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Please quote our ref: PFA/GA/4901/2005/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – J HOFFMANN v THE JOY GLOBAL SOUTH AFRICA EMPLOYEE BENEFIT FUND / JOY GLOBAL SOUTH AFRICA t/a P & H MINEPRO

Introduction

- [1] This complaint concerns the alleged unlawful withholding by the Global South Africa Employee Benefit Fund (henceforth referred to as “the fund”) of your withdrawal benefit on leaving the service of the Joy Global South Africa t/a P & H Minepro (henceforth referred to as “the employer”) and withdrawing from the fund on 1 March 2005.
- [2] The complaint was received by this office on 16 August 2005 and a letter acknowledging receipt thereof was sent to the complainant on 17 September 2005. On the same date, letters were dispatched to the respondents giving each until 7 October 2005 to file a response to the complaint. On 20 October 2005 a response of the same date was received from Webber Wentzel Bowens Attorneys filed on behalf of the second respondent. No response was received from the first respondent. After considering the written submissions before me, I consider it unnecessary to hold a hearing.
- [3] Save for setting out only those essential facts that are pertinent to the issues raised herein, I shall not burden this determination by repeating the background facts as they are well-known to all parties.

Facts in brief

- [4] You were a member of the Joy Global South Africa Employee Benefit Fund

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

during your tenure of employment with Joy Global South Africa t/a P &H Minepro until your resignation on 1 March 2005.

- [5] Prior to your resignation from the employer, you and a colleague, one Mark Abbott, admitted to the employer in writing to having engaged in activities which amounted to unlawful competition against the employer. Such activities entailed, *inter alia*, being in unlawful possession of property owned by the employer, to wit, one concrete drilling machine, one sander, two set of nylon slings and one grinder; using the equipment and employees of the employer to perform private jobs and providing false information to the employer's customers regarding its capacity to perform certain core operations of its business. For the purpose of this complaint, I do not deem it necessary to delve into the unlawful activities in detail. On 9 May 2005, you addressed a letter to the trustees of the fund acknowledging your liability to compensate the employer from the proceeds of your withdrawal benefit for actions caused by dishonesty and misconduct on your part. You also authorised the trustees to pay to the employer your benefit in the fund amounting to R234 507.00.
- [6] Pursuant to the admissions referred to above, various meetings were held between yourself, Mr Abbott and an attorney Michael Salomon of the firm Salomon Lipshitz on the one hand and the attorneys Webber Wentzel Bowens representing the employer on the other. The said meetings culminated in a written agreement ("the agreement") between yourself, Abbott and the employer wherein you gave full disclosure of the unlawful activities and admitted liability for such activities. You also deposed to an affidavit which essentially restates the admissions contained in the agreement.
- [7] In terms of the agreement, you and Abbott jointly and severally accepted liability for the damages sustained by the employer to be in the amount of R1 274 535.00. The agreement also sets out various mechanisms by which the employer will recover the amount concerned from you and your colleague. Of relevance for the purpose of this complaint is clause 3.2.4 of the agreement (this will be canvassed later in my determination).
- [8] The contents of the agreement and the affidavit now form the subject-matter of this complaint.

Complaint

- [9] Your complaint, as I understand it, is two-fold. Firstly you aver that you signed the agreement under duress in that you were unduly pressured by the attorneys for the employer and your accomplice's attorneys. You contend that you signed the agreement and the affidavit on pain of having

criminal procedures instituted against you and you allege that such conduct constitutes a criminal offence of compounding, which offence, you submit, is “constituted by threatening to press criminal charges in exchange for certain conduct on the part of the person threatened with criminal charges” on the part of the employer’s attorneys. You also appear to allege that you signed the agreement without legal representation and were thus unaware of your legal rights. In your reply, however, you make a belated retraction of this allegation but contend that the attorney concerned represented your accomplice’s interests more than he did yours. You also appear to impute irregular conduct on the part of the attorneys for the employer in that you allege that they put themselves in a conflict of interest situation in that they provided you with legal advice in a matter completely unrelated to this complaint. Secondly, you argue that the agreement and the affidavit are not a correct reflection of your actual liability to the employer.

