



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Appeal number: **A67/2019**
Case number (court a *quo*) **5596/2018**

In the Appeal between:

MUNICIPAL WORKERS RETIREMENT FUND

Appellant

and

KOPANONG LOCAL MUNICIPALITY

Respondent

CORAM: DAFFUE, J *et* REINDERS, J *et* POHL, AJ

HEARD ON: 16 SEPTEMBER 2019

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 19 SEPTEMBER 2019

INTRODUCTION:

- [1] This is an appeal to the full bench against the judgment of a single judge of this Division. Final orders were granted on 8 November 2018 and the court *a quo*'s reasons were provided on 10 January 2019. On 27 March 2019 leave was granted by the court *a quo* to appeal to the full bench.
- [2] Several legal disputes emanate from the judgment, but the dominant issue is whether the court *a quo* could have granted final orders not applied for in the notice of motion. The best result the successful applicant could have obtained was a temporary stay of execution pending final determination of the application on the return date, to wit 7 February 2019. More detail will be provided later in this judgment.

THE PARTIES

- [3] The unsuccessful respondent in the court *a quo* and appellant in this appeal is a pension fund registered in terms of s 4 of the Pension Fund Act¹, ("the PFA"). It was represented in the proceedings before us by Advv P van der Berg SC and H Drake. The appellant was incorrectly described in the court *a quo* and the incorrect citation remained in the papers before us. The appellant's name is the South African Municipal Workers' Union National Provident Fund.

¹ 24 of 1956

- [4] The respondent is a local municipality, established in terms of the Local Government: Structures Act.² It was represented by Adv AH Burger SC in the court *a quo* and by Advv Burger SC and DR Thompson before us.
- [5] I shall hereinafter refer to the appellant as “the Fund” and to the respondent as “the Municipality”.

MATERIAL BACKGROUND:

- [6] The Municipality is statutorily obliged to pay over to the Fund pension fund contributions in respect of its employees in accordance with the provisions of s 13A of the PFA. It has a history of failing to abide by the compulsory provisions of the PFA. In 2016 judgment was taken against it for an amount in excess of R2m.
- [7] It continued to disregard its statutory obligations, causing the Fund to obtain judgment by consent against it in October 2017 in the amount of R6 506 277.04. On 6 November 2017 the Fund caused a writ of execution to be issued by the registrar of this court against the Municipality. A whole host of movable assets of the Municipality were consequently attached. A sale of execution pursuant to the said attachment was arranged and scheduled for 8 November 2018. The intended sale in execution prompted an urgent application in the court *a quo* by the Municipality, seeking to stay the intended sale in execution pending finalization of the application. The court *a quo* ordered that the sale in execution by

² Act 117 of 1998

way of an auction, premised on the said writ of execution be “set aside”, as opposed to “stayed”. The court also went further and made a certain “payment plan”, which was proposed by the Municipality, an order of court. It is against the whole of this judgment and the orders made by the court *a quo* that the Fund appeals.

THE NOTICE OF MOTION:

[8] The Municipality approached the court *a quo* on 7 November 2018 on an urgent basis to stay a sale in execution advertised to take place the next day pending the final determination of the application. *Ex facie* the notice of motion just over 2 hours’ notice was given to the Fund’s Bloemfontein attorney who acts as a correspondent. I quote from the notice of motion and emphasize that no amendment was ever sought or granted:

- “1. Dispensing with the prescribed time limits, forms and service provided for in the Uniform Rules of this Honourable Court and allowing the matter to be heard as one of urgency under Rule 6(12);
 2. That the sale in execution scheduled for Thursday, 8 November 2018 at 10h00 by the Second Respondent, be stayed **pending** the final determination of this application;
 3. That a rule *nisi* be hereby issued calling upon the respondents to show cause on **Thursday, 7 February 2019** at **09h30**, why the following orders should **not be made final**:
- 3.1 That the sale in execution by way of an auction premised on a writ of execution issued on 6 November 2017 in pursuance of a

judgment granted by this Honourable Court on 19 October 2017, be hereby set aside.

