FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Appeal No.: A59/2013

In the appeal between:

ILIAD AFRICA TRADING (PTY) LTD Appellant
t/a BUILDERS MARKET, WELKOM
Registration number: 1997/010059/07)

and

JOHANNES HENDRIKUS BOSHOFF Respondent

In Re: Case No.: 1140/2011

JOHANNES HENDRIKUS BOSHOFF Applicant

and

ILIAD AFRICA TRADING (PTY) LTD Respondent
t/a BUILDERS MARKET WELKOM
Registration number: 1997/010059/07)

CORAM: JORDAAN, J *et* DAFFUE, J *et* THAMAGE, AJ

JUDGMENT: DAFFUE, J

HEARD ON: 23 SEPTEMBER 2013

DELIVERED ON: 26 SEPTEMBER 2013

INTRODUCTION

[1] This is an appeal to the Full Bench of the Free State High Court concerning the entitlement of respondent to claim from appellant his provident fund benefits which have been paid to appellant.

THE PARTIES

[2] Appellant is Iliad Africa Trading (Pty) Ltd t/a Builders Market, Welkom. The respondent is Johannes Hendrikus Boshoff a former employee and branch manager of the Welkom branch of appellant.

THE RELIEF CLAIMED AND OBTAINED

[3] Respondent instituted motion procedure in the Free State High Court claiming payment from appellant in the amount of R219 944.16, being a portion of provident fund benefits due and payable to him, but which had been paid over by the Iliad Provident Fund (the Fund) to appellant.

[4] Appellant, relying primarily on set-off, opposed the application. The matter was argued on 15 December 2011 when judgment was reserved.

[5] On 26 January 2012 Rampai J directed appellant to pay respondent the amount of R101 992.14 (R219 994.16 less an amount of R117 952.02 previously paid by appellant to

respondent) plus interest on R101 992.14 and the costs of the application.

[6] On 31 August 2012 Rampai J dismissed appellant's application for leave to appeal with costs, but on 14 February 2013 the Supreme Court of Appeal, per Leach JA and Van der Merwe AJA, granted leave to appellant to appeal to the Full Bench. The order of the Supreme Court of Appeal reads as follows:

> "Leave to appeal is granted to the Full Bench of the Free State High Court.
>
> Without seeking to limit the issues in any way, leave has been granted the Full Bench (sic) on the issue whether the respondent (Boshoff) had the necessary *locus standi* to seek repayment of the account (sic) improperly paid by the pension fund to the applicant (Iliad), as his right to recover in full whatever sum he had become entitled to receive from the pension fund on his resignation could not have been affected and would be recoverable from the pension fund without it being reduced by the amount of the improper payment to Iliad.
>
> In the circumstances, it would seem that the pension fund was obliged to pay Boshoff his pension sum without any reduction of the amount it had improperly paid to Iliad was (sic) obliged to refund the pension fund. But at first blush Boshoff has no claim against Iliad."

Throughout this judgment reference will be made to "provident fund" and not "pension fund" as referred to in the order of the Supreme Court of Appeal as it is apparent that

respondent was a member of the Iliad Provident Fund and entitled to provident fund benefits and not pension.

GROUNDS OF APPEAL

[7] The Supreme Court of Appeal raised a point of law which was never raised by appellant, either in the opposing affidavit that served before Rampai J, or in any of the two applications for leave to appeal. This aspect has been raised for the first time in the notice of appeal prepared on receipt of the order of the Supreme Court of Appeal. The following grounds of appeal are now raised:

7.1 The learned Judge erred in ordering the appellant to effect payment of R101 992.14 to the respondent (as the balance that remained after the appellant had paid the undisputed (sic) amount of R117 952.02 to the respondent).

7.2 The learned Judge erred by not considering that the respondent's indebtedness towards the appellant for the amount of R101 992.14 had not been disputed, alternatively there was no genuine and *bona fide* dispute of this indebtedness, and that set-off had accordingly taken place.

