

SOUTH AFRICA / JUDGMENT

Du Plessis N.O and Another v Minister of Finance and Others (18568/22) [2024] ZAGPPHC 581 (27 June 2024)

[2024] ZAGPPHC 581

COURT

North Gauteng High Court, Pretoria

BEFORE

MPD Chabedi

CASE / FILE NUMBER

18568/22

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IN THE HIGH COURT OF
SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Case number: 18568/22

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

SIGNATURE

DATE: 27 June 2024

In the matter between:

JOHANNES HENDRICUS DU
PLESSIS N.O
First applicant
(as joint liquidator
of Double Ring 222 (Pty) Ltd)
QUINTON SIMON JOSEPH
N.O
Second applicant
and
MINISTER OF
FINANCE
First respondent
DEPARTMENT OF NATIONAL
TREASURY

Second respondent

MOGAJANE,

DONDO

Third respondent

(as the

Director-General of National Treasury)

MINISTER OF HOME

AFFAIRS

Fourth respondent

This judgment has been

delivered by uploading it to the Court online digital data base of
the Gauteng Division, Pretoria and by

email to the attorneys of

record of the parties. The date of the delivery of the judgment is
deemed to be 27 June 2024.

JUDGMENT

Chabedi AJ

Introduction

[1] This is an application for a mandamus in terms of which the applicant seeks an order directing the first, second and third respondents to comply with the provisions of the Public Finance Management Act 1 of 1999 and SCM Instruction 5 of 2016 and National Treasury Circular issued on 26 March 2018, by enforcing their directives to the fourth

respondent to make payment of the amount of \$2 095 238.09 together with interest thereon, to the applicants.

[2] The first respondent, the Minister of Finance, is cited as the executive authority of the National Treasury responsible for the administration of the Public Finance Management Act ("PFMA"). The applicants have not made any allegations against, or in relation to the Minister of Finance in their papers. The allegations contained in the founding affidavit in support of the relief are made only against the second respondent, the National Treasury, and its then Director-General, Mr Dondo Mogajane, the fourth respondent interchangeably. In this judgment I will therefore refer to both the second and the third respondents as the National Treasury, unless the context dictates that they be referred to as cited.

[3] The applicants have also cited the Minister of Home Affairs, the fourth respondent, merely on the basis that he may have interest in the outcome of this application. No relief is sought against the fourth respondent, save in the event of opposition. The Minister is not opposing this application.

- [4] The allegations made by the applicants in support of the relief they seek also implicate the Department of Home Affairs and its then Director-General. However, both the Department of Home Affairs and its Director-General have not been cited as parties in these proceedings and thus no order is sought against them.

Background

- [5] The applicants are joint liquidators in the insolvent lite of an entity named Double Ring 222 (Pty) Ltd (“Double Ring”) appointed by the Master of the High Court on 6 February

2017. According to the applicants, the only asset in the estate were claims against the Minister of Home Affairs, the fourth respondent. The claims arose from a service level agreement between Double Ring

and Department of Home Affairs (the “Department”) concluded in 2005 for the provision of satellite bandwidth services

(the “SLA”), which was terminated in 2009.

- [6] Although the detail is not clear from the papers, during 2007 and 2008 the Department did not pay invoices issued by Double Ring, with the result that by late 2008 a total amount of \$2 095 238.09 (R15,84 million at that time) remained unpaid. It is this claim that the applicants seek to recover in these proceedings.

- [7] In late 2008, Double Ring referred the issue of the non-payment of its invoices to the National Treasury for mediation in terms of the provisions of the SLA. The applicants have not attached the SLA to their founding affidavit, neither did the respondents. However, the relevant part of the SLA has been quoted in the heads of argument filed on behalf of the National Treasury, with no objection from the applicant, which I quote herewith for completeness’s sake:

“Clause 20

20.1 Referral of Dispute to joint Committee of the parties

Any dispute which arises and which cannot be resolved by means of the informal dispute resolution mechanisms and escalation procedure stipulated in schedule 4 - Contract Governance Structures shall be referred to a committee comprising the Accounting Officer of the Department, as contemplated in the Public Finance Management Act, 1999 and the Chief Executive Officer of double Ring primarily responsible for operations, or alternates appointed by them, who will use their endeavours to resolve the dispute within 14 (fourteen) days of the dispute having been referred to them.

