

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case No: 11458/2015

In the matter between:

THE MUNICIPAL WORKERS RETIREMENT FUND

APPLICANT

and

UMZIMKHULU LOCAL MUNICIPALITY

FIRST RESPONDENT

T NGCEMU

SECOND RESPONDENT

**S CHIYA
RESPONDENT**

THIRD

**T M MADLALA
RESPONDENT**

FOURTH

**T SONDZABA
RESPONDENT**

FIFTH

**A MKHIZE
RESPONDENT**

SIXTH

**N S MHLAWULI
RESPONDENT**

SEVENTH

**H B MBOTHO
RESPONDENT**

EIGHT

ORDER

1. The first respondent is ordered to pay to the applicant the amount of R2 239 991.34
2. The first respondent is ordered to pay interest on the amount of R2 239 991.34 calculated at the rate prescribed in section 13A(7) of the Pension Funds Act, 24 of 1956 from 31 October 2021 to date of final payment.
3. The first respondent is ordered to pay the costs of the application.

JUDGMENT

Delivered on:

Mngadi J

[1] The applicant is the Municipal Workers Retirement Fund (the fund) a pension fund organisation registered as such in terms of section 4 of the Pension Funds Act 24 of 1956 (the PFA).

[2] The first respondent is UMzikhulu Municipality (the municipality) a duly constituted Municipality in terms of section 2 of the Local Government Municipal Systems Act 32 of 2000. The second respondent is T J Ngcemu the Chief Financial Officer of the first respondent . The third respondent is S Chiya an adult municipal worker employed by the first respondent. The fourth respondent is TM Bandala an adult municipal worker employed by the first respondent. The fifth respondent is TM Sondzaba an adult municipal worker employed by the first respondent. The sixth respondent is A Mkhize an adult municipal worker employed by the first respondent.

The seventh respondent is NS Mhlawuli an adult municipal worker employed by the first respondent. The eight respondent is HB Mbotho an adult municipal worker employed by the first respondent.

[3] The applicant seeks an order as follows:

- 1. That the first respondent is ordered to pay the applicant the amount of R2 239 991.34**
- 2. The first respondent is ordered to pay interest on the amount of R2 239 991.34 calculated at the rate prescribed in section 13A(7) of the Pension Funds Act 34 of 1956 from 31 October 2021 to date of payment.**
- 3. The first respondent is ordered to pay costs of the application on attorney and client scale.**

The first and second respondents oppose the application. The other respondents have not taken part in the litigation and no relief is sought against them.

[4] The Fund is a pension fund and a number of its members are employees of the municipality. The business of the fund is to collect contributions payable every month in respect of its members from the participating employers and to invest them in accordance with the registered rules of the Fund until such time that the members leave the service of the employer and a benefit is payable to them in terms of the registered rules of the fund.

[5] The Municipality is a participating employer and an employer in terms of the rules of the Fund. The Municipality is also an employer within the meaning of that phrase in section 13A of the PFA read with the definition of employer in section 1 of the PFA.

[6] The Municipality failed to comply with the provisions of section 13 A(1) and (2) of the PFA in not delivering to the applicant prescribed information and, further, by

failing to make contributions as required in terms of the provisions of the rules of the applicant and the PFA from December 2013. The applicant then instituted an application to compel compliance by the Municipality of its statutory obligations, in particular, the furnishing of prescribed minimum information in respect of its members/employees. The Municipality resisted the application but the applicant succeeded in the litigation that followed, and obtained an order to be furnished with the required prescribed information and that on the same papers supplemented as it may be necessary, could seek an order for payment of arrear contributions and penalty interest. The order made by the Supreme Court of Appeal on 2 April 2019, the relevant part reads as follows;

‘The first respondent is directed to provide the applicant within thirty (30) days of this order with the prescribed initial and/or subsequent contribution statements prescribed by Regulation 33 of the Pension Funds Act 24 of 1956 in respect of the third to eight respondents.

2. The applicant is granted leave to supplement its papers for payment of any further arrear contributions after receipt of the above statements

[7] On 3 March 2022 the Municipality furnished the minimum required information which enabled the Fund to quantify the quantum of the arrear contributions up to March 2021. On 13 June 2022 the Fund advised the Municipality that the arrear pension contributions plus interest up to 31 October 2021 as on June 2022 amounted to R4 471 814.91. The Municipality paid to the Fund arrear contributions in the sum of R2 231 831.60

[8] The Municipality resisted payment of the balance. It contended that it was entitled to be furnished with particulars of the calculation of the balance. It argued that the Fund is required to prove its claim, it was not obliged to make payment without a detailed application of how the amount claimed is determined.

