



**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 2024-067842**

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: YES

In the matter between:

**LESEDI LOCAL MUNICIPALITY**

Applicant

and

**MUNICIPAL GRATUITY FUND**

First Respondent

**MAHLOGONOLO MPHAHLELE**

Second Respondent

**Delivered:** 16 August 2024 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII.

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**ORDER**

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The application is dismissed with costs, including the cost of counsel at scale B.

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**JUDGMENT**

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**BESTER AJ:**

[1] The Lesedi Local Municipality applies urgently for an interdict restraining the first respondent, a fund registered in terms of the Pension Funds Act, 24 of 1956, from

processing the second respondent's claim to have her pension benefits paid out to her. The relief is sought pending the finalisation of forensic investigations into maladministration and misappropriation of bursary funds by the second respondent whilst the applicant employed her as a training and development officer.

[2] During her employment with the applicant, the second respondent was responsible for the administration of the applicant's bursary funds, which included processing applications and payments to various tertiary institutions. The applicant held a disciplinary inquiry into the conduct of the second respondent. On 30 January 2024, she was found guilty of gross misconduct, fraudulent misrepresentation and breach of trust, and dismissed. The second respondent has challenged her dismissal on both procedural and substantive grounds and the matter is pending before the relevant bargaining council.

[3] The first respondent is a defined contribution fund providing retirement benefits to municipal employees in various provinces. The second respondent is a member of the first respondent.

#### *The relief sought*

[4] It is well settled that an applicant for an interim interdict must establish (a) a *prima facie* right even if it is open to some doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (c) that the balance of convenience favours the granting of the interdict; and (d) that the applicant has no other legal remedy.<sup>1</sup>

[5] In *National Gambling Board*<sup>2</sup> the Constitutional Court confirmed the nature of an interdict as:

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<sup>1</sup> *National Treasury and Other v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 23 (CC) in [41] to [45], approving *Setlogelo v Setlogelo* 1914 AD 221 and *Webster v Mitchell* 1948 (1) SA 1186 (W).

<sup>2</sup> *National Gambling Board v Premier, Kwa-Zulu Natal and Others* 2002 (2) SA 715 (CC) in [49], approving of LTC Harms' definition in *The Law of South Africa first reissue*, Vol. 11 para 314.

“A court order preserving or restoring the *status quo* pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.”

[6] Mr Moloi, appearing for the second respondent, challenged the applicant’s assertion that it seeks interim relief. He pointed out that the interim interdict is sought pending internal processes, without reference to further proceedings at which the issue of the second respondent’s liability will be finally determined. In the circumstances, he argued, the applicant asks for final relief. Mr Mthombeni, appearing for the applicant, conceded the point and moved for an amendment to have the interdict granted pending the institution of civil proceedings for recovery of funds. He did not, however, clearly articulate the wording he would move for, nor present an amended version of the relief in a draft order. Because of the conclusions I reached below, it is not necessary to consider the issue of the amendment further.

*The prima facie right asserted*

[7] Section 37D of the Pension Funds Act stipulates the circumstances in which a registered fund may deduct amounts from any benefits due to a member. The applicant specifically relies on section 37D(1)(b)(2). The section provides as follows:

“(1) A registered fund may –

...

(b) deduct any 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 –

...

(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in sub-paragraph (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 magistrates’ court, from any benefit

payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such an amount to the employer concerned;

- (2) For the purposes of paragraph (a)(ii)(bb) and (cc) of subsection (1), the amounts so deducted shall be deemed to be a benefit to which the member becomes entitled on termination of his or her membership of the fund for reasons other than as a result of retirement or death arising at the date of the transfer or the default.”

[8] Section 37D sets out exceptions to the general principles set out in section 37A designed to protect pension benefits against *inter alia* execution. The object of section 37D(1)(b) is to protect an employer’s rights to pursue the recovery of money misappropriated by its employees.<sup>3</sup> For the section to be effective in its purpose, it must be interpreted as allowing the withholding of payment of a member’s benefits pending the determination of the member’s liability.<sup>4</sup>

[9] The applicant has to establish *prima facie* that it has reasonable prospects of success in obtaining a judgment against the second respondent which would entitle it to receive payments towards the judgment from her pension benefits.<sup>5</sup> The applicant thus has to establish a *prima facie* case that it will obtain a judgment for recovery of damages from the second respondent which she caused the applicant through theft, dishonesty, fraud or misconduct. The reference to ‘misconduct’ in section 73D(1)(ii) has been interpreted as dishonest conduct, or conduct involving an element of dishonesty, thus intentional conduct.<sup>6</sup>

#### *The applicant’s case under scrutiny*

[10] Mr Dlamini, the applicant’s Municipal Manager, deposed to the founding affidavit. The deponent states that “*it is suspected that the applicant has lost more than R200 000,00 through maladministration, dishonesty, misconduct, and misappropriation of bursary funds*”.

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<sup>3</sup> *Highveld Steel & Vanadium Incorporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) in [16].

