

SOUTH AFRICA / JUDGMENT

Kotze v Mpumalanga Department of Education and Others (18453/13) [2014] ZAGPPHC 322; (2014) 35 ILJ 2361 (GNP) (4 June 2014)

[2014] ZAGPPHC 322

COURT

North Gauteng High Court, Pretoria

BEFORE

S K Hassim

CASE / FILE NUMBER

18453/13

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH PROVINCIAL DIVISION

DATE: 4/6/2014

CASE NO: 18453/13

In the matter between:

WILLEM JOHANNES PAULUS KOTZEApplicant

and

MPUMALANGA DEPARTMENT OF EDUCATIONFirst Respondent

GOVERNMENT EMPLOYEES' PENSION FUNDSecond Respondent

MEMBER OF THE EXECUTIVE COUNCIL

RESPONSIBLE FOR THE MPUMALANGA

DEPARTMENT OF EDUCATION IN THE

MPUMALANGA PROVINCEThird Respondent

HASSIM AJ

- [1] The applicant seeks a mandatory interdict (“the main application”), the third respondent, in turn as counter applicant, seeks, a prohibitory interdict (“the counter application”).

- [2] The applicant applies for an order compelling its former employer, the member of the executive council in the Mpumalanga Province responsible for education (“the MEC: Education”) to:
- (a) complete, finalise and deliver all documents relating to the termination of his employment;
 - (b) pay all amounts due to him in terms of his contract of employment up until the date of the termination of his employment, including outstanding salary and pay in lieu of leave;
 - (c) complete all the requisite documents to enable him to withdraw the pension benefit payable to him from the Government Employees’ Pension Fund (“Fund”);
 - (d) submit the documentation referred to in (c) above within seven days of this order.
- [3] The third respondent counter applies for an order, either:
- (a) staying the main application alternatively, postponing it, pending the finalisation of an action which has been instituted by it against the applicant; alternatively
 - (b) attaching the applicant’s pension fund interest and/or other benefits that may be due to him pending the finalisation of the aforementioned action.
- [4] The applicant avers that he is owed a salary and payment in lieu of leave (“leave payment”). He states that he has submitted all the necessary documents to the Human Resources section of the Department of Education, in the Mpumalanga province (“the Department”) in order for these payments to be made to him. It is common cause some money is due by the third respondent to the applicant. There is no compelling reason why these should not be paid to the applicant.
- [5] There one issue which is dispositive of both the main application and counter application. It is whether an employer has a right to preclude the Fund from paying the benefit (“the pension benefit”) which is due to an employee in terms of the Government Employees’ Pension Law, 1996 (“GEPL”). This question is dependent upon the interpretation given to section 21(3) of the GEPL.
- [6] Section 21(1) of the GEPL prohibits the assignment or transfer or cession or any other encumbrance of an employee’s pension benefit. Section 21(3) does however provide an exception to this provision. For purposes of this judgment I need only consider subsection (1) and subsection 3(c) of section 21 of the GEPL. The latter permits, from the pension benefit payable to an employee, the deduction of the amount of a loss that an employer has suffered due to theft, fraud, negligence or any other misconduct on the part of an employee. Then too, there is a restriction; the deduction may only be made if the employee has admitted wrongdoing in writing or this has been proved in a court of law.
- [7] Subsections 21 (1) and (3)(c) of the GEPL provide as follows:

“21 Prohibition on cession and attachment of benefits

- (1) Subject to section 24A, no benefit or right in respect of a benefit payable under this Act shall be capable of being assigned or transferred or otherwise ceded or of being pledged or hypothecated or...be liable to be attached or subjected to any form of execution under a judgment or order of a court of law;
- (2) ...
- (3) Notwithstanding the provisions of subsection (1) or of any other law-
 - (a) ...
 - (b) ...
 - (c) the amount of any loss which has been sustained by the employer through theft, fraud, negligence or any misconduct on the part of any member, pensioner or beneficiary which has been admitted by such member or pensioner in writing or has been proved in a court of law;

may be deducted from the benefit payable to such member, pensioner or beneficiary under this Law in a lump sum or in such instalments as the Board [of Trustees] may determine.”

- [8] A similar provision is found in section 37D(1)(b)(ii) of the Pensions Funds Act, 24 of 1956. It provides:

“37D Fund may make certain deductions from pension benefits

- (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 subsection (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 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;”
- [9] The applicant was employed in the Department in the position of deputy director general in the supply chain management section. He had been employed in the government service since 7 January 1976.

