finalize a matter is unreasonable and the employer has not taken further steps to ensure that the matter is finalized, the Fund must release the benefits to the employee. The Court also acknowledged that a delay could be the result of the time it takes to finalize criminal matters and that could led to the conclusion that the delay was not unreasonable.

THE EVIDENCE

- [12] Mr Jacobs had been in the employment of Telkom from 3 January 1989 until his resignation on 31 October 2012. During his employment at Telkom he and his employer made contributions to the TRF. During 2012 he received notice to appear before a disciplinary enquiry to answer to certain allegation pertaining to misconduct. He decided to resign rather than subjecting himself to the disciplinary enquiry. Criminal charges were laid

against him by Telkom during or about 2013. He alleged that after a search of his house and seizure of certain items on 22 August 2013 he never heard from the South African Police (SAPS)

again. Mr Jacobs was informed by SAPS that the docket was closed and that the case was withdrawn on 21 November 2019. He was informed that no investigation was being conducted in this matter. However during March 2021 Mr Jacobs's attorney of record received an email from an advocate Smith from the NPA, advising her that the criminal matter is proceeding. Despite that, he had since the date of deposing to the affidavit in this application not been contacted by the SAPS.

- [13] The dispute that led to this application started as far back as 2013. Mr Jacobs was informed per email by Telkom on 19 April 2013 that his pension benefits would not be paid out until a court has given judgment in respect of the criminal and civil cases instituted by Telkom against him. He lodged a complaint in terms of section 30A of the Act on 13 September 2013 and the complaint was transmitted to the Pension Fund Adjudicator. On 29 August 2014 the Pension Fund Adjudicator found that she did not have jurisdiction to adjudicate the matter. Mr Jacobs did not agree with this decision, as he was of the view that his referral of the dispute to the Pension Fund Adjudicator preceded the summons issued by Telkom. He however did not launch a review application against the decision.
- [14] On 3 October 2013 Mr Jacobs was informed that Telkom requested the TRF to withhold payment of the pension benefits in terms of section 37D of the Act and Rule 9.5.(2) (b)(i) of the Fund. Mr Jacobs bemoans the fact that despite the long delay the dispute has not been finalized and the pension benefit has not been paid out.
- [15] Telkom issued a summons against Mr Jacobs during February 2014 claiming an amount of R203 539 510-00 as contractual damages, caused by his breach of contract. An exception was raised against the particulars of claim. Mr Jacobs initially insisted that since the launching of the exception on 11 March 2014 no further steps had been taken to finalize the dispute. In the answering affidavit Telkom pointed out that the exception was set down on 1 April 2014 and Telkom filed heads of argument on 3 September 2014. On 10 September 2014 Mr Jacobs' previous attorney filed a notice of withdrawal of the exception and tendered the costs. Mr Jacob's plea was filed on 16 September 2014 and comprised of one page and constitutes a bald denial of the allegations against him. In his reply Mr Jacobs disavows any knowledge of these steps taken by his erstwhile attorney, but there was certainly a duty on him to enquire about the progress and status of the matter, if he insisted on a prompt finalization of it. If his attorney acted without instructions from him one would have expected that the Legal Practice Council would have been approached and a complaint lodged.

[16] Telkom explains the reason why it refuses to agree that Mr Jacobs's pension benefits be paid out. It is alleged that Mr Jacobs, during the period 2006 to 2016 accessed certain of Telkom's systems and data and sold same to Telkom's competitors. The details of the alleged misconduct were fully set out in the answering affidavit together with supporting emails and expert and forensic reports. As a consequence of the allegations against Mr Jacobs a suspension notice

was issued against him. Pursuant to the charges laid against him, Mr Jacobs tendered his resignation. Telkom says that it requested that his pension benefit be endorsed, relying on section 37(D)(b)(i) of the Act and Rule 9.5(2) of the Rules. Criminal charges were also laid simultaneously in terms of section 3 of the Prevention and Combatting of Corrupt Activities Act, 123 of 2004. Mr Jacobs says that the Code of Ethics, the Electronic Communication Policy and the Conflict of Interest Policy on which Telkom relies in its claim did not form part of his employment contract.

[17] Mr Jacobs is of the view that Telkom caused the inordinate delay and did not proceed with the civil claim against him, nor did the criminal case proceed. He sets out the prejudice he and his family is suffering as a result of the long delay and failure to pay out his pension benefits.

[18] Telkom says that the only reason that the civil action was not proceeded with was that the NPA requested it to hold the civil matter over, pending the finalization of the criminal matter. This much is confirmed by the e-mails between the NPA and Telkom. It contends that it has no control over the delay at the NPA and attached several emails during the period 2016 to 2017 wherein Telkom requested the NPA to proceed with the matter. The NPA assured Telkom in these emails that the matter was being attended to and undertook that it would be escalated and enrolled. Despite the undertaking nothing was done by the NPA. Telkom asserts that it wants to proceed with both the criminal and civil matters, but was hamstrung by the NPA's

delays. Telkom states that it will now proceed with the civil matter, despite the criminal matter not being finalized. Mr Jacobs would have none of the explanation and insists that Telkom should have done more to bring the matter to finality. Telkom in its affidavit says the matter would be enrolled for 2022, but during argument a date during 2023 was foreshadowed.