- 3.2 That the payment plan proposed by the applicant to settle its indebtedness to the first respondent in terms of the court order dated 19 October 2017, referred to in paragraph 4.8 of the founding affidavit, is made an order of Court or, alternatively, such order with regard to a payment plan that this Honourable Court deems fit in the circumstances;
4. That prayer 2 above, shall serve and operate as an interim interdict against the respondents, pending the final determination of this application;
5. That the relief granted herein be served on the respondents in accordance with the Rules of Court;
6. That the applicant is granted leave to supplement its papers, if necessary;
7. The respondents to pay the costs of the application, only if unnecessarily opposed;
8. Further and/or alternative relief.” (emphasis added)

PROCEEDINGS IN COURT ON 7 NOVEMBER 2018

- [9] Adv Hefer who appeared for the Fund that day made it clear from the onset that the application papers were received by email that morning only and that there was no time to draft an answering affidavit. Leave was granted to him, as requested, to call the local attorney, Mr Gerdener, to place certain facts on record which he did without being cross-examined at all. He referred to the judgment obtained in 2017 by consent. It is common cause that

this judgment was for an amount in excess of R6.5m and that a writ of execution was issued on 6 November 2017, a year earlier. A sale in execution, advertised to be held in June 2018, was cancelled previously. Mr Gerdener also referred to an earlier judgment obtained in respect of the same cause of debt for about R2m under application 1148/2016. He emphasized the problematic payment history pertaining to the Municipality's pension fund contributions on behalf of employees. Mr Gerdener admitted that he received an offer to pay the debt in instalments which he rejected on 30 October 2018. The written offer dated 24 October 2018 – annexure H to the founding affidavit - is vague to the extreme in that the municipal manager stipulated "that a new payment proposal will be negotiated before the end of December 2019 for the outstanding capital amount."

[10] The arguments of counsel were not transcribed fully, but it is apparent that Mr Hefer argued that the application be dismissed insofar as the urgency was self-created. He did not deal with the payment plan, either the offer made before the application was issued referred to above, or the offer presented in the founding affidavit at all. It may be mentioned that the two offers differ completely but I deem it unnecessary to deal with that. Mr Hefer's argument on the availability of an alternative remedy was not transcribed. When he started to address the court in this regard a technical problem arose whereafter the court adjourned. No further recording is available.

[11] Mr Burger incorrectly, without any substance and contrary to established legal principles made the following submissions during

argument³: “**Today** they ask in this application that the court must make an order and that order is contained in paragraph 3.2 in the notice of motion.....” Again on the same topic we find the following a few lines further on: “...and that to be made an order of court **today**.” (emphasis added)

- [12] Contrary to his earlier submissions, Mr Burger eventually requested orders in terms of the notice of motion⁴. It is difficult to accept that counsel, let alone senior counsel, could simultaneously ask for (1) relief in terms of the notice of motion which clearly anticipates resolution of the main dispute on a future date (7 February 2019 in this case) and after the other party had an opportunity to show cause why the relief should not be granted on the one hand and (2) the granting of the very relief which is the subject of dispute and which the other party did not have any opportunity to deal with in an answering affidavit and without even asking for an appropriate amendment of the notice of motion on the other hand. There can be no doubt that Mr Burger’s reliance on the so-called payment plan influenced the court *a quo* to make the orders set out under the next heading.

THE ORDERS GRANTED:

- [13] The court *a quo* granted the following orders:

“1. That this application be heard as one of urgency as envisaged in the Uniform Rule 6(12);

³ Page 64 of the record

⁴ Page 67 of the record

2. The sale in execution by way of an auction premised on a writ of execution issued on 6 November 2017 in pursuance of a judgment granted by this court on 19 October 2017 is hereby set aside;
3. The payment plan proposed by the applicant to settle its indebtedness to the first respondent in terms of the court order dated 19 October 2017, as more fully set out in paragraph 4.8 of the applicant's founding affidavit, is hereby made an order of court;
4. It is ordered that the payments as envisaged in paragraph 3 above shall be made on or before the 7th of each month;
5. Should the applicant default on any payment, then in that case the whole balance shall be immediately due and payable.
6. The applicant shall bear the costs of this application and costs of issuing the writ of execution, arrangement of sale and its cancellation thereof on party and party scale." (emphasis added)

THE GROUNDS OF APPEAL:

[14] Several grounds of appeal have been raised⁵. These are that the court *a quo* erred:

- (i) in granting final relief not sought in the notice of motion;
- (ii) by making a final payment plan an order of court which the Municipality did not ask for on the hearing day, whilst the issue of the payment plan was to be determined on the return day of the rule *nisi*;
- (iii) by not allowing the Fund an adequate opportunity to be heard;

⁵ Pages 96 – 104 of the record

- (iv) in finding that the Fund elected not to deal with the Municipality's payment plan;
- (v) in failing to consider the nature of the arrear pension fund contributions and the harm and injustice caused to affected employees;
- (vi) in finding that the proposed payment plan was reasonable in the circumstances and in the process impermissibly created a contract between the parties;
- (vii) in failing to consider alternative remedies provided for in the Municipal Finance Management Act⁶, ("the MFMA") and
- (viii) in finding that the judgment in *Mafube Local Municipality v South African Municipal Workers' Union National Provident Fund* was distinguishable.

THE CORE ISSUE OF THE APPEAL

[15] It is not my intention to deal with all grounds of appeal. The more pertinent grounds will be considered and some in more detail than others for obvious reasons. The core issue of the appeal, from the Fund's point of view, is that the Municipality only sought *interim* relief in the urgent application, with final relief to be argued at a later stage. The court *a quo* however granted final relief as indicated in the previous heading. The Fund therefore takes issue with the court *a quo*'s order on the basis that it was not competent to have made a final order when the Municipality did not ask for it and expressly put the Fund on notice that it would not ask for it on 7 November 2018, when the urgent application was moved, but only on the return date which would be 7 February 2019.

⁶ 56 of 2003

[16] The notice of motion envisaged the Municipality's application to be heard in two stages:

- (i) in the first stage, the Municipality would seek an *interim* order on an urgent basis on 7 November 2018, namely that the sale in execution scheduled for the next day, 8 November 2018, be stayed pending the final determination of the application;
- (ii) in the second stage, it would seek a rule *nisi* with a return date on 7 February 2019 "*why the following orders should not be made final.*" It was envisaged that only on the return day, to wit 7 February 2019, final orders that the sale in execution premised on a writ issued on 6 November 2017 could be set aside and the said payment plan be made an order of Court.

[17] *Ex facie* the notice of motion, the Municipality did not intend to seek on 7 November 2018 either a final order setting aside the sale of execution pursuant to the writ of execution, or a final order that the payment plan be made an order of court. The case that the Fund had to meet on 7 November 2018 was an application for an *interim* order "staying" the sale in execution pending finalization of the application. The Fund was not called upon to oppose the final order of setting aside the sale in execution on a permanent basis or the making of the proposed payment plan an order of court.

- [18] I recorded above that the Fund was only given a few hours to oppose the application and that they had insufficient time to file an answering affidavit. I explained earlier what transpired during the court proceedings of 7 November 2018. The evidence of Mr Gerdener, the correspondent attorney in Bloemfontein, may perhaps be described as somewhat sketchy and most certainly not in any detail with regards to the final relief the Municipality envisaged to be dealt with on the return day of the rule *nisi*.
- [19] It is important to have regard to the fact that the court order setting aside the sale in execution and making the payment plan an order of court, was done by the court *a quo* on 8 November 2018 *ex facie* the record (the typed order on page 79 of the record apparently incorrectly states 9 November). The court thus made a final order on that day even though the Municipality did not ask for such an order, save for Mr Burger's submissions during argument which contradicted his final submission as mentioned earlier. The pertinent issues relevant to the matter were not canvassed fully or at all during the hearing.
- [20] The fact that the Municipality itself did not ask for final orders when the application was moved, is illustrated by what I stated above and reiterated during the final submission by its own counsel, Mr Burger. At page 67 of the record, referred to earlier, he submitted to the court that the relief contained in the notice of motion should be granted because the "balance of convenience.... favours the applicant. It begs the question: why would Mr Burger as senior counsel refer to one of the unique requisites of an *interim* interdict if he did not

ask for it? It is trite that the balance of convenience is a requisite of an *interim* interdict and not a final interdict.