7.3 The learned Judge erred in finding that because of the improper payment of R219 994.16 from the Iliad Pension Fund to the appellant of monies that were due by the Pension Fund to the respondent, the appellant

was obligated to effect payment of this amount to the respondent. In this regard, the learned Justice failed to appreciate set-off had taken place of the indebtedness between the appellant and the respondent *vis-à-vis* each other, and for the amount of R101 992.14.

7.4 The learned Judge erred by placing too much emphasis on the manner in which the appellant come (sic) into possession of the money, and to find that the appellant should effect payment of the undisputed amount (R101 992.14) to respondent, notwithstanding the respondent's pre-existing indebtedness towards the appellant.

7.5 The learned Justice furthermore erred in holding that the respondent had *locus standi* to seek repayment of the entire amount improperly paid by the Iliad Pension Fund to the appellant, and to seek this payment from the appellant and not the pension fund.

FACTUAL MATRIX

[8] Respondent was employed by appellant's Welkom branch for a period of nine years. He was the branch manager. He resigned effectively on 30 November 2010.

[9] Appellant is a participating employer in terms of the Pension Fund Act, 24 of 1956, who participated in a scheme whereby a fund, the Iliad Provident Fund ("the Fund") has been established. These two entities are separate legal *personae*.

The Fund was at all relevant times managed and administered by Alexander Forbes.

[10] As a member of the Fund respondent was entitled to his provident fund benefits upon his resignation. The amount due and payable as calculated on 17 August 2011 was R496 003.79.

[11] Respondent is the sole member of a close corporation, Hanlein Boerdery CC, a customer of appellant for which an open account with credit facilities was granted during respondent's employment. Respondent bound himself as surety and co-principal debtor *in solidum* with his close corporation to appellant for the due and proper fulfilment of all obligations of the close corporation towards appellant.

[11] During 2011 and after respondent's resignation, appellant issued summons out of this court against respondent claiming payment of an amount of R208 139.93 based on his suretyship and the indebtedness of the principal debtor, Hanlein Boerdery CC. Summons was served at the *domicilium citandi et executandi* address of respondent and as no notice of intention to defend was given, default judgment was granted on 10 June 2011 for the aforesaid amount, interest and costs. In the meantime appellant caused a criminal charge to be laid against respondent, but according to the documents before us, nothing further transpired in this regard.

[12] A warrant of execution was issued and served on the *domicilium* address, but no attachment was made. Eventually appellant informed the Fund of the civil judgment obtained against respondent, which caused the Fund to pay the capital amount of the judgment debt, interest and costs in the total amount of R219 994.16 to appellant on 17 August 2011. The balance of the provident fund benefits was paid to respondent. Payment by the Fund to appellant was not done in terms of any court order obliging it to pay same or as a result of any attachment consequent upon the default judgment. At that stage appellant was already in receipt of respondent's application for rescission of judgment referred to in the next paragraph. In the application for rescission of judgment, which forms part of the documents before us, respondent averred in paragraph 17 of his founding affidavit as follows:

> "Op die datum van my bedanking sal die volgende gelde my derhalwe toegeval het:
>
> | | | |
> |---|---|---|
> | 17.1 | Salaris en verlof | R88 000.00 |
> | 17.2 | Voorsorgfonds | R480 683.51 |
> | | **TOTAAL** | **R568 683.51** |
> | | **MIN: Verskuldig ten opsigte van Hanlein Boerdery** | **R101 992.14** |
> | | **NETTO TOTAAL** | **R466 691.37**" |

If the affidavit is read in its entirety and in context there can be no doubt that respondent admitted liability in his personal capacity towards appellant in the amount of R101 992.14

and conceded that this amount might be deducted from any funds owing to him by appellant.

