REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-066082

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date:30 September 2024

In the matter between:

MM Applicant

and

STATE SECURITY AGENCY First Respondent

ACTING DIRECTOR GENERAL OF THE STATE SECURITY AGENCY Second Respondent

THE MINISTER IN THE PRESIDENCY DESIGNATED WITH RESPONSIBILITY FOR THE STATE SECURITY AGENCY Third Respondent

GOVERNMENT EMPLOYEES PENSION FUND Fourth Respondent

JUDGMENT

DE VOS AJ

[1] The issue to be determined is whether the state, as employer, is permitted to make deductions from pension benefits, in the absence of any due process or agreement between the parties. It brings into sharp focus issues regarding self-help, an aspect of the rule of law, as well as fundamental principles of procedural fairness.

[2] MM worked for the first respondent ("the Agency") for 20 years. On retirement MM was to receive pension benefits. MM planned to take care of her own and her family's needs with her pension. Shortly before retirement, the Agency informed MM that MM owed the Agency a debt of R 823 000.00. The Agency had decided to recover this alleged debt summarily by deducting it from her pension.

[3] The Agency's decision that MM owed it money was taken unilaterally, with no court oversight and through a process in which MM was not known or heard. MM disputed that she owed the debt and followed internal grievance procedures. Having failed to resolve the dispute internally, MM approached the urgent court to interdict the Agency from deducting the alleged debt from her pension.

[4] MM's grievance is that her employer is the sole arbiter concerning the alleged debt, as well as the appropriate means to recover the indebtedness. In addition, the state is the self-appointed executioner of this alleged debt.

[5] The Agency's position is that it is empowered to unilaterally, without any court oversight or process, deduct monies from MM's pension. The source of its power, contends the Agency, is section 21(3)(a) of the Government Employees Pension Fund Law, 1996 ("GEPF"). The section provides that any amount which is payable to the Agency may be deducted from the benefit payable to the employee. The Agency contends that in terms of section 21(3)(a), the Agency is empowered, without more, to deduct the amount from its employees' pension.

[6] The controversy in this case is whether the Agency's interpretation of section 21(3)(a) is correct. If it is correct then MM's interdict fails as she cannot prove a clear right to an interdict.

[7] The arena of this dispute, whilst labour in nature, is not one in which the Labour Court has jurisdiction. The Labour Court's jurisdiction is expressly excluded in issues involving employees of the Agency (section 2(b) of the Labour Relations Act). The area of law in which the matter must be considered is not administrative in

nature, but one which falls within employment law (*Gcaba v Minister for Safety and Security* 2010 (1) SA 238 (CC)). The Court is therefore seized with an employment matter which is properly placed before this Court, and not the Labour Court.

[8] Some context to the dispute is required. In 2003 MM was head-hunted for the position of General Manager of the National Communications Centre subsequently named National Communications ("NC"). The then President of the Republic, President Mbeki appointed MM as the Deputy Executive Director Operations of the NC. For the years 2010 to 2015, MM was deprived of performance appraisals. This mean MM was denied any chance at a performance bonus and any appropriate salary progression. MM places this failure at the feet of Mr Zokwe who was her supervisor at the time.

[9] On 21 September 2011 the then Minister Siyabona Cwele, appointed MM as the Head of the NC due to the failure of Mr Zokwe to report for duty. For the next four years, MM acted as the Head of the NC with its accompanied responsibilities, but without being paid an acting allowance or the appropriate remuneration. Despite this, MM continued to act in the position as Head of the NC for four years. Until 10 April 2015, when the Minister of State Security demoted MM from acting Head of the NC to the position of "IT Trainer".

[10] MM challenged this demotion in Court proceedings and sought to set aside and review the decision. Before the review proceedings were finalised, in July 2020, Minister Ayanda Dlodlo announced MM's appointment to Head of NC. MM accepted the appointment, but reserved her rights to claim the remuneration for the years of 2011 to 2015 (when MM acted as Head of the NC but was not remunerated) and the period of 2015 to 2020 (where MM was demoted to an IT Trainer). MM did claim these reserved rights and with the arrival in March 2022 of the permanent DG Ambassador T Majola, MM received a rectification payment of R 1.3 million as outstanding remuneration for the period 2011 to 2020.