[21] The final orders made on 8 November 2018 were not asked for in the concluding submissions of Mr Burger, but even if it could be said that it was asked for, it could not have been granted in the absence of such relief claimed in the notice of motion. In this regard I align myself with the following *dicta* in paragraph [7] of the decision of *Commissioner of Correctional Services v Ntsetselelo Hlatswako*⁷:

“[7] At the outset it is instructive to note that the first order setting aside the decision of the Disciplinary Board was not prayed for. Accordingly, it was in my view incompetent for the Court *a quo* to make the order in the absence of an amendment of the notice of motion. This part of the order was unfair both procedurally and materially. It is trite that a litigant can also not be granted that which he/she has not prayed for in the *lis*”

The full bench held in *Mgoqi v City of Cape Town & another*⁸ that the relief sought by applicant’s counsel during his argument could not be considered as the notice of motion did not provide therefore and applicant failed to move for an appropriate amendment of the notice of motion.

[22] In *NDPP v Zuma*⁹ the court held as follows in paragraph [15]:

⁷ (67/09) [2010] SZSC 31 (28 May 2010)

⁸ 2006 (4) SA 355 (CPD) at paras [10] - [13]

⁹ 2009 (2) SA 277 (SCA)

“[15] It is crucial to provide an exposition of the functions of a judicial officer because, for reasons that are impossible to fathom, the court below failed to adhere to some basic tenets, in particular that, in exercising the judicial function, judges are themselves constrained by the law. The underlying theme of the court's judgment was that the Judiciary is independent; that judges are no respecters of persons; and that they stand between the subject and any attempted encroachments on liberties by the Executive (paras 161 - 162) This commendable approach was unfortunately subverted by a failure to confine the judgment to the issues before the court; by deciding matters that were not germane or relevant; by creating new factual issues; by making gratuitous findings against persons who were not called upon to defend themselves; by failing to distinguish between allegation, fact and suspicion; and by transgressing the proper boundaries between judicial, executive and legislative functions.”

See also paragraph [47] where the following was said:

“[47] The trial judge, again, failed to comply with basic rules of procedure. Judgment by ambush is not permitted. It is not proper for a court in motion proceedings to base its judgment on passages in documents which have been annexed to the papers when the conclusions sought to be drawn from such passages have not been canvassed in the affidavits. The reason is manifest - the other party may well be prejudiced because evidence may have been available to it to refute the new case on the facts. A party cannot be expected to trawl through annexures to the opponent's affidavit and to speculate on the possible relevance of facts therein contained. The position is no different from the case where a witness in a trial is not called upon to deal with a fact and the court then draws an adverse conclusion against that witness.”

[23] Having referred to the aforesaid *dicta* in *Zuma*, I wish to come to the defence of my learned colleague who granted the orders in the urgent court and having to consider an import matter such as the imminent sale of the majority of a municipality's movable assets which are required to comply with service delivery. This is not a case of judgment by ambush as set out in *Zuma*. I have no doubt in my mind, having considered the record and Mr Burger's submissions quoted above, that the court *a quo* was persuaded to grant the orders based on Mr Burger's insistence. This is rather unfortunate.

[24] It would not have assisted the Municipality to argue during the hearing before the court *a quo* that it could obtain relief under the prayer "further and alternative relief." It expressly claimed that a rule *nisi* be issued with return date 7 February 2019 for finalization of the application once an opportunity was provided to the Fund to advance reasons why relief should not be granted. In *Queensland Insurance Co Ltd v Banque Commerciale Africaine*¹⁰ the court held as follows:

"The prayer for alternative relief does not help the plaintiff over the difficulty."

It continued: "... the prayer for alternative relief is limited by the statement of fact in the declaration and by the terms of the express claim, and that a plaintiff cannot get, under the prayer for alternative relief, anything that is inconsistent with those two things."

[25] I want to reiterate that it would be a totally different scenario if the Municipality gave proper notice to the Fund who had sufficient time

¹⁰ 1946 AD 272 at 286

and indeed filed an answering affidavit in respect of the main relief sought whereupon the Municipality filed its replying affidavit. In such a case, all aspects being fully canvassed and disputes properly ventilated, the matter would be ripe for hearing and the court be entitled to adjudicate the application after having received submissions on behalf of all parties concerned without the necessity to issue a rule *nisi*, obviously unless third parties' rights might be affected such as for example in sequestration proceedings.