20.2 Mediation

Should the joint committee be unable to resolve a dispute in accordance with the foregoing, such dispute will in the first instance be referred to the Contract Management Unit of the National Treasury for mediation, which mediation shall be undertaken within 30 (thirty) days of the matter being referred to the National Treasury, provided that should the parties be unable to resolve the dispute within 30 (thirty) days period, either party shall be entitled to proceed with litigation.”

[8] The National Treasury replied to Double Ring in a letter dated 20 January 2009 and stated, among other things, that “the Chief Financial Officer (CFO) of the Department has confirmed the amount owed to you (Double Ring) and indicated that the matter is receiving attention and at the same time he has been in constant discussion with you over the matter.”

[9] On 18 April 2009 the then Director-General of Home Affairs addressed a letter to Double Ring, in which he stated that:

“We refer to the above matter and address this letter in yet another attempt to resolve the various issues between ourselves. In this regard we note the following:-

1. the VSAT service to the Department was interrupted over the weekend of 28 and 29 March 2009 and again on 31 March 2009. At present the Department does not have connectivity, which is impacting service delivery. We require your written confirmation of the reasons for such interruption;
2. to ensure that the Department receives uninterrupted service, the supply of satellite bandwidth should be transferred to a direct contractual relationship between the Department and Sentech, Sentech being the designated bandwidth provider in terms of your initial bid to the Department. The Department would appreciate your written confirmation of your acceptance of this requirement. Should we not receive a response within 48 (forty-eight) hours from receipt hereof, we will deem your assent thereto;
3. to date, we have received no response to our letter of 19 November 2008 (copy attached marked A). Kindly nominate three independent firms of attorneys into whose Trust Account payment can be made, as a matter of urgency. The Department will select one of these three nominated attorneys unless there is a compelling reason not to, in which case the Department will notify you of the reason. Should we not receive your nomination we shall nominate a trust account with an independent firm of attorneys for such purposes. For clarity, by attaching the letter as annexure A, the Department waives the privilege in its contents;
4. You have written to the National Treasury requesting that they mediate the dispute, in accordance with the signed contract between yourselves and the Department. National Treasury have indicated that they are not in a position to do so (copy attached as B).

- [10] The letter concluded by stating that “As soon as the Department receives the written confirmations and details set out in paragraphs 1-3 above, the Department will pay all the amounts not in dispute into the nominated Trust Account and we propose that the parties meet thereafter in an attempt to resolve all other outstanding issues.” The applicants have not attached annexures A and B referred to in the letter of 18 April 2009.
- [11] After several engagements in the intervening period, on 29 June 2010 the National Treasury issued a letter to the Department in which it stated, among other things, that “we recommend that the Director-General of the Department of Home Affairs seriously considers settling this matter along the lines of the letter of 18 April 2009, as we are of the strong view that the letter is binding on the Department of Home Affairs.”
- [12] Double Ring subsequently issued summons against the Department for what the applicants term the “unsettled portion of the claims”. The applicants have not stated the date when the said summons was issued, save to state that it was prior to their appointment as liquidators. The applicants have also not stated what are the exact issues in the civil action, except that the Department is defending the action and pleadings had already closed by the time they were appointed as liquidators.
- [13] Following their appointment, the applicants pursued further settlement discussions with the Department, and this time, also sought the intervention of the National Treasury. On 21 June 2021 the applicants addressed a letter to the National Treasury requesting it to once again intervene in the resolution of the dispute between Double Ring and the Department. According to the letter, the request to intervene was not based on the provisions of the SLA, but in terms of the PFMA, as the National Treasury is the custodian of the PFMA tasked with ensuring that its provisions were complied with.
- [14] In this regard, the applicants requested the National Treasury to formally investigate the dispute and take such action as it can, including issuing instructions to the Department to immediately pay the undisputed amounts as undertaken by it in April 2009, plus applicable interest.
- [15] On 12 October 2021, after several follow up letters one of which on behalf of the applicants by its “fee facilitators”, Pholosang Fee Facilitation Services (Pty) Ltd, and another sent on even date by the applicants, the National Treasury wrote an email to the Fee Facilitators and stated that:

“Please be informed that the National Treasury met with the Department of Home Affairs on this matter. The Department of Home Affairs provided a comprehensive context including the legal status of this matter. National Treasury is mindful of the process detailed by the Department of Home Affairs, noted their interest in this matter (sic) proceed efficiently through the legal process towards its conclusion.”