[13] Respondent, averring that he did not receive the summons and that he had a *bona fide* defence, applied for rescission of judgment. The application was opposed, but on 3 November 2011 Kruger J rescinded the judgment. It is apparent from the rescission application that respondent signed two documents, to wit

(i) a withdrawal notification to Iliad Provident Fund; and

(ii) an instruction and indemnity in favour of the Iliad Provident Fund;

the purpose of which was to facilitate payment of the provident fund benefits to respondent. In the second document respondent's full bank details were provided and the following is significant:

> "2. The Member is entitled to receive a retirement benefit in terms of the Rules of the Fund. The Member hereby instructs the Fund to pay over the retirement benefit as specified below after any deductions for tax…"

In the last paragraph the following is stated:

> "It is agreed that;
> On payment of the Member's retirement benefit in accordance with the rules of the Fund and the Member's instruction, the Member hereby unconditionally absolves the Fund and as necessary indemnifies and keeps indemnified, the Fund from

> and against all and any loss… as a result of the aforesaid instruction." (emphasis added)

[14] On 13 April 2011 one Stuart Veal of Bay Union Employee Benefit Consultants (Pty) Ltd informed respondent's attorney, Mr Peyper of Welkom, in an email as follows:

> "On the 28th of February we were advised by Paul Fleming of Iliad's Building Material Division, that a docket had been opened against Mr. Boshoff at the Bloemfontein Park Road police station with Case No. 1195/02/2011. We were instructed that the Employer would be claiming against Mr. Boshoff's Provident Fund in terms of Section 37D of the Pension Funds Act. We have no details as to the nature of the case or claim made by the Employer."

[15] As indicated *supra* the record does not provide further details pertaining to this issue at all. I am not exactly sure what the relationship between Bay Union Employee Benefit Consultants and the Fund is, but Mr Peyper responded to this email in a letter dated 14 April 2011 wherein he clearly indicated when and under what conditions the Fund might pay over money to an employer in terms of section 37D(b)(ii) of the Pension Funds Act, 24 of 1956.

SECTION 37D OF THE PENSION FUNDS ACT, 24 OF 1956, AND THE POINT OF LAW RAISED

[16] Section 37D deals with certain deductions that may be made by a Fund from pension benefits, including provident fund

benefits. The only relevant subsection thereof is s 37D(1)(b)(ii) which reads as follows:

> "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 sub-paragraph (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; …" (emphasis added)

[17] Rampai J correctly found as follows in paragraph [26] of his judgment:

> "[26] The debt by Hanlein Boerdery BK which gave rise to the suretyship agreement signed by the applicant in favour of the respondent was, in my view, not underpinned by the requisite *causa* as envisaged in section 37D. Since the

> respondent was not procedurally entitled to recover such a pure commercial debt from the provident fund, the provident fund was not legally obliged to pay over to the respondent any pension money due to the applicant."

However, the latter part of paragraph [26] of the judgment is quite simply not correct. I quote:

> "It would seem, for this reason alone, that the court order in question (the default judgment) was erroneously sought and erroneously granted. That specific judgment by default has, on different grounds, since been rescinded. Accordingly no valid *causa* exists for the respondent's continued retention of the applicant's pension money."

This aspect will be dealt with *infra* in more detail.

[18] It is clear that respondent instructed the Fund to pay his provident fund benefits into his bank account in accordance with the rules of the Fund. The Fund adhered partially only to this instruction as indicated *supra*. If the respondent has a right to claim the balance of the amount due and payable to him from the Fund, on what legal ground could he claim payment from appellant if the Fund acted contrary to his instructions and the law by paying the balance to his ex-employer? I'll consider this later.

[19] In **Cape Dairy and General Livestock Auctioneers v Sim** 1924 AD 167 the facts were as follows:

The plaintiff claimed the balance purchase price of livestock sold to the defendant on a Sunday. The transaction was unlawful and in contravention of the law at the time. The defendant did not take this point at all in the magistrates' court, but in the Transvaal Provincial Division, that court raised the question on appeal, stating it was the duty of the court not to enforce any contract which was in violation of the law, whether or not the parties raised the issue. The Provincial Division reversed the magistrate's judgment whereupon the plaintiff sought leave to appeal to the Appeal Court. The first ground of appeal was that it was not the duty of the Provincial Division sitting, as a court of appeal, to *mero motu* take the point that the sale was illegal. Innes CJ stated the following at 170:

> "Mr. Fischer exercised a wise discretion in abandoning the first of the suggested grounds for the application. When a Court is asked to enforce or uphold a contract which the law expressly forbids, it is not only justified but bound to take cognizance of the prohibition and the consequent illegality."

