



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: 4836/2016

In the matter between:

MAFUBE LOCAL MUNICIPALITY

Applicant

and

SOUTH AFRICAN MUNICIPAL WORKERS' UNION
NATIONAL PROVIDENT FUND

Respondent

HEARD ON: 16 FEBRUARY 2017

JUDGMENT BY: MOTIMELE, AJ

DELIVERED ON: 06 APRIL 2017

- [1] The applicant, Mafube Local Municipality ("Mafube") seeks to interdict the respondent the South African Municipal Workers Union National Provident Fund ("the Fund") from executing on a judgment debt of R16 249 215.75 plus interest and costs, obtained against it on the 5 May 2016. The Judgment debt

represents arrear contributions to the Fund on behalf of the applicant's employee-members and due in terms of the statute. The applicant does not dispute that the debt is owed.

- [2] The applicant, also seeks a supervisory order against itself imposing a 60-month repayment plan on the Judgment Debt with effect from 7 November 2016. The supervisory order is ancillary to, and dependent on, the interdict being granted.
- [3] The applicant alleges that the basis for the application is;
 - 3.1 the severe financial constraints which it experienced;
 - 3.2 its inability to pay the judgment amount;
 - 3.3 the fact that it is unable to secure an undertaking by the respondent to accept payment by way of instalments; and
 - 3.4 the fact that it has no alternative remedy.
- [4] It is contended on behalf of the applicant that where a breach of a statutory right is at stake, including a socio-economic rights, a court is under a duty to ensure that an effective relief is granted. The argument continues that this case is an appropriate case for a structural interdict to be granted, in order to secure compliance with a declaratory order and the relief sought, more so, that the Mafube is under a constitutional obligation to provide services to the community, as the custodian of the community interest.
- [5] The respondent opposes the application on various grounds chief among those is that the applicant does not provide a lawful bases for any of the relief it seeks. It specifically does not set out the cause of action, as a result this application is without merit and

should be dismissed. Furthermore the respondent argues that the remedy sought (structural interdict) cannot be used to obtain relief when established criteria for the relief sought, *to wit* an interdict exists but cannot be met. To do otherwise would be to attempt to circumvent established law so contends the respondent.

- [6] Were the relief to be granted the court would condone, *inter alia*,
1. on-going and noncompliance with a judgment debt, and
 2. on-going breach of the Pension Fund Act of 1956 without any evidence that the rights will be infringed and what the extend thereof is.

- [7] The seriousness of the applicant's default in paying the judgment is further compounded by three issues;

- 7.1 the importance of the state honouring its debts and court orders;
- 7.2 the extra ordinary statutory nature of provident funds contributions; and
- 7.3 the applicant's history of non-payment of contributions to the Fund.

In *casu* the applicant did not prove that the service delivery would be impacted by its compliance with the judgment and its agreements to the respondents and cannot renege on its

obligations which were agreed to voluntarily. In this regard, see the Constitutional Court Judgment in the Ekurhuleni matter¹.

“To allow the municipality to escape liability by extricating itself from the bargain, when it has failed to establish the threatened rights or even advance a cogent reason for its failure to comply with its contractual obligation, would constitute an injustice for the Fund.”

- [8] The constitutional court held that to do so would frustrate the principle of *pacta sunt servanda* and the very purpose the rule was intended to achieve. This is so, because when the municipality agreed to the bargain, it did so as a contributing employer for the benefit of its employees in a bargaining process that is at the very heart of the employment relationship.
- [9] Non-payment of contributions is a statutory offence and can attract criminal penalties. The Fund contributions form part of the employees remuneration and terms and conditions of their employment. Notwithstanding the fact, the Applicant collects contribution from its employees, it failed to pay them over to the Respondent. This constitutes a serious breach of trust, which underpins the employer-employee relationship.
- [10] The applicant continues to default on the payment of the employees remuneration, to grant the relief sought is to condone this on-going default of payment remuneration.

¹ Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund CCT (226/15) [2017] ZACC 1 (17 January 2017)

- [11] Non-payment also prejudices the affected members employee who cannot benefit from *inter alia* the capital amount, or the investment interest thereon, or the insured benefits which premiums are deducted from the contributions or the full amount that they are entitled to upon exit from the Fund. Should they resign, retire or be retrenched during the applicant's default period, this will adversely affect their interest.
- [12] It is common cause between the parties that continued non-payment of premiums is a serious matter.
- [13] The applicant failed to establish a clear right accordingly the applicant cannot suffer any harm as a result of any breach of such a right not established. The applicant has mandatory or alternative remedies in terms of the statute. National legislation expressly provides for the appropriate steps to be taken by the municipality as a result of the crisis in its financial affairs.
- [14] Both the constitution and the Municipal Finance Management Act ("MFMA") provide for mandatory, not discretionary intervention by the provincial government. Should the provincial government fail to intervene, the national government would be required to intervene.
- [15] Section 139(5) of the Constitution requires provincial intervention as follows:

"(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to

meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must

(a) *Impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which*

- (i) *is to be prepared in accordance with national legislation; and*
- (ii) *binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs [...].'*

[16] Section 139 of the MFMA similarly provides for mandatory intervention by the provincial executive. It provides as follows:

"139. **Mandatory** provincial interventions arising from financial crises.