- [16] The National Treasury did not respond to the applicants' letter of 12 October 2024. The applicants contend that the failure by the National Treasury to provide a meaningful response is deemed to be a refusal, which then necessitated this application.
- [17] The National Treasury opposes the application on the grounds mainly that the Constitution and the PFMA do not confer power on the National Treasury to compel other state organs to pay claims by their service providers where such claims are disputed; or intervene or resolve contractual disputes between state organs and their service providers.
- [18] Relying on section 239 of the Constitution, the National Treasury also contends that the PFMA applies to all organs of state equally, which are separate organs of state with powers to procure goods and services in their own name including a corresponding obligation to honour its contracts by paying for those goods and services. The National Treasury stands on its own and its oversight role in terms of the PFMA as set out in section 6 thereof, does not extend to it assuming upon itself the adjudication of disputes between organs of state and their service providers and contractors.
- [19] The National Treasury contends that it may assist in the mediation of such disputes and make recommendations, however if the recommendation is not accepted by the state organ, the Constitution and the PFMA do not give the National Treasury the power to override the state organ's position or enforce its recommendations in any way, this especially where such as in this case, there is civil litigation involving such dispute.
- [20] As regards, its role in the dispute between Double Ring and the Department, the National Treasury contends, firstly, that their involvement was because the SLA provided for mediation by the National Treasury in case of a dispute, however this did not make them a party to the SLA. Second, there is ongoing civil action between Double Ring and the Department pertaining to the claims made by the applicants in this application, therefore, it is appropriate in those circumstances that the applicants pursue the claims in that process.
- [21] In the replying affidavit the applicants deny that the claim in this application is part of the pending civil litigation between Double Ring and the Department. The explanation given by the applicant is that the claim in this application pertains to the "undisputed" portion of Double Ring's claims, which according to the applicants the Department has no defense to. The National Treasury in their answering affidavit insist not. Because the Department was not cited as a party to these proceedings it has not, and neither was it required to, put a version before the court in these proceedings.
- [22] However, in my view the question whether the claim in this application forms part of the issues in the civil action can be put to rest by referring to paragraph 29 of the applicants' letter to the National Treasury of 21 June 2021, which gave rise to this application. It stated that:

“29. Firstly, we had offered to pause the litigation should the Department be willing to negotiate with us or our representatives outside the litigation process. Secondly, it is not unusual for parties to choose to enter into settlement discussions. Such negotiations would of course be on a without prejudice basis which means no party is bound by any matter discussed should negotiations fail. Neither the Department’s rights nor those of Double Ring are therefore compromised or in any way endangered. Instead, it is clear choice on the part of officials to rather litigate than attempt to settle the matter out of court and in the process save costs for the Department.”

[23] It is clear from the above that the claim in this application is linked to the issues that form the subject matter of the pending civil action. The applicants therefore sought National Treasury’s intervention as an alternative to the protracted, and by the look of things, costly litigation. The National Treasury’s response to Pholoso in the email of 12 October 2021, also confirms

this. That said, whatever the merits in the civil action, the relief sought by the applicants in this application is a different one and must stand on its own merits.

Issues in this application

[24] The applicants’ case, as refined in their heads of argument, is that the letter of 29 January 2009 to Double Ring records that the National Treasury has established that the Department has agreed that it owed Double Ring the amount of \$2 095 238.09 (R15,84 million) and in the letter of 18 April 2009, the Department agreed to pay this amount.

[25] The applicants conclude that the National Treasury in its letter of 10 June 2010, has as a result issued a directive or instruction to the Department to pay Double Ring the so called “undisputed” portion of the claims in the amount of \$2 095 238.09. The applicants argue in this regard that the National Treasury has breached its duties in terms of the PFMA by refusing to enforce the directive, hence the relief sought in this application.