Refer also to **Yannakou v Apollo Club** 1974 (1) 614 (AD) at 623G – H and **F & I Advisors (Edms) Bpk en 'n Ander v Eerste Nasionale Bank van Suidelike Afrika Bpk** 1999 (1) SA 515 (SCA) at 526B – C.

[20] Unlike the judgments referred to, there is no illegality *in casu*, but the point that needs to be made is that a court may in particular circumstances *mero motu* take cognisance of legal points. The often quoted judgment of **Paddock Motors**

(Pty) Ltd v Igesund 1976 (3) SA 16 (AD) is referred to with specific reference to the following *dictum* at 23D – F:

> "It is clear that 'the duty of an appellate tribunal is to ascertain whether the court below came to a correct conclusion on the case submitted to it.'" (per Innes, J, in **Cole v Government of the Union of South Africa** 1910 AD 263 at p 272.) For this reason the raising of a new point of law on appeal is not precluded, provided certain requirements are met:
>
> "'If the point is covered by the pleadings, and if its consideration on appeal involves no unfairness to the party against whom it is directed, the Court is bound to deal with it. And no such unfairness can exist if the facts upon which the legal point depends are common cause, or if they are clear beyond doubt upon the record, and there is no ground for thinking that further or other evidence would have been produced had the point been raised at the outset. In presence of these conditions a refusal by a Court of Appeal to give effect to a point of law fatal to one or other of the contentions of the parties would amount to the confirmation by it of a decision clearly wrong.'" (per Innes J in **Cole's** case *supra* at pp 272 – 273.) That it would create an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on its part, has also been accepted by this Court in **Van Rensburg v Van Rensburg en Andere** 1963 (1) SA 508 (AD) at p 510 (A)."

See also **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at par [39], p 336 and **Government of the Republic of South Africa and Others v Von Abo** 2011 (5) SA 262 (SCA) at paras [18] and [19], p 270.

[21] In **Alexkor Ltd and Another v The Richtersveld Community and Others** 2004 (5) SA 460 (CC) at par [43] p 476 the Constitutional Court referred with approval to the rule enunciated in **Paddock Motors** *supra*, and stated as follows:

> "The rationale for this rule is that the duty of an appeal court is to ascertain whether the lower court reached a correct conclusion on the case before it. To prevent the appeal court from considering a legal contention abandoned in a court below might prevent it from performing this duty. This could lead to an intolerable situation, if the appeal court were bound by a mistake of law on the part of a litigant. The result would be a confirmation of a decision that is clearly wrong. As the Court (in *Paddock* Motors) put it:
> 'If the contention the appellant now seeks to revive is good, and the other two bad, it means that this Court, by refusing to investigate it, would be upholding a wrong order.'"

[22] As indicated, Rampai J correctly found that the requisites for payment by the Fund to appellant as employer were not met *in casu* and therefore the Fund could not lawfully ignore respondent's instruction and pay over his provident fund benefits to appellant. Respondent's claim lies against the Fund who ignored the Pension Funds Act, respondent's instructions and the rules of the Fund.

[23] No legal basis exists for respondent's claim against appellant. Appellant is not contractually bound to make payment and it has not been alleged and proven that respondent is entitled to damages as a result of delict, or that

respondent is entitled to compensation based on enrichment. Mr Grewar on behalf of respondent conceded this. None of these legal bases are available to respondent. Respondent based his cause of action purely and squarely on the rescission of the default judgment and I quote from paragraph 25 of the founding affidavit:

"Ek doen met eerbied aan die hand dat die Applikant geregtig is op uitbetaling van die gelde op sterkte van die vonnis wat nou tersyde gestel is …."

This allegation and the finding of Rampai J that, once the judgment had been rescinded no valid *causa* existed for the appellant's continued retention of the money received from the Fund and that respondent was entitled to payment from appellant in respect of the amount received, are incorrect. Even assuming that respondent would be entitled to claim back money he had paid to appellant in terms of the judgment or warrant issued, which was valid at the time, fact is that respondent never made any payment at all as the Fund paid appellant in conflict with the Pension Funds Act, respondent's instructions and the rules of the Fund. The appeal should therefore succeed as respondent does not have any claim against appellant, but against the Fund.

