IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case no: **2672/2021**

In the matter between:

MAFUBE LOCAL MUNICIPALITY	Applicant
and	
MUNICIPAL WORKERS' RETIREMENT FUND	First Respondent
FIRST NATIONAL BANK LIMITED	Second Respondent
STANDARD BANK OF SOUTH AFRICA	Third Respondent
ABSA BANK	Fourth Respondent
THE SHERIFF: HEILBRON	Fifth Respondent

CORAM: CRONJÉ, AJ

HEARD ON: 20 APRIL 2023

JUDGMENT BY: CRONJÉ, AJ

DELIVERED ON: 2 MAY 2023

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 10h30 on 2 May 2023.

I INTRODUCTION:

[1] The Municipal Workers' Retirement Fund ("the Fund") obtained judgment in 2021 against the Mafube Local Municipality ("the Municipality") for payment of **R37 795 476.32**. Writs of attachment and execution for this amount was issued against the bank accounts that the Municipality holds at the Second to Fourth Respondents.

[2] The Municipality brings an urgent application requesting that the Respondents be called upon to show why, pending the filing of an application in terms of Section 153 of the Municipal Finance Management Act (the "MFMA")[1], the execution of the warrants should not be stayed and uplifted. This includes funds in its so-called primary and secondary accounts. It intends to file the application in terms of Section 153 of the MFMA within ninety (90) days of this order.

[3] The Fund attached the funds in the FNB account on 2 March 2023 and this allegedly came to the Municipal Manager's attention on 7 March 2023. On 9 March 2023, the Fund issued writs against the bank accounts held at Absa Bank and Standard Bank.

[1] 56 of 2003 – Also sometimes referred to as the LGMFMA

[4] The Municipality does not state what the balances in those accounts are. On 9 March 2023, the Municipality's attorneys sent a letter to the Fund requesting the immediate upliftment of the attachment over the FNB account as it is the secondary account into which earmarked grants and its equitable share from the national and provincial spheres of government are paid.[2] A careful reading of the letter isolates the FNB account from the two other banks' accounts. It is stated that the *majority*, thus not all the grants are subject to conditions and cannot be attached.[3]

[5] In support for an argument that the application should be treated with urgency, Mr Louw, for the Municipality, referred me to The MEC: Northern Cape Provincial Government: Department of Cooperative Governance and Traditional Affairs and Another v The Renosterberg Local Municipality and Another[4] ("Renosterberg"). In that matter the MEC opined that Eskom lacked *bona fides* and was dealing with the municipality's banking account as if it was its own account resulting in massive disruption in the financial administration of the municipality. The MEC sought that the municipality declare a formal intergovernmental dispute with Eskom and convene a meeting as envisaged in the Intergovernmental Relations Framework Act[5] (IGRFA) to deal with the dispute relating to the payment of the judgment debt. There was an apprehension of further attachment and removal of *all deposits* made into the banking account. The Mafube Municipality is mum on the amounts available in the accounts and whether the attachments will remove *all* amounts as in Renosterberg *supra*.

[6] In Renosterberg, however, the Court differentiated between the municipality's own revenue and that which are *earmarked* for other infrastructural projects

[2] Pleadings, p. 78, para 4

[3] Pleadings, p. 24, para 23

[4] (803/2021) [2022] ZANCHC 34 (31 May 2022) paragraphs [11] – [23]

[5] 13 of 2005

and for payment of salaries and related service delivery initiatives in future.[6] Mafube Municipality's affidavit is mum on exactly how much is needed for specific expenditure or what exactly is earmarked. It rather relies on an umbrella protection.

[7] Mr Van der Berg SC, for the Fund, distinguished Renosterberg from the case before me. He submits that the Fund claims a statutory and not an ordinary debt, the MEC in Renosterberg did not seek an impermissible condonation of ongoing non-compliance with the Pension Funds Act[7] (PFA) or the MFMA. IGRFA differs from the PFA and MFMA legislation, and the resultant relief differed.

[8] I understood Mr Van den Berg to state that this Court does not, in the absence of facts underpinning the application of Rule 45A of the Uniform Rules of Court, have a general equitable discretion to stay execution. He relies on Firm Mortgage Solutions (Pty) Ltd and Another v ABSA Bank Ltd and Another[8] where it was held that where the *causa* for the execution is a judgment and the judgment is placed in dispute, and an application for rescission has been brought, grounds may exist for the exercise of a favourable discretion by a court.

