

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA



23/5/2014

CASE NUMBER: 76484/2013

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED: <u>✓</u>
<div style="display: flex; justify-content: space-between; align-items: center;"> <div style="text-align: center;"> <u>23/05/2014</u> DATE </div> <div style="text-align: center;"> SIGNATURE </div> </div>	

In the matter between:

KWACHA PENSION FUND

1ST APPLICANT

SIZWE MEDICAL FUND

2ND APPLICANT

and

PENSION FUND ADJUDICATOR

1ST RESPONDENT

NOMPUMELELO FAITH GABELA

2ND RESPONDENT

CORAM: DE VRIES AJ

JUDGMENT

1. In this matter the 1st and 2nd Applicants seek an order in the following terms:

- 1.1 That the decision/determination of the 1st Respondent dated 26 November 2013 be reviewed and set aside insofar as it directs the 1st Applicant to reimburse the 2nd Respondent with an amount of R 383 808.86;
 - 1.2 That the determination of the 1st Respondent be substituted by an order dismissing the 2nd Respondent's complaint dated the 17th of January 2013;
 - 1.3 That the deduction of R 383 808.86 from the 2nd Respondent's pension benefit be declared to have been lawfully made;
 - 1.4 That the Respondent who opposes this application be ordered to pay the costs thereof.
2. The 1st Applicant is Kwacha Pension Fund ("Kwacha"), a pension fund duly established and registered in terms of the provisions of the Pension Funds Act 24 of 1956.
 3. The 2nd Applicant is Sizwe Medical Fund ("Sizwe"), a medical fund duly established and registered in terms of the provisions of the Medical Schemes Act 131 of 1998.
 4. The 1st Respondent is the Pension Fund Adjudicator appointed as such by the Minister of Finance in terms of Section 30C(1)(a) of the Pension Fund Act 24 of 1956.
 5. The 2nd Respondent is Nompumelelo Faith Gabela, previously employed by the 2nd Applicant (Sizwe) as a principal officer.

THE FACTUAL BACKGROUND

6. The contract of employment was terminated by way of an agreement, entered into between the 2nd Applicant and the 2nd Respondent on the 31st of October 2011. The agreement was in writing and annexed to the Applicants' papers.

7. The salient terms of this agreement which are germane to this dispute are the following:

"The employee hereby undertakes to return the following assets and/or property to the employer with immediate effect:

- 5.1 The employee's company car, a black BMW X6, with letters and registration numbers LHK 1GP;
- 5.2 The employer's petrol card;
- 5.3 The employer's two cell phones;
- 5.4 The employer's laptop;
- 5.5 External data storage (USB), including the cable and charger;
- 5.6 The employer's credit card."

8. The 2nd Respondent alleges that, after the agreement had been concluded, the 2nd Respondent breached and repudiated the agreement between the parties which repudiation was accepted by the 2nd Applicant.

9. Thereafter, the 2nd Applicant instituted its *Rei Vindicatio* by way of application, which application was ultimately successful in order to recover the motor vehicle referred to herein above.

10. On the 19th of January 2012, the South Gauteng High Court, as it was then known, confirmed a *Rule Nisi* and in terms thereof, the 2nd Respondent was ordered to pay the 2nd Applicant's costs.

11. The costs were taxed and amounted to a sum of R 383 808.86.

12. The Taxing Master's allocatur, on the two bills, a total of which is this sum, was affixed on the 24th of October 2012.

13. A letter, dated the 28th of November 2012 was directed by attorneys, at that stage acting for the 2nd Respondent, to the 1st and 2nd Applicants attorneys, and contained the following:

"Kindly take note that we have read the contents of your letter dated above, and our client consent (sic) to such set-off from pension fund (sic) in the amount of R 383 808.86."