[19] In his combined replying and answering affidavit to the counter-application Mr Jacobs correctly states that the allegations against him cannot be determined on the papers. He also chooses not to respond to the evidence provided by Telkom and relies on his right to remain silent and not to incriminate himself in criminal proceedings, which may follow. This stance ironically illustrates why it would have been advisable to first finalize the criminal matter, before proceeding with the civil matter. His silence also leaves the allegations against him unanswered. The result is that, although Mr Jacobs has the right to remain silent, the Court is largely left in the dark as far as his version is concerned. The unintended consequence of this is that the Court has only the evidence provided by Telkom to determine whether the

requirement for an interim interdict have been met.

- [20] None of the factual disputes between the parties, which includes the terms and conditions of the employment contract and what formed part of it, nor the veracity of the allegations against Mr Jacobs can be determined on the papers. The disputed facts can however be used in the determination of the interdict that Telkom is seeking, pending the finalization of the trial.

CONCLUSION

- [21] In this instance there is no question that there is an inordinate delay. The facts set out above illustrate that the delay was caused by various factors, these include the NPA's non-responsiveness, the fact that the exception was withdrawn by Mr Jacob's erstwhile attorney, the failure by both Telkom and Mr Jacobs to pursue the civil litigation to finality. Mr Jacobs could also have brought an application to review the decision of the Pension Fund Adjudicator. In this regard the well-known saying "the pot can't call the kettle black" should apply. Mr Jacobs waited until April 2021 to launch this application. Although it has been made clear that the employer should not be the cause of the delay, the employee also has a duty not to contribute to any delay and can hardly put the blame on the employer, if he contributed to the delay. In this instance Mr Jacob's attorney withdrew the exception. His alleged ignorance about that does not constitute a reasonable explanation. His attorney acted under his instructions and he should have followed it up if he noted a delay. No explanation is also given for the delay in bringing this application. Both parties contributed to the long delay. I am of the view that the long delay should in the circumstances of this case not be regarded as unreasonable, it must however be stressed that if not for the exceptional circumstances of this case, the delay would have been unreasonable. If the matter could not be finalized in the foreseeable future the Court may have come to a different conclusion.
- [22] I am of the view that Telkom established the existence of a prima facie right. This much is clear from the facts set out in the application and forensic report. In the absence of any explanation by Mr Jacobs the version provided by Telkom should suffice to prove a prima facie right.
- [23] It is clear that if the monies are paid out to Mr Jacobs he will, on his own version, try and meet his existing financial obligations, which in turn would leave Telkom with no re-course. Even if successful, a judgment against Mr Jacobs will be of no value if an interim interdict is not granted. Consequently irreparable harm was proven.
- [24] The disputed evidence against Mr Jacobs is serious and potentially criminal. As a result I am of the view that it will be in the interests of justice to grant an interim interdict, especially in the light of the fact that a preferential trial date can be obtained from the DJP. Any one of the parties or both can approach the DJP in this regard.

[25] In considering the balance of convenience, despite the long delay Mr Jacobs, as already stated, only filed this application during April

2021. The civil action will in all probability not be determined this year, but should be determined at the latest next year.

COSTS

[26] I take into consideration that both parties to an extent contributed to the delay and also that Mr Jacobs is at a clear financial disadvantage. As a result I am of the view that each party should pay its own costs.

[27] The following order is made:

1. The application is dismissed.
2. The counter-application is granted and the respondent is interdicted from making payment to the applicant pending the adjudication of the action instituted by the first interested party under case number 10516/2014.
4. Each party to pay its own costs.

R G TOLMAY

JUDGE OF THE HIGH COURT, PRETORIA

DATE OF HEARING: 10

FEBRUARY 2022

DATE OF JUDGMENT: 2022

ATTORNEY FOR APPLICANT: ROETS AND VAN RENSBURG INC

ADVOCATE FOR APPLICANT: B P GEACH (SC)

F H H KEHRHAHN

RESPONDENT: TELKOM

RETIREMENT FUND

FIRST INTERESTED PARTY: TELKOM SA (LTD)

SECOND INTERESTED PARTY: MOMENTUM

[1] 2009(4) SA 1 (SCA) (Highveld).

[2] Ibid para 9.

[3] Ibid para 16, 17, 19, 20 (footnotes deleted).

[4] 2019(4) SA 608 (GJ).

- [5] Ibid para 78.
- [6] <https://www.labourguide.co.za/recent-articles/2740-hand-of-my-retirement-benefit-not-so-quickly>.
- [7] Molobela v Corporate Selection Retirement Fund and another [2011]2 BPLR 220 (PFA) p 148.
- [8] Charlton and Others v Tongaat-Hulett Pension Fund (9438/05) [2006] ZAKZHC 15 (1 December 2006); Sayed Essop v Non Ferrous Metal Workers Pension Fund & Another [2000] 9 BPLR 1051 (PFA)
- [9]
- [2001] 5 BPLR (FPA).
- [10]
- [2011] 1 BPLR 118 (PFA).
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