



THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Case No: 103/ 2008

**HIGHVELD STEEL AND VANADIUM
CORPORATION LTD**

Appellant

and

H F M OOSTHUIZEN

Respondent

Neutral Citation: Highveld Steel and Vanadium Corporation Ltd v
Oosthuizen (103/2008) [2008] ZASCA 164 (01December 2008)

Coram: Harms ADP, Scott, Brand, Maya JJA et Griesel AJA

Heard: 11 November 2008

Delivered: 01 December 2008

Summary: Pension Funds Act 24 of 1956 – whether a pension fund has discretion under s 37D to withhold payment of pension benefits due to a member at the termination of his employment pending finalisation of a claim for damages allegedly suffered by the member's employer by reason of theft, dishonesty, fraud or misconduct committed by the member.

ORDER

On appeal from: Pretoria High Court (Hartzenberg J)

1. The appeal is upheld with costs, such costs to include the costs occasioned by employment of two counsel.
2. The order of the court below is set aside and for it is substituted the following:
 - ‘(a) Highveld Steel and Vanadium Corporation Ltd (Highveld) is granted leave to intervene in the application launched by the respondent under case number 24648/07.
 - (b) The application under case number 24648/07 is postponed pending the final determination of the action instituted by Highveld in the Transvaal Provincial Division under case number 13776/07.
 - (c) The costs of the application, including those of the application to intervene, are reserved.’

JUDGMENT

MAYA JA: (Harms ADP, Scott, Brand, Maya JJA et Griesel AJA concurring):

[1] This is an appeal against the judgment of the Pretoria High Court (Hartzenberg J) dismissing the appellant's application to intervene in application proceedings launched by the respondent, its erstwhile employee, against the appellant's Pension Funds, Highveld Retirement Fund (Provident Section) and Highveld Retirement Fund (Pension Section), ('the Funds'), for payment of his pension benefits in terms of the Funds' rules. The appeal is with leave of the court below.

[2] The issue on appeal is whether or not the boards of the Funds had the power to withhold payment of pension benefits due to the respondent pending the outcome of a damages action to be instituted by the appellant against him.

[3] The background facts which gave rise to these proceedings are briefly these. The respondent commenced employment with the appellant as an observer in its metallurgical division and joined the Funds on 1 August 1978. He rose through the ranks over the years and by January 2006 he held the position of Unit Manager in charge of stores with contents worth approximately R177m at any given time. On 31 January 2007, the appellant instituted disciplinary proceedings against the respondent for bribery, fraud, theft and other transgressions involving dishonesty. The respondent pleaded guilty to some of the charges. At the conclusion of the proceedings, on 16 February 2007, he was dismissed.

[4] Shortly thereafter, the respondent sought to withdraw his pension benefits from the Funds. On 28 February 2007, at the behest of the appellant, which intended to institute an action against the respondent to recover losses it allegedly suffered as a result of his misconduct, the Funds resolved not to pay the benefits due to the respondent pending the final determination of the contemplated action which was subsequently duly instituted.

[5] The respondent brought an application for an order directing the Funds to pay him his pension benefits. The Funds elected to abide the court's decision, despite initial opposition to the application. The appellant then launched the application to intervene in the application and sought an interdict restraining the respondent from withdrawing any of his pension benefits and other relief. However, on appeal before us, the relief sought had been whittled down to leave to intervene and a postponement of the respondent's application against the Funds pending the final determination of its action against the respondent.

[6] In dismissing the application to intervene, the court below invoked a judgment of this court in *Absa Bank Ltd v Burmeister*¹ for its finding that s 37D of the Pension Fund Act 24 of 1956 (the Act), which regulates deductions from pension benefits, must be interpreted restrictively. On that basis, the court below held that the right of an employer in the appellant's position is restricted to what is specifically stated in s 37D. In its view, the legislature would have said so expressly had it intended to vest courts with the implicit power to protect an employer by preserving its right pending an action to ascertain whether or not it is owed money. The court concluded

¹ 2004 (5) SA 595 (SCA) at para 14.

that a finding that such implicit power existed would allow employers to ‘cause tremendous hardship to ex-employees’ by instituting and then delaying actions.

[7] The first question that arises is whether the order refusing leave to intervene is appealable. The argument for the respondent in this regard was that the decision of the court below was merely a procedural ruling similar to a refusal to entertain an application as one of urgency, with no final effect to the rights of the intervening party. The basis of this submission was that the appellant had the option to apply for interim relief in its action after the dismissal of the intervention application.

[8] As pointed out by Harms AJA in *Zweni v Minister of Law and Order*,² a ‘judgment or order’ is a decision which, generally, is final in effect and not susceptible of alteration by the court of first instance, is definitive of the rights of the parties and has the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

[9] 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 1993 (1) SA 523 A at 532I-J.

