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

Reportable / Not reportable

CASE NO: **2218/2024**

In the matter between:

THE MUNICIPAL WORKERS RETIREMENT FUND	**Applicant**

and

MAFUBE LOCAL MUNICIPALITY	**First Respondent**
MUNICIPAL MANAGER,	
MAFUBE LOCAL MUNICIPALTY	**Second Respondent**
CHIEF FINANCIAL OFFICER,	
MAFUBE LOCAL MUNICIPALITY	**Third Respondent**
EXECUTIVE MAYOR,	
MAFUBE LOCAL MUNICIPALITY	**Fourth Respondent**

Neutral citation: *Municipal Workers Retirement Fund v Mafube Local Municipality And 3 Others*

Coram: **Ramdeyal AJ**
Heard: **29 August 2024**
Delivered: **05 September 2024.**

ORDER

The application as per the notice of motion including the costs of two counsel and the Fund's legal practitioners reasonable travel and accommodation cost, on Scale C in terms of Rule 67A is granted.

JUDGMENT

Ramdeyal AJ

INTRODUCTION

[1] The applicant is the Municipal Worker's Retirement Fund (the Fund) registered in terms of s 4 of the Pensions Fund Act 24 of 1956. The Mafube Local Municipality (the Municipality) is a duly constituted municipality in terms of s 2 of the Local Government Municipal Systems Act 32 of 2000.

[2] The Municipality is a participating employer in the Fund and has many employees registered as members. Arrear pension fund contributions for its employees have always been a major issue resulting in many court orders and writs of execution against the Municipality for payment thereof. Consequently, the Municipality, too, has brought many unsuccessful applications to stay writs of execution.

[3] On 9 September 2021 the Municipality was ordered to pay the Fund an amount of R37 795 476.32, with interest and costs. Subsequently, the Municipality's bank accounts were attached by the Fund, while the sheriff executed the writ. Only R97 000 was available in the Municipality's bank account which was then paid to the Fund.

[4] The judgment debt still stands for arrear pension fund contributions from the Municipality for its employees. The Fund now endeavors to retrieve the arrear amount

for its members by seeking past and future information in respect of the Municipality's bank accounts to give effect to its current court order.

APPLICANT'S VERSION

[5] It is not in dispute by the Municipality that it has deducted pension fund contributions from the salaries of its employees and failed to pay it over to the Fund. However, no explanation appears to be forthcoming about what happened to the money deducted. It is also not in dispute that the Municipality receives an equitable share annually: for the previous financial year an amount of R128 million, and for the 2024/2025 financial year an amount of R138 million. Arrear pension payments are still not forthcoming, despite these large amounts of equitable shares received and to be received by the Municipality.

[6] The Fund contends that the Municipality has the money it received from its employees and has moved money from one account to another to avoid attachment of same. The Fund therefore seeks an order to furnish a full accounting of each and every withdrawal, payment or transfer from ABSA Bank accounts as well as FNB of the respondent from 10 October 2023 to date. They seek an order from this court to obtain copies of bank statements of the relevant accounts and copies of bank statements for the account/s where the equitable shares are held as well as the dates expected by the Municipality to receive such shares.

[7] Judgment was granted against the Municipality on 9 September 2023 for the amount of R37 795 476.32. The Municipality offered payment of 25% of the judgment debt. The fund declined the offer and proceeded with its writ of execution by attaching the Municipality's bank accounts via the sheriff, resulting in an urgent application by the Municipality to have the writ of execution stayed, which was unsuccessful. The sheriff received an amount of R97 000 from ABSA and paid same to the Applicant's attorneys. That appears to have been the only amount received of the judgment debt. Hence the application to this court to grant the order as per the notice of motion.

RESPONDENT'S VERSION

[8] The respondent avers that the applicant attached the Municipality's right, title and interest in its claim against the bank. The bank now stands in the 'shoes of the Municipality' and the bank must pay over to the applicant any monies that were in the

account and monies deposited thereafter. The respondent contends that the applicant should have joined the banks in this matter as they are relevant parties.