14. On the same date the attorneys caused a further letter to be direct to the 1st and 2nd Applicants' attorneys, which letter contains the following:

"Kindly take note that we requested you to inform Moriting Wealth Managers, who informed us that they will release our client's pension once they have been advised (sic) of the status of the case in High Court by Sizwe Medical Fund or their representative under case number 42022/01, that it has been finalised, hence the case is finalised, we therefore request from your office to discuss this matter with your client as their legal representatives that they must release our client (sic) pension fund and subject to the set-off of the amount agreed on between our client and your client as costs incurred at High Court by your client in the amount of R 383 808.86"

15. Pursuant to that letter, the 1st Applicant deducted the sum in respect of the taxed costs from the pension benefit and paid it over to the 2nd Applicant. The balance of the credit of the 2nd Respondent's entitlement in terms of the fund was retained and not paid out to the 2nd Respondent pursuant to a request by the 2nd Applicant who had instituted an action for damages against the 2nd Respondent under case number 5560/2013 in the South Gauteng High Court, as it was then known, for amounts far exceeding that credit which action is still pending.
16. A complaint was laid by the 2nd Respondent with the 1st Respondent during January 2013, in terms of which the 2nd

Respondent complained that she had not been paid out the pension benefit accruing to her, held by the 1st Respondent. The complaint was replied to by way of submissions made by Moriting Wealth Managers (Pty) Ltd, made to the 1st Respondent and thereafter the 1st Respondent made the following order:

16.1 The 1st Respondent is ordered to reimburse the complainant with an amount of R 383 808.86 deducted from her withdrawal benefit together with interest at a rate of 15.5% per annum calculated from the 26th of March 2013 to date reimbursement (sic), within three weeks of this determination.

17. It is this determination which forms the subject matter of the present dispute between the parties.

18. The 2nd Respondent has not opposed this application and the 1st Respondent takes the view, in an affidavit filed by her, that she does not oppose the application and says:

"In these circumstances, my possession akin to that of a judicial officer who's ruling is appealed against or reviewed. I do not defend my determinations, nor do I have a right to do so."

19. The affidavit contains a request:

"I will read the outcome or judgment and reasoning when the matter is finalised and abide by the decision of the Honourable Court. I humbly request that the Honourable Court considers giving a written judgment as guidance of the 1st Respondent, particularly in instances where the Court differs with the reasons for my determination."

THE PRESENT DISPUTE BETWEEN THE PARTIES:

20. The Applicants take the view that the 1st Respondent correctly found that:

"Having regard to the rules of the 1st Respondent and the Act, there is nothing in the 1st Respondent's conduct to suggest that it acted outside the scope of its powers as contained in Section 37D(1) of the Act by withholding the complainant's benefit, pending the finalisation of the criminal case against her. Thus the withholding of the complainant's withdrawal benefit by the 1st Respondent, pending the outcome of the criminal charge is permitted by the rules and the law."

21. The Applicants take the view that the determination given by the Pension Fund Adjudicator in regard to the deduction from the pension fund, as set out in her award, is bad in law, was not an issue before her, and has in any event become settled between the parties.

22. The allowable deductions which a fund may make against the benefits accruing to a member are set out in Section 37D of the Pension Funds Act, 24 of 1956. Section 37D(b)(ii) reads:

"Compensation (including any legal costs recoverable from the member in a matter contemplated in sub-paragraph (bb)) in respect of any damages 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;"

23. There is in my view no doubt that the actions of the 2nd Respondent in retaining the employer's vehicle after having undertaken to return same, thereby placing the employer in a position where it had to institute action to recover its asset falls four


square within the ambit of misconduct by the member and against the background of the correspondence between the parties, the member had, in writing, admitted liability, and that the amount thereof was fixed by order of Court is an allowable deduction.

24. For these reasons I make the following order:

24.1 That the deduction of R 383 808.86 from the 2nd Respondent's pension benefit was lawfully made;

24.2 The 1st Respondent's determination is set aside, insofar as it directs the 1st Applicant to reimburse the 2nd Respondent;

24.3 The 2nd Respondent's complaint is dismissed.


DE VRIES, AJ

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION,
PRETORIA