(1) *If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or meet its financial commitments. Or admits that it is unable to meet its obligations or financial commitments, the provincial executive **must** promptly.*

(a) *request the Municipal Financial recovery Service*

- (i) *to determine the reasons for the crisis in its financial affairs;*
- (ii) *to assess the municipality's financial state;*
- (iii) *to prepare an appropriate recovery plan for the municipality;*
- (iv) *to recommend appropriate changes to the municipality's budget and revenue raising measures that will give effect to the recovery plan; and*

(v) *to submit to the MEC for finance in the province*

(aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and

(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and

(b) consult the mayor of the municipality to obtain the municipality's cooperation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan. [111]"

[17] Section 146 of the MFMA sets out the further detailed steps and consequences of the imposition of a mandatory recovery plan envisaged in section 139 of the MFMA, which does not include or impose a moratorium on the execution of judgment debts, automatic or otherwise. The legislature thus did not contemplate that the execution of judgment debts against a municipality be suspended if it is facing financial constraints.

[18] The provincial intervention is the appropriate remedy to follow in the applicant's circumstances and the applicant has the right to compel the provincial executive to intervene accordingly.

[19] Should the provincial executive fail to intervene, there is a further alternative remedy: The national executive is required to intervene. Section 150 provides:

"150. National interventions.

(1) If the conditions for a provincial intervention in a municipality in terms of section 139 (4) or (5) of the Constitution are met and the provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in that section, the national executive must

(a) consult the relevant provincial executive; and

(b) act or intervene in terms of that section in the stead of the provincial executive [...].”

[20] Section 151 of the MFMA expressly protects creditors rights. It provides:

“151. Legal rights. Except as expressly provided for in this Part, nothing in this Chapter limits or affects

(a) the rights of any creditor or other person having a claim against a municipality;

(b) any person’s access to ordinary legal process in accordance with the common law and relevant legislation”.

[21] Finally section 152 and 153 of the Municipal Management Act 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.

COSTS

[22] Special considerations in respect of both the applicant’s conduct and the circumstances which gave rise to this application are

present which merit a cost order against the applicant on attorney-client scale. These considerations include:

- 22.1 The applicant's constitutional duty to comply with court orders;
- 22.2 Failure to make out a cause of action in this application;
- 22.3 Requiring the Fund to incur further costs by bringing this application;
- 22.4 Contemplating in its relief sought that the Fund may incur even further costs in enforcing the payment of one or many instalments of the Judgment Debt; and
- 22.5 Requesting the Fund to waive statutory interest on arrear contributions.

[23] It is not competent to seek relief which contemplates that the Fund may agree to an extension of the period of repayments when the PFA expressly provides for the terms of payment of contributions. The Fund cannot agree to different terms or interest rates: to do so would be a breach of its board members' fiduciary duties and of the PFA.

[24] To date, extensive legal costs have been incurred by the Fund to require the applicant to meet its statutory obligations.

24.1 First, the Fund had to seek the requisite outstanding schedules in terms of section 13A(2) from the applicant which the applicant opposed.

24.2 Second, the applicant failed to meaningfully oppose the application of the outstanding amount which lead to the Judgment Debt which the applicant agrees is due and owing.

24.3 Third, the Fund has to incur further costs to oppose this application brought by the applicant despite having obtained the Judgment Debt.

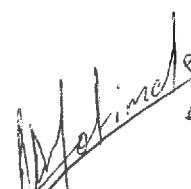
24.4 Fourth, the applicant itself foresees in its relief that further litigation may be necessary should it default on any of its instalments. The applicant has crafted its proposed relief in a manner that contemplates further litigation should the applicant default on one or many of its proposed repayments. The applicant thus foresees that it may default on some of its future payments and expects the Fund to incur even further costs to enforce such payment.

[25] Fund expenses are borne by members. Legal costs incurred by the Fund to collect arrear payments are ultimately borne by the members of the Fund. It doubly prejudices the affected members that they have not received arrear contributions, and that they are required to bear costs to collect it from their employer – in this case more than once in respect of the same debt.

[26] As a result, the applicant's conduct falls within the broader meaning of 'vexatious for the purpose of awarding costs on an attorney-client scale. In *Re Alluvial Creek Ltd*, Gardiner J said in the context of punitive costs order, that "*proceedings may be regarded as vexatious when they put the other side to unnecessary trouble and expense which the other side ought not to bear*". This is so even if the intent may not have been that the proceedings be vexatious.

[27] The Applicant has failed to establish a cause of action. For the reason set above, I make the following order;

1. The Application is dismissed.
2. The Applicant to pay the cost of this application, on the scale as between attorney and client, and such costs to include the costs concomitant upon the employment of two counsel.


 A.M.M. MOTIMELE, AJ

On behalf of applicant: Instructed by:	Louis Radley c/o Peyper Attorneys Bloemfontein
On behalf of respondent: Instructed by:	MCV Gerdener McIntyre Van der Post Bloemfontein