[10] Turning to the merits of the appeal, it was contended on behalf of the appellant that rule 12 of the Provident Section Fund read with s 37D(1)(b) (ii) of the Act implicitly confers upon the trustees of the Funds power to withhold or delay payment of benefits due to a member pending determination or admission of liability. It was conceded that the trustees of the Funds were not entitled to make any deduction in the absence of a written admission of liability by the respondent or a judgment obtained by the appellant against him as required by s 37(1)(b)(ii). However, it was argued that the object of that section – the protection of an employer against loss occasioned by employees’ acts of dishonesty – would be thwarted if an employee could simply circumvent it by resigning and claiming immediate payment of his benefits upon discovery of his criminal conduct.

[11] For the respondent it was contended that s 37D cannot be interpreted in isolation and must be read with s 37A(1) which contains provisions of general application prohibiting the reduction, transfer or execution of pension benefits. As s 37D provides an exception to that general application, it must be strictly interpreted, so the argument continued. It was submitted further that these provisions so interpreted and read with rules 8.3.3 and 7.3 of the Funds,³ which similarly require the payment of pension benefits to be made ‘as soon as possible’ after a member’s termination of service, did not confer the implied power contended for by the appellant.

³ The identical provisions read:

‘The benefit in terms of this Rule shall be paid to the Member as a lump sum. Payment shall be made as soon as possible after the date of his leaving Service.’

[12] Rule 12 of the Provident Section Fund, which is identical to rule 11 of the Pension Section Fund, vests the trustees with ‘the right to make such deductions from the benefit to which a member or other beneficiary is entitled in terms of the rules as are permitted in terms of s 37D of the [Pension Funds] Act and in respect of which a claim has been lodged in writing within such reasonable time of the event giving rise to the benefit as the trustees may from time to time fix for making such claims.’

[13] Section 37A(1) reads:

‘Pension benefit is not reducible, transferable or executable.

(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of the registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, 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 ...’.

Section 37A(3) however states that the prohibition against reduction does not apply to a reduction effected under s 37D.

[14] Section 37D(1)(b) provides:

‘(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 subparagraph (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'.

[15] It should be pointed out at the outset that the respondent's submissions relating to the provisions of s 37A(1) were ill-conceived for the simple reason that the appellant did not seek any reduction of or deduction from his pension benefits. All it asked was an order affirming the Funds' decision to withhold payment of such benefits pending resolution of its claim against the respondent. As stated, the issue is merely whether or not the Funds had the discretion to accede to that request.

[16] 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.⁴ This approach is, in my view, supported by the plain wording of the section and is, with respect, correct.

[17] 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

⁴ See, for example, *Twigg v Orion Money Purchase Pension Fund* (1) [2001] 12 BPLR 2870 (PFA) at para 21, *Charlton v Tongaat-Hulett Pension Fund* [2006] 2 BPLR 94 (D) at 97I-98B.

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.

[18] These practicalities lead me to disagree with the submissions for the respondent, inter alia, that the tense used by the legislature in s 37D(b)(ii) (aa) and (bb), in the words '*has in writing admitted liability*' and '*judgment has been obtained*' reflects an intention that either proof of liability must be available on termination of the employment contract. I similarly have a difficulty with the contention that the words '*as soon as possible*' in rule 7.3 require payment of the pension benefits to be effected immediately upon termination of an employee's service.

[19] 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.⁵ 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

⁵ *Twigg* (supra) at para 21; *Chalton* (supra) at 98B; *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA); *Buthelezi v Municipal Gratuity Fund* (1) [2001] 5 BPLR 1996 (PFA); *Allison v IMATU Retirement Fund* [2004] 7 BPLR 5831 (PFA).

serious challenge to the appellant's detailed allegations of dishonesty against the respondent.

[20] 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.

[21] In the result the following order is made:

1. The appeal is upheld with costs, such costs to include the costs occasioned by employment of two counsel.
2. The order of the court below is set aside and for it is substituted the following:

‘(a) Highveld Steel and Vanadium Corporation Ltd (Highveld) is granted leave to intervene in the application launched by the respondent under case number 24648/07.

(b) The application under case number 24648/07 is postponed pending the final determination of the action instituted by Highveld in the Transvaal Provincial Division under case number 13776/07.

(c) The costs of the application, including those of the application to intervene are reserved.’

MML MAYA
JUDGE OF APPEAL

APPEARANCES:

For Appellant: A E Franklin SC
M A Chahan

Instructed by

Brink Cohen Le Roux Inc., Houghton
c/o Claude Reid Inc., Bloemfontein

For Respondent: J G Bergenthuin SC
N F de Jager
Instructed by

Van Zyl Le Roux and Hurter Inc., Pretoria
c/o McIntyre and Van Der Post, Bloemfontein