<sup>4</sup> *Highveld* above; *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others* 2019 (4) SA 608 (GJ) in [84].

<sup>5</sup> *SABC* above in [86]; *Highveld* above.

<sup>6</sup> *Moodley v Scottburgh / Umzinto North Local Transitional Council and Another* 2000 (4) SA 524 (D); *SABC* above in [81].

[11] Presumably, the applicant envisages relying on a claim for fraud or theft. The allegations relied upon, do not reveal a *prima facie* case on either of those two causes of action.<sup>7</sup>

[12] So little is said by the applicant in the founding affidavit in support of its case, that it is possible to set it out here verbatim:

- “18. It was discovered that the second respondent was about to send a signed letter to UNISA on the letterhead of the Municipal Manager. The letter was dated 28 November 2022. In essence, the letter was requesting UNISA to pay an amount of R20 000.00 into the personal bank account of Mr John Mofokeng. What is surprising is that Mr Mofokeng stated in his bursary application that he personally paid R8 560.00 for his studies, and it is worrisome that he could have applied for such bursary while he paid for himself.
19. In addition, on 11 March 2022, an amount of R20 000.00 was paid to Tshwane University of Technology the same day in which similar amounts were paid to UNISA. This disturbing pattern although sophisticated was designed to embezzle the bursary funds. It is against this background that forensic investigation has been sanctioned to unravel this dubious scheme and to determine the extent of monies lost.”

[13] Based on these two sparse paragraphs, the applicant contends it is entitled to interdict the payment of the whole of the second respondent’s pension benefit.

[14] The principle is clear. In *Van der Merwe*<sup>8</sup> the Constitutional Court stated:

“The applicants must stand or fall by the factual averments in their affidavits which are intended to support the cause of action on which the relief sought is based.”

[15] In *Betlane*<sup>9</sup> the Constitutional Court was emphatic:

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<sup>7</sup> For fraud, see *inter alia* *Quartermark Investments (Pty) Ltd v Mkhwanazi and Another* 2014 (3) SA 96 (SCA) and for the *condictio furtiva*, see for instance *Crots v Pretorius* 2010 (6) SA 512 (SCA).

<sup>8</sup> *Van der Merwe and Another v Taylor N.O. and Others* 2008 (1) SA 1 (CC) in [122].

<sup>9</sup> *Betlane v Shelly Court* CC 2011 (1) SA 388 (CC) in [29].

“It is trite that one ought to stand or fall by one’s notice of motion and the averments made in one’s founding affidavit.”

[16] The applicant did not attempt to improve its case in its replying affidavit, which includes only a verbatim repeat of paragraphs 18 and 19 of the founding affidavit, quoted above. It is thus not necessary to consider whether the applicant ought to be allowed to deviate from the rule.

[17] The applicant is required to set out the primary facts from which the inferences, the secondary facts, may be obtained.<sup>10</sup> As the Supreme Court of Appeal explained in *Willcox*<sup>11</sup>:

“There is nothing artificial or technical about the notion of primary facts. Facts are conveniently called primary when they are used as the basis for inference as to the existence or non-existence of further facts, which may be called, in relation to primary facts, inferred or secondary facts.”

[18] Secondary facts in the absence of the primary facts on which they are based are nothing more than the deponent’s conclusions which are the expression of an opinion and do not constitute evidential material capable of supporting a cause of action.<sup>12</sup>

[19] The applicant has not provided primary facts; rather, it has simply jumped to the legal conclusion that the second respondent is guilty of fraud and theft.<sup>13</sup>

[20] The applicant seeks to bolster its case with the fact that the second respondent was found guilty of various charges, including fraudulent misrepresentation. It attaches the findings of the chairperson of the disciplinary committee. It further relies on having procured a similar order on 10 May 2024 against a different fund, the National Fund for Municipal Workers, where the second respondent is also a member.

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<sup>10</sup> *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602A; *Radebe v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 792 I – 793 G/H.

<sup>11</sup> *Willcox and Others* above at 601 J – 602 A.

<sup>12</sup> *Willcox* above; *Radebe* above; *Die Dros (Pty) Ltd and Another v Telefon Beverages CC and Others* 2003 (4) SA 207 (C) at [28]. For the correct approach to drawing inference, see for instance *South African Post Office v De Lacy and Another* 2009 (5) SA 255 (SCA) in [35].

<sup>13</sup> See for instance *Radebe* above.

The founding affidavit does not engage with the contents of the two documents, nor with the events that led to either the disciplinary outcome or the earlier order.

[21] When pressed to identify the evidence in support of the applicant's *prima facie* case against the second respondent in the founding affidavit, Mr Mthombeni, who appeared for the applicant, correctly conceded that the founding affidavit does not contain such evidence. Instead, he sought to rely on the Chairperson's findings, the order obtained on 10 May 2024, and the terms of reference for the forensic investigation.