[11] MM has taken care to disclose this rectification payment to the Court, the circumstances under which it was made and to identify which officials approved this

rectification payment. They included: the former DG T Majola; General Manager of HR, the CFO and the HR Manager of the NC Branch (whose names are confidential but is disclosed separately under “lock and key”).

[12] In December 2023 Ambassador Majola resigned and was replaced by Ambassador Nozuko Bam. In January 2024 Ambassador Bam called MM to a meeting to advise that the Inspector General (“IG”) had completed an investigation and that the Minister had approved the IG’s recommendations. MM’s affidavit reads that up and until the meeting with Ambassador Bam, MM had been “entirely ignorant” of the investigation. The recommendations, approved by the Minister, required that MM return the money which was paid to her in rectification of her outstanding salary. MM’s affidavit reads as follows: “I was shocked to hear this news. Until then I had no knowledge whatsoever of this investigation and I had had no communication form the IG at all, either in relation to this matter, or indeed any matter”. MM requested the Ambassador to confirm this in writing, including the investigation report. The Ambassador’s response was that the report could not be shared as the investigation was not about MM, but about the former DG.

[13] The next set of steps includes correspondence between the Agency and MM and the exhaustive attempts to resolve the matter through internal grievances. As the CCMA was not available to MM, she had to resolve the dispute within the Agency’s internal grievance structures. This culminated in a letter from the Acting DG on 12 June 2024 which materially stated that MM is indebted to the Agency, the indebtedness will be deducted from her pension and the Agency would not forward the necessary forms to the Fund. However, if MM were to complete an acknowledgement of debt form, the Agency will forward the forms to the Fund so that the remainder of the pension – minus the alleged debt - could be processed. In effect – unless MM signed an acknowledgement of debt, her pension would not be processed.

[14] It is these events that led MM to launch an urgent application for relief to prohibit the Agency, essentially, from deducting this alleged debt from her pension. MM relies on section 21 of the GEPF and contends that the section provides that a pension

benefit cannot, save in exceptional circumstances be liable to be attached under an order of court pursuant to a judgment. MM contends that the Agency had reverted to self-help and unlawfully instructed the Fund to withdraw her pension benefit application. This is particularly egregious as the Agency has not only failed to obtain a judgment but has not even instituted legal proceedings for recovery of this alleged debt. Worse, MM criticises the Agency for seeking to extract an acknowledgement of debt from her – in return for submitting her pension fund forms to the Fund.

[15] The Agency contends that section 21(3)(a) of the GEPF permits it to unilaterally, without due process or court oversight, deduct an amount it contends is owed from a pension benefit. The Agency's submission is founded on a contextual approach to section 21(3)(a). The Agency points to subsection 21(3)(c) which expressly provides that a deduction must be preceded by a court order. Subsection 21(3)(a) does not contain this express requirement. Therefore, the argument goes, the absence of any textual reference to a court order in section 21(3)(a) means the Agency can deduct the amount it believes is due, without court oversight.

[16] The Court has considered the text of section 21(3)(a). Subsection 21(3) is located in a section which in the main prohibits the cession or attachment of benefits. Subsections 21(2) and (3) provides a statutory protection against a host of actions that may deprive a pensioner of their pension, specifically by prohibiting benefits of being assigned, transferred, ceded, pledged or hypothecated. The prohibition in section 21 is broad in its reach. Subsection 21(3) contains the exception to the prohibition. Subsection 21(3)(a) provides that an amount which is payable to the employer, the Agency in this case, may be deducted from the benefit payable.

[17] On the clear text of section 21(3)(a) it does not empower the Agency to itself, unilaterally and without due process, determine if an amount is payable or not by a pensioner. The Agency has grounded its case on a section which permits a deduction – but has read into the section that the Agency may do so without more. The Agency's case hinges on interpreting the word "payable" to mean: the Agency is permitted to determine the liability without following any due process. The

interpretation contended for by the Agency is not supported by the clear text of the section. On the text, the interpretation contended for by the Agency is incorrect.