SET-OFF

[24] In my view it is not required to deal with the issue of set-off as the application of the point of law dealt with *supra* should really depict the end of the matter. However and on the basis that another court might find that such conclusion is

incorrect, I shall deal with this issue which was uppermost in the legal representatives' and the court *a quo*'s minds when the matter was argued and judgment finally pronounced.

[25] Set-off is a method by which contractual and other debts may be extinguished. If two parties are reciprocally indebted to each other and if the debts are equal, both are discharged, but if they are unequal, the smaller is discharged and the larger is reduced by the amount of the smaller. See Christie's, **The Law of Contract in South Africa**, 6th ed at 494. Set-off, also referred to as compensation or *compensatio*, is not dependent on an agreement and is automatic. It has to be pleaded and proved only to inform the court that it has occurred. See **Schierhout v Union Government (Minister of Justice)**1926 AD 286 at 289 and 290 where Innes CJ remarked as follows:

> "When two parties are mutually indebted to each other, both debts being liquidated and fully due, then the doctrine of compensation comes into operation. The one debt extinguishes the other *pro tanto* as effectually as if payment had been made. Should one of the creditors seek thereafter to enforce his claim, the defendant would have to set up the defence of *compensatio* by bringing the facts to the notice of the Court – as indeed the defence of payment would also have to be pleaded and proved. But, compensation once established, the claim would be regarded as extinguished from the moment the mutual debts were in existence together."

[26] *In casu* there can be no doubt that appellant's claim against respondent as surety and co-principal debtor was acknowledged by respondent in the amount of R101 992.14. It is a liquidated and admitted claim. It was due and payable. Respondent conceded that the amount might be deducted from the monies appellant owed him. Under the circumstances appellant was entitled to rely on set-off and the appeal should succeed on this basis as well.

[27] Having said this, the court *a quo* referred to collateral issues which are with respect unnecessary to consider for purposes of this appeal. I shall refrain from doing so, but merely wish to deal with the following. The fact that Kruger J rescinded the default judgment did not take the matter any further insofar as no finding was made that respondent did not owe the amount of R101 992.14 to appellant. Kruger J elected to set aside the default judgment insofar as he was of the view that rule 31(2) did not provide that default judgments could be set aside in part. Rampai J incorrectly relied in paragraph 27 of his judgment on the outcome of the rescission application. The following *dicta* are with respect incorrect and cannot be supported:

> "The alleged set-off is tainted by an illegality. The respondent's continued retention of the applicant's pension money flagrantly undermines the legal effects of the rescission of the default judgment. The legal effect of the rescission was that payment to the respondent by the provident fund was retrospectively nullified. Therefore, the respondent no longer had a right to hold the proceeds of the applicant's pension fund."

Rampai J mentioned also that Kruger J had found that the appellant was obliged to repay the full amount which it received from the Fund. No such finding was made. It is reiterated that payment was effected to appellant by the Fund which was not a party to the proceedings.

RELIEF

[28] As indicated *supra* the appeal should succeed and the order of the court *a quo* should be set aside. There is no reason why the general rule should not apply and consequently appellant is entitled to his costs of appeal, including the costs of the application for leave to appeal to the Supreme Court of Appeal as well as the costs of the first unsuccessful application to the High Court for leave to appeal.

ORDER

[29] Wherefore the following orders do issue:

1. The appeal succeeds with costs, including the costs of both applications for leave to appeal, firstly to the High Court and secondly, to the Supreme Court of Appeal.

2. The order of Rampai J is set aside and substituted with the following:

    2.1 The application is dismissed with costs.

_____
J.P. DAFFUE, J

I concur.

_____
A.F. JORDAAN, J

I concur.

_____
S.J. THAMAGE, AJ

On behalf of appellant:	Adv S. Grobler Instructed by: Hill McHardy & Herbst Inc BLOEMFONTEIN
On behalf of respondent:	Adv D.M. Grewar Instructed by: Vosloo Attorneys BLOEMFONTEIN

/spieterse