[10] During 2011 the third respondent instituted disciplinary proceedings against the applicant. On 21 June 2011 the applicant and the third respondent agreed to refer the dispute to the General Public Service Coordinating Bargaining Council. The applicant was charged with misconduct on various grounds. In broad terms the charges all related to financial misconduct. Some of the allegations against the applicant were:

- (a) He had issued a guarantee and/or indemnity to a service provider, without the requisite authority to do so.
- (b) He had appointed a service provider without complying with Supply Chain Management processes and other related processes.
- (c) Because of a representation/representations made by him the Department paid an amount of R10 000 per month for 5 years to a service provider.
- (d) He entered into an oral agreement with a service provider for a transactional value of R40 000, per month for a period of 5 years without being authorised to do so and contrary to Supply Chain Management processes.
- (e) He committed the Department to an amount of R212 797.46 when the obligation to pay was that of another government department.

[11] The applicant pleaded not guilty to all the charges. He opted not to lead evidence in his defence. He was found guilty on all of the charges. On 20 November 2011 the enquiry resumed to determine the imposition of a sanction. The applicant elected not lead evidence in mitigation thereof. In the course of the hearing the applicant tendered his resignation which the Department refused to accept. On 21 November 2011 the sanction of dismissal was imposed.

[12] On 25 August 2012, the applicant launched review proceedings in the labour court challenging his dismissal. The application is opposed by the third respondent and has not been finalised.

[13] On or about 20 March 2013, the third respondent instituted an action in this court under case no. 17290/2013 for the recovery of an amount of R 4 691 219.63. This amount is alleged to constitute the loss which was suffered as a result of the applicant's financial misconduct. The particulars of claim are regrettably not a model of clarity. The applicant raised an exception to the particulars of the third respondent's claim on the basis that the particulars of the

claim failed to disclose a cause of action alternatively that they are vague and embarrassing. I heard the exception a few days before this application. My decision on the exception is in a separate judgment.

- [14] What is however clear from the particulars of the claim is that the third respondent is seeking compensation for the alleged loss that the applicant's financial misconduct caused to the Department.
- [15] Mr Shakoane who appears for the third respondent, in opposing the main application and in support of the counter application, argues that if the third respondent were to succeed in its action, it is probable that the applicant will not be able to satisfy the judgment. I tend to agree; on the applicant's own version he has no assets and is not earning an income. The fact that he had to sell his assets in order to live because the pension benefit has not been paid to him, is highly unfortunate. I have sympathy for his plight. It is however not beyond the realm of probability that by the time the action is finalised a large portion, if not all, of the pension benefit would have been depleted. I hasten to add that I am not suggesting that the applicant will do so with the intent to render any judgment meaningless. The only hope for the recovery of any loss suffered by the Department lies in the pension benefit due to the applicant. I accept that this is harsh for the applicant. The allegations against the applicant are suggestive of underhandedness. The State has an obligation to root out the underhandedness that is plaguing our country. The State owes a duty to its citizens to ensure that the public purse is for the benefit of all and not a select few. To achieve this it must recover whatever money is due to it. The Public Finance Management Act No. 1 of 1999 is unforgiving in this regard.
- [16] Mr Snyman who appears for the applicant argued that the applicant is entitled to payment of the benefit due to him from the GEPPF. As I understand Mr Snyman's argument it is that the third respondent cannot find comfort in the exception in section 21 (3) to the general prohibition on the attachment of the pension benefit and deductions therefrom. Any benefit which falls outside the ambit of section 21(3)(c) of the GEPL, he argues, is secure from any type of attachment or deduction. He sought to persuade me that the third respondent cannot call section 21(3)(c) in aid. He quite correctly pointed out that there is no written admission of wrongdoing. But this in itself is not enough to protect the benefit. The next question is whether a court of law has made a decision on compensation, if any due to the employer. Mr Snyman argues that there is no such finding.
- [17] Mr Shakoane conceded that there is no written admission of wrongdoing. He submits that this does not affect the third respondent's position, because in terms of section 88A of the Labour Relations Act, 1996 ("LRA") read together with section 43 thereof the arbitrator's dismissal award is equivalent to a court order. I am not persuaded that the words that in section 43 that the arbitration award "may be enforced as if it were an order of the Labour Court" assists the third respondent in answering the question which arises in this case. In any event section 43(3) of the LRA has to be satisfied before an arbitrator's award can assume the status of a court order. There is no such allegation. However, in light of the conclusion I arrive at, it is not necessary for me to consider whether Mr Shakoane is correct.