[18] In addition, the Court is aware of the duty imposed by section 39(2) of the Constitution to interpret legislation in a manner which avoids a breach of constitutional rights (*Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd* 2009 (1) SA 337 (CC)). The interpretation the Agency contends for would draw a line through several fundamental sections in the Constitution. If an employer, particularly the state, were allowed to unilaterally determine an amount is payable, claim and execute its payment from an employee - it would infringe on the right to equality in section 9 of the Constitution as it only applies to government employees and other employees are expressly protected from such deductions by section 35 of the BCEA.

[19] In addition, such an interpretation would infringe section 34 of the Constitution as it limits employees' ability to have a dispute resolved by a Court of law. Section 34 of the Constitution guarantees everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court. This section not only guarantees everyone the right to have access to courts but also "constitutes public policy and thus represents those legal convictions and values that are held most dear by the society."(*Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng* 2018 (2) SA 365 (CC) para 61) The interpretation contended for by the Agency does away with the right to a fair public hearing entirely.

[20] The Court cannot accept the Agency's interpretation as it would permit the state as an employer to itself determine a debt is due, adjudicate such a debt and act as executioner of the debt. This would negate the principle of a fair procedure, which at heart, is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that no-one shall be the judge in his or her own matter - and that the other side should be heard - aim toward doing away with the proscribed arbitrariness in a way that gives content to the rule of law. These principles reach deep down into the adjudicating process, striving to rid bias and ignorance from it. "Absent these central and core notions, any procedure that touches in an enduring

and far-reaching manner on a vital human interest . . . points in the direction of a violation". (*De Lange v Smuts N.O.* 1998 (3) SA 785 (CC) at para 131.) The Agency would have the Court ignore these fundamental principles and agitate for an interpretation of section 21 that would permit such undue process. The Court cannot accept such an interpretation.

[21] More fundamentally, the interpretation contended for by the Agency would amount to untrammelled self-help. The interpretation would breach the rule of law. MM's counsel drew the Court's attention to the Constitutional Court judgment in *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng* 2018 (2) SA 365 (CC) ("*PSA*"). In *PSA* the constitutionality of section 38 of the Public Service Act was challenged, specifically as it permitted the state to deduct amounts unilaterally determined as owing. The text of section 38 of the PSA is not identical to section 21(3)(a). Reliance has been placed on the section for the impact of such a section on the rule of law and not because of a similarity in the language of section 38 of the PSA and 21 of the GEPF. At its core, *PSA* declared that a section which permitted an employer to deduct monies unilaterally amounted to untrammelled self-help. The reasoning of the Constitutional Court weighs with the Court in this matter.

[22] In *PSA*, the Constitutional Court held that the foundational values of the Constitution include the supremacy of the Constitution and the rule of law (*PSA* para 61). This supremacy connotes that "law or conduct inconsistent with the Constitution is invalid, and the obligations imposed by it must be fulfilled." The Court held that the section "is a statutory mechanism to ensure recovery of monies wrongly paid to an employee out of the state coffers, the provision gives the state free rein to deduct whatever amounts of money allegedly wrongly paid to an employee without recourse to a court of law". (*PSA* para 64)

[23] The Court held that the effect of the provision is to impose strict liability on an employee. The deductions may be made without the employee concerned making representations about her liability and even her ability to pay the instalments. The impugned provision also impermissibly allows an "accounting officer unrestrained

power to determine, unilaterally, the instalments without an agreement with an employee in terms of which the overpayment may be liquidated". (*PSA* para 65).

[24] In this context, the Constitutional Court declared that section 38 of the PSA undermines a deeper principle underlying our democratic order. The deductions in terms of that provision "constitute an unfettered self-help − the taking of the law by the state into its own hands and enabling it to become the judge in its own cause, in violation of section 1(c) of the Constitution." (*PSA* para 66).

