THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
Case no: 647/02

In the matter between:

ABSA BANK LIMITED	APPELLANT
and	
HENDRIK JACOBUS BURMEISTER	1ST RESPONDENT
SHERIFF OF THE HIGH COURT FOR THE DISTRICT OF BELLVILLE, WESTERN CAPE	2ND RESPONDENT
SANLAM PERSONAL PORTFOLIOS (PTY) LTD	3RD RESPONDENT

Coram: MPATI DP, SCOTT, CAMERON, NUGENT *et* CLOETE JJA

Date of hearing: 8 MARCH 2004

Date of delivery: 26 MARCH 2004

Summary: Interpretation of s 37D(1)(b) of Pension Funds Act 24 of 1956

JUDGMENT

SCOTT JA/…

SCOTT JA:

[1] The question in issue in this appeal concerns the interpretation of s 37D(1)(b) of the Pension Funds Act 24 of 1956 ('the Act'). The facts are largely common cause.

[2] The first respondent ('Burmeister') was formerly employed by the appellant bank as a manager at its branch in Springs, Gauteng. He resigned on 15 April 1997. Some three months later in July 1997 and at his instance the pension fund benefits accruing to him were paid by the appellant's pension fund, the Absa Bank Pension Fund, to the Protector Pension Fund, a subsidiary of Old Mutual. They were subsequently used to purchase a compulsory linked life annuity with Sanlam Life Assurance Limited. The annuity is administered by Sanlam Personal Portfolios (Pty) Ltd which is the third respondent.

[3] In February 1998 the appellant issued summons against Burmeister in the High Court, Johannesburg, claiming damages in the sum of R1 765 269.05, being the loss it alleged it had suffered as a result of the latter's dishonest and fraudulent conduct while in its employ. Burmeister initially defended the action but did not appear on the day of the trial, 2 August 2000, and default judgment was granted against him in the sum of R721 420.56. The judgment

remained unsatisfied and on 25 March 2002 the sheriff for the District of Bellville, Western Cape, who is the second respondent, purported to attach the life annuity to the extent of R300 000.

[4] Burmeister sought an order as a matter of urgency in the High Court, Cape Town, for the setting aside of the attachment. The only relief sought against the third respondent was an order directing it to continue its monthly payments to Burmeister in terms of the annuity it administered. No relief was claimed against the second respondent other than costs in the event of his opposing. The appellant was joined as a party at its own request. It opposed the application and at the same time brought a counter-application for an order declaring in effect that its judgment against Burmeister was of such a nature as to entitle it to cause the annuity to be attached. The matter came before Potgieter AJ who granted an order setting aside the attachment and dismissing the counter application with costs. The appeal is with the leave of this court.

[5] Section 37A(1) of the Act provides that save to the extent permitted by the Act and certain other statutory provisions, which are not relevant,

'. . . no benefit provided for in the rules of a registered fund (including an annuity purchased by the said fund from an insurer for a member) . . . shall

. . . be liable to be attached or subjected to any form of execution under a judgment or order of a court . . . '.

I interpose that it is common cause that the compulsory linked life annuity in question falls within the ambit of this provision and, subject to what follows, would be protected by it.

[6] Section 37A(3) reads —

'The provisions of subsection (1) shall not apply with reference to anything done towards reducing or obtaining settlement of a debt —

. . .

(c) which a fund may reduce or settle under section 37D, to the extent to which a fund may reduce or settle such debt . . .'.

Section 37D(1) provides in turn —

'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 —

. . .

(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; . . . .'

[7] On behalf of Burmeister it was contended that because the default judgment in the present case was granted without evidence being led, the judgment was not proved to have been one 'in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct' within the meaning of s 37D(1)(b)(ii). There is no merit in this contention. The cause of action pleaded by the appellant was founded upon Burmeister's fraudulent and dishonest conduct in the execution of his duties as manager of the appellant's Springs branch. The judgment by default was quite clearly granted on the basis of these allegations.

[8] As previously indicated, Burmeister's pension fund benefits did not remain with the Absa Bank Pension Fund but were transferred first to the Protector Pension Fund and later used to purchase the annuity administered by the third respondent. Subject to Burmeister's contention dealt with in the preceding

paragraph, it was common cause that had the pension fund benefits remained with the Absa Bank Pension Fund, that fund would have been authorised in terms of s 37D(1)(b) to make the deduction in question and the benefits would not have enjoyed the protection afforded by s 37A(1) of the Act. I should add that it was not at any stage alleged that the pension fund benefits were transferred with the object of avoiding the exception provided for in s 37D(1)(b). The sole question in issue, therefore, is whether on a proper construction of this section, its provisions extend to the third respondent which is presently in control of the benefits. The appellant contends they do; Burmeister contends the contrary.

[9] Section 37D(1)(b) refers to 'a member' of a registered fund. 'Member' is defined in s 1 as meaning —

'. . . in relation to —

(a) a fund referred to in paragraph (*a*) of the definition of "**pension fund organization**", any member or former member of the association by which such fund has been established;

(b) a fund referred to in paragraph (*b*) of that definition, a person who belongs or belonged to a class of persons for whose benefit that fund has been established,

but does not include any such member or former member or person who has received all the benefits which may be due to him from the fund and whose

membership has thereafter been terminated in accordance with the rules of the fund; . . . '.

