

**REPUBLIC OF SOUTH AFRICA**



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

Reportable  
Case no.: 1653/2024

In the matter between:

**MUNICIPAL WORKERS' RETIREMENT FUND**

Applicant

and

**MAFUBE LOCAL MUNICIPALITY**

First Respondent<sup>1</sup>

**MUNICIPAL MANAGER,  
MAFUBE LOCAL MUNICIPALITY**

Second Respondent<sup>2</sup>

**CHIEF FINANCIAL OFFICER,  
MAFUBE LOCAL MUNICIPALITY**

Third Respondent

**EXECUTIVE MAYOR,  
MAFUBE LOCAL MUNICIPALITY**

Fourth Respondent

**THOMAS LINDELO MKAZA**

Fifth Respondent

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<sup>1</sup> The 'Municipality'.

<sup>2</sup> The second to fourth respondents will also be referred to as the 'Municipal Officers'. The fifth respondent will also be referred to as 'Mr. Mkaza' or the 'Administrator'.

**Coram:** Opperman J

**Heard:** 25 July 2024

**Delivered:** 17 January 2025. This judgment was handed down in court and electronically by circulation to the parties' legal representatives via email and release to SAFLII on 17 January 2025. The date and time of hand-down is deemed to be 15h00 on 17 January 2025

**Summary:** Whether the applicant is entitled to payment of retirement fund contributions in terms of section 13A of the Pension Funds Act 24 of 1956 from the first respondent – whether the second to fifth respondents are personally liable for the first respondent's arrear contributions and interest in terms of ss 13A(8) and 13A(9) of the Pension Funds Act 24 of 1956

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## ORDER

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1. The first respondent, Mothusi Lepheana (second respondent), Dimakatso Tryphona Tau (third respondent), Tlhoare Motsoeneng (fourth respondent), and Thomas Mkaza (fifth respondent) are ordered jointly and severally to:

- 1.1 Make payment to the applicant in the amount of R14 723 639.52;
- 1.2 make payment to the applicant of interest on the amount of R14 723 639.52 from 1 February 2024 to date of payment at the rate(s) which have been prescribed in terms of section 13A(7) of the Pension Funds Act 24 of 1956; and
- 1.3 pay costs of this application on attorney-client scale, including the costs of two counsel.

2. The Registrar of this court shall forward a copy of this judgment to the Director of Public Prosecutions: Free State, Bloemfontein forthwith. The Director of Public Prosecutions: Free State, Bloemfontein shall report to the court within 60 days of the date of this order on the progress of the investigation in writing.

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## JUDGMENT

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**Opperman J**

### **Background**

[1] The atmosphere of this case is captured in a judgment handed down on 5 September 2024<sup>3</sup> in this division. It is one in a series of cases<sup>4</sup> that pertains to the Municipality's ongoing non-payment of contributions and noncompliance with court orders obtained by the Municipal Workers' Retirement Fund (Fund) dating back to 2011.

'[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.*'<sup>5</sup> (Emphasis added.)

[2] It was stated in *Mafube Local Municipality v Municipal Workers' Retirement Fund and Others*,<sup>6</sup> after a comprehensive discussion of the disputes, that:

'[45] History has taught that the Municipality tramples on the rights of contributors to the Fund and who will rely on their pension's growth when they retire or may have to rely on earlier. The words of Molitsoane J, *that what the Municipality is doing is too ghastly to contemplate, remain shuddering*' (Emphasis added)

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<sup>3</sup> *Municipal Workers Retirement Fund v Mafube Local Municipality and 3 Others* (2218/2024) [2024] ZAFSHC 272 (5 September 2024) (First Ramdeyal-judgment).

<sup>4</sup> Founding affidavit (FA) paras 63-65, *Mafube Local Municipality v South African Municipal Workers' Union National Provident Fund* (4836/2016) [2017] ZAFSHC 244 (6 April 2017); *Municipality Workers Retirement Fund v Mafube Local Municipality* (2672/2021) [2021] ZAFSHC 342 (9 September 2021); *Mafube Local Municipality v Municipal Workers Retirement Fund* (2672/2021) [2021] ZAFSHC 311 (3 December 2021); *Mafube Local Municipality v Municipal Workers' Retirement Fund and Others* (2672/2021) [2023] ZAFSHC 136 (2 May 2023) (Cronje-judgment); *Municipal Workers Retirement Fund v Mafube Local Municipality and 3 Others* (2218/2024) [2024] ZAFSHC 272 (5 September 2024) (First Ramdeyal-judgment); and *Mkaza v Municipal Workers' Retirement Fund and Others* (2218/2024) [2024] ZAFSHC 296 (26 September 2024) (Second Ramdeyal-judgment).

<sup>5</sup> First Ramdeyal-judgment.

<sup>6</sup> Cronje-judgment.

[3] The applicant motions for an order that the first to fifth respondents are jointly and severally to make payment of its obligation in terms of the Pension Funds Act 24 of 1956 (PFA).<sup>7</sup> It is the Fund's case that the total amount due is R14 723 639.52 (R10 210 053.38 + R4 513 586.14). The amount includes interest in terms of the rate prescribed in s 13A(7).

[4] The quantum is not in dispute. The period on which the claim is based is May 2021 to January 2024. The debt comprises the first respondent's arrear monthly retirement contributions due to the Fund in respect of its employees-members in terms of s 13A(1) of the PFA read with the rules of the Fund.<sup>8</sup> The PFA obliges the Fund to ensure that contributions are timeously paid.

[5] It is common cause that the monies were deducted from the employees-members. The Municipality has not opposed the claim. The second to fifth respondents were in office when the claim was instituted. The claim was instituted on 25 March 2024.