[9] The Municipality contended that interest owed is not owed in terms of s13A (7) of the PFA but had altered its nature becoming a debt that accrued interest at the prescribed rate of interest in terms of the Prescribed Rate of Interest Act and the

first respondent is entitled to a partial exemption from interest based on the delay by the applicant in computing the debt, and that whatever interest due is limited to the capital portion of the debt which is R2 231 823.60 by virtue of the *in duplum* rule.

[10] The applicant in reply, states that s13 (1) (2) of PFA imposes a duty on the participating employer to calculate and pay over to the Fund the pension contributions on a monthly basis and to furnish to the fund the prescribed information accompanying the contributions. The PFA prescribes the rate of interest and the *in duplum* rule, contends the applicant, has no application. In addition, the applicant referring to *F & I Advisors (Edms) Bpk Een 'n'Ander v Eerste Nasionale Bank van Suidelike Afrika* 1999(1) SA 515 (SCA) at 525E and *DA Cruz v Bernado* 2022 (2) SA 185 (GJ), argues that the first respondent did not raise as a defence the *in duplum* rule in the answering affidavit and that, in any case, the *in duplum* rule does not apply to interest on late pension contributions provided for in section 13A(7) of the PFA.

[11] The PFA imposes the obligation on the employer to calculate and pay over to the fund the prescribed contributions. The PFA and the regulations set out how the contributions are to be calculated and when are they due to be paid over to the Fund. Section 13 A(7) of the PFA provides:

‘(7) Interest at a rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable on-

(a) The amount of any contribution not transmitted into a funds bank account before the expiration of the period prescribed therefor by subsection (3)(a)(i);

(b) The amount of any contribution not received-

(i) by a fund before the expiration of the period prescribed therefor by subsection (3) (a) (ii) ; or

(ii) ...

[12] The first respondent contends that the effect of the Supreme Court of Appeal judgment was to alter the debt into a form to which interest payable in terms of the Prescribed Rate of Interest Act and not section 13A(7) of the PFA, it is limited to the capital portion of debt, to wit R2 231 823.60 by virtue of the *in duplum* rule. In addition, the first respondent contends that the applicant delayed in calculating the total amount due and should be deprived of part of the *mora* interest claimable in terms of s1(1) of the Prescribed Rate of Interest Act.

[13] The first respondent relies on *Da Cruz v Bernardo* 2020 (2) SA 185 (GJ) para 57, wherein it was held that where interest is calculated with reference to a rate stipulated in an agreement, whether the agreement is a loan agreement or another type of agreement, the interest which accrues on the debt cannot exceed the capital sum of the debt. It , further, refers to *Paulsen and Another v Slip Knot Investment 777 (Pty) Ltd* 2015 (3) SA 479 (CC) wherein the court held that *in duplum* rule is not suspended by litigation. In *DA Cruz v Bernado* at p186 it is stated: ‘The *in duplum* rule broadly speaking, provided that arrear interest ceased to accrue once the sum of the unpaid interest equalled the amount of the outstanding capital. The question in the present matter was whether the rule applied to liquidated debts-like the present- in respect of which there was no law or agreement governing the calculation of the rate of interest, but which instead, in terms of the common law, bore *mora* interest and accordingly fell within the purview of s1(1) of the Prescribed Rate of Interest Act 55 of 1975. The section provided that the type of debt in question attracted interest as calculated ‘at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run’ unless a court of law, on the ground of special circumstances relating to the debt, orders otherwise.’

[14] I am in agreement with the applicant that its claim for interest is statutorily regulated, it does not arise out of a contractual relationship. The statute imposes liability for the payment of interest , stipulates the a rate of interest applicable, and when it accues, therefore, it is not *mora* interest and it is not interest regulated by the provisions of the Prescribed Rate of Interest Act. The court in this matter has no

power to order otherwise as envisaged in the provisions of the Prescribed Rate of Interest Act.

[15] The interest the applicant claims is an interest prescribed by statute in the circumstances of the relationship between the applicant and the respondents. The parties cannot contract otherwise. Therefore, the interest is not claimed in terms of a term of a contract. The obligation to deduct and pay over pension contributions is regulated by the statute, the PFA which also imposes interest penalties on late paying over of contributions. The court order to pay over pension contributions is an order to comply with the provisions of the statute. It is not an order to pay damages or compensation. The Prescribed Rate of Interest Act provides:

‘(1) If a debt bears interest and the rate at which the interest is to be calculated is not governed by any other law or by an agreement or trade custom or in any other manner, such interest shall be calculated at the rate contemplated in subsection (2)(a) as at the time when such interest begins to run, unless a court of law, on the ground of special circumstances relating to the debt, orders otherwise’. Clearly, this provision explicitly exclude instances where liability to pay interest and the calculation of interest is statutorily governed.