[22] The applicant's reliance on the Chairperson's findings and the judgment against the National Fund for Municipal Workers does not cure this deficiency. In *Helen Suzman Foundation*<sup>14</sup> the Constitutional Court endorsed what Joffe J said in *Swissborough Diamond Mines*<sup>15</sup> :

"[I]t is not open to an applicant or a respondent to merely annex to its affidavit documentation and to request the court to have regard to it. What is required is the identification of the portions thereof on which reliance is placed and an indication of the case which is sought to be made out on the strength thereof. If this were not so the essence of our established practice would be destroyed. A party would not know what case must be met."

[23] In the same judgment, the Constitutional Court endorsed what the Supreme Court of Appeal said in *NDPP v Zuma*<sup>16</sup>:

"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

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<sup>14</sup> *Helen Suzman Foundation v President of the Republic of South Africa and Others* 2015 (2) SA 1 (CC) in [35] footnote 35.

<sup>15</sup> *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 324 G.

<sup>16</sup> *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) in [47].

the opponent's affidavit and to speculate on the possible relevance of facts therein contained."

[24] I nonetheless briefly venture into those documents, to illustrate the dangers of not doing so to the administration of justice. This is especially relevant to urgent hearings, where matters must often be decided without the benefit of a careful study of all the available supporting documents, and the Court must rely on the parties to properly present the evidence, and counsel to present their client's case in a manner befitting an officer of the court.

[25] The Chairperson made the following findings against the second respondent: she used a colleague's laptop without authority; she contracted with an external service provider for venue hire without following appropriate protocols; she signed off on a letter and learnership agreements without the requisite authority; she failed to return a laptop upon her suspension; and she took unauthorised leave. What is entirely missing from these findings, is anything related to misappropriated bursary funds.

[26] The closest reference in the Chairperson's report is found in a summary of one of the witnesses' evidence:

- "34. [The witness] testified, in respect to the charge relating to the employee having signed a letter addressed to UNISA regarding the bursary monies and upon her stumbling on the letter, that she required information and could not obtain same from the employee as she was blocked and the employee would not respond to her emails and as such she contacted a John who confirmed that he had already paid UNISA and as such requested a reimbursement.
- 35. Thereafter, [the witness] went to look at the bursary application and found an application for a bursary, however, the amounts had a significant difference; R 8 600 was requested but R 20 000 was paid."

[27] This payment did not feature in the Chairperson's analysis and was not a basis for any of the findings. The basis for the conclusion of fraudulent misrepresentation was the use of a colleague's email address to send communication.

[28] The Municipal Manager's reliance on the Chairperson's findings in support of the allegations that the second respondent is suspected of having misappropriated funds is thus baseless. Counsel's persistence with that line of argument is, to say the least, disconcerting. Both the deponent and counsel contended that there was a link between the finding of fraudulent misrepresentation by the Chairperson and the suspicion of misappropriation of funds. No such basis was laid in the Chairperson's report.

[29] The covering letter under which the terms of reference for the investigation were sent to the Chairperson of the Disciplinary Committee Board by the board member who prepared the terms of reference, Mr Taylor, deserves mention. The letter presents the second respondent's dismissal as being a consequence of her having fraudulently caused R20 000 to be deposited into UNISA's bank account. The letter further states that it subsequently came to the knowledge of the applicant (without any indication of how) that another R20 000 was deposited into the Tshwane University of Technology's bank account on the same day. The letter thereafter states that the applicant *"is desirous to ascertain whether additional misconduct was perpetrated by Ms Mphahlele. This may have an effect on her pension payout from the LLM"*.

[30] It is thus clear that the high watermark of the purported suspicion amounts to R40 000, although no evidence in support thereof has been produced. It thus remains a mystery how the Municipal Manager could allege in the founding affidavit that the second respondent is suspected of having misappropriated R200 000.

[31] Mr Mthombeni also urged me to grant an order on the strength of the previous order. That judgment did not make a final finding on the second respondent's liability that would be binding on her. It was also granted against another fund and the order is thus not binding on the first respondent. This court must decide the case before it on its own merits.

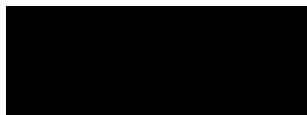
### *Conclusion*

[32] I find that the applicant has not shown that it has a *prima facie* right to obtain judgment against the second respondent which it may satisfy from her pension

benefits. In the result, it is not necessary to consider the further requirements for an interim interdict.

[33] There is no reason why the ordinary rule that costs should follow the result should not be applied here. I therefore make the following order:

The application is dismissed with costs, including the cost of counsel at scale B.



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**A Bester**  
**Acting Judge of the High Court of South Africa**  
**Gauteng Local Division, Johannesburg**

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|--------------------------------|------------------------------------------------------|
| Heard on:                      | 4 July 2024                                          |
| Judgment Date:                 | 16 August 2024                                       |
| Counsel for the Applicant:     | Mr P Mthombeni, Instructed by Raphela Attorneys Inc. |
| First Respondent:              | No appearance                                        |
| Counsel for Second Respondent: | Mr LM Moloi, instructed by Masekwameng Inc.          |