- [18] In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*[1] the Supreme Court of Appeal has decided the question which I have to decide. It had to consider whether section 37D (1)(b) of the Pension Funds Act, 24 of 1956 stood in the way of an employer preserving a benefit payable to an employee by a pension fund in order to satisfy any future compensation award. In a unanimous decision the court found that the wording of the relevant section had to be interpreted purposively so as to include the withholding of the payment of pension benefits from an employee pending the determination, or acknowledgement, of the employee's liability. The court found that an interpretation that the acknowledgement of wrongdoing or a judgment of a court must be available on the termination of the employment contract is far too restrictive. Such an interpretation the court held, does not reflect the intention of the legislature which is to protect the employer's right to recover money for wrongdoing of the nature contemplated in the section.
- [19] The appeal was by an employer who had been refused leave by the court a quo to intervene in proceedings before it. The main application before the court a quo had followed from a pension fund's decision not to pay the pension benefit due to the employee pending an action (to be instituted) for the recovery of losses suffered by the employer as a result of the employee's misconduct. The employee challenged
- the decision, which was made by the pension fund at the employer's request, and applied for an order compelling the pension fund to pay the pension benefit due to him.
- [20] The pension fund decided not to defend its decision and abided the court's decision. In the circumstances it comes as no surprise that the employer wanted to intervene in the employee's application and prayed for an interdict restraining the employee from withdrawing the pension benefit.
- [21] The Supreme Court of Appeal found that the employer was not seeking a deduction from the pension benefit due to the employee, nor a reduction thereof. It found that the only thing that the employer was asking for was that the fund should withhold the payment of the benefit pending the determination of its claim against the employee. The court upheld the appeal against the refusal of the application for intervention and postponed the employee's application pending the final determination of an
- action to be instituted by the employer.
- [22] In deciding as I do, I am mindful that the appeal was against the refusal of an application for leave to intervene. I am also mindful that the appeal concerned the provisions of section 37D(1)(b) of the Pension Fund Act 24 of 1956. I am of the view that, save for the differences identified, that the case is in *pari materia* with this application and counter application and is otherwise not distinguishable. In my opinion, the principles established are relevant to the main application and counter application; and are binding on me.

- [23] Mr Snyman drew my attention to the fact that the applicant was not applying for the GEFP to pay the pension benefit to him and that the order prayed for was confined to compelling the third respondent to complete documents and give them to the second respondent. Mr Snyman is correct in this regard. However the effect of such an order would be that the GEFP will have to pay the benefit within 60 days of the benefit becoming payable. The order will defeat the object which the counter application seeks to achieve.
- [24] I am disposed to postponing the main application pending a final decision on the action.
- [25] I have not left out of consideration the potential prejudice that the applicant may suffer from my order. In an effort to ameliorate the prejudice to the applicant I intend making an order which will entitle him to apply for any relief deemed appropriate, on these papers supplemented if necessary, in the case where the value of the pension benefit due to the applicant is in excess of the third respondent's claim inclusive of a reasonable estimate for both interest and costs. Of course the second and third respondents must be duly notified and they will be entitled to oppose such application.
- [26] I also intend ordering the second respondent to within a period of not more than 60 days assess the value of the applicant's pension benefit.
- [27] I urge the parties to fully cooperate with each other in giving effect to my order.
- [28] I make the following order:
- (a) All amounts due to the applicant as at the date of the termination of his employment which arise from his contract of employment or which are due to him in law, including if any, outstanding salary and payment in lieu of leave, together with interest on such amounts calculated at 15.5% p.a from the day of the termination of the employment to date of payment must be paid to the applicant within 30 days of this order;
 - (b) subject to paragraph (a), the main application is postponed sine die and the costs thereof are to be in the cause;
 - (c) the second respondent may not pay the pension benefit due to the applicant until the final determination of the action instituted by the third respondent in this court under case no. 17290/2013;
 - (d) the second respondent must within 60 days of this order assess the value of the applicant's pension benefit and notify the parties in writing thereof;
 - (e) leave is granted to the applicant to apply on the present papers, duly supplemented, for any relief it considers appropriate, if the pension benefit due to the applicant (as assessed by the second respondent) is in excess of third respondent's claim, including an estimated amount for costs and interest.
 - (f) the costs of the counter application are costs in the action under case no. 17290/2013;

(g) the parties must bring this order to the attention of the second respondent forthwith.

S K HASSIM

Acting Judge: Gauteng North High Court

4 June 2014

[1] [2009] 1 All SA 225 (SCA)

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