

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY

Case No: 2748/17
Heard on: 20/04/2018
Delivered on: 06/07/2018

In the matter between:

MPOLETSANG BEAUTY KILELO

APPLICANT

And

SOL PLAATJE MUNICIPALITY

FIRST RESPONDENT

CONSOLIDATED RETIREMENT FUND

SECOND RESPONDENT

Summary: Applicant dismissed from employment- misconduct based on fraud, gross dishonesty, theft and corruption- pension benefits withheld- application for release of pension benefits 37A of Pension Fund Act 24 of 1956- s 37D(1)(b)(ii) followed to protect the employer's right to pursue recovery of money misappropriated by its employee- Counter-claim granted. Second respondent interdicted from paying the pension benefit.

JUDGMENT

MAMOSEBO J

- [1] The applicant, Ms Mpoletsang Beauty Kilelo, seeks the following relief:
- 1.1 An order for the payment of all her benefits or interests administered by the second respondent, Consolidated Retirement Fund, on behalf of the first respondent, Sol Plaatje Municipality (Municipality); and
 - 1.2 An order for monetary payment of all accrued leave days and costs of the application. By the time this application was heard the Municipality had already paid to the applicant all her accrued leave days. This relief has therefore become moot. The application was opposed by the Municipality which also filed a counter-application. There is no opposition by the second respondent, the Consolidated Retirement Fund.

Condonation application

- [2] This application served before Lever AJ on 15 December 2017 and by agreement between the parties postponed to 20 April 2018. Mr Motlhamme appeared for the applicant and Mr van Tonder for the Municipality when the matter was postponed by agreement. Although no schedule for the filing of the affidavits and heads of argument was agreed upon, the Rules are clear on that aspect.
- [3] The Northern Cape Rules¹ provide the following in Rule 3(4):
- “In respect of each opposed application heads of argument shall be filed with the registrar and served on the opposing party –
- (a) Before 12:00 on the Monday preceding the trial date on behalf of the applicant; and
 - (b) Before 12:00 on the Wednesday preceding the trial date on behalf of the respondent:

¹ Superior Court Practice Volume 3 Erasmus Second Edition M1-2

Provided that in respect of long or complicated applications the heads of argument shall be filed and served at least eight and six court days, respectively, before the trial date.”

[4] The applicant served and filed her heads of argument and the practice note the day before the matter was heard, on 19 April 2018. The notice of motion for condonation was only filed the morning of the hearing. The only reason advanced for the late filing of the heads of argument by Mr Pela, counsel for the applicant, was that from 10 April 2018 to 17 April 2018 he was unable to attend to any work including the drawing of the applicant’s papers. The affidavit did not disclose or specify any reason.

[5] The High Court has inherent power to protect and regulate its own process² where the blame for the late filing of the heads can be laid squarely at the door of the legal practitioner. Steyn CJ held in *Saloojee and Another, NNO v Minister of Community Development*³ that:

“there is a limit beyond which a litigant cannot escape the results of his attorney’s lack of diligence or the insufficiency of the explanation tendered”.

The Court warned:

“To hold otherwise might have a disastrous effect upon the observance of the Rules of this Court. Considerations ad misericordium should not be allowed to become an invitation to laxity.” See also *S v Mohlathe*⁴

The heads were filed three days out of time. The delay was not inordinate. The application for condonation was filed in the morning of the hearing. Although this is also a matter of 4 days late, it should, in my view, send a warning to the applicant’s practitioner that non-compliance

² Section 173 of the Constitution of the Republic of South Africa, Act 108 of 1996, as amended.

³ 1965 (2) SA 135 (A) at 141C

⁴ 2000 (2) SACR 530 (SCA) at 536e - f

with the court rules should be a thing of the past. In this instance, however, dilatoriness of the practitioner should not be visited on the client. The condonation for the late filing of the heads of argument is therefore granted.

The salient facts underpinning this case

- [6] Ms Mpoletsang Kilelo was employed by the Municipality as an accountant in the payroll office and her responsibilities included uploading the ACB.txt file into the Standard Bank Business Online Platform for the payment of salaries to the Municipality's employees. She claims to have been dismissed on 02 February 2017 following a disciplinary enquiry. Although the Municipality maintains that the dismissal date was 23 March 2017, nothing turns on the difference or the exact date.
- [7] While she was in the employment of the Municipality she contributed towards her pension fund under the umbrella of the Consolidated Retirement Fund. Upon dismissal, she made an effort to claim monetary payment for her accrued leave days and her pension pay out. She was informed that because the Municipality was to pursue a claim for damages suffered as a consequence of her misconduct her pension benefit was withheld. Ms Kilelo further claims to be prejudiced by the non-payment of her pension benefits as regards her subsistence and livelihood. She now brings this application in terms of s 37A of the Pension Funds Act⁵.
- [8] It was contended on behalf of the Municipality that after anomalies were detected in the reconciliations of the payroll run through internal