[9] The respondent contends that rule 45(12) and 45(8) of the Uniform Rules of Court set out the applicable process to be followed because of the effect of the attachment and that the banks should be ordered to make payment to the applicant.

[10] The respondent further contends that the applicant should have brought this application by invoking the Promotion of Access to Information Act 2 of 2000 (PAIA). The respondent further contends that the applicant's procedure sought is in itself premature and the respondent seeks an order for the application to be dismissed with costs.

HISTORY OF THIS MATTER

[11] There is an ongoing non-compliance from the Municipality to pay its own employees' pension fund contributions to the Fund. An application was launched in 2011 by the Fund for non-payment where judgment was granted in 2015 and the Municipality eventually made partial payment to the Fund. In 2019 the Fund brought a similar application against the Municipality, seeking judgment for R25 411 872.20 and an order against ABSA Bank for disclosure of transfer of monies by the Municipality to another account. Confirmation of the transfer was made by ABSA Bank. Then, too, it was not in dispute that the Municipality owed money to the Fund in respect of its employees' pension fund contributions. In *Municipal Workers Retirement Fund and Mafube Local Municipality*[1] it was held that '**The Municipality asserts that although it does not in any way try to escape liability for any payment due . . .**'

[12] The Municipality did not pay the arrear contributions to the Fund. Instead, it brought an application for leave to appeal against the court's judgment which was dismissed on 3 December 2021 by Molitsoane J where he remarked that:

'**What remains undisputed is that the applicant is indebted to the respondent**. It only seems that the concern of the applicant is that it seeks to verify the information contained in the documents it supplied to the respondent . . .'[2]

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1 *Municipal Workers Retirement Fund and Mafube Local Municipality* [2021] ZAFSHC 342 para 11.
2 *Mafube Local Municipality v Municipal Workers Retirement Fund* [2021] ZAFSHC 311 para 9.

[13] This practice by the Municipality seems to have continued over the years; frivolous defences and non-payment of its employees' pension fund contributions still remains unabated. Cronje AJ in *Mafube Local Municipality v Municipal Workers Retirement Fund and Others*[3] at para 61-63 made an order for referral of the non - payment by the Municipality to the *NDPP.*

'The Municipality fails to pay pension fund deductions of employees to the Fund as regulated by section 13A of the Pensions Fund Act, 24 of 1956.

In terms of section 37 of the pension Funds Act this constitutes a criminal offence.

The Registrar is directed to bring this judgment to the attention of the National Director of Public Prosecutions for consideration of instituting criminal proceedings against the Municipality for breach of the Pension Funds Act.'

[14] There is an ongoing battle by the applicant to seek payment for the arrear pension amounts as this is an urgent matter. Their attempts to remedy the situation seems to be opposed by the respondents on a consistent basis with stay of execution proceedings, leave to appeal against court orders and, as in the current matter, raising mis-joinder of parties, incorrect remedies used by the applicant *ad infinitum.*

[15] Pertinent to this matter is that it always appears common cause that the money 'arrear pension' is deducted by the Municipality. The disappearance of the money of the employees of the Municipality and members of the Fund remains questionable. The Municipality would rather challenge each and every application brought to assist the pension fund members rather than pay its employees' money to the Fund. There is a mysterious delay rather than a solution to an ongoing undisputed problem, namely the non-payment of the arrear pension monies of the Fund's members to the Fund by the Municipality.

PREJUDICE TO THE FUND AND MEMBERS CONCERNED

[16] In the founding affidavit of the applicant, it is clear that severe prejudice would result to the Fund's members whilst contributions remain outstanding, as explained in paras 61-67. Members would receive increasingly less benefits if retrenched or upon resignation, with some possibly not receiving any benefits at all. Claims can be repudiated if members become sick, disabled or die while in service. The Fund is

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[3] *Mafube Local Municipality v Municipal Workers Retirement Fund and Others* [2023] ZAFSHC 136

unable to invest the outstanding amounts which is a statutory requirement, ultimately benefitting the members, with the result that their constitutional right to social security is breached (s 27(1)*(c)* of the Constitution). It is axiomatic that the prejudice caused to members can have devastating consequences for them and their families if this matter is not attended to promptly and as a matter of urgency.