[25] The Constitutional Court concluded that section 38 of the PSA was unconstitutional as it promoted self-help and imposes strict liability on an employee in respect of overpayment irrespective of whether the employee can afford the arbitrarily determined instalments and was afforded an opportunity for legal redress. (*PSA* para 67).

[26] The Court, guided by the judgment in *PSA*, cannot accept the Agency's interpretation of section 21(3)(a) of the GEPF. The interpretation contended for is not supported by the text of the section, is at odds with this Court's duty in terms of section 39(2) and would be an interpretation which aids untrammelled self-help. For these reasons, the Court rejects the Agency's interpretation and accepts MM's interpretation.

[27] There is another argument by the Agency to consider. The Agency also refers to its duty to correct errors in terms of the Public Service Act. It contends that MM was previously overpaid and by deducting the amount, the Agency is acting in terms of its statutory mandate to correct an error. The Agency refers the Court to the Constitutional Court judgments in which the Court has expressly approved of this duty of the state to act to correct its errors (*Khumalo v MEC for Education* 2014 (5) SA 579 (CC) and *Njongi v MEC* 2008 (4) SA 237 (CC). The Agency contends it is permitted to self-correct in terms of section 21(3)(a) of the GEPF. At the heart of this argument sits the Agency's incorrect interpretation of section 21(3)(a).

[28] The Court accepts the statutory basis for the Agency's duty to correct a perceived error. However, when acting to correct is own alleged unlawfulness, the Agency must do so lawfully. It must identify the law that permits it to correct an alleged error without any due process, unilaterally by deducting pension benefits. It has failed to do so. As the Court has already rejected this interpretation, this second argument also fails.

[29] The Court has noted the case law the Agency relied on in its heads of argument. Specifically the Supreme Court of Appeal judgment in *Highveld Steel Vanadium Corporation v Oosthuizen* 2009 (4) 1 SCA ("Oosthuizen"), where the Court held that pension benefits may be withheld pending the determination of a members' liability. The judgment was made in the context of the Pension Fund Act and not the GEPF. The Agency then adds a bow to this argument, by relying on the judgment by Her Ladyship Justice Modiba who held in *Special Investigating Unit v Hlatshwayo* GP/20/2020 (2021) ZAST 3, that the principles in *Oosthuizen* apply to section 21 of the GEPF law.

[30] The difficulty with the Agency's reliance on these judgments is that they are authority for the proposition, as correctly cited by counsel for the Agency, that pension benefits can be lawfully withheld "pending the determination of a members' liability". Here the facts are not that the funds are withheld pending a determination of liability. The Agency contends that it has determined liability and therefore is allowed to deduct the benefits, without more. That brings the matter into the realm of the principles in *PSA* and not *Oosthuizen* or *Hlatshwayo*.

[31] MM's relief is in the form of an interdict. To be successful, the Court has to be satisfied of a clear right to the relief sought. MM has satisfied this requirement as MM has shown the unlawfulness of the Agency's conduct. Not only is the Agency's conduct not permitted by section 21(3)(a) but it amounts to what the Constitutional Court has termed untrammelled self-help.

[32] The Court is also satisfied that there is no alternative remedy available to MM. The impact of section 2(b) of the LRA is that the usual mechanisms available to an

employee through the CCMA is not available to MM. In addition, MM exhausted and escalated all internal grievance procedures available to her before approaching this Court. The Court is similarly satisfied that there are no alternative remedies available.

[33] The harm which MM stands to suffer if MM does not receive her pension is layered. MM is entitled to a fair procedure, to access to Courts and to fair labour practices and to live in a society regulated by the rule of law. All these are breached if her employer can determine her pension will not be paid out because of a unilaterally determined, calculated, imposed and executed debt. The Court similarly is satisfied that MM has proven a breach of this clear right or the apprehension of harm. The Court is satisfied that the requirements for an interdict have been met.