- [10] You contend that notwithstanding your signature of the said documents, your actual liability to the employer translated to an amount of R15 800.00 representing the value of the employer’s materials and tools. You further argue that since you have already authorised a set-off of the sum of R53 421.00 being remuneration due to you by the employer, you have discharged all your legal obligations to the employer and that the employer is therefore not entitled to the proceeds of your benefit from the fund amounting to R234 507.00. Put differently, you aver that on account of irregular conduct on the part of the employer, the amount that it deducted from your benefit in terms of the provisions of section 37D of the Act was in excess of your true liability to the employer. You allege that by virtue of this fact, the employer has not fulfilled its duties in terms of the rules of the fund read in conjunction with the Act.
- [11] You accordingly seek that I set the agreement aside on the grounds that your signature thereof was occasioned by unconscionable conduct on the part of the employer and its legal representatives.

Response

- [12] The fund, despite being invited to do so, has not responded to the complaint. In any event, your complaint appears to be directed against the employer and no relief is sought against the fund.
- [13] The employer denies that you signed the agreement and the affidavit under duress. It states that no pressure was placed on you by either your attorney or your employer’s legal representative that you signed the agreement. The employer further points out that amendments were made to the agreement at your specific instance and request and that if you were under pressure as you allege, there could not have been amendments made to the draft. The employer further states that the affidavit that you signed was precisely in the

form that you required and the employer did not prescribe the contents of the affidavit. The employer further makes the point that neither it nor its legal representatives could compel you to swear to an affidavit which contained a matter(s) with which you did not agree.

[14] The employer avers that you were at all material times (when you approached the employer to make full disclosure of unlawful activities; the conclusion and the signature of the agreement) represented by an attorney, Mr Michael Salomon. You admit this in your reply, albeit in a begrudging manner.

[15] Regarding your contention about the extent of liability to the employer, the employer draws my attention to your admissions as contained in the agreement and the affidavit. These, *inter alia*, relate to:

- the methods you and your accomplice used to carry out your intention of starting a competing business with the employer were such as to constitute unlawful competition with the employer;
- you and Abbott using a team of the employer's employees to accomplish your aims;
- you and Abbott used the employer's material, resources, machinery, tools and equipment to carry out work which had been unlawfully diverted to the competing business;
- unlawfully copying the employer's intellectual property in the form of coils;
- insinuating to longstanding and valued customers of the employer that the employer no longer had capacity and/or expertise to carry out its core functions;
- you acknowledged liability to the employer for compensation in respect of damage caused to the employer by reason of your dishonesty and misconduct;
- you admitted being liable (jointly and severally with Abbott) to the employer for payment of the sum of R1 274 535.00 being the damages actually sustained by the employer.

[16] The employer understandably stresses the import of clause 3.2.4 of the agreement which provides:

"Hoffman has advised the trustees of the Joy Global South Africa Employee Benefit Fund, in writing, in accordance with the provisions of section 37D(1)(b) of the Pension Funds Act 24 of 1956, as amended that he is liable to Joy by

reason of his dishonesty and misconduct as a consequence of which the Joy Global South Africa Employee Benefit Fund is authorised to pay the amount standing to his credit in its Fund of R234 507.00 (being the net amount after deduction of income tax) to Joy direct”.

- [17] Furthermore, the employer points out the letter you addressed to the fund trustees to give effect to your said undertaking as contained in clause 3.2.4. The employer argues that it did not deduct monies from your pension fund benefit but that you authorised payment of such monies to the employer and that the amount of your true liability to the employer is as you have agreed to in the agreement and the affidavit.
- [18] The employer seeks that I dismiss your complaint on the basis that the terms of the agreement which you signed of your own volition are legally binding. Furthermore the employer avers that your allegation that you signed the agreement “without legal representation and in ignorance of my rights” is false. The employer goes further to say that even if your said allegation were correct, you would, in any event , have been bound by the terms of the agreement and the contents your affidavit. The employer further seeks me to order you to pay the employer’s legal costs occasioned by its reply to your complaint and in respect of any further proceedings before the Adjudicator on an attorney and own client scale.