[9] Binns-Ward J, in Stoffberg N.O and Another v Capital Harvest (Pty) Ltd[9]was of the view that the principles in Firm Mortgage Solutions have to be seen within a factual context and a stay of execution is not to be had on flimsy grounds, merely to accommodate an alternative payment plan that the judgment debtor might be able to offer. The court held that the remedy is not just for the asking.

II IN LIMINE – NON JOINDER

[6] Renosterberg *supra*, para [46] – [47]

[7] 34 of 1956

[8] (11126/2013) [2013] ZAWCHC 135; 2014 (1) SA 168 (WCC) (18 July 2013)

[9] (2130/2021) [2021] ZAWCHC 37 (2 March 2021)

[10] The Fund asserts that the individual contributors to the Fund were not joined. Mr Van der Berg referred to City of Johannesburg and Others v South African Local Authorities Pension Fund and Others[10] in support of his submission that the affected contributors have a legal interest in the non-payment of the deductions. Mr Louw, for the municipality, argues that the Fund represents the contributors and joinder is not necessary.

[11] I am of the view that the matter before me is distinguishable from City of Johannesburg and that non-joiner will not affect their legal rights adversely. The Court held:

> *"[8] Uncertainty as to the effect of the order also arises from the general nature of the order itself. Although the content of the order is rather verbose and wordy, it declares in essence that the employers' decision to withdraw from SALA is set aside as 'unlawful and invalid' and 'of no force and effect'. But its impact on the rights and obligations of SALA, the employers, the employee-members and eJoburg, inter se is left obscure. ... But what about the employees? Are they also liable to pay their arrear contributions despite the fact that they have in the meantime paid their contributions to eJoburg? And what is the position of eJoburg? Is it bound to repay any of the contributions received from the employers and/or the employee-members? These obscurities, incidentally, underscores the caveat expressed in Oudekraal Estates (Pty) Ltd v City of Cape Town & others 2004 (6) SA 222 (SCA) para 45, that it is generally inappropriate for a court to make declarations in a vacuum. But more pertinent for present purposes is the prospect that the order could potentially have an even more prejudicial effect on the rights and interests of the terminating members than a first glance would seem to indicate.*

[10] (20045/2014) [2015] ZASCA 4; (2015) 36 ILJ 1439 (SCA) (9 March 2015)

> *[9] … A test often employed to determine whether a particular interest of a third party is the one or the other, is to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against that party, entitling him or her to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the order made in the first place (…).*

[12] In the matter before me the contributors' rights are established. They are only financially affected as payment is not made. They are not necessary parties and their prejudice will be exacerbated by postponing the matter for joinder.

III THE PARTIES

[13] The Fund is a registered retirement fund in terms of Section 4 of the PFA. Its object is to provide retirement and ancillary benefits for members and their dependents and/or beneficiaries. Sections 7C and 7D of the PFA obliges it to take all reasonable steps to ensure that contributions are timeously paid. Non-payment of contributions is a statutory offence that can attract criminal penalties of up to R10 million and/or ten (10) years' imprisonment. [11]

[14] Contributions shall be deducted from salaries or wages within seven days of the end of each month and paid to the Fund. The benefits that contributories to the Fund enjoy include normal retirement, voluntary early retirement, ill-heath early retirement, late retirement, death in service, total and permanent disability, as well as a withdrawal benefit.

[15] Section 13A of the PFA provides that every person in accordance with whose directions or instructions the governing body or structure of the employer act, or who controls or who is regularly involved in the management of the employer's overall financial affairs, shall be personally liable for compliance with this section and for the payment of any contributions. This person is the

[11] Section 37 of the PFA

Municipal Manager as accounting officer who is, *inter alia*, responsible to exercise his functions, fiduciary responsibilities and powers assigned to him with fidelity, honesty, integrity.[12]

[16] The Municipal Manager is, *inter alia*, prohibited from *incurring* unauthorised expenditure. The MFMA defines this as any expenditure *incurred* by a municipality otherwise than in accordance with section 15 or 11(3), and includes expenditure of money appropriated for a specific purpose, otherwise than for that specific purpose, and spending of an allocation referred to in paragraph (b), (c) or (d) of the definition of "allocation" otherwise than in accordance with any conditions of the allocation.

[17] The MFMA defines "allocation" as *inter alia* a municipality's share of the local government's equitable share referred to in section 214(1)(a) of the Constitution of the Republic of South Africa[13]; an allocation in terms of section 214(1)(c) of the Constitution; an allocation in terms of a provincial budget; or any other allocation by an organ of state, otherwise than in compliance with a commercial or other business transaction.

[18] The Municipality may thus not use the monies for unauthorised purposes. I cannot find any provision that protects it against attachment. The statutory matrix, the responsibilities of the Municipal Manager and the Municipality's indebtedness to the Fund is not in dispute.

IV THE HISTORY OF LITIGATION BETWEEN MAFUBE AND THE FUND

[19] To appreciate the continued defiance of the Municipality towards complying with its statutory obligations towards the pensioners, their dependents and beneficiaries, extracts from a few litigious skirmishes between the Fund and the Municipality are necessary.

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[12] Sections 60 and 61 of the MFMA

[13] 108 of 1996

[20] During 2011, the Fund launched an application against the Municipality as it failed to comply with the statutory obligation of making payment of the pension deductions. Judgement was granted in 2015. The Municipality eventually, after many years' delay, made partial payment.

[21] In October 2016, the Municipality brought an application to interdict the Fund from executing the unpaid portion of a 2015 judgment debt.[14] It sought the Court's intervention to impose a structural interdict and a payment plan in respect of the 2015 judgment debt. It was the Fund's case that a proposed payment plan would breach the Municipality's legal obligations as it sought sanction for its unlawful activities in failing to make payment. Motimele, AJ dismissed that application on 6 April 2017. The Municipality was ordered to pay the cost of two counsel on attorney and client scale.

[22] The Court, *inter alia,* found that the seriousness of the Municipality's default was compounded by the importance of the State honouring its debts and Court orders, the extraordinary statutory nature of pension contributions and the Municipality's history of non-payment. Relevant to this application before me is the following remark by Motimele, AJ, already in 2017:

> "*[21] Finally section 152 and 153 of the Municipal Management Act* [MFMA} *permits a municipality to apply for a temporary stay of the legal proceeding for a period not exceeding 90 days. The applicant has not sought to exhaust this remedy.*" [my emphasis]

[23] On 29 July 2019, the Fund issued another application against the Municipality seeking judgment for **R25 411 872.20** and an order against Absa Bank to disclose to what account the Municipality transferred **R39 939 000.00**. Absa

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[14] Reported in Mafube Local Municipality v South African Municipal Workers' Union National Provident Fund (4836/2016) [2017] ZAFSHC 244 (6 April 2017)

confirmed that it was transferred on 8 July 2019 into an FNB account.[15] The transfer took place surreptitiously whilst litigation was pending between the Municipality and the Fund.

[24] On 11 June 2021, the Fund brought an application for the unpaid contributions for the period between July 2015 to April 2021. On 9 September 2021, Molitsoane J, in Municipality Workers Retirement Fund v Mafube Local Municipality[16] ordered the Municipality to pay **R37 795 476.32** representing the capital amount until April 2021 with interest, and costs on attorney and client scale based on the Municipality's own contribution schedules.

[25] Molitsoane J found that: "*The answering affidavit of the Municipality does not raise any defence. It is replete with allegations of its own internal maladministration and mismanagement which have nothing to do with the Fund*".[17] The Court concluded:

> "*[10] The assertion by the Municipality of the alleged irregular promotions in its ranks does little to assist it in this case. ... The Municipality did not even pay the benefits of those employees it does not 'suspect' of being irregularly promoted. Common sense dictates that there exists the likelihood that a number of employees still occupy the same positions they occupied six years ago which begs the question why their contributions were not paid to the Fund. It is not in dispute that the Municipality made no payment whatsoever for the last six years. The prejudice to the employees, the former employees and their families is too ghastly to contemplate. No explanation is forthcoming as to why this is so. Even if I could find that there were people irregularly appointed to certain positions and enjoyed benefits they did not deserve, that can hardly excuse the Municipality as a participating employer in terms of the PFA to perform its statutory*

[15] Pleadings, p, 233

[16] 2672/2021) [2021] ZAFSHC 342 (9 September 2021)

[17] At para [8]

<u>obligations of paying its contributions and those of its employees to the Fund</u>." [my emphasis]

[26] Nothing has since changed. The Municipality did not pay, nor did it bring an application in terms of section 153 of the MFMA. On 1 October 2021, after the Fund gave instructions to the Sheriff to execute the judgment debt, the Municipality filed a notice for leave to appeal. That application was dismissed by Molitsoane J[18] on 3 December 2021, again with costs. He remarked:

> "*[10] The assertion that this court failed to appreciate the applicant's responsibility as a public entity to ensure that it does not make payments that are irregular by asking time to debate the amounts owed is misconceived. <u>Over a period of six years were the amounts outstanding</u>. The applicant does not dispute its indebtedness to the respondent. The indebtedness of the applicant is calculated from the schedules it furnishes to the respondent. <u>The applicant does not seem to appreciate the obligations of the respondent towards its members. It is not only about the applicant. This ground of appeal has no merit</u>.* [my emphasis]

[27] The Municipality now repeats its delaying tactics as it did before 2017 and since 2021. The Municipal Manager now states that Provincial Government intervention came about as a result of a judgment by Van Rhyn, AJ (as she then was) in <u>Mafube Business Forum and Another v Mafube Local Municipality and Others</u>[19].

[28] He states that part of the orders granted by Van Rhyn AJ, was that the Provincial Government is to implement a recovery plan to enable the

[18] Mafube Local Municipality v Municipal Workers Retirement Fund (2672/2021) [2021] ZAFSHC 311 (3 December 2021)

[19] (1969/2021) [2022] ZAFSHC 86 (28 April 2022)

Municipality to meet its obligations. He then states that the judgment makes mention of the various factors contributing to the Municipality's financial crisis, that the same factors still exist, and that "*the financial recovery plan has not yet been implemented*". The present application is issued close to 5 years after Motimele, AJ's judgment wherein reference was made to section 153, close to two years after Molitsoane's judgment, and nearly a year after Van Rhyn AJ's judgment.

[29] Van Rhyn AJ's judgment notes that the Standing Committee on Public Accounts ("SCOPA") summoned the Municipality and its Administrator at the time, to a meeting on 17 September 2019 regarding the dire situation at the Municipality. The issues raised during the meeting were, *inter alia,* the Auditor General's repeated adverse findings regarding the Municipality's financial situation since 2014. The then Municipal Manager and the Administrator failed to attend several meetings of SCOPA.[20]

[30] It was noted that the Municipality made payments to the then Administrator notwithstanding that no services were rendered and also transferred an amount of "R40 million" (the **R39 939 000.00**) from an ABSA bank account to FNB without providing reasonable explanation for the transfer.[21] The Court noted that a decision by the Provincial Executive for a mandatory intervention in terms of Section 139(4) and (5) of the Constitution is indicated.[22]

[31] The MEC for Finance for the Free State was responsible for approving the financial recovery plan, but despite requests the Municipal Financial Recovery Service (MFRS) did not receive progress reports from the Municipality, its Administrator(s) or the Provincial Executive on the implementation of the recovery plan.[23]

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20 Mafube Business Forum *supra*, para [25]

21 Ibid para [30]

22 Ibid para [31]

23 Ibid para [32]

[32] In December 2020, the Free State Government resolved to terminate the Section 139(1)(b) intervention with effect from 30 March 2021 but continued post-intervention support. The Minister of Finance conceded that the Municipality and the Administrators failed to implement the financial recovery plan.

[33] Before Van Rhyn AJ, it was argued that it would be unconstitutional to make an order against the newly elected municipal council, which was elected by the electorate in November 2021. It was argued that the new municipal council must be given an opportunity to deal with the problems which they inherited.[24] This is approximately 18 months before issuing of this application before me.

[34] Van Rhyn, AJ made the following declarator:

> "*1.5 The jurisdictional facts for mandatory National intervention in the affairs of Mafube Local Municipality in terms of s 139(7) of the Constitution, as read with s139, s140 and s150 of the LGMFMA* [MFMA] *<u>are now present and have consistently been present in the past</u> as a result of the failure of the First to Fifth and Sixteenth Respondents, as well as the Sixth to Tenth Respondents, to ensure that the First Respondent* [the Municipality] *meets its constitutional obligations.*" [my emphasis]

[35] She made the following orders:

> "2. *In terms of the provisions of s139(4) and (5) of the Constitution, read with the aforementioned provisions of the LGMFMA, Sixth to Tenth Respondents ("the Provincial Respondents") are directed*

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24 Ibid para [58]

forthwith to undertake a mandatory provincial intervention into the affairs of the First Respondent by exercising the powers conferred by section 139(4) and (5) of the Constitution, as read with sections 139, 140 and 146 to 149 of the LGMFMA. The Sixth to Tenth Respondents are specifically directed:

2.1 to approve a temporary budget or revenue-raising measures or any other measures intended to give effect to the Financial Recovery Plan detailed in paragraph 2.2 below, to provide for the continued functionality of the Municipality.

2.2 to implement a recovery plan aimed at securing the Municipality's ability to meet its obligations to provide basic services and to meet its financial commitments, having due regard to the existence and the terms of the Financial Recovery Plan already developed for Mafube Municipality (the plan is attached to the Founding Affidavit as Annexure "JJS26").

2.3 …."[25]

V PROVINCIAL GOVERNMENT INTERVENTION

[36] The Municipality states it is presently under administration in terms of compulsory intervention by the Provincial Government. A Notice to this effect was published in the Government Gazette on 9 September 2022[26]. Under the caretaker provisions, Mr Mkaza was appointed as the Lead Provincial Exco representative from **1 June 2022** to **31 May 2024**.

[37] A copy of the publication was attached to the founding affidavit.[27] In terms of the Notice, Mr Mkaza has to exercise and perform *inter alia* the following

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[25] Ibid para [92]

[26] Provincial Gazette. Provincial Notice 79 of 2022, 9 September 2022, p. 5

[27] Pleadings, p. 29

powers and functions: he and the Intervention Support Team will have unrestricted access to the municipal manager and all the senior managers reporting to him; he must exercise oversight over the implementation of Municipal Finance Systems, Policies and Procedures; he must ensure and report on the implementation of the Financial Recovery Plan (FRP) targets, including: submitting a revised financial recovery plan to the municipal council for inputs and consideration and to the MEC for finance for approval; ensuring the adoption and implementation of the funding plan supporting the unfunded budget of 2022/2023; ensuring that funded budgets are prepared for the 2023/2024 financial year; ensuring that conditional grants are ring-fenced and are used for the intended purpose; ensuring management of creditors including prioritization of payments for critical services, assessment of contractual obligations of the Municipality, negotiations for contractual payments and scope with service providers; implementing prevention and reduction of unauthorized, irregular, fruitless and wasteful expenditure; and the intervention support team must manage the intervention on behalf of the Province/Cabinet, and ensure that the specified executive obligations which the Municipality is failing to fulfil are fulfilled and must ensure that the financial recovery plan is implemented.

[38] Mr Mkaza had to issue directives and instructions to the Municipal Manager and relevant staff *to implement the financial recovery plan*, *submit monthly progress reports* to the MEC for Finance/Provincial Exco/Municipal Council and the Minister for Finance, *prepare quarterly financial recovery plan reports* on impact achieved against said indicators, *maintain a record of decisions of financial recovery plan implementation*, and *assist in the preparation and implementation of the financial recovery plan*. Not a single document that even purports to be a directive, instruction, plan, report or decision was appended to the papers before me.

[39] The Municipal Manager states that Mr Mkaza "*manages the process, and he has confirmed that it will still take some time before the Recovery Plan is implemented*". [my emphasis]

[40] The Municipal Manger continues to state that "*Mr Mkaza confirms that he intends to bring an application for relief in terms of section 153 of the MFMA, but this will take a month or two*". This section provides that a municipality may apply to the High Court for an order to stay, for a period not exceeding 90 days at a time, all legal proceedings, including the execution of legal process, by persons claiming money from the municipality and the Court may make an order in terms of subsection (1) only if the provincial executive has intervened in terms of section 139 and a financial recovery plan to restore the municipality to financial health *has been approved* for the municipality. On the papers before me, and which is confirmed by the Municipal Manger and Mr Mkaza, neither the Municipality, Mr Mkaza or the Provincial Government executed their obligations and they can therefore not utilize section 153 as there is no plan. If there was any plan available, they could have brought the section 153 application.

[41] On 19 April 2023, the Municipality's attorneys filed a Supplementary Affidavit. The Municipal Manager states that: "*Since I deposed to the founding affidavit* [10 March 2023] *the Municipal Financial Recovery Service has started a process to prepare a Financial Recovery Plain as contemplated in section 141(2)*".

[42] The Municipal Manager, rather audaciously, states that the Municipality seeks to address "*a wrong committed, … namely a writ of execution for attachment of movable assets and subsequent attachment*" by Fund. There is nothing in the papers of any wrong committed by the Fund. The only wrong, objectively established and perpetuated since 2015, is the Municipality's failure to comply with legislation and to pay.

[43] He likens the attachment of the bank accounts *to undue preference of creditors in liquidation proceedings*. This analogy is misplaced.

[44] Van Rhyn, AJ, in April 2022, made an order for implementation of a plan. Complaining now of a cumbersome process that cannot be implemented on an urgent basis, flies in the face of the long period that has expired from the date of that judgment to the date on which this application was launched.

[45] History has taught that the Municipality tramples on the rights of contributories to the Fund and who will rely on their pension's growth when they retire or may have to rely on earlier. The words of Molitsoane J, that what the Municipality is doing is too ghastly to contemplate, remain shuddering

VI THE PENSIONERS' PREJUDICE

[46] The Fund cannot invest what is owed and cannot improve the benefits to match the devaluation of money over time.

[47] This was considered in <u>Municipal Workers Retirement Fund v South African Local Government Bargaining Council and Others and Other Related Matters</u>[28]:

> *"S 12(3) of the PFA provides that in considering whether any proposed amendment 'may affect the financial condition' of a fund, it is necessary to submit a certificate or statement of 'financial soundness' to the Registrar. In issuing such a certificate or making such a statement, the valuator – usually an actuary, or the fund must consider several factors. These include:*
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> > *"The value of accrued benefits, particularly in retirement funds and life insurance instruments, is determined with reference to actuarial liabilities. In calculating these liabilities, the actuary is guided by several assumptions. These relate to <u>economic assumptions</u>, which refer to the* ***<u>investment income likely to be</u>***

[28] (2905/2022; 4580/2022; 30396/2022;) [2023] ZAGPPHC 98 (20 February 2023)

earned, *future rates of inflation or salary growth*, *future tax rates and changes in the regulatory environment*. *Demographic assumptions also have to be made, factoring in elements such as rates of mortality, disability and* ***emigration from the scheme***. *Various factors, such as the impact of medical advances and HIV/AIDS have to be considered. Assumptions as to the rates of accrual, that is the rates at which occupational benefits accrue, must also be made. Finally,* ***surpluses and shortfalls are also the subjects of assumptions****.(my emphasis).*" [additional emphasis added]

VII NO CLEAR RIGHT

[48] The Municipality has for years been aware of mechanisms available to address its challenges. Mr Mkaza was apparently appointed to assist in the exercise of its obligations, to render support services and to pay creditors.. This application is not the correct approach. The jurisdictional requirements for reliance on section 153 have not been met. Section 151 of the MFMA provides that nothing limits or affects the rights of any creditor or other person having a claim against a municipality or any person's access to ordinary legal process in accordance with the common law and relevant legislation. The Fund exercises a statutory right to collect contributions and the Municipality continues to commit an offence. It has no *prima facie* or clear right.

VIII NO WELL-FOUNDED APPREHENSION OF HARM

[49] No financial information was placed before me. The Fund avers that the Municipality's own records show that it had a surplus of R124 million in the 2021/2022 financial year.[29] This was not denied in the replying affidavit. The

[29] Pleadings, p. 129, para 52.1

Fund referred to a public website[30] where it is shown that the Municipality had a surplus of R124 898 000.00 in the 2021/2022 financial year. The replying affidavit was a general repetition of remarks by Van Rhyn AJ as well as a repetition of the steps in the preparation of the Financial Recovery Plan, of which nothing was disclosed. It leaves more questions than provide answers. I can only conclude that the Municipality had no pertinent defence to those allegations in the answering affidavit of the Fund that it failed to address.

[50] What is indisputable is that the Municipality is harming its own employees and continues to do so by unlawful use of their monies. It deals with the monies of the employees as if they are its bank. It has not since 2021, and still does not, make a cents worth of payment.

IX NO BALANCE OF CONVENIENCE

[51] As it seeks final relief (release of the monies to enable it to spend it), it cannot rely on a balance of convenience. Even if it did, trampling on other's rights can hardly have been justified as inconvenient to it.

X ALTERNATIVE REMEDY

[52] Its alternative remedy has been available since as early as 1 July 2005 when the MFMA was enacted. It was reminded of it by Motimele AJ in 2017, and again in April 2022 by Van Rhyn AJ. The outcome of this matter does not close its door to exploit the alternative remedy in section 153.

[53] The Municipality failed to show how much exactly is *protected*. On 8 July 2019, the Municipality, whilst in litigation about monies due to the Fund, surreptitiously transferred **R39 939 000.00** from its Absa account to an FNB account.

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[30] https://municipalities.co.za/financial/1039/mafube-local-municipality

[54] In my view, the Municipality had many opportunities of substantial redress since 2005 when it started experiencing challenges.

[55] Municipal Managers are appointed for their assumed professed knowledge and expertise and Administrators presumably as well. Fact is that neither this Municipal Manager, the previous municipal managers, Mr Mkaza, or the Provincial Executive have shown any urgency or resolve.

[56] I can place no reliance on any assurances of the Municipal Manger or Mr Mkaza, who is incidentally the Province's agent. They, together, fulfil the duties of accounting officer and the high watermark of their activity is this *urgent* application for which the taxpayers have already paid more than their share.

[57] In failing to pay, the Municipality, through the Municipal Manger, is committing a criminal offence and it has to stop. The Municipal Manager has to be called to account for the Municipality's unlawful conduct.

[58] Can the word of the Municipality be trusted when it says that all the monies in the FNB account is protected. Clearly not. History showed how it surreptitiously transferred **R39 939 000.00** between accounts.

XI ALTERNATIVE DISPUTE RESOLUTION

[59] I could, notwithstanding a comprehensive search, not find any provision in legislation or elsewhere that limits execution, whether in primary or secondary accounts.

[60] In view of the enormous legal cost incurred by the Municipality over the years on litigation, wherein it had no and still does not have a defence, the parties would be well-advised to employ the alternative dispute resolution mechanisms provided for in section 151 of the MFMA, read with Rule 41A of the Uniform Rules of this Court.

XII REFERRAL TO THE NDPP

[61] The Municipality fails to pay pension fund deductions of employees to the Fund as regulated by section 13A of the Pension Funds Act, 24 of 1956..

[62] In terms of section 37 of the Pension Funds Act this constitutes a criminal offence.

[63] The Registrar is directed to bring this judgement to the attention of the National Director of Public Prosecutions for consideration of instituting criminal proceedings against the Municipality for breach of the Pension Funds Act.

XIII COSTS

[64] I believe that the time may have arrived that functionaries should be called upon to show cause why they should not be ordered to pay costs *de bonis propriis* in litigation over this indisputable claim. I was not asked to make such an order in this application.

[65] I believe that a punitive cost order on this occasion would only cause the inhabitants further hardship. It is with reluctance that I order costs on party and party scale.

ORDER:

[66] The following orders are made.

1. The Application is dismissed.

2. The Applicant pays the costs of the application, including the costs attendant on employment of one Senior Counsel and one Junior Counsel, on party and party scale.

3. The costs include the travelling and accommodation costs of two counsel and the instructing attorney.

4. The Registrar is directed to bring this judgement to the attention of the National Director of Public Prosecutions for consideration of instituting criminal proceedings against the Municipality in respect of its breach of section 13A read with section 37 of the Pension Funds Act, 24 of 1956.

[redacted]

P R CRONJÉ, AJ

On behalf of the Applicants: Adv M Louw
Instructed by:
Peyper Attorneys
BLOEMFONTEIN

On behalf of the Respondents: Adv. P Van der Berg SC
Adv. H Drake
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