[26] The issues in this application are therefore first, whether the National Treasury issued a directive to the Department to pay the amount of \$2 095 238.09; second, if yes, whether the National Treasury had the duty in terms of the PFMA and the Treasury Instructions and Circular, to enforce the directive, and third, whether the National Treasury has breached such duty. If the answers to all these questions are in the affirmative, the applicants are entitled to the relief they seek, if not, the application fall to be dismissed.

Did the National Treasury issue Directives

[27] In the notice of motion, the applicants ask this court to compel the National Treasury to enforce their directives to the fourth respondent, the Department of Home Affairs to make payment of the amount of \$2 095 238.09. The applicants do not specify the date when the said directive was issued by the National Treasury.

- [28] The applicants rely on the letter of 29 June 2010 in which the National Treasury recommends that the Director-General seriously considers settling the dispute between the Department and Double Ring “along the lines of the letter of 18 April 2009, as we (National Treasury) are of the strong view that the letter is binding on the Department of Home Affairs”.
- [29] The letter of 18 April 2009 from the Director-General to Double Ring states that the Department will pay all the amounts not in dispute into a nominated attorney’s trust account as soon as the Department receives the written confirmation and details relating the pre-conditions set out in paragraphs 1 to 3 of that letter (see supra). The letter does not state the specific amount that to be paid. In any event, the payment of whatever amount was conditional on certain actions being undertaken by Double Ring. The applicants have not dealt with the latter aspect of the letter at all.
- [30] To the extent that the applicants also rely on the National Treasury’s letter of 20 January 2009, this letter too did not mention a specific amount. The letter simply stated that the CFO of the Department of Home Affairs has confirmed the amounts owed
- to Double Ring and that further engagement in this regard is anticipated.
- [31] Read together, both the letters of 29 June 2010 and 18 April 2009 do not contain statements in which the National Treasury directs or instructs the Department of Home Affairs to make payment of the amount of \$2 095 238.09. The letter of 29 June 2010 only recommends that the Department seriously considers settling the dispute between itself and Double Ring. A recommendation to seriously consider settling a dispute, is not a directive to pay money.
- [32] The applicants themselves have not stated that the letter of 29 June 2010 contains any such directive. The fact that the date of the supposed directive is not mentioned in the relief sought, is instructive.
- [33] Furthermore, in their replying affidavit, the applicants propose an interpretation of the language adopted by the author of the letter of 21 June 2010, a Mr Breytenbach, the then Chief Director: Norms and Standards in the National Treasury that, given his position which was lower than that of the Director- General of Home Affairs, the term “recommend” takes a singular meaning that “you are directed to honour your undertaking because we are of the strong view that you are bound by it”. The applicants persisted in this argument in their heads of argument and oral submissions. The applicants then suggest that the term “recommend” must be considered to mean a “directive”.
- [34] It is important to highlight that the applicants have approached this court on the basis that the directive exists, and that all that the court needs to do is to compel the National Treasury to enforce it. The applicants are not seeking declaratory relief in terms of which it is declared that the directive exists or that the letter(s) as read constitute a directive, such that if the

court agrees with such interpretation, then the National Treasury must be ordered to enforce it.

[35] This court is therefore not called upon to interpret the letters of 18 April 2009 and 21 June 2010. The applicants have settled for themselves that the letters, read together, constitute a directive or instruction by the National Treasury to the Department to pay Double Ring and that all that is required from the court is to compel the National Treasury to enforce it. The applicants' interpretation as to what Mr Breytenbach meant, is to support such a construction and thus their entitlement to the order. It therefore necessary to assess whether the applicants' contentions in this regard are legally sustainable.

[36] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[1] the court stated the following as to the interpretation of legal documents:

“Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[37] The letters of 29 June 2010, 18 April 2009 and 20 January 2009, respectively, contain plain and straightforward language. It is neither possible nor reasonable to ascribe alternative meanings to it. The terms of the letters read in their totality are also not ambiguous. There is therefore no need to interpret or substitute the words in the letters. Given that the relief the applicants seek, being a mandamus, is worded in specific terms, the contended interpretation that the term “recommend” is a “directive” is a rather tenuous link to the relief sought. Put simply, it is untenable for the court to compel an act which may only be defined by way of interpretation.