- [26] It was procedurally and materially unfair to the Fund for the order of 8 November 2018 to have been issued. The notice of motion envisaged that a final order would be sought on the return date of the rule *nisi* and thus only after all the issues have been ventilated. The appeal must succeed based solely on this ground of appeal.
- [27] Mr Burger conceded that (1) he had no instructions to move for the payment plan to be made an order of court on 7 November 2018, (2) his submission in this regard was incorrectly made, (3) he eventually merely asked for an *interim* order in terms of the notice of motion and (4) therefore the order was erroneously granted. He effectively conceded that the appeal should succeed. Upon questioning why he did not approach the court immediately for variation of the order in terms of rule 42(1)(b) of the Uniform Rules of Court after becoming aware of the mistake and why the application for leave to appeal and the appeal itself were opposed, he responded by alleging that the “matter got out of hand” and “it went beyond control.” I shall deal with this aspect again when I exercise my discretion pertaining to costs. My finding in respect of the core issue on appeal should really be the end of the matter. However,

bearing in mind Mr Burger's submission that the matter should be referred back to the court *a quo* to be adjudicated afresh after a proper opportunity was given to the Fund to file answering affidavits, it is regarded apposite to deal with some the other grounds, albeit in less detail.

AUDI ALTERAM PARTEM:

[28] In *Motswai v RAF*¹¹ the Supreme Court of Appeal had to deal with a finding of fraud against an attorney by a judge of the High Court, calling it a grave injustice in paragraph [57]. It concluded as follows in paragraph 59:

"[59] Through the authority vested in the courts by s 165(1) of the Constitution judges wield tremendous power. Their findings often have serious repercussions for the persons affected by them. They may vindicate those who have been wronged but they may condemn others. Their judgments may destroy the livelihoods and reputations of those against whom they are directed. It is therefore a power that must be exercised judicially and within the parameters prescribed by law. In this case it required the judge to hold a public hearing so that the interested parties were given an opportunity to deal with the issues fully, including allowing them to make all the relevant facts available to the court before the impugned findings were made against them. The judge failed to do so and in the process did serious harm to several parties."

¹¹ 2014 (6) SA 360 (SCA)

[29] It is important to have regard to the fact that the Municipality served the papers in which it sought *interim* relief only on the morning of the hearing. The Fund's legal representative then applied to the court for permission to lead *viva voce* evidence, because it did not have enough time to file an answering affidavit. The court correctly granted the Fund the opportunity to lead such *viva voce* evidence.

[30] As mentioned, Mr Gerdener was called to testify to "*place certain facts*" on record¹². No witness from the Fund with firsthand knowledge about the pros and cons of the payment plan was called to deal with same. If one has cognizance of the statutory obligations of the Municipality pertaining to payment of pension fund contributions and the consequences of non-compliance as set out in paragraphs 7 and 8 of the Fund's founding affidavit in application 1148/2016, there can be no doubt that the Fund would clearly be entitled to advance reasons on the return date why final relief should not be granted. I respectfully agree with the convincing and reasoned judgment of Motimele, AJ in *Mafube Local Municipality v South African Municipal Workers' Union National Provident Fund*.¹³ Mr Gerdener made it clear that the Municipality's offer was rejected, but did not venture into any further detail. It could surely not be expected of him to deal comprehensively with the Fund's possible responses to the founding affidavit. He could not be expected to present admissible evidence as to for example the consequences of late payment on

¹² Page 51 of record

¹³ (4836/2016) ZAFSHC 2016 (16 February 2017)

affected employees. The record illustrates that the Fund did not have enough time to prepare an answering affidavit. To my mind the Fund did not want the evidence of the attorney to be its complete answer to the founding affidavit. This fact is further illustrated by the somewhat sketchy nature of the attorney's evidence.

- [31] Under these circumstances, the court misdirected itself by finding that the Fund “*elected... not to deal with the adequacy or otherwise*” of the Municipality's proposed payment plan¹⁴. Based on this misdirection, the court then went ahead and adjudicated the final relief without affording the Fund an opportunity to place facts before the court in this regard and thus effectively denying it one of the most fundamental rights of natural justice, the *audi alteram partem* principle, which, on its own, justifies the decision being set aside. As is the case with the core issue considered above this finding makes it unnecessary for this court to deal with the other aspects, but which will be dealt with briefly for the sake of completeness.

UNPRECEDENTED ORDER:

- [32] The relief granted, *i.e.* to make a payment plan presented by the Municipality an order of court against the will of the Fund (and without having allowed the Fund to make representations in this regard) is unprecedented. I do not have to come to any final

¹⁴ Pages 87 and 92 of the record

conclusion in this regard insofar it might be possible to break new ground, but surely only once both parties have been given the opportunity to tender detailed evidence and provide comprehensive legal argument on the issue. This is not what occurred and the court *a quo*'s judgment is in direct conflict with the judgment in *Mafube* which I believe cannot be criticized.

- [33] It is correct that rule 45A of the Uniform Rules of Court states that the court has a discretion to suspend the execution of any order for such period as it deems fit, but that does not mean that a court has a general equitable jurisdiction to stay execution. The cases referred to by Mr Burger are clearly distinguishable and it is not necessary to consider them at all. I fully agree with Davis, J¹⁵ that rule 45A does not envisage “the exercise of an equitable jurisdiction unhinged from any legal causa, but simply predicated on the equities of a case.” *In casu*, the Municipality conceded to judgment being granted. It has no defence. In fact, it is in breach of the PFA and is liable to criminal prosecution. Its neglect has serious consequences for affected employees. The urgent application was issued more than a year after judgment was granted and the writ of execution issued. The court *a quo* was approached on the basis of alleged urgency by giving only about 2 hours’ notice to the Fund. The equities did not favour the Municipality who apparently did nothing for a year to utilize alternative remedies provided for in the MFMA.

¹⁵ in *Firm Mortgage Solutions (Pty) Ltd & another v Absa Bank Ltd & another* 2014 (1) SA 168 (WCC) at paras 12 – 14

[34] Although in a different context, the court held in *Nelson Mandela Metropolitan Municipality v Grievenouw CC*¹⁶ that

“a court does not have a general discretion, having found conduct of a respondent to be unlawful and criminal. to suspend its order that would put an end to that conduct.....In the absence of the type of exceptional circumstances that was present in the suspension of an order would, in my view, amount to an abdication of judicial responsibility. For good reason, such a course finds no support in our case law.”

[35] In *Tshiya Infrastructure Development (Pty) Ltd & another v Standard Bank of South Africa & another*¹⁷ Molitsoane, AJ (as he then was) declined to impose a draft payment plan and thereby creating a contract for the parties. The application to stay a sale in execution was dismissed. In *Democratic Alliance v Public Protector*¹⁸ the High Court dealt with “budgetary constraints” as a defence and quoted with approval the *dictum* of the Constitutional Court in *Blue Moonlight Properties* that

“it is not good enough for the City to state that it has not budgeted for something if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”

In casu the Municipality well knew when it appointed personnel from time to time what their cost to company would be. They had to plan and budget. It knew that it was statutorily obliged to deduct from employees’ salaries their pension fund contributions and to pay such contributions together with its own contributions over to the Fund on a monthly basis. There is just no excuse for its transgression of the PFA.

¹⁶ 2004 (2) SA 81 (SECLD) at para [94]

¹⁷ 5157/2017 [2017] ZAFSHC 228 (9 November 2017)

¹⁸ 2019 (7) BCLR 882 (GP)

CREATING A CONTRACT FOR THE PARTIES:

[36] One further aspect which flows from the fact that the court adjudicated the payment plan without affording the Fund the opportunity to place further facts before the court must be considered. The most fundamental principle of the South African law of contract is that it is based on *consensus*. Without the complete input from the Fund with regards the payment plan, there can be no doubt that by making the Municipality's proposed payment plan an order of court, the court effectively created a contract for the parties where there was no consensus. In fact, Mr Gerdener made it clear that the payment plan was rejected. It is trite that courts may not create contracts between parties. I refer to *ABSA Bank Ltd v Moore and Another*,¹⁹ at paragraph [42], endorsed by the Constitutional Court in *ABSA Bank Ltd v Moore and Another*.²⁰

ALTERNATIVE REMEDIES:

[37] The MFMA provided alternative mandatory remedies which could and should have been utilized if the Municipality was in such dire financial straits as it wanted the court to believe. I refer to ss 139, 152 and 153.²¹ Nothing more needs to be said, save to confirm that the Fund's arguments in this regard are pure and that I agree with respect with the judgment in *Mafube* as indicated above. Obviously, the Municipality could not have waited until the eleventh hour and then argue that the Provincial or National Governments

¹⁹ 2016 (3) SA 97 (SCA), a principle also accepted by this court in Tshiya (footnote 17)

²⁰ 2017 (1) SA 255 (CC) at para [44]

²¹ Of the MFMA

would not be in a position to come to its assistance a day before the auction. It has only itself to blame.

MOOTNESS:

[38] The dispute pertaining to the stay of execution as sought in paragraph 2 of the notice of motion has become moot insofar as the auction was called off as a consequence of the order of the court *a quo*. The question to be considered is how the court *a quo*'s order should be substituted. Costs is not an issue as an order was made in favour of the Fund. In my view the Municipality failed to prove all four requisites in order to obtain *interim* relief. The correct order would be to substitute the order by an order dismissing the application with costs.

COSTS:

[39] Mr Van Der Berg submitted that the fact that the court *a quo* granted an order, which, not even the Municipality itself sought, justifies a punitive cost order. This is not entirely correct as I have shown how Mr Burger's submissions apparently convinced the court *a quo* to grant orders not applied for in the notice of motion. I do not agree with the submission that the Municipality should be mulcted with punitive costs. I considered directing the Municipality's counsel and attorney to pay the costs of the appeal *de bonis propriis* for the reasons advanced herein and also for not abandoning the appeal when it should have been evident that there is no chance of success. Mr Van der Berg came to the assistance of the Municipality's legal team and submitted that such

an order was not warranted. Eventually I decided against such an order.

CONCLUSION:

[40] In conclusion it is perhaps appropriate to say something about the court *a quo* and the Municipality's reliance on *Fose v Minister of Safety and Security*.²² Particular reliance was placed on the *dictum* in paragraph [19]. That paragraph did not form part of the *ratio decidendi* of the court's judgment. The Constitutional Court upheld an exception in respect of a claim for constitutional damages, holding that the common law provides effectively for a damages claim in the particular case. Of course, one has to respectfully agree that in our new constitutional dispensation "courts may even have to fashion new remedies to secure the protection and enforcement of these all-important (constitutional) rights." However, the common law provides sufficient safeguards for persons or entities whose rights are infringed or threatened to be infringed. No new remedy has to be created. The issue whether a court may make a payment plan presented by a judgment debtor an order of court against the will of the judgment creditor who wants to execute and sell movable or immovable property of the debtor is novel. I accept, however, that it has already found application in respect of the intended sale of the primary residence of a judgment debtor based on the right to housing in s 26 of the Constitution. *In casu* such issue would only have arrived on the return date of the rule *nisi* if one were in fact to be issued. The court *a quo* could not have adjudicated such novel issue when it did and we also do not have

²² 1997 (3) SA 786 (CC)

to concern ourselves therewith. In the premises the appeal should be upheld.

[41] Mr Burger submitted that even if the appeal is upheld, the matter should be referred back to the court *a quo* to reconsider the adoption of the payment plan once the parties have had an opportunity to file a full set of affidavits. I am not prepared to make such an order. The court *a quo* has already adjudicated the matter. Furthermore, important constitutional law issues will come into play. Not only indicated Mr Burger that the Municipality would seek leave to supplement its papers, but bearing in mind the novelty and complexity of the dispute as well as the constitutional law issues applicable, I have reason to believe that notice will have to be given in terms of rule 16A of the Uniform Rules of Court. I also believe that several civil rights organizations might wish to join as *amici curiae*. It would be more appropriate to allow the Municipality the opportunity to institute new proceedings afresh.

ORDERS:

[42] The following orders are issued:

- 1) The appeal is upheld with costs, such costs to include the costs of two counsel.
- 2) The order of the court *a quo* is set aside and substituted with the following:
“The application is dismissed with costs.”

J. P. DAFFUE, J

I concur,

C. REINDERS, J

I concur,

L. LE R. POHL, AJ

On behalf of appellant:

P VAN DER BERG SC
H DRAKE

Instructed by:

M C V Gerdener
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On behalf of the respondent:

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