⁵ Act 24 of 1956

processes, attorneys and forensic investigators were appointed to attend to the matter further. They unearthed fraudulent activities which led to the appointment of digital forensic investigators to add to the team of investigators. The estimated costs for the appointment of such investigators ran up to over One Million Rand. The applicant was suspended from work and later charged with misconduct. She faced charges of fraud, gross dishonesty and theft. Disciplinary proceedings followed in 2016. The Municipality has further laid criminal charges against the applicant and other employees involved in the alleged activities. The Commercial Crime Investigation Unit probed the matter under CAS 136/12/2016. The Commanding Officer of the Directorate for Priority Crime Investigations (DPCI)(the Hawks) has referred the docket to the Director of Public Prosecutions (DPP), for a decision whether to prosecute the applicant or not. The Municipality has also engaged the Asset Forfeiture Unit (AFU) in its efforts to recover its losses.

- [9] The applicant was found guilty in the disciplinary hearing for depleting the amount of R796 788.80 now owed for damages that the Municipality has suffered as a result of the applicant's involvement in the fraudulent activities which the Municipality seeks to recover from her. The Municipality has since determined that the benefit due to her from the fund is R567 211.00. The Municipality's attorney, Mr Oban Cronje, wrote to the Consolidated Retirement Fund on 7 April 2017 requesting them to withhold payment of the applicant's pension benefits in terms of s 37D of the Pension Funds Act⁶ pending adjudication of their claim in the action that it intends to institute against her within 60 days of the order. The Municipality has since issued summons on 18 April 2018. The

⁶ 24 of 1956

Fund has withheld the money from the applicant which is now the subject of this application.

- [10] In the counter-application, the respondent seeks an order interdicting and prohibiting Consolidated Retirement Fund from paying any pension benefits or proceeds therefrom to the applicant pending the adjudication of the action as pointed out, has already been instituted, and costs on an attorney and client scale.
- [11] Mr van Tonder, for the Municipality, submitted that the Municipality has a clear or prima facie right which stands to be protected by s 37D of the Pension Fund Act. Should the applicant succeed in her current application for her pension benefit to be released the Municipality may suffer irreparable harm since the money may be dissipated and the Municipality may not be able to recover its damages. Counsel argued that the balance of convenience tilts towards the granting of the interim interdict. Counsel further submitted that the applicant will not suffer any prejudice since the Municipality is not reducing, transferring or executing the pension benefit but merely asking the Court that it be preserved pending adjudication in the action proceedings. There is no other remedy than to approach this Court for the interim relief. The pending criminal charges will not assist the Municipality to recover its losses in terms of the Pension Fund Act.
- [12] The applicant seems to “**NOTE**” most of the allegations made by the Municipality in her replying affidavit. These are the remarks made by the Court in *Makhuva v Lukoto Bus Service (Pty) Ltd*⁷ pertaining to allegations being “**noted**” in affidavits:

⁷ 1987 (3) SA 376 (VSC) at 386C- F; [1987] 3 All SA 565 (VSC)

“In the course of the replying affidavit many of the allegations made by the second respondent in regard to the company’s affairs, for instance in regard to the authority to sign cheques, was merely dealt with on the following basis: ‘The contents of this paragraph are taken note of.’

*In the course of argument I put it to counsel for the applicant that, where a deponent is under a duty to admit or deny or to confess and avoid a direct allegation, a reply that the allegations are ‘taken note of’ would, in the circumstances, amount to an admission. See in this respect the case of *McWilliams v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) at 10E – D where it is stated that whilst ‘quiescence is not necessarily acquiescence’, a party who does not make a firm repudiation of an allegation when bound to do so incurs the risk of an adverse inference being drawn against him. As to admissions, denials, confessions and avoidance in pleadings see Rules 22(2) and 25(1) and as to affidavits in motion proceedings see Rule 6(4)(d) and 6(4)(e). It is clear that affidavits really constitute both pleadings and the evidence in support of the allegations made, and the rules as to pleadings should, to that extent, be applied to affidavits.”*

- [13] The general rule is that pension benefits are not reducible, transferable or executable unless permitted by the Income Tax Act⁸ see in this regard s 37A of the Pension Funds act. The exception to this provision is found in s 37D(1)(b)(ii) which stipulates the following:

“(1) A registered fund may –

....

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

⁸ 58 of 1962

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which –

(aa) the member has in writing admitted liability to the employer; or

(bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.”