[34] The matter came before the urgent court. MM relied on the principle that certain types of financial harm attracts the attention of the urgent court if the financial harm that is risked may result in ruin (*Twentieth Century Fox Film Corporation and Another v Anthony Black Films* (Pty) Ltd 1982 (3) SA 582 (W)). The Court accepts this principle. There is, however, a factor with more weight in this matter which means MM will not be able to obtain satisfactory relief in the ordinary course: the Agency is immediately depriving her of her only livelihood. MM and her family's substance needs was to be met with her pension benefits. MM is the sole bread-winner and have three dependents. The pension which MM expected to receive was to be her only future source of income and as such is essential to her future survival. To deprive her of this deprives her and her family of their earned livelihoods. This harm cannot be remedied in due course. To be without, essentially an income, which one is entitled to for possibly years, pending a determination in the ordinary course results in the type of hardship which cannot be cured down the line. The Court is satisfied that if the matter was not heard on the urgent roll, MM and her family would suffer immediate and acute hardship, that the situation would have worsen if persisted and that there is no true remedy for that type of hardship in the ordinary course.

[35] The Court also considered the Agency's criticism that MM dragged her feet in coming to Court. The Court is not persuaded by these submissions. It is true that the meeting with Ambassador Bam took place in December 2023. However, the final word from the DG – after MM exercised and exhausted her internal grievance procedure - is dated mid June 2024, a couple of days before this matter was launched. MM cannot be criticised for attempting to resolve the matter internally by following the prescribed grievance procedure.

[36] Lastly, a word on costs. The Agency acted unlawfully. MM had to come to Court to enforce her rights and was successful. MM was not only successful but was successful in asserting fundamental rights and halting self-help. For these reasons, MM is entitled to costs.

[37] MM counsel argued for punitive costs, based on the conduct of the Agency. The Agency had withheld the submission of pension forms to the Fund – but indicated that if MM were to sign an acknowledgement of debt – then the forms would be sent off. MM's position is that an acknowledgement of debt was being extracted in return for at least processing a part of her pension benefits. This type of conduct, contended counsel for MM bordered on extortion.

[38] In addition, the submission before the Court is that the matter is complex. The matter involved a section which had not yet been litigated, a complex history, a foray into confidentiality of documents which the Court ultimately did not have to decide and involved principled matters of self-help.

[39] The Court is convinced that the Agency's conduct combined with the complexity of the matter, justifies costs on scale C.

[40] In September 2024, between the Court reserving judgment on 2 July 2024 and the handing down of the judgment, the applicable legislation – being section 21 of the GEPF - was amended. The subsequent amendment has no bearing on this judgment, but the Court wishes to explain why the amended sections were not considered in its reasoning as they post-dated the hearing of the matter.

[41] On 10 July 2024, shortly after the hearing of the urgent matter the Court granted an order but reserved the issue of costs for determination with the reasons. The Court therefore amends the last paragraph of the order granted on 10 July 2024 to address the reserved issue of costs.

Conclusion

[42] The Court orders:

1. This application is enrolled as an urgent application in terms of rule 6(12) of the Uniform Rules of Court.

2. The First Respondent ("the Agency") and/or the Second Respondent ("the Acting Director-General") and/or the 3rd Respondent ("the Minister") are interdicted and prevented from taking any steps:

    i) to deduct from Applicant's remuneration all monies referred to in the Interoffice Memorandum of the Acting Director-General to Applicant of 7 May 2024 and headed Summary Salary Debt Recovery: MM (A[...] 7[...]);

    ii) To stop and/to interfere with and/or to obstruct and/or to withhold, payment by 4th Respondent to ("the Government Employees' Pension Fund") to Applicant of her pension benefit, which payment is due on 1 July 2024.

3. The first to third respondents are ordered to pay costs on scale C.

I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

Counsel for applicant: Peter Buirski

Instructed by:	Fairbridges Wertheim Becker Attorneys
Counsel for 1 - 3rd respondents:	DT Skosana SC
Instructed by:	State Attorney
Date of hearing:	26 June 2024
Date of order:	10 July 2024
Date of reasons:	30 September 2024