[17] An order has been made by a court of law directing the respondent to pay the arrear amount. Instead of complying and paying the whole amount as ordered, only R97 000 has been paid. The remainder is a mystery. Court orders are binding until set aside (s 165(5) of the Constitution). Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority follows. Therefore, effective enforcement to protect the trust and respect for the courts is required.[4]

[18] A binding court order exists, yet the Municipality considers it prudent to present various remedies and strategies to obtain the outstanding monies, but conveniently avoids addressing the elephant in the room: what happened to the pension fund contributions that had been deducted by the Municipality? In addition, its plea to join the banks as respondents and resorting to the approach of PAIA will only delay this matter even further.

[19] The respondent has, and is due to receive, money in equitable shares, that is common cause. They receive various amounts of monies from different sources. It has not pleaded bankruptcy or any similar notion, yet offers naught but silence on the issue of its members' monies.

[20] The applicant has requested that the court now utilise its inherent jurisdiction power to regulate its procedure, namely to give effect to the previous judgment granted. Section 173 of the Constitution makes it manifest that '[t]he Constitutional Court, Supreme Court of Appeal and the High Court have the inherent power to protect and regulate their own process, . . . taking into account the interest of justice.' Such powers do have limitations. However, in *S v S and Another*[5] it was held that '. . . where strict adherence to the rules is at variance with the interests of justice, a court may

[4] *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3; [2022] BLLR 393 (CC) para 26.
[5] *S v S and Another* [2019] ZACC 22; 2019 (8) BCLR 989 (CC); 2019 (6) SA 1 (CC).

exercise its inherent power in terms of s 173 of the Constitution to regulate its own process in the interests of justice.'[6]

[21] The utilisation of s 173 of the Constitution by the Court to use its inherent power to grant the prayers sought in the notice of motion maybe a suitable application of law, in light of the history of this matter and its prejudicial component on working citizens of this country who's rights should be protected, and not blatantly infringed, as it is. The Municipality cannot continue to delay proceedings and delay the rights of the applicant's members from being enforced. Non-payment of the pension fund contributions is a serous breach of law. It is now time to act and compel the Municipality to disclose all the necessary documentation that the Fund requires to enforce the court order and writ of execution on the relevant bank account that holds money to eradicate this long outstanding problem and give proper effect to this court order. The interests of justice warrant same.

[22] The obligation of the Municipality is simple: it merely has to give the instruction to the bank holding its money to dispose of the monies by paying the Fund, but the respondents have made this matter difficult for the applicants. No instruction has been forthcoming. Rather, the Municipality contends that the applicant must use alternative remedies to litigate. This, notwithstanding the fact that there is an existing court order for payment of money. The applicants are unable to give effect to it due to lack of funds, or no funds at all in the respondent's bank account. The applicant believes that the respondent has money, perhaps in a different account. To this end, if the respondent does not want to comply with the court order then the Court must act and assist the applicant so that the Fund members are safeguarded with their pension benefits. It has been held that '[i]f the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the judiciary, and the rule of law, would indeed be bleak.'[7]

ORDER

[23] In consideration of the circumstances of this matter, I make the following order:

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[6] Ibid para 58.
[7] *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture Corruption and Fraud in the Public Sector including Organs of State v Zuma* [2021] ZACC 18; 2021 (5) SA 327 (CC); 2021 (9) BCLR 992 (CC) para 87.

The application, as per the notice of motion including the costs of two counsel and the Fund's legal practitioners reasonable travel and accommodation cost, on Scale C in terms of Rule 67A, is granted.

[redacted]

RAMDEYAL, AJ

APPEARENCES

For the Applicant:	Advocate P Van der Berg, SC Accompanied by Advocate H Drake
Instructed by:	McIntyre Van Der Post Attorneys
For the 1st to 4th Respondents:	Advocate M C Louw
Instructed by:	Peyper Attorneys