- [14] It is undisputed that the Municipality has laid criminal charges against the applicant and is also applying for an interdict against the fund pending the adjudication of the action. The Supreme Court of Appeal in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*⁹ per Maya JA (concurring in by Harms ADP, Scott and Brand JJA et Griesel AJA) held:
- “[16] It has been stated in a number of cases that the object of s 37D(1)(b) is to protect the employer's right to pursue the recovery of money misappropriated by its employees. This approach is, in my view, supported by the plain wording of the section and is, with respect, correct.”

The Court continued at para 17:

“[17] However, a practical problem threatens the efficacy of the remedy afforded by the section. In many a case employers only suspect dishonesty on the date of termination of an employee's service and fund membership with the consequence that pension benefits are paid before the suspected dishonesty can be properly investigated. Furthermore, it has to be accepted as a matter of logic that it is only in a few cases that an employer will have obtained a judgment against its employee by the time the latter's employment is terminated because of the lengthy delays in

⁹ 2009 (4) SA 1 (SCA) at 5F – I; [2009] 1 BPLR 1 (SCA) at E – G; also reported at [2008] JOL 22846 (SCA)

finalizing cases in the justice system. The result, therefore, is that an employer will find it difficult to enforce an award made in its favour by the time judgment is obtained against him.”

[15] The Supreme Court of Appeal further remarked at para 19:

“[19]....The Funds therefore had the discretion to withhold payment of the respondent’s pension benefit in the circumstances. I daresay that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant’s detailed allegations of dishonesty against the respondent.”

[16] The Municipality, in its counter-application, is not applying to this Court to reduce, transfer or execute the applicant’s pension benefit but urges the Court to order the fund to withhold payment of such benefits pending resolution of its claim against the applicant.

[17] Mr Pela, for the applicant, raised the spectre of prejudice to the applicant if the pension benefits are withheld as she is a breadwinner and has not earned any income since her dismissal. She needs money to support her family. In my view, this involves a balancing act by the Court. The interests of the Municipality to protect its right to recover damages also need to be taken into account. There is no evidence before me by the applicant that shows that the Municipality is unreasonably delaying the prosecution of either the criminal or civil matters or that it has not taken any reasonable steps to bring the civil matter to a conclusion.

[18] Regard being had to the evidence before me, I am not persuaded that the applicant has made out a case for this Court to order the Pension Fund to pay out her pension benefits at this stage. The application stands to fail. I

am satisfied that the respondent has made out a proper case in the counter-application for the restraining order to be granted against the Pension Fund.

Costs

- [19] The Municipality has, in its counter-application urged me to grant it costs against the applicant on a scale as between attorney and client. Cillié J in *Hawkins v Gelb & Another*¹⁰ expressed himself in these terms:

“It is relevant to refer firstly to the essential differences between party and party costs and attorney and client costs. The former is defined at p.391 of The Civil Practice of the Superior Courts in South Africa by Herbstein and van Winsen as follows:

‘Party and party costs are those costs which have been incurred by a party to legal proceedings and which the other party is ordered to pay to him.’ The definition of the other class of costs appears on p.392:

‘Attorney and Client costs are the costs which an attorney is entitled to recover from his client for the disbursements made by him on behalf of his client and the professional services rendered by him. In the wide sense it includes all the costs the attorney is entitled to recover against his client on taxation of his bill of costs, but in the narrow and more technical sense the term is applied to those costs, charges and expenses as between Attorney and Client which ordinarily the client cannot recover from the other party.’”

- [20] Tindall JA has dealt with the awarding of attorney and client costs in *Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging*¹¹ as follows:

¹⁰ 1959 (1) SA 702 (W) at 705B -

¹¹ 1946 AD 597

“[T]he true explanation of awards of attorney and client costs not expressly authorised by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs that the successful party will not be out of pocket in respect of the expense caused to him by the litigation.”

[21] Mindful of the fact that the applicant is now unemployed and I am about to order that her pension benefit be withheld, it will not be fair and equitable to order costs against her on attorney and client scale. I accept that she approached this Court in an attempt to protect her rights in respect of money owing to her. A cost order should not, in these circumstances, discourage would be litigants from approaching this Court as a punitive may have the effect of.

[22] In the result, the following order is made:

1. The applicant is granted condonation for the late filing of the heads of argument.
2. The application is dismissed with costs.
3. The first respondent's counter-application is granted with costs on a party and party scale.

MAMOSEBO J

NORTHERN CAPE DIVISION

For the applicant:	Adv TJ Pela
Instructed by:	Motlhamme Attorneys
For the respondent:	Adv AG van Tonder
Instructed by:	Van de Wall Incorporated