[6] Personal liability of the second to fifth respondents is challenged. The one issue that hovers strongly is the liability of different individuals that occupied the same office often over different periods. Some officers served in an acting capacity. The other is the issue of provincial intervention and the effect thereof. Some findings on the accountability of the second to fifth respondents were already made in *Mafube Local Municipality v Municipal Workers' Retirement Fund and Others*,<sup>9</sup> *Municipal Workers Retirement Fund v Mafube Local Municipality and 3 Others*<sup>10</sup> and *Mkaza v Municipal Workers' Retirement Fund and Others*.<sup>11</sup> I will deal with the defences raised to interrogate the correctness and applicability of the said judgments on the facts of this case. Counsel for the parties to the

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<sup>7</sup> Reference to a section will be to a section in the PFA unless otherwise indicated. I will also depict the relevant sections hereunder more comprehensively.

<sup>8</sup> The Municipal Workers Retirement Fund Consolidated Rules (July 2019) are at 'MWRF 1' and 'MWRF 2' at p 30-53 of the court bundle indexed on 17 July 2024. Also, FA paras 18-27 at p 12-15.

<sup>9</sup> Cronje-judgment.

<sup>10</sup> First Ramdeyal-judgment.

<sup>11</sup> Second Ramdeyal-judgment.

litigation here did not have the opportunity to argue on the judgments and will it only be fair to revisit the issues based on their arguments.

[7] The Municipality has become a faceless and untouchable perpetrator of the PFA to the detriment of the constitutional rights of the affected employees-members. It is common cause, and as will be shown later, that the Municipality has evaded accountability for many years and illegitimately so. The individuals comprising the governing body and that were regularly in control of the financial affairs,<sup>12</sup> have not been held legally liable and answerable to the neglect of their duties to pay the statutory imposed monthly retirement contributions to the Fund.

[8] Recent judgments in this division show that there had been some relentlessly and ruthlessly questionable conduct to avoid payment to the Fund.<sup>13</sup> The Fund has now, out of dire desperation, joined the second to fifth respondents to account for their actions. The applicant is the Municipal Worker's Retirement Fund registered in terms of s 4 of the PFA.

[9] The Mafube Local Municipality is a duly constituted municipality in terms of s 2<sup>14</sup> of the Local Government Municipal Systems Act 32 of 2000. The Municipality is a

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<sup>12</sup> Chapter 7 of the Constitution of the Republic of South Africa is applicable. The governing body of a municipality is the municipal council. The responsibilities of the council are among others to make decisions for the municipality, including adopting policies, developing plans, and approving budgets. They also implement national and provincial legislation, set service charges, and regulate the provision of municipal services. The council is led by an elected mayor, who is assisted by an executive committee of councilors. The mayor and executive oversee the work of the municipal manager and department heads. *The Municipal Council has several duties, including providing democratic and accountable government, using the municipality's resources in the best interests of the local community, ensuring that municipal services are provided in a sustainable manner and respecting the rights of citizens and others protected by the Bill of Rights.*

<sup>13</sup> The judgments referred to above in fn 4 give a sense of the mischief that prevails.

<sup>14</sup> Section 2 of the Local Government Municipal Systems Act 32 of 2000 provides:

'2. Legal nature. — A municipality—

- (a) is an organ of state within the local sphere of government exercising legislative and executive authority within an area determined in terms of the Local Government: Municipal Demarcation Act, 1998;
- (b) consists of—
  - (i) the political structures and administration of the municipality; and
  - (ii) the community of the municipality;
- (c) functions in its area in accordance with the political, statutory and other relationships between its political structures, political office bearers and administration and its community; and

participating employer in the Fund and has employees registered as members. The Municipality falls, undisputedly so, within the ambit of s 13A(8)(c).<sup>15</sup>

[10] The second to fifth respondents are the Municipal Manager, the Chief Financial Officer, the Executive Mayor and the Administrator of the Municipality who has been appointed as the Lead Provincial EXCO Representative of the Municipality. I will refer to their statutory imposed duties to determine their accountability later. It seems to be common cause except for the fact that it causes liability in the context of this case.

[11] The Fund did make the prescribed request in terms of s 13A(9)(a) to the Municipality.<sup>16</sup> They were simply ignored, and no response was forthcoming. The situation persisted during the hearing of the matter in July 2024.

[12] The applicant claims costs against all five respondents jointly and severally on an attorney and client scale due to the history of transgressions by the Municipality and its officers on this score.

[13] It is true as will also be shown later that: '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.'<sup>17</sup> The sloppy litigation by the respondents is undeniable. On 25 March 2024, notice of motion was issued. The first to fifth respondents have filed a notice of intention to oppose on 24 April 2024. The respondents were at the time represented by Peyper Attorneys. On 8 May 2024 the fifth respondent filed another notice of intention to oppose via the Office of the State Attorney. Mr. Mkaza filed an answering affidavit on 3 June 2024. The 15-day period within which the respondents had

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(d) has a separate legal personality which excludes liability on the part of its community for the actions of the municipality.'

<sup>15</sup> '(c) In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.'

<sup>16</sup> 'MWRF 3' attached to the FA at 54 and FA paras 39-40, p 18-19.

<sup>17</sup> First Ramdeyal-judgment para 15.

to file their answering affidavits expired on 17 May 2024. On 19 June 2024 the Fund served the notice of set down on both Peyper Attorneys and the State Attorney, CE Cawood. The second to fourth respondents only filed their answering affidavits on 16 July 2024; one day before the heads of argument for the applicant was filed and after the notice of set down dated 19 June 2024. They were fully aware of the date of the hearing of 25 July 2024. Worse even, the first respondent has, to date, not filed any answering affidavit and the case against the Municipality and the relief sought stands unopposed. *There, astoundingly so, are not any condonation applications on the non-compliance with the Uniform Rules of Court.* For the sake of finality and completeness the Fund dealt with all the issues and disputes in their case. The judgment will similarly be comprehensive of the issues raised.

## **The Law**

### ***In general***

[14] The statutory obligation in terms of s 13A(1) enacted to pay pension contributions is a *sui generis* constitutional obligation that raises the bar on liability for non-compliance. The Supreme Court of Appeal<sup>18</sup> ruled that:

‘[13] The legal principles that apply to pension and provident funds are clear and uncontroversial. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules,<sup>19</sup> applicable legislation and the common law. . . .’<sup>20</sup>

[15] Fundamental is the fact that s 13A *may not be read in isolation*. There is a mosaic of law applicable that specifically regulates the Municipal Officers’ and Administrator’s duties and responsibilities and it must be read in conjunction herewith. The subsections may not be regarded in seclusion. For instance; the argument of counsel for the Municipal Officers that the words ‘is to be deducted’ in subsection 13A(1) from the employees-members remuneration only creates future liability and not retrospective liability for the

<sup>18</sup> *Sasol Limited v Chemical Industries National Provident Fund* (20612/2014) [2015] ZASCA 113 (7 September 2015).

<sup>19</sup> ‘MWRF 1’ and ‘MWRF 2’ at 30-53 of the court bundle.

<sup>20</sup> Neither counsel for the applicant nor for the respondents could refer the court to case law that is directly applicable to the facts of this case. Same could also not be located by the court except for the matters referred to.

current incumbent on existing debt of the pension monies, is narrow and out of context. It is ascribed a meaning different from the meaning that was intended as it is intrinsically entwined with the surrounding relevant law. The suggestion by counsel could never have been the intention of the Lawgiver; it would clash with the miscellany of legislation and case law. *It cannot be that the current employer and its officers are only liable for future deductions; such an interpretation will have bizarre consequences.*

[16] Section 13A is the point of departure. *Inter alia*, the Constitution of the Republic of South Africa (Constitution), the Municipal Workers Retirement Fund Consolidated Rules (July 2019) (Rules), the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA) and the Municipal Systems Act 32 of 2000 (Systems Act) are crucially relevant to complete the law to be drawn from. The legislation is underscored by the relevant case law. There is limited case law on the personal liability of current Municipal Officers and Administrators on the facts of this case. Available case law does, however, provide precedent on application and interpretation of the legislation.

[17] Section 13A provides:

‘13A. Payment of contributions and certain benefits to pension funds —

- (1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely—
  - (a) any contribution which, in terms of the rules of the fund, is to be deducted from the member’s remuneration; and
  - (b) any contribution for which the employer is liable in terms of those rules.
- (2)
  - (a) The minimum information to be furnished to the fund by every employer with regard to payments of contributions made by the employer in terms of subsection (1), shall be as prescribed.
  - (b) If that information does not accompany the payment of a contribution, the information shall be transmitted to the fund concerned not later than 15 days after the end of the month in respect of which the payment was made.

- (3) (a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a member's behalf—
- (i) shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act No. 94 of 1990), not later than seven days after the end of the month for which such a contribution is payable; or
  - (ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month; or
  - (iii) in the case of a fund contemplated in section 15(4) that has been exempted from the provisions of sections 5(2) and 9 because, in operating as a fund, its assets consist exclusively of one or more policies of insurance with an insurer carrying on long-term insurance business as contemplated in the Insurance Act, 1943, shall be forwarded to the insurer concerned in such manner as to have the insurer receive the contribution not later than seven days after the end of that month.
- (b) Any contribution forwarded to and received by a fund in the circumstances contemplated in paragraph (a) (ii), shall be deposited in the fund's bank account on the first business day following the day of receipt.
- (4) . . .
- (5) . . .
- (6) (a) For the purpose of monitoring and ensuring compliance with this section, the principal officer of the fund or any authorized person shall, at the times and in the manner and format prescribed, submit reports to the categories of persons, to be specified in that notice, who have an interest in such compliance.
- (b) In applying paragraph (a), "authorized person" means any person who has been authorized by the relevant board to perform the function contemplated in that paragraph and of whom the registrar has been advised in writing.
- (7) Interest at a rate as prescribed shall be payable from the first day following the expiration of the period in respect of which such amounts were payable on—
- (a) the amount of any contribution not transmitted into a fund's bank account before the expiration of the period prescribed therefor by subsection (3)(a)(i);

- (b) the amount of any contribution not received—
    - (i) by a fund before the expiration of the period prescribed therefor by subsection (3)(a)(ii); or
    - (ii) in the circumstances contemplated in subsection (3)(a)(iii), by the insurer concerned before the expiration of the period prescribed therefor by that subsection;
  - (c) the value of any benefit, or right to any benefit, not transferred by the first fund to the other fund before the expiration of the period prescribed therefor by subsection (5).
- (8) *For the purposes of this section, the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1):*
- (a) If an employer is a company, every director who is regularly involved in the management of the company's overall financial affairs;
  - (b) if an employer is a close corporation registered under the Close Corporations Act, 1984 (Act No. 69 of 1984), every member who controls or is regularly involved in the management of the close corporation's overall financial affairs; and
  - (c) *In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.*
- [Sub-s. (8) added by s. 17 of Act No. 45 of 2013.]
- (9) (a) A fund to which the provisions of subsection (8) apply, must request the employer in writing to notify it of the identity of any such person so personally liable in terms of subsection (8).
- (b) In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8).
- [Sub-s. (9) added by s. 17 of Act No. 45 of 2013.]

(10) A board of a fund must report any non-compliance with the provisions of this section, in accordance with such conditions and in the format as may be prescribed.

[S. 13A inserted by s. 15 of Act No. 86 of 1984, amended by s. 6 of Act No. 22 of 1996 and substituted by s. 1 of Act No. 94 of 1997. Sub-s. (10) added by s. 17 of Act No. 45 of 2013.]' (Emphasis added)

[18] There is not any other process to be followed outside s 13A(9)(a). The only preliminary process prescribed to claim against the liable entities in terms of the PFA on the scenario in this case is that notice must be given in terms of s 13A(9). The Fund did make the prescribed request in terms of s 13A(9)(a) to the Municipality on 24 October 2019. However, they were simply ignored, and no response was forthcoming. This is the only required procedure that had to be complied with before the claim was instituted. The claim was filed on 25 March 2024 and notwithstanding a reference to the request in terms of s 13A(9)(a) and the attachment thereof to the founding affidavit, the current incumbents remained silent.

[19] The argument of defective joinder and citation of the respondents by counsel for the Municipal Officers falls by the wayside due to their own neglect and contempt of the provisions of the PFA. The onus is on the employer as represented by the governing body that it is constituted of, in the least, the Municipal Officers and the Administrator, to indicate the identity of the persons to be held accountable. This silence speaks volumes.

[20] There is not any requirement that the Fund must embark on an inquiry into the persons in power from May 2021 to January 2024. The onus is on the employer to supply the information. In addition; the current entity in power has the authority to erase the arrears and meet the claim by paying. In fact, it is a legislative duty to honour outstanding debt and specifically pension-related fees.

[21] The principles decreed in s 13A(9)(b) now, undisputedly so, take effect. It decrees that in the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the

management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, *shall be personally liable* in terms of subsection (8). The legislation is mandatory.

[22] Section 13A(9)(b) must be read with s 13A(8)(c) which gives a definitive definition of the entities that are to be held liable in this case:

'In respect of any other employer of any legal status or description that has not already been referred to in paragraphs (a) and (b), every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved in the management of the employer's overall financial affairs.'

It is any employer of any legal status; this includes the Administrator.

[23] *Engineering Industries Pension Fund and Another v Pioneer Mechanical CC and Another*<sup>21</sup> (*Engineering Industries/Pioneer*) provides some valuable precedent and the standard to be applied on the personal liability provisions of the PFA:

a. Sections 13A(8) and 13A(9) *must be interpreted strictly and to the word*. The personal liability claim is not accessory but primary.

[6] Notwithstanding the above, the second respondent makes significant admissions which, in my view, underscores the rationale for the implementation and application of section 13A(8), and thereby weakens his argument that *this section only imposes accessory, not primary, obligations upon him to comply therewith*. In my view, the *raison d'être* of this section is to ensure that, in circumstances where a failure to comply with section 13A(1) occurs, someone must and should, via compulsion, be responsible to 'step into the shoes' of the employer, in this case of the first respondent. If this were not the intention of the Legislature, it would call into question why this section was enacted and is interpreted strictly. In *Fundstrust (Pty) Ltd (In Liquidation) v Van Deventer* the Court held:

"The Legislature has not unambiguously expressed its intention and here it becomes of prime importance to have regard to the context, and thus including the often more important matter of the statute it's apparent scope and purpose and within limits, its background."

I therefore disagree with the second respondent's rationale and practical application of subsection (8).' (Emphasis added)

<sup>21</sup> *Engineering Industries Pension Fund and Another v Pioneer Mechanical CC and Another* (13568/2020) [2022] ZAWCHC 215 (3 June 2022).

b. There is not any constraint on the applicant to first seek payment from the employer; in this case, the Municipality. *The applicant can go directly to the officers that are accountable. The Municipal Officers and Administrator shall not hide behind the 'corporate veil'.* In *Engineering Industries/Pioneer*, it was held that:

[8] Inasmuch as these submissions might have sought to convince me to apply same to this matter, they did not. In *Fundtrust* the appellate division states that the regime of the corporate veil 'remained firmly intact . . . except for rare and exceptional cases of "piercing" by the Legislature or the Courts.' I agree with this approach and am of the view that this matter is precisely such an instance as the Legislature foresaw in enacting the provisions of section 13A(8), and this court should apply its discretion in invoking its powers to prevent the second respondent from hiding behind the corporate veil and escaping liability, discarding any onus which rests upon him, leaving unsuspecting and disadvantaged employees rudderless and up the creek without a paddle. *The three amendments of subsections (8), (9) and (10):* "... aim to pierce the corporate veil and mandates employers to identify a person who can be held personally liable for non-payment of contributions to the fund." (Emphasis added)

[24] The second to fifth respondents have a heightened obligation to comply with the rule of law and specifically the Constitution. They may not choose when and how to implement the legislation that decrees their conduct. Some of the defences that are raised in this case have been disposed of and ruled on by the judgments that went before this case. The Municipality was unsuccessful, but they persisted.<sup>22</sup> The Constitutional Court condemned the conduct of some Municipal Officers in no uncertain terms in *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni*<sup>23</sup> (Ndabeni):

[38] Although the Municipal Parties escape being held in contempt, their dilatoriness, inertia and unaccountability must be viewed through the lens of the Municipality's heightened duty to comply with court orders. *Organs of state, of which the Municipality is one, are expressly enjoined to "assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts". They have obligations under the Constitution to respect the rule of law and the courts as guardians of the Constitution.*' (Emphasis added)

<sup>22</sup> See footnote 4.

<sup>23</sup> *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* (CCT 45/21) [2022] ZACC 3 (14 February 2022); [2022] 5 BLLR 393 (CC); (2022) 43 ILJ 1019 (CC); 2022 (10) BCLR 1254 (CC); 2023 (4) SA 421 (CC).

[25] The legislation was *clearly conceived to curtail the conduct of perpetual perpetrators*. It will therefore not exclude any current officeholder from liability. It is *irrelevant that some of the Municipal Officers were in acting appointments and are not formal fixed term- or permanent appointments*. The scope to evade liability will be too wide and entities such as the Municipality may very well, on a permanent basis, employ acting office holders; the result will be enduring impunity.<sup>24</sup> *The fact that an employer is under administration in terms of the Constitution does not pose a defence for the current incumbent.*

[26] In the First Ramdeyal-judgment it came to light that the Municipality receives revenue from the central government annually (its equitable share). This was R128 million in 2023/24 and R138 million in 2024/25. Despite this revenue, the contributions have not been paid. The Fund contended that the Municipality has moved the money from one bank account to another to prevent it from being attached. The Fund sought an order to furnish a full accounting of every withdrawal, payment, or transfer from the Municipality's ABSA and First National Bank (FNB) accounts from 10 October 2023. It also sought an order to obtain copies of the bank statements of the relevant accounts and copies of bank statements for the accounts where the equitable shares are held, as well as the dates on which the Municipality expects to receive this revenue. The application was granted against all the respondents. It included the Municipal Manager, Chief Financial Officer, Executive Mayor, and the fifth respondent in *casu*, Mr. Thomas Lindelo Mkaza.

[27] The above establishes the liability of the current incumbent in whatever capacity, whether it be permanent or not, stretches over periods retrospectively, presently and most possibly into the future. In the scenario of the claim in this case; *it goes to the claim and the debt due; the whole and total claim and debt.*

[28] The essential context wherein adjudication must be conducted is the constitutional gravity of the case. *The basic rights to social security of the members of the Fund in terms*

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<sup>24</sup> Answering Affidavit (AA) paras 11-16.

of s 27(1)(c)<sup>25</sup> of the Constitution of the Republic of South Africa, 1996 is the foundation.

It is trite in the instance that the contributions have been deducted from hard-earned income; most probably from breadline-salaries, by the Municipality.<sup>26</sup> It must now be paid over to the Fund.

[29] The PFA protects a member's pension from being attached or being the subject of execution.<sup>27</sup> It may not be misappropriated and used for any other purpose than what it was deducted for. Contributions in terms of s 13A(1) are akin to a payment made into a trust account of attorneys.

[30] In *Post Office Retirement Fund v South African Post Office SOC Ltd and Others*<sup>28</sup> (SAPO), the purpose of legislation such as the PFA was, *inter alia*, emphasised. The monies must simply be transferred to the Fund, because the monies have been deducted. *It may not be utilized for any other purpose; it, in the least, constitutes unfair labour if not paid over to the Fund. The employer and the responsible officers may not appropriate the monies to pay other debt or salaries.* The 'founding constitutional value of the rule of law' may not be ignored by the Municipal Official or the Administrator, as was held by the Supreme Court of Appeal in SAPO:

*'By misappropriating a portion of its employees', salaries required to be paid on their behalf to the Fund, and using that money for other unauthorized purposes, SAPO perpetrated an obvious unfair labour, in contravention of s 23(1) of the Constitution, and did so on a grand and persistent scale. And the endorsement of an arbitrary, open-ended and undefined power in the hands of SAPO to prefer its creditors of choice over other creditors undermines the rule of law enshrined as a*

<sup>25</sup> Section 27(1)(c): '(1) Everyone has the right to have access to—

...  
(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.'

<sup>26</sup> Paragraph 60 of the FA.

<sup>27</sup> *Sentinel Retirement Fund and Another v Masoanganye* (1003/2017) [2018] ZASCA 126 (27 September 2018) paras [8]–[18].

<sup>28</sup> *Post Office Retirement Fund v South African Post Office SOC Ltd and Others* (1134/2020) [2021] ZASCA 186; [2022] 2 All SA 71 (SCA) (30 December 2021) (SAPO). Also see *Mudau v Municipal Employees Pension Fund and Others* (CCT 142/22) [2023] ZACC 26; 2023 (10) BCLR 1165 (CC); [2023] 11 BLLR 1109 (CC); (2023) 44 ILJ 2641 (CC) (2 August 2023) para [47].

founding value of the Constitution in s 1(c). It is far from clear to me how this promotes constitutional values. At best, if it does, it does so while simultaneously undermining other fundamental rights and constitutional values. This interpretation of the rule turns a blind eye to SAPO routinely giving undue preferences to some creditors at the expense of others.<sup>29</sup>

The Court continued:

'SAPO, being a public body, may only do what it is empowered by law to do. It is not free to do what it pleases. No provision is made in the rules for an exemption from the obligation to pay contributions on a monthly basis and SAPO is not authorized, in its discretion, to decide to withhold payment. . . . The purpose of the Fund would be undermined if SAPO was free to contribute if it wanted to, and to withhold contributions at will.'<sup>30</sup> (Emphasis added)

[31] *The words of the legislation may not be ignored, distorted or manipulated by a court or the respondents.* The doctrine of impossibility does not come into play and an inability by the Municipal Officers to pay on account of financial constraints of the Municipality is not a defence. There is a difference between interpretation and divination. SAPO made it clear that:

'[58] Secondly, the high court confused the interpretation of rule 3.3 with the separate doctrine of impossibility of performance when it held that the rule should not be interpreted to include an obligation on the part of SAPO to pay contributions when this was impossible. In order to make such a finding as to the meaning of the rule, *the high court had to ignore the words of the rule, its context and purpose, and read other, unspecified, words into it.* A dictum of Kentridge AJ on constitutional interpretation, in *S v Zuma and Another*, is apposite:

"We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination." (Emphasis added)

[32] The monies claimed in this case, for instance, *were deducted and earmarked to be paid over to the Fund and there may not and cannot be any financial constraint.* If the person(s) liable proposes financial constraint or impossibility, the monies were illegitimately appropriated, and it simply culminates into confession to a criminal offence

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<sup>29</sup> SAPO para 59.

<sup>30</sup> Ibid para 56.

and of civil liability. There is not any onus on the Fund, or the court for that matter, to inquire into the state of the finances of the employer before liability can be established.

[33] The *dictum* in *Engineering Industries/Pioneer* slots in with the above in that:

'[11] Based on my understanding of section 13A(8) there are two remaining aspects I wish to deal with:

11.1 Firstly, there is no mention by any stretch of the imagination, nor is it suggested in the interpretation thereof, that some form of 'other process', for instance an enquiry, must first be undertaken under section 13A(1) before the provisions of section 13A(8) may be invoked. This simply does not exist.

11.2 Secondly, section 13A(8)(b) states: '... the following persons shall be personally liable for compliance with this section and for the payment of any contributions referred to in subsection (1)'. (My emphasis.) *This is self-explanatory and, in my view, any interpretation to the contrary can only be considered as being otherwise hopeful and therefore wrong.* This is well summarized as follows:

"Section 13A(8) of the of the Act imposes personal liability on certain parties within the employer's organization. *These persons will be held personally responsible for ensuring that contributions are deducted and paid to the fund within the prescribed period.* This section allows for determining the person who will be held personally liable for the corporation's failure to make contributions. In the event that an employer fails to comply with the requirements of this provision, all the directors (in respect of a company), all the members regularly involved in the management of the closed corporation (in respect of a closed corporation), or all the persons comprising the governing body of the employer, as the case may be, shall be personally liable in terms of subsection (8)"

[34] Non-payment of contributions is an ongoing, single and continuous act and offence. The Municipal Officers and Administrator do not dispute the fact that the contributions with the interest stipulated are due. They simply allege that they made some efforts to conclude an arrangement with the Fund. The financial constraints of the Municipality, according to the Municipal Officers, cause an inability to pay. The Municipal Officers suggest that because the Municipality is (allegedly) unable to pay contributions,

and because they (allegedly) 'did what they could' they cannot be held personally liable. This defence clearly has no merit because of the following:<sup>31</sup>

a. Fault is not a requirement for the imposition of personal liability in terms of s 13A(8)(c). As per *Engineering Industries/Pioneer and Natal Joint Municipal Pension Fund v Endumeni Municipality*,<sup>32</sup> all that is required is the strict application of the plain language of subsecs (8) and (9).

b. Marumoagae<sup>33</sup> writes, with reference to case law, that:

'It is not clear from these amendments, if after such a person has been identified and the company experiences financial difficulties which lead to the identified person to fail to make contributions to the fund, whether such identified person would still be held liable for the non-payment. This subsection appears to be placing a heavy burden on the identified person more particularly if the non-payment is due to circumstances beyond his or her control, for instance, financial difficulties experienced by the corporation. However, as far as employers who continue to deduct contributions from their employees' salaries and fail to pay them over to the intended pension funds, this subsection appears to be what is needed to address this issue. Section 9(10) of the PFA mandates the board of trustees to report any noncompliance with section 13A in accordance with such conditions as may be prescribed. This entails that there is a duty on the board of trustees to ensure that employers who fail to comply with the requirements of section 13A of the PFA are adequately dealt with by among others reporting them to the National Prosecuting Authority to face heavy criminal sanctions imposed by the recent amendments to the PFA. These amendments are welcomed and are a step in the right direction and would go a long way in ensuring that contributions made by members of pension funds reach the funds to which they are contributing.' (Emphasis added)

c. The second to fourth respondents relied on some offers of settlement. In argument in reply during the hearing of the matter it was pointed out that due to the *sui generis* nature of pension contributions the offers could not be accepted. The offers were simply

<sup>31</sup> AA paras 18-24.

<sup>32</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

<sup>33</sup> Motseotsile Marumoagae, 'SECTION 13A OF THE PFA: EMPLOYER'S FAILURE TO PAY EMPLOYEE'S CONTRIBUTION TO THE EMPLOYEE'S PENSION FUND', *Speculum Juris*, Volume 29 Part 1, 68-85, 2015 at 78-79.

not sufficient to service the pension claims. It would have been reckless and illegal for the Fund to accept the compromise. It is trite law that the Fund's rules bind the employer and the members. It provides the law of the payments. The rules relevant here provide payment of contributions by the 7th day of the month following the month in respect of which contributions are due.<sup>34</sup> The payments to the Fund were not paid for the period May 2021 to January 2024. *It is a fact undisputed by all the respondents.* The non-negotiable mandatory prescriptions of the PFA were transgressed and negated. Section 13A dictates, to reiterate, that:

- '(3) (a) Any contribution to a fund in terms of its rules, whether it be a contribution contemplated in subsection (1), a contribution for the payment of which a member of the fund is responsible personally, or a contribution to be paid on a member's behalf—
- (i) shall be transmitted directly into the fund's account with a bank finally registered as such under the Banks Act, 1990 (Act No. 94 of 1990), not later than seven days after the end of the month for which such a contribution is payable; or
  - (ii) shall be forwarded directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month; or...
- (b) Any contribution forwarded to and received by a fund in the circumstances contemplated in paragraph (a) (ii), shall be deposited in the fund's bank account on the first business day following the day of receipt.'

[35] As indicated above; admission of non-payment is confession to criminal and civil liability. The mere nonpayment of the deducted contributions by the employer as represented by the Municipal Officers and Administrator, is certainly within the realm of criminal. Non-compliance must be reported to the South African Police Service by the Fund. The Municipal Officers and Administrator, personally liable to pay the claim, must also be prosecuted; there is no getting away from liability. Apart from the common law offences that might be applicable, s 37(1)(a) read with s 37(1)(c) of the PFA decrees that:

'37. Penalties. — (1) Any person who —

- (a) contravenes or fails to comply with section 4, 10, 13A, 13B or 31;
- (b) . . .
- (c) . . .

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<sup>34</sup> Fund Rule 4.4. FA para 26, p 15.

is guilty of an offence and liable on conviction to a fine not exceeding R10 million or to imprisonment for a period not exceeding 10 years, or to both such fine and such imprisonment.'

[36] To sum up; the purpose of s 13A(8) is to ensure that the persons comprising the governing body of the employer **shall** via compulsion be responsible for the payment of the contributions to the Fund. If the arguments of the second to fifth respondents are presumed to be the situation in law in that they are not liable on the defences raised; then there will be not anyone accountable, and the whole pension system in South Africa will collapse.

[37] The second to fifth respondents step into the shoes of the employer. New appointees shall be liable for the total arrears, an officer shall not escape liability by resigning and multiple officers in the governing body shall be liable. Current incumbents are liable for the whole amount in arrears and amount due as at the time of the institution of the claim. They are authorised and must erase the whole claim during their tenure.

Counsel for the Fund explained the law fittingly and is correct:

'35 The Municipal Officers do not seem to deny that a municipal manager, a CFO and a mayor do fall within the ambit of section 13A(8)(c) but suggest that because they did not hold the positions at the time (or for the whole period) when the arrear contributions became payable, they cannot be held personally liable. This contention is wrong in law.

36 The current municipal manager, chief financial officer and mayor are personally liable in terms of section 13A(8) if regard is had to the following principles of interpretation set out in Endumeni:<sup>35</sup>

*"The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."* (Own emphasis)

37 The language of section 13A(8) shows that the current incumbent of the positions listed in the sub-section are personally liable.

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<sup>35</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

38 Firstly, section 13A(8) is worded in the present tense in imposing personal liability and does not distinguish between current and former incumbents of the relevant positions:

38.1 sub-para (a): “a director who is regularly involved”,

38.2 sub-para (b): “controls or who is regularly involved”,

38.3 sub-para (c): “every person in accordance with whose directions or instructions the governing body or structure of the employer acts or who controls or who is regularly involved.”

### ***The respondents***

[38] The Municipality does not deny liability. The second, third, fourth and fifth respondents are individuals comprising the governing body of the Municipality and are regularly involved in the management of the employer’s overall financial affairs. This follows from their statutory and common law obligations and powers.

[39] The Municipal Manager is tasked with overseeing the implementation of court orders against the Municipality. In the matter of *Meadow Glen Home Owners Association and others v Tshwane Municipality and Another*<sup>36</sup> the Supreme Court of Appeal was clear on the legislatively pronounced duties of the Municipal Manager and it ties in with personal liability in terms of s 13A(8)(c):

‘[23] There are numerous legislative provisions regarding the person or persons responsible for the administration of local authorities. Section 82 of the Local Government: Municipal Structures Act 117 of 1998 determines that the municipality must appoint a municipal manager as the person responsible for the administration of the municipality and such person will also be the accounting officer of the municipality. In terms of s 56(3) of the same Act, the executive mayor, in performing his duties must monitor the management of the municipality’s administration in accordance with the direction of the municipal council (s 56(3)(d)) and oversee the provision of services to communities in the municipality in a sustainable manner (s 56(3)(e)). Section 54A of the Local Government: Municipal Systems Act 32 of 2000 also provides that the municipal council must appoint a municipal manager as the head of administration of the municipal council.

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<sup>36</sup> *Meadow Glen Home Owners Association and others v Tshwane Municipality and Another* (767/2013) [2014] ZASCA 209; [2015] 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA) (1 December 2014).

Furthermore, s 55 sets out the responsibilities of the municipal manager as head of the administration, subject to the policy directions of the municipal council. Section 55(1)(b) determines that the municipal manager is responsible and accountable for the management of the municipality's administration. Section 60 of the Local Government: Municipal Finance Act 56 of 2003 provides that the municipal manager is the accounting officer of the municipality.

[24] From the abovementioned provisions it is clear that the municipal manager is, as far as the officials of a municipality are concerned, the responsible person tasked with overseeing the implementation of court orders against the municipality. The municipal manager would know, as the accounting officer, what is feasible and what is not. The municipal manager cannot pass responsibility for these administrative duties to a manager or director who is not directly accountable in terms of their duties . . .'

[40] In *Pheko and Others v Ekurhuleni Metropolitan Municipality*<sup>37</sup> the ruling was clear on the liability of the Mayor and the Municipal Manager:

'[59] The Mayor and the Municipal Manager are tasked with the oversight and management, respectively, of the provision of services by municipalities to the local community in a sustainable and, in the case of the Municipal Manager, equitable manner. In addition to these responsibilities, the Municipal Manager is also tasked with the implementation of national and provincial legislation applicable to the municipality, like the Housing Act. Thus, despite Mr Chaine's efforts to exonerate the Mayor and the Municipal Manager, they nonetheless have Constitutional and statutory obligations in relation to the supervisory orders of Pheko I.'

[41] The Municipal Manager is the accounting officer and in terms of s 60 of the MFMA. Section 65(2)(f) of the MFMA decrees that the accounting officer of a Municipality is responsible for ensuring that the Municipality complies with its statutory commitments. This includes taxes, levies, duties, pensions, medical aid, and audit fees. *The accounting officer is also responsible for taking all reasonable steps to ensure that the municipality makes adequate provision to repay all creditors.*

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<sup>37</sup> *Pheko and Others v Ekurhuleni Metropolitan Municipality* (No 2) (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015).

[42] Creditors must be remunerated in accordance with the law and the Municipal Officers, and the Administrator does not have any discretion on this score. The Fund is a legislatively proclaimed creditor. Section 61 of the MFMA imposes fiduciary duties on the accounting officer towards the Municipality and *inter alia* provides that the accounting officer must seek to 'prevent prejudice' to the financial interests of the Municipality. Section 55(1) of the Systems Act provides that the Municipal Manager is responsible and accountable for the management of the Municipality's administration in accordance with this Act *and other legislation applicable to the Municipality*. Section 55(2) of the Systems Act imposes further relevant responsibilities on the Municipal Manager as accounting officer. Clearly, the personal liability of the Municipal Manager is undeniable.

[43] The third respondent as Chief Financial Officer also falls within the provisions of s 13A(8)(c) of the PFA in accordance with 'regularly involved in the management of (the Municipality's) overall financial affairs' and is also one of the 'persons comprising the governing authority' because of the provisions of s 81 of the MFMA.

[44] The fourth respondent as Executive Mayor is bound by ss 52 and 56 of the MFMA that impose duties and responsibilities on the Executive Mayor, which include overseeing the responsibilities of the Accounting Officer and the Chief Financial Officer assigned to them in terms of the MFMA.