Determination and reasons therefor

- [19] In terms of section 37D(1)(b) of the Act, before a fund may deduct or withhold a member’s benefit, it has to comply with the following conditions:
- there must be an amount due by a member to his/her employer on the date on which he/she ceases to be a member of the fund;
 - the amount must be in respect of compensation in respect of any damage caused to the employer;
 - the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
 - the member must either admit liability in writing to the employer or judgement must be obtained in any court;
 - the written admission of liability or judgment must be in respect of the compensation due in respect of the damage caused.

If these conditions are met, the fund may deduct the amount due by the member to the employer from the member’s benefit payable in terms of the fund rules and pay it to the employer.

[20] In the instant case, you claim that the written admission of liability for the amount of R234 507.00 was not freely and voluntarily made and thus you have not admitted liability in writing as required by section 37D(b)(ii)(aa) of the Act.

[21] Thus the question for determination is whether the agreement containing your written admission of liability to the employer was freely and voluntarily concluded. This is a question of fact to be deduced from all the surroundings circumstances.

[22] The employer provides the historical backdrop to the conclusion of the agreement in the following terms:

“As a result of its investigation Joy instructed its attorney, Mr N Robb (“Robb”) a partner of Webber Wentzel Bowens (“WWB”), to commence with the preparation of appropriate legal proceedings in the form of an application against the complainant and Abbott in order to interdict them from carrying on their unlawful activities and to claim appropriate damages for the losses occasioned to Joy.

During the preparation of the application as aforesaid, Abbott contacted Joy on 14 April 2005 and requested the opportunity to make full disclosure to it with a view to making full recompense to it of all losses and/or actual damages sustained by it...”

[23] It is apparent from the above that you and Abbott actually approached the employer when you became aware that it got wind of your unlawful activities. Clause 1.6 of the agreement reinforces this view. It provides:

“After knowledge of the aforementioned unlawful activities of Abbott and Hoffman came to the attention of Joy and Joy Global Inc (“Joy Global”) and whilst Joy and Joy Global were in the process of preparing to launch the legal proceedings against Abbott, Hoffmann and Multipla in order to, *inter alia*, interdict them from carrying on the unlawful activities aforementioned and to claim appropriate damages, Abbot and Hoffman approached Joy and Joy Global, and requested the opportunity to make full disclosure to Joy and Joy Global, make full recompense to Joy and Joy Global of all loss and/or actual damages sustained by them, and to conclude an agreement acceptable to Joy and Joy Global encompassing the foregoing...”

[24] In your complaint, you were adamant that you were not legally represented and thus you signed the agreement “in ignorance of my legal rights”. It is only when the respondent pointed out that you had legal representation that you changed your stance and even then you did not, in my view, play open cards in that you persisted that the attorney represented Mr Abbott’s interests more than he did yours. Clause 1.6 of the agreement makes the position regarding your legal representation quite clear as follows:

“... Abbott and Hoffman were assisted both in their approach and in the conclusion of this agreement, and all matters ancillary hereto, by their attorney,

Michael Salomon of Attorneys Salomon Lipshitz”.

- [25] It is quite clear, as is evidenced by the minutes of the meetings which I have had sight of, that at all material times during the conclusion of the agreement, you were represented by an attorney, Michael Salomon.
- [26] I find on the facts that your conduct in approaching the employer and setting in motion the conclusion of the agreement is incompatible with conduct of a person acting under duress. I also find it instructive that you were no longer in the employ of the employer at the time of the conclusion of the agreement. These facts serve, in my view, as an indication that you could not have been unduly influenced to make the admissions.
- [27] In the circumstances, I find on a balance of probabilities that the written admission of liability for an amount of R234 507.00 was freely and voluntarily made and thus you have admitted liability in writing as required by section 37D(b)(ii)(aa) of the Act.
- [28] In the result, your complaint cannot succeed.
- [29] I make no order regarding costs because a complainant should generally not be stultified by a possible costs order when considering lodging a complaint.
- [30] Our file is hereby closed.

DATED at JOHANNESBURG on this day of 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR