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 number: 4353/2023

In the matter between:

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Applicant
and	
IZIZWEZIDIBENE LAWRANCE SPRINGKAAN	1st Defendant
MANTOA YVONNE MAHLOKO	2nd Defendant
GLORIA CONSTANS SMITH	3rd Defendant
TIISETSO MANUEL MAHLATSI	4th Defendant
MUNICIPAL WORKERS RETIREMENT FUND	1st Respondent
NATIONAL FUND FOR MUNICIPAL WORKERS	2nd Respondent

CORAM: LOUBSER, J

HEARD ON: 26 OCTOBER 2023

JUDGEMENT BY: LOUBSER, J

DELIVERED ON: 2 NOVEMBER 2023

[1] This is the return date of a *rule nisi* issued by Daffue, ADJP in terms of section 26 of the Prevention of Organised Crime Act (POCA)[1]. In terms of the rule, the defendants, the respondents or any interested persons were called upon to show cause on the return day why the provisional order made by the court with immediate effect should not be confirmed pending the outcome of the trial of the defendants on the relevant charges, and pending the outcome of any

[1] **Act 121 of 1998, as amended**

proceedings for a confiscation and/or a forfeiture order that may follow on the trial.

[2] Having been duly served with the rule, the 1st, 2nd and 3rd defendants as well as the 2nd respondent are not opposing the confirmation of the rule. Service of the rule on the 4th defendant has not yet been effected. It is only the 1st Respondent who is opposing the confirmation of the rule. It has filed an answering affidavit to this effect. In this affidavit, the 1st Respondent mentions that it does not want to get involved in the criminal prosecutions or the issues between the applicant and the defendants, but that it is constrained to opposed the application as the final order sought by the applicant would be unlawful and contrary to the provisions of the Pension Funds Act (PFA)[2]. In this respect the 1st respondent obviously relies on, *inter alia*, its duty to take all reasonable steps to ensure that the interests of members and the provisions of the PFA are protected at all times[3].

[3] The provisional order made by the court reads as follows:

"1. Pending further order of this court, and in terms of section 26 of the POCA, the following provisional order is hereby issued with immediate effect:

2. This order relates to realisable property as defined in sections 12 and 14 of the POCA and extends to:

2.1 An amount of R146 153.08 of the pension benefits of the First Defendant, held by the First Respondent under membership number 002[…] and reference number 150[…].

2.2 An amount of R125 865.17 of the pension benefits of the Second Defendant, held by the First Respondent under membership number 0[…]6 and reference number 120[…].

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[2] **Act 24 of 1956**

[3] **Section 7C(2)(a) of the PFA**

2.3 An amount of R164 977.91 of the pension benefits of the Third Defendant, held by the Second Respondent under membership numbers 518[…] and 516[…].

2.4 An amount of R924 702.97 of the pension benefits of the Fourth Defendant, held by the First Respondent under membership number 001[…] and reference number 510[…].

2.5 Any other realisable property of the Defendants held by or on behalf of the Defendants by any other person excluding necessities."

[4] The facts that gave rise to the provisional order are not in dispute. They concern the unlawful promotions of the defendants into various positions within the Matjhabeng municipality. It is alleged by the applicant that these promotions took place within a scheme by the defendants and one Makofane, who purported to be the acting municipal manager, and who effected the promotions and ensured that the necessary salary adjustments were made for the new positions to which the defendants were unlawfully promoted.

[5] The unlawfully promotions of each of the defendants meant that each defendant earned a higher salary, and the higher salary came with a higher employer and employee contribution towards the pension fund. The pension benefits obtained by each defendant in this manner can therefore be directly traced back to the unlawful promotions, the applicant alleges.

[6] It needs mentioning here that the trial of the defendants is still pending, and they have not been convicted on the charges relevant to the alleged facts. All of the defendants are still in the employment of the said municipality.

[7] The provisional order was made in terms of section 26 of POCA. This section provides that the National Director may by way of an ex parte application apply to a competent High Court for an order prohibiting any person from dealing in any manner with any property to which the order relates. Such an order is

referred to as a restraint order.[4] The section further provides that a restraint order may be made in respect of such realisable property as may be specified in the restraint order and which is held by the person against whom the restraint order is made. Such an order may also be made in respect of all realisable property held by such person, whether it is specified in the restraint order or not. It may further be made in respect of all property which, if it is transferred to such person after the making of the restraint order, would be realisable property.

[8] At the hearing of this matter for either a confirmation or a discharge of the *rule nisi,* I was referred by counsel appearing for the 1st respondent to the decision of the Supreme Court of Appeal in **Sentinel Retirement Fund v Masoanganye**[5]. In this decision it was held that a member's pension benefit cannot be the subject of a restraint order in terms of section 26 of POCA. The Court based its conclusion in this regard on two grounds:

[9] Firstly, it referred to section 37A(1) of the PFA, which provides that no benefit provided for in the rules of a registered fund, or the right to such benefit, shall be liable to be attached or subjected to any form of execution under a judgement or order of a court of law. In this respect the Court found that a restraint order in terms of section 26 of POCA constitutes both an attachment and a form of execution under an order of a court of law within the meaning of section 37A of the PFA. The Court referred with approval to the judgement in **Van Heerden and Another v Director of Public Prosecutions and another**[6] where it was found that, if by virtue of section 37A(1), a pension benefit cannot be realised in satisfaction of a confiscation order, it would appear to follow that it cannot be restrained in terms of section 26 of POCA.

[10] Secondly, the Court pointed out that section 14(1)(a) of POCA provides that "any property held by the defendant concerned" shall be realisable property for the purposes of a restraint order. The Court held that a member's benefit belongs to the fund as long as it is in the hands of the fund, and not to the

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[4] **Section 12(1) of POCA**
[5] **[2018] ZASCA 126**
[6] **[2015] ZAWCHC 96**

member. This is so by virtue of section 5(1)(b) of the PFA, which provides that all the assets, rights, liabilities and obligations of a fund are deemed to belong to the fund. The pension benefit is thus not property held by the defendant.[7]

[11] On behalf of the Applicant it was submitted, *inter alia*, that the Sentinel judgement is distinguishable from the present matter on the facts. Although this is true, different facts do not make different law, because the legal principles remain the same. It was further submitted on behalf of the Applicant that the Sentinel judgement did not refer or take into account the provisions of section 37D of the PFA. Here counsel for the Applicant specifically had section 37D(1)(b)(ii) in mind, that provides that a fund may deduct any amount due by a member to his employer in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member.

[12] This submission of the Applicant's counsel is not correct. In the judgement reference is in fact made to section 37D on more than one occasion, and it therefore cannot be said that the learned Judges of Appeal were not mindful of the provisions of the section. Counsel for the Applicant also advanced the submission that the pension funds will eventually be transferred to the Defendants, and then it will be realisable. In this respect the Applicant is only seeking attachment or restraint for the time being, and not execution, it was contended.

[13] Now whatever one can make of all the submissions made on behalf of the Applicant, it is not for this Court to decide whether the Supreme Court of Appeal was correct in holding that a member's pension benefit cannot be the subject of a restraint order in terms of section 26 of POCA. This is so, because this Court is bound by the decisions of the Supreme Court of Appeal, and that is the end of the matter for the Applicant. It follows that the provisional restraint order in 2, 2.1, 2.2, 2.3 and 2.4 of the *rule nisi* stand to be discharged. As for the costs, there is no reason why costs should not follow the result. The 1st Respondent, as indicated herein before, was the only party opposing the confirmation of the *rule nisi*.

[7] **Par 13 and 14 of the judgement**

[14] Furthermore, no reasons were advanced why 2.5 of the provisional order should be discharged, and the confirmation thereof remains unopposed. The *rule nisi* has not yet been served on the 4th Defendant, with the result that the rule will be extended to another date in his case and as far as it remains applicable to him.

[15] The following order is made:

1. The provisional restraint order in paragraphs 2, 2.1, 2.2, 2.3 and 2.4 of the *rule nisi* is discharged with costs, which costs relate to the costs incurred by the 1st Respondent in opposing the confirmation of the rule.

2. The provisional restraint order in paragraph 2.5 of the *rule nisi* is confirmed, with no order as to costs as far as the 1st, 2nd and 3rd Defendants are concerned.

3. The *rule nisi* is extended to 8 February 2024 for service of the rule nisi, the founding affidavit and this judgement on the 4th Defendant.

4. The proceedings for the confirmation or discharge of 2.5 of the *rule nisi* in relation to the 4th Defendant is consequently postponed to 8 February 2024.

P. J. LOUBSER, J

For the applicant:	Adv. S. Khumalo
Instructed by:	The State Attorneys
	Bloemfontein
For the 1st respondents:	Adv. P. van der Berg SC
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