[16] The first respondent contends that an obligation to pay contributions in terms of the statute for its employees in question was replaced by an obligation to pay a future judgment debt. The contention is based in that the order sought and granted by the Supreme Court of Appeal required that the first respondent furnished particulars which, once furnished, would enable the applicant to prove the amount of contributions to be paid to it and the interest due to it due to late payments of the contributions. However, it is claimed, the applicant refused and failed to set out in details how it calculated the pension contributions to be paid as well as interest. It is stated that, despite that the first respondent, having the benefit of the particulars furnished, it was able to satisfy itself that the amount claimed for unpaid contributions was correct. In my view, this contention holds no water. Firstly, the PFA imposes the obligation to calculate and pay over pension contributions on the first respondent. Secondly, on the information furnished by the first respondent, it was able to satisfy itself that the amount claimed for outstanding contributions is correct. Thirdly, if the

information available to first respondent was enough to satisfy itself that the amount claimed for outstanding contributions is correct, why based on the same information, was it not able to calculate interest due.

[17] The first respondent claims that a statutory obligation was converted to an obligation to pay a future judgment debt. There is no merit in this contention. The applicant exercised a power given to it by statute. It is a creature of statute with no other power other than powers granted to it by statute. It exercised its powers to force the first respondent to comply with its statutory obligations. It had no power to convert its statutory power to something else.

[18] The first respondent pointed out in the supplementary heads of argument that regulation 33 of the Pension Funds regulations has been repealed in its entirety and therefore, it is argued, plaintiff's claim framed in terms of regulation 33 falls to be dismissed. Government Notice, GN 2977 on 27 January 2023 provides:

1. The Minister of Finance has in terms of section 36 of the Pension Funds Act, 1956 (act No 24 of 1956) and with effect from 20 February 2023, repealed regulation 33 of the regulations published under Government Notice No. R98 of 26 January 1962, as amended. Regulation 33 is replaced with by Conduct Standard 1 of 2022 made under the Financial Sector Regulation Act 2017. Section 5 of the Conduct Standard 1 provides:

1. For purposes of section 13A(7) of the Act, compound interest on late payments or unpaid amounts –
 - (a) must be calculated from the first day following the expiration of the period in respect of which such amounts were payable until the date of receipt by the fund; and
 - (b) is prescribed to be the prime rate plus 2 percent.

(2) Interest referred to in sub paragraph (1) shall constitute investment income for the fund and must be payable to the fund by no later than the end

of the second month following the month in respect of which the amount is payable, or the amount it transferable, as the case may be.’ The respondent argues that the lower interest rate prescribed in section 5 of Conduct Standard 1 applies to the entirety of the debt because the provisions replace regulation 33 and that it provides for ‘calculation of interest from the first day following expiration of the period of which such amount were payable until the date of receipt by the fund.’

[19] Section 7 of the Schedule Conduct Standard 1 of 2022 provides that it comes into operation (a) six months (6) after the date of publication, or (b) on a later date as determined by the Authority by notice on its website. The repeal of regulation 33 is proposed since it is to be replaced by Conduct Standard 1 of 2022 and taking effect on 20 February 2023 as per Government Gazette No 47557 of 22 November 2022. In my view, it must be noted that the amendment takes effect on 20 February 2023. It provides for the calculation of interest from the first day following the expiration of the period in respect of which such amounts were payable. It does not apply in calculating interest from the first day following the expiration of the period in respect of which such amounts were payable which fell in the period before its commencement. In my view, there is no merit in the first respondent’s contention to the contrary.

[20] The applicant seeks costs on attorney and client scale. The grounds put forward by the applicant are that the first respondent has no *bona fide* defence, it has breached its duty to uphold the law, its breach is non-compliance with the law which constitutes a criminal offence, and it has caused prejudice to its members.

[21] In my view, the applicant for unknown reasons delayed in pursuing the claim against the first respondent. The delay resulted in penalty interest accruing. The opposition by the respondents is misguided but, in my view, it is not a reason to order the respondents to pay costs on a punitive scale.

[22] The application falls to be granted. It is ordered as follows:

1. The first respondent is ordered to pay to the applicant the amount of R2 239 991.34

2. The first respondent is ordered to pay interest on the amount of R2 239 991.34 calculated at the rate prescribed in section 13A(7) of the Pension Funds Act, 24 of 1956 from 31 October 2021 to date of payment.

3. The first respondent is ordered to pay the costs of the application.

Mngadi, J

APPEARANCES

Case Number : 11458/2015

For the Applicant : Pieter Van Der Berg SC

Instructed by : Mathew Francis Inc.
PIETERMARITZBURG

For First & Second Respondents : G D Van Niekerk SC

Instructed by : Shepstone & Wylie Attorneys
PIETERMARITZBURG

Date of Hearing : 17 July 2023

Date of Judgment : 10 August 2023