[38] It is a fundamental principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no doubt as to what the order requires to be done.[2] The applicants fail on this basis alone.

[39] To the extent that the background and the circumstances that existed at the time the letters were written may be relevant, in *Novartis (Pty) Ltd v Maphil Trading (PTY) Ltd* 2016

(1) SA 518 (SCA)[3] the court stated that:

“[29] Referring to the earlier approach to interpretation adopted by this court in Coopers & Lybrand and Others v Bryant,[4] where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language should a court look to surrounding circumstances, Wallis JA said (para 12 of Bothma-Batho):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. Whilst the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding

circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is essentially one unitary exercise.'

[40] The request by the applicants to the National Treasury in the letter of 21 June 2021 to formally investigate the dispute and come to its own conclusion, including ordering that amounts be paid to the applicants, means that the applicants understood that there was no prior directive by the National Treasury to the Department on which an order to compel its enforcement may granted as sought.

[41] The above conduct of the applicants shows that they understood the content of the letters as constructed. The fact that the applicants are contending for a different construction that does not appear from the terms used in the letters proves this point. Considering the time when the letters were written (more than ten years before this application was launched), the protracted history of the disputes, the contended construction that the term “recommend” should be read as a “directive” is not reasonable,

sensible or businesslike.

[42] On the contrary, the words actually used accord with the manner in which all the parties conducted themselves on either side of the dispute. The applicants' argument therefore lacks merit and must be rejected.

[43] In light of the above, the applicants have failed to show that there is a directive by the National Treasury to the Department of Home Affairs to make payment of the amount of \$2 095 238.09. I agree with the National Treasury that a recommendation to the Department to seriously consider settling the dispute is not a directive by the National Treasury to pay money to Double Ring. The letter of 29 June 2010 does not contain any directive to pay Double Ring the undisputed claims, let alone the amount of \$2 095 238.09 as

claimed by the applicants.

- [44] Even if, on the applicants' own interpretation of the facts and of the letter of 29 June 2010, the recommendation constituted a directive, such directive would have been made by the National Treasury in the mediation process in terms of the SLA, which role, as the National Treasury correctly argued, was contractual and not statutory.
- [45] For purposes of the applicants' case however, to make the recommendation or directive enforceable, it must be based on specific provisions of the PFMA. The question whether the PFMA contains such provisions and whether there has been breach thereof is dealt with hereinafter.

Was there a breach of the PFMA

- [46] It is important to start with the provisions of section 38 of the PFMA. The applicants rely on section 38(1)(f) of the PFMA, which provides that the accounting officer for a department, trading entity or constitutional institution must settle

all contractual obligations and pay all money owing, including inter-governmental claims, within the prescribed or agreed period.

- [47] Section 38 of the PFMA deals with general responsibilities of accounting officers for a department, trading entity or constitutional institutions. Section 1 thereof defines "accounting officer" to mean a person mentioned in section 36 of the PFMA. Section 36(1) and (2) of the PFMA dealing with accounting officers, among other things, provides that every department and every constitutional institution must have an accounting officer and the head of a department must be the accounting officer for the department and the chief executive officer of a constitutional institution must be the accounting officer for that institution.
- [48] Therefore, the responsibilities of the third respondent in relation to this section, are limited to his functions as the accounting officer of the National Treasury, which functions similarly apply to Director-Generals of all Departments, including the Department of Home Affairs, and not in the purported role sought to be argued by the applicants in this application. Section 38 is therefore not applicable to this dispute and therefore, need not be analysed further.
- [49] In the founding affidavit, the applicants rely on section 6(1)(g) of the PFMA under the powers and functions of the National Treasury, which provides that the National Treasury must promote and enforce transparency and effective management in respect of revenue, expenditure, assets and liabilities of Departments, public entities and constitutional institutions.