The two categories set out in the definition of 'pension fund organization', in so far as they are relevant, are —

'*(a)* any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or

(b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons, . . .'.

It emerges from the aforegoing that 'member' in s 37D(1)(b) includes a former member (or former member of a class) who has not received all the benefits that may be due to him or her from the fund. Expressed differently, a member remains such until he or she has received all the benefits and that person's membership is terminated according to the rules of the fund.

[10] The only fund authorised to make the deduction in terms of s 37D(1)(b) is, of course, the fund of which the person

concerned is still a member. If that person is not a member as defined, there would, in any event, be nothing to deduct. In terms of the section the amount that may be deducted is the amount due by the member to his employer either on the date of his retirement or on which he ceases to be a member. An ordinary reading of the section suggests that the fund contemplated is the fund of which the ex-employee was a member at the time of his employment; in other words, the fund in which the employer participates, in this case the Absa Bank Pension Fund. In the event of the member retiring, and subject to the fulfilment of the other requirements, that fund would be entitled to make the deduction at any stage until the ex-employee ceased to be a member of the fund. In the latter event the fund could pay over the balance of the pension fund benefits after deducting the amount owing to the employer on that date. The ex-employee would then no longer be a member and the fund would no longer be able to deduct an amount due to the employer, if it had not yet done so.

[11] The appellant's contention is, however, that the wording of the section is wide enough to include a subsequent fund of which the ex-employee is a member and to which the

pension benefits emanating from the original fund have been paid. In my view such a construction is not justified.

[12] The effect of s 37A(1) is to establish a general rule protecting pension fund benefits from *inter alia* attachment and execution. (The amendment of the section by s 45 of 1998 is not material to the present case.) Its object is clearly to protect pensioners against being deprived of the source of their pensions. In terms of s 37(B) such benefits are also deemed not to form part of the assets in the insolvent estate of the person in question. The protection afforded by s 37A(1) is, however, subject to a number of exceptions, one of which is the exception provided for in s 37D(1)(b). That section, therefore, affords to an employer a right of access to pension fund benefits which other creditors do not have. The rationale of the exception can only be the employer's participation in the pension fund concerned, normally by way of employer contributions. If the exception permitted the ex-employer access to pension fund benefits in the hands of any pension fund, the exception could well lose its rational basis. One thinks, for example, of the situation that may arise where the benefits are transferred to the pension fund of a

new employer to which further contributions are made. The inference, therefore, is that the pension fund referred to in s 37D(1)(b) was intended to be a reference to the original pension fund, ie the employer's pension fund which in this case is the Absa Bank Pension Fund. It is true, as emphasized by counsel for the appellant, that the pension benefits in the hands of a subsequent fund could be traced back to their origin in what I have called the employer's pension fund. But that does not, in my view, justify the construction sought to be placed on the section.

[13] In the first place, such a construction is not readily compatible with the framework of the section. It makes good sense that the employer's fund should be able to deduct the amount due on the date on which the ex-employee ceases to be a member of that fund. But a subsequent fund cannot deduct the amount due to the employer on that date. This much is apparent from the use of the definite article 'the' at the commencement of the section which makes it clear that the date in question is the date on which the ex-employee ceases to be a member of the fund making the deduction, not some other fund. But it makes no sense that a subsequent fund

should be authorised to deduct an amount due to the ex-employer on the date the ex-employee ceases to be a member of that subsequent fund and not on the date the ex-employee ceased to be a member of the original fund. Applying this construction to the facts of the present case, it would mean that the appellant could cause only so much as was due to it on Burmeister's retirement to be attached, even though he might have owed more on the date he ceased to be a member of its fund. That fund, if it were making the deduction, would, however, have been entitled to deduct the higher amount.

[14] It is furthermore necessary to bear in mind that this anomaly, if the appellant's construction were to be accepted, would occur in a provision which creates an exception to a rule of general application. Such a provision will normally be strictly interpreted; in other words, the legislature will be presumed to have intended that only cases clearly falling within the scope of the language used are to be excepted. (See *Hartman v Chairman, Board for Religious Objection, and others* 1987 (1) SA 922 (O) at 927G-928B.) This approach to statutory interpretation is particularly apposite when the rule of general application has as its object the protection of a particular class

of persons considered by the legislature to be worthy of protection, such as pensioners.

[15] It follows that in my view 'the registered pension fund' referred to in s 37D(1)(b) of the Act must be construed as a reference to the pension fund of which the ex-employee was a member at the time of his employment, ie the fund in which the employer participated and not some other fund to which the pension fund benefits may subsequently have been transferred.

[16] The appeal is dismissed with costs.

D G SCOTT
JUDGE OF APPEAL

CONCUR:

MPATI DP
CAMERON JA
NUGENT JA
CLOETE JA