

SOUTH AFRICA / JUDGMENT

South African Local Authorities Pension Fund v Mohokare Municipality and Another (4145/2021) [2023] ZAFSHC 32 (3 February 2023) [2023] ZAFSHC 32

COURT

Free State High Court, Bloemfontein

BEFORE

C Reinders

CASE / FILE NUMBER

4145/2021

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 4145/2021

Reportable:

YES/NO

Of

Interest to other Judges: YES/NO

Circulate

to Magistrates: YES/NO

In

the matter between:

SOUTH

AFRICAN LOCAL AUTHORITIES PENSION

FUND

Applicant

And

MOHOKARE

MUNICIPALITY

First Respondent

THE

MUNICIPAL MANAGER OF THE MOHOKARE

Second Respondent

MUNICIPALITY

JUDGMENT

BY: C REINDERS, J

HEARD ON: 8 SEPTEMBER 2022

DELIVERED ON: 3 FEBRUARY 2023

- [1] The applicant is the South African Local Authorities Pension Fund (hereafter “the Fund”). This is an application to declare Mohakare Municipality (the first respondent, hereafter “the Municipality”) and the Second Respondent (as Municipal Manager of the Municipality) in contempt of court. Reference to the respondents jointly will hereafter be “the respondents”.
- [2] The genesis of this application is a dispute between the municipality and the Fund in respect of the former’s alleged failure to effect payments to the Fund for the benefit of its (the municipality’s) employees. The dispute was referred to the Pension Fund Adjudicator (the “Adjudicator”) which dispute was resolved when the determination dated 30 July 2020 was handed down. The applicant was the complainant and the first respondent was the respondent in the proceedings.
- [3] The determination of the Adjudicator reads:
- “6.1.1 The respondent is ordered to provide contribution schedule for August 2016 to November 2018 and January 2019 and April 2019 to the complainant in order to facilitate the computation of its outstanding contributions, within five weeks of this determination;*
- 6.1.2 Should the respondent fail to comply with paragraph 6.1.1, the complainant is ordered to reconstruct the contribution schedules based on the information already in its possession, within two weeks of the respondent’s failure to submit the schedules;
- 6.1.3 The complainant is ordered to compute the arrear contributions and late payment interest owed by the respondent in terms of section 13A (7) of the Act, within one week of receiving the contributions schedules in terms of either paragraphs 6.1.1 or 6.1.2 (whichever is applicable);
- 6.1.4 The complainant is ordered to transmit to the respondent its computation and details of how it computed the arrear contributions and late payment interest within three days of completing them;
- 6.1.5. The respondent is ordered to pay the complainant arrear contributions for the period August 2017 to April 2019, plus late payment interest as computed in paragraph 6.1.3, within two weeks of receiving the computations from the complainant; and
- 6.1.6 The complainant is ordered to update the records of the respondent’s employees who are its members within one week of receipt of payment from the respondent.”
- [4] Section 30(O) of the Pension Fund Act 1956 makes provision for enforcement of the Adjudicator’s determination:

“30 (O) Enforceability of determination

- (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court and shall be so noted by the clerk or the registrar of the court, as the case may be.
- (2) A writ of warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of

such court after expiration of a period of six weeks after the date of the determination on condition that no application contemplated in section (P) has been launched.

Section 30 (P) entails the right of an aggrieved party to approach the High Court for relief where such party is aggrieved by the

determination.

- [5] The applicant moves for orders in the following terms:

“1. Declaring that the first respondent is guilty of contempt of court;

2. Directing the first respondent to comply with the determination within a period of five days from date of the order;
3. Failure to comply as ordered, then the duly authorised representative of the first respondent, Mr Selby Selepe, in his capacity as the Municipal Manager of the first respondent, be committed to prison for contempt of court for a period of 12 months and a fine of R1 million;
4. Costs of the application on the Attorney and own client and scale.”

- [6] The deponent to the applicant’s founding affidavit states that the applicant seeks to enforce the determination which, according to the applicant, compelled the municipality to pay “some specified moneys” over to the applicant. It is clear from the notice of motion (as quoted in the previous paragraph) that I am called upon to firstly find the municipality in contempt of court, order compliance with “the determination”, failure whereof the second respondent be committed to prison for contempt of court.

- [7] The respondents oppose the relief claimed on several grounds, amongst others that the purpose of contempt proceedings is not to enforce a monetary judgment and that there was in any event compliance with the

determination.

- [8] The requirements for an order of contempt is trite: The applicant has the onus to prove (a) that a court order was granted; (b) that the court order was served on the respondent or that the respondent had knowledge of the court order; and (c) that the court order was not complied with by the respondent. If the applicant proves these requirements a presumption

arises that the respondent's non-compliance is wilful and mala fide. Once the applicant has satisfied the requirements to prove contempt, an evidentiary burden rests on the respondent to show reasonable doubt. Should the respondent fail to discharge this burden, contempt will have been established.[1]

- [9] In its answering affidavit the respondents do not deny either the existence of the determination or knowledge thereof. The issue between the parties is rather whether there was compliance with the determination, and if not, the wilfulness and mala fides of such non-compliance.
- [10] As the applicant is moving for an order of committal to jail the applicable standard of proof is beyond a reasonable doubt.[2]
- [11] In the opposing papers the respondents contended that it was not in contempt of the order. It was submitted that on a proper reading of the order, there was a duty upon the applicant in terms of paragraph 6.1.2 of the order to reconstruct the contribution schedules based on the information in its possession in case respondents failed to provide the contribution schedules referred to in para 6.1.1 of the order. Once same had been computed, it was to be forwarded to the respondent where after the respondents were to pay same as envisaged in 6.1.5. Respondents submitted that applicant failed to do so. It stated that applicant in its founding affidavit omitted to inform the court that the respondents' chief financial officer and officials of the applicant had a meeting on 9 November 2020 where an outstanding amount was agreed upon. The respondents were required to

prepare a repayment plan which was done. It attached the plan to its papers. The plan makes provision for payments up and until June 2028.

- [12] Applicant in its replying papers did not seriously dispute the allegations regarding the meeting and payment plan, but simply made the remark to the effect that "a year has since passed" (with reference to the date when the affidavit was attested to) and that the respondents "however failed to indicate if they have paid in terms of para 6.1.5 of the order or determination".
- [13] I am not convinced that the above explanation of the respondents regarding the meeting and suggested payment plan can be rejected as false beyond a reasonable doubt and am inclined to accept that this is exactly what has happened. The respondent is therefore not in wilful default as suggested by applicant in its founding papers. The order that the respondents therefore be found guilty of contempt of court cannot be sustained and stands to be dismissed.
- [14] In passing I might mention the following. I have referred herein to the determination of the adjudicator as an order. Section 30 (O)(1) of the Pension Act deems an adjudication to be a civil judgment by a court of law. I have therefore referred thereto as an order. I am not convinced however that such an order is an order for which I can convict an entity or person for contempt of court. Notwithstanding what the statute ordains, it remains an adjudication

made by an adjudicator who is not a judge nor a magistrate. It most definitely is not an order issued by a court. It is an adjudication made by the adjudicator in terms of the specific act where a dispute has been referred to it.[3]

- [15] In my view section 30 (O)(1) simply statutorily elevates such a determination to have the effect of a civil judgment by a court of law to facilitate the easy process of issuing a warrant to execute. It would appear to me that the applicant, instead of filing an application to have the respondent held in contempt, should have issued a warrant (having noted the judgment with the clerk or registrar of the court as the case may be). I would therefore have dismissed the application on the basis that the order was not an order made by a competent court.
- [16] It is common cause that the first respondent is a member of the fund. The complaint before the adjudicator was that the municipality had failed to pay contributions for the periods January 2015 to November 2018 and January 2019 to April 2019 in an estimated amount in the region of 34 million rand. Counsel for the applicant invited me to make any order I deem fit to coerce respondent to effect payment, suggesting that parties may be ordered to revise a payment plan. Counsel for the respondents submitted that applicant could have made the payment plan an order of court. This matter had been finalised by the adjudicator and I am not required to rehear that matter. I was not called upon to adjudicate the application as a review or an appeal. I therefore refrain from making any comment save to strenuously urge upon the respondent and/or its representatives and remind them of the statutory and/or legal duty and imperative to see to it that the calculated amounts (which does not belong to any of the respondents) be paid to the applicant.
- [17] The usual cost order is to have it follow the event. Respondents are rather vague on payment, and in this instance I intend to order each party to pay its own costs.

[18] In the circumstances I make the following order:

18.1 The application is dismissed.

18.2 Each party to pay its own costs

C REINDERS, J

On behalf of applicant:

Adv N Ralikhuvhana

Instructed by:

Prince Mudau and Associates

c/o Webbers Attorneys

BLOEMFONTEIN

On behalf of respondents: Adv MC Louw

Peyper Attorneys

- [1] Fakie NO v CCII Systems (Pty) Ltd 2006 4 SA 326 (SCA)
- [2] Matjhabeng Local Municipality v Eskom Holdings Ltd and Others 2018 (1) SA 1 (CC) at para [61]
- [3] See the reasoning of Dewrance AJ in Mantsho v Managing Director of the Municipal Employees Pension Fund 2015 JDR 1399 (GP) with reference to similar findings in respect of other tribunals. See also: Joint Municipal Pension Fund and Another v Marthinus and Another, [2007] 1 BPLR 94 (W) at 97 the court, wherein Snyders J (as she then was), after analysing sections 30M read with section 30O, said the following: "The purpose of section 30M read with section 30O, is to give effect to the determination by the Second Respondent not to create jurisdiction for the purpose of an appeal as submitted. The proceedings allowed in terms of section 30P is not an appeal in the usual narrow sense of the word, the section specifically states that. The argument that the present proceedings are an appeal effectively from a judgment of this Court is, in my view, fallacious. The determination by the Second Respondent is not a judgment by this Court. It is deemed to be for a specific purpose of giving effect thereto. That is the interpretation on the clear wording of the Act, apparent from sections 30M, 30O and 30P. The legislature, in my view, refrained from referring in section 30P to a Court (as referred to in section 30O(1)). If it did, the First Applicant's submission would have been perfectly valid." (own emphasis added)
- [3] See the reasoning of Dewrance AJ in Mantsho v Managing Director of the Municipal Employees Pension Fund 2015 JDR 1399 (GP) with reference to similar findings in respect of other tribunals.

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