- [50] The applicants also rely on section 6(2)(a) and (b) which provides that to the extent necessary to perform the functions mentioned in subsection (1), the National Treasury must prescribe uniform treasury norms and standards, and must enforce this Act and any prescribed norms and standards, including any prescribed standards of generally recognised accounting practice and uniform classification systems, in national departments.
- [51] In terms of sub-section 2(f) thereof, the National Treasury must intervene by taking appropriate steps, which may include steps in terms of section 100 of the Constitution or the withholding of funds in terms of section 216 (2) of the Constitution, to address a serious or persistent material breach of this Act by a department, public entity or constitutional institution.
- [52] Section 100(1) of the Constitution of the Republic deals with national intervention in provincial administration, and provides that when a province cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including. Section 100 finds no application to the facts in this case.
- [53] Be that as it may, section 216 deals with Treasury control, and subsection (1) provides that National legislation must establish a national treasury and prescribe measures to ensure both transparency and expenditure control in each sphere of government, by introducing generally recognised accounting practice; uniform expenditure classifications; and uniform treasury norms and standards. Subsection (2) thereof provides that the national treasury must enforce compliance with the measures established in terms of subsection
- (1) and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures.
- [54] The applicants argue in this regard that the National Treasury does not have the option not to investigate complaints and also does not have the choice not to intervene when faced with serious breaches of the Act. The applicants argue that the breaches of the PFMA by the Department are serious and ought to have been investigated by the National Treasury, and that the powers of the National Treasury in this regard are wide and include anything that is necessary to fulfil its responsibilities.
- [55] In their heads of argument the applicants also rely on section 76(1)(h) (erroneously referred to as section 76(1)(g) dealing with the cancellation or variation of contracts to the detriment of the state). Section 76(1)(h) deals with Treasury regulations and instructions and it provides that the National Treasury must make regulations or issue instructions

applicable to departments, concerning the settlement of claims by or against the state. In this regard Regulation 8.2.3 provides that “unless determined otherwise in contract or other agreement, all payments due to creditors must be settled within 30 days from the date of the statement and in the case of civil claims, from the date of settlement or court judgment.”

- [56] In the notice of motion and founding affidavit, the applicants refer to what they term “SCM Instruction 5 of 2016/2017”, which was however not attached. A document separately filed by the applicants at the hearing of this application is titled “National Treasury Instruction 5 of 2015/2016 – Month-End Closure Procedures”. According to the document its purpose is to prescribe the month end closure procedures for departments to meet reporting requirements in terms of section 32 of the PFMA for interim financial statements. The applicants have not otherwise stated what portions of this document they rely on, and I have found none.
- [57] The applicants also rely on the National Treasury Circular issued on 26 March 2018 (the “Circular”) dealing with “Timeous Payment of Invoices and Claims”. The applicants referred to clause 4 of the Circular which provides that “Accounting Officers and Accounting Authorities of institutions falling under the scope of the PFMA or the MFMA must ensure that measures are in place to pay valid invoices and claims within 30 days as required by legislation or where applicable, within the period contractually agreed with suppliers.”
- [58] Clause 5 provides that “Officials responsible for the late non-payment of invoices and claims commit financial misconduct or ordinary misconduct. The relevant authorities must institute disciplinary steps against those employees in accordance with the applicable disciplinary procedures. A failure by the relevant authority to take such steps in itself constitutes non-compliance. Where justified, the National Treasury will utilize available powers including reporting to Parliament or, [...] on the late or non-payment of creditors and, in the case of serious or persistent breaches of measures in the PFMA or the MFMA, the stoppage of funds in terms of section 216 of the Constitution and other applicable legislation.”
- [59] Clause 6 of the Circular provides that “where a dispute arises, the relevant creditor must be informed in writing within 30 days of receipt of the invoice, or contractually agreed period of payment, to enable the matter to be resolved amicably between the contracting parties. Facilitation of such disputes may be referred to the National Treasury or the relevant provincial treasury, if an organ of state is party to the dispute.”
- [60] The applicants argue that by undertaking to make payment to Double Ring and then failing or refusing to pay, the Department acted in breach of the above provisions of the PFMA and the regulations. Similarly, by failing to enforce the regulations and thus compel the Department to pay, the National Treasury is also in breach of the PFMA and its regulations, in particular the Circular which regulates timeous payments.

- [61] Whether the Department in the letter of 18 April 2009 or at any stage made an undertaking to pay the “undisputed” amounts to Double Ring is not a matter for this court to determine.
- [62] What is however not in dispute is that (i) the claims on which the applicants rely for the relief in this application have been disputed by the Department since 2009 and are still being disputed to date; (ii) the National Treasury was involved at various stages in the mediation of the disputes in terms of the SLA on the request of Double Ring; and (iii) there is pending civil action between Double Ring and the Department which, as I have found above, the claim in this application form part of.
- [63] The applicants have therefore failed to show, first, instances of non-compliance with the provisions of the PFMA and its regulations by the National Treasury, second, the provisions of the PFMA and its regulations, in terms of which the National Treasury has express powers to issue a directive or instruction to a particular department, let alone the Department of Home Affairs, to make specific payments to its service providers, and third, that the National Treasury has the power, but has failed, to enforce such directive. The Treasury Circular is patently not such an instruction, as it is a general instruction to all Accounting Officers, and as stated above, provides for a different regime in clause 6 where there are serious and persistent instances of non-compliance with the PFMA.
- [64] The applicants’ case pertains to a specific claim arising from a contractual dispute which remains unresolved. Treasury Circular is silent as to what is to happen where there is a dispute between the Department and the service provider in relation to payment and the dispute is not resolved amicably.
- [65] In the *Affordable Medicines Trust and Others v Minister of Health and Others*[5] the court stated that:
- “[48] Our constitutional democracy is founded on, among other values, the 'supremacy of the Constitution and the rule of law'. The very next provision of the Constitution declares that the 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'. And to give effect to the supremacy of the Constitution, courts 'must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency'. This commitment to the supremacy of the Constitution and the rule of law means that the exercise of all public power is now subject to constitutional control.”*
- [66] The essence of the above constitutional principle in relation to this case is that if the applicants are unable to show that there is conduct that is inconsistent with the law or the constitution that relates to the relief they seek, the court cannot intervene. The court cannot compel the National Treasury to do that which it is not authorised or empowered to do by legislation.
- [67] In *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others*³⁰ the Court stated the following in relation to the exercise of public power:

“[58] It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution.

[68] In order to give effect to the supremacy of the Constitution the court may only grant an order that compels the National Treasury to take steps for which it bears legal authority. The court cannot order the National Treasury to do that which it does not have the power to do. Such order would offend the principle of legality.

[69] In the absence of the legislative provisions to do so, the National Treasury therefore does not have a duty in terms of the PFMA and the Treasury Instructions and Circular, first, to issue directives to the Department to pay Double Ring, and second, to force

the Department to comply with such order. Any such duty does not generally exist in respect of other state organs either. I agree with the National Treasury in light of the above that while it may mediate on disputes and make recommendations, it does not have power to impose such recommendations on state organs.

[70] Accordingly, I find that there is no breach by the National Treasury of the PFMA, the regulations and the Treasury Circular. The applicants have failed on the facts to show that there was a breach.

The relief sought - Mandamus

[71] I now turn to the relief sought by the applicants. The applicants seek an order to compel the National Treasury to comply with the provisions of the PFMA and the National Treasury Instruction 5 of 2016 and the Treasury Circular issued on 26 March 2018, by enforcing their directives to the fourth respondent to make payment of the amount of \$2 095 238.09 together with interest thereon, to the applicants.

[72] The relief sought by the applicants is an interdict and final in nature. In Minister of Law and Order, Bophuthatswana and another v Committee of the Church Summit of Bophuthatswana and others[6] the following was stated by the Court in relation to a final interdict:

“A final interdict finally determines the rights of the respective parties to a dispute or litigation. It is referred to sometimes as an 'absolute' or 'perpetual' interdict. A final interdict is usually applied for by way of action, but has also been granted on application if no bona fide factual dispute exists. [...]

To obtain a final interdict by way of application, an applicant must establish:

- (i) a clear right;
- (ii) an injury actually committed or reasonably apprehended or an actual or threatened invasion of that right; and
- (iii) the absence of a similar protection by any other ordinary or suitable remedy in law.”[7]

[73] The Court further stated that:

“Whether the applicant has a right is a matter of substantive law. The onus is on the applicant applying for a final interdict to establish on a balance of probability the facts and evidence which prove that he has a clear or definite right in terms of substantive law. This is a right which exists only in law, be it at common law or statutory law.”[footnotes not included] [8]

[74] In *Rossouw v Haumann*[9] the Court stated the following:

“[...] In order to justify his claim to an interdict the onus is on the applicant to establish that he has a clear right, or at least a prima facie clear right. On his own showing the applicant has, at least, caused very grave doubts as to the existence of that right, for, as I read his petition (as I have already stated) it seems to me to contain an admission that this agreement had become impossible of performance; and if the agreement had become impossible of performance, then he has no right under the agreement.[10] [...] In so far as the second ground is concerned, it seems to me that while it was open to the respondent to move to have this order of Court set aside on the grounds that the agreement had become impossible of performance, he is entitled to resist this interdict by saying that the agreement is impossible of performance, and no longer binds the parties. In my view the interdict must be discharged with costs.”[11]

[75] As discussed above, for their case that, the applicants rely on the letter of 29 June 2010 from the National Treasury to the Department, the letter of 18 April 2009 from the Department to Double Ring and the letter of 29 January 2009 from the National Treasury to Double Ring. I have already found above that none of these letters contain a directive to the Department to pay the amount of \$2 095 238.09. The applicants have further failed to show that the National Treasury has the duty to issue such directive and have as a result breached any provisions of the PFMA and its Regulations.

[76] The tenuous interpretation put forward by the applicants to sustain the argument that the “recommendation” is a directive, shows that the applicants do not have a clear right. This is because such contended interpretation would first have to be declared by the court to be the correct one for the applicant to rely on such a construction for the relief it seeks. Admittedly, this is

not the case.

[77] Furthermore, a right to a relief that compels the National Treasury to act in a manner inconsistent with the PFMA and thus the Constitution, is not a right at all as it is not one capable of legal protection. Therefore, the applicants have failed to show that they have a clear right entitling them to the relief they seek.

[78] Based on the foregoing, it follows that the applicants may not show an injury actually committed or reasonably apprehended or an actual or threatened invasion of a right, if that right legally does not exist or is not legally protected. Therefore, this application fails in addition for failure to establish the second jurisdictional requirement for a final interdict.

- [79] It is also not necessary to assess whether the applicants have satisfied the requirement of the absence of a similar protection by any other ordinary or suitable remedy in law, because the applicants have failed to establish a clear right, and thus the first and main jurisdictional requirement for entitlement to a final interdict.
- [80] As to costs, in the notice of motion, the applicants sought costs on attorney scale. During argument the applicants' counsel submitted that in the event the applicants are not successful, the court should consider not awarding costs against the applicants as this matter is of constitutional importance and public interest.
- [81] I am not inclined to accept this argument. On the facts of this case, there are no reasons to justify a departure from the established principle that costs should follow the course.

Conclusion

[82] In the premises, I make the following order:

1. The application is dismissed.
2. The first and second applicants are ordered to pay the costs of this application on a party and party scale, including the costs for the employment of two counsel.

MPD Chabedi

Acting Judge of the High Court

Gauteng Division, Pretoria

APPEARANCES

For the applicant: Adv H Molotsi SC Pistorius Scheepers Attorneys Inc For the first, second and third respondent: Adv ZZ Matebese SC Adv L Mgwetyana State Attorney, Pretoria Date of hearing: 30 January 2024 Date of Judgment: 27 June 2024

[1] 2012 4 SA 593 (SCA) [At p.603G - 604B-D]

[2] Eke v Parsons 2016

(3) SA 37 (CC), concurring judgment of Jafta J, para 64.

[3] paras

[31] at p.527 and [44] G-H at p.530

[4] 1995

(3) SA 761 (A) ([1995] 2 All SA 635; [1995] ZASCA 64) at 768A-E

[5]

[2005] ZACC 3; 2006

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- (3) SA 247 (CC)
- [6] [1994] 4 All SA 448 (BG)
- [7] At p.455-456, See Setlogelo v Setlogelo 1914 AD 221 at 223, 226; Juvena Produits de Beaute SA v BLP Import and Export 1980
- (3) SA 210 (T) at 223G-H, per Gordon J; Joubert (ed) The Law of South Africa vol 11 paras 314, 315; Prinsloo v Shaw 1938 AD 570 at 576; Johan Meyer Interdicts and Related Orders at 55.
- [8] At p.456
- [9] [1949] 4 All SA 442 (C)
- [10] At p.447
- [11] At p.448
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