[45] A prima facie view on the liability of the fifth respondent, Mr. Mkaza, was already expressed in this division<sup>38</sup> in an application for rescission of a court order. The law dictates that the dictum is correct and applicable to this case:

'[18] The Executive Head of the Free State Province appointed Mr. Mkaza as the Lead Provincial EXCO representative of the Municipality with effect from 1 June 2022 to 31 May 2024 to exercise and perform the powers and functions as set out in annexure "FA2" of the court bundle. Some of the functions include: submitting a revised Financial Recovery Plan to the municipal council for inputs and consideration and to the MEC for Finance for approval, to ensure that funded budgets are prepared for the 2023/2024 financial year, ensuring daily management of

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<sup>38</sup> Second Ramdeyal-judgment.

cash and bank balances, providing strategic leadership and direction to implement the financial recovery plan, issuing directives and instructions to the accounting officer and relevant staff to implement the financial recovery plan, submitting monthly progress reports to the MEC for Finance / the Provincial EXCO / the Municipal Council and the Minister of Finance, maintaining a record of the decisions on Financial Recovery Plan implementation and assisting in the preparation and implementation of the Financial Recovery Plan.

[19] The above powers and duties conferred on the applicant in itself is indicative of the applicant's involvement and information of the financial issues of the Municipality, which he does not deny, and could only obtain same by having access to the bank accounts and relevant bank statements as sought in the notice of motion for the main application. *He is not the accounting officer as he avers and does not have fiduciary duties, but his duty and power delegated to him to confer on the accounting officer is much higher. He has to issue directives and instructions to the accounting officer. He did have the necessary power, duties and obligations in the management of the Municipality's finances during his term of appointment and at the time the notice of motion application was served at his place of employment, and his involvement in same, cannot simply vanish 20 days later when the order against him was granted by a court of law. His defence of lapsed appointment is not a reasonable explanation, does not hold water for a bona fide defence and simply appears to be that Mr Mkaza "was playing for time" by using specious excuses to gain time, hence causing unnecessary delays in the administration of justice. He had access to the relevant information sought and was in a position to furnish the required information.'* (Emphasis added)

[46] In terms of the Provincial Notice and s 139(5)(c) of the Constitution, the fifth respondent is a person who falls within the ambit of s 13A(8)(c) of the PFA. The Provincial Government ordered an intervention into the affairs of the Municipality under the provisions of s 139(5)(c) of the Constitution and appointed the fifth respondent as the Lead Provincial EXCO Representative at the Municipality with effect from 1 June 2022 to 31 May 2024 in terms of Provincial Notice 79 of 2022 published in the *Provincial Gazette* of 9 September 2022 (the Provincial Notice).<sup>39</sup>

<sup>39</sup> See 'RA1', 'RA2' and 'RA3' at p 105-421 of the court bundle.

[47] The Administrator is not expected to have exercised any power that he did not have as was argued by his counsel in following of the case of the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*.<sup>40</sup> There is not a separation of powers implicated in his duties and obligations. All that is prescribed is that, as by decree of his functions set out in the Provincial Notice, Mr. Mkaza is on all fours as Administrator and Lead Provincial EXCO Representative at the Municipality within the ambit of subsection 13A(8)(c).

[48] The provincial intervention does not suspend the Municipality's obligations to the Fund. It does not replace or suspend the duties of the second to fourth respondents. The Municipal Council has not been dissolved. The contract of the Administrator is a constitutional decree; ss 139(5)(a) and (c) of the Constitution provides:

'(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; and

(b) . . . ; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.'

[49] In the Cronje-judgment, the conduct of Mr. Mkaza as Administrator was depicted and an attempt to hide behind the corporate veil and s 139-administration<sup>41</sup> in terms of the Constitution was unsuccessful. The Court held:

<sup>40</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999) paras 44-58.

<sup>41</sup> Paragraphs 13-18 and 36-45.

[18] The Municipality may thus not use the monies for unauthorised purposes. I cannot find any provision that protects it against attachment. The statutory matrix, the responsibilities of the Municipal Manager and the Municipality's indebtedness to the Fund is not in dispute.'

[50] Cronje AJ continued to criticise Mr. Mkaza and stated that:

[48] The Municipality has for years been aware of mechanisms available to address its challenges. *Mr Mkaza was apparently appointed to assist in the exercise of its obligations, to render support services and to pay creditors.* This application is not the correct approach. The jurisdictional requirements for reliance on section 153 have not been met. *Section 151 of the MFMA provides that nothing limits or affects the rights of any creditor or other person having a claim against a municipality or any person's access to ordinary legal process in accordance with the common law and relevant legislation. The Fund exercises a statutory right to collect contributions, and the Municipality continues to commit an offence. It has no prima facie or clear right.* (Emphasis added)

[51] The Municipal Officers refer to and complain about schedules which the Municipality, as a participating employer, has to furnish to the Fund on a monthly basis in terms of s 13A(2). They are in possession of the schedules and cannot complain that it has not been attached to the founding affidavit; it is their own evidence, not that of the Fund, to submit. This has been ruled upon in previous cases in this division and one wonders why this is still an issue conjured up as a defence.

[52] The Fund is justified in their concern of the damaging snowball-effect the conduct of the Municipal Officers triggers.<sup>42</sup>

8.5 Non-payment reduces the employee-members' capital savings towards retirement. Should any of the affected employee-members resign or be retrenched, they would have a smaller benefit payable from the Fund.

8.6 For the same reasons, the employee-members would not receive any potential investment returns on the outstanding capital amounts because the Fund could not invest the capital contributions. This further reduces their retirement savings.

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<sup>42</sup> Heads of argument for the applicant dated 17 July 2024.

8.7 It also prevents the Fund from paying the affected employee-members' risk premiums which are deducted from contributions received in terms of the Fund rules. If an affected employee-member becomes sick, disabled or dies in service (all insured risks), there is a risk that the Fund's insurers would repudiate the claim because of premium non-payment.

8.8 It prejudices the Fund membership as a whole because other Fund members have to subsidize the portion of the administration costs which would have been paid by the affected employee-members.'

[53] In *Municipal Workers Retirement Fund v Groot Kei Municipality and two others*<sup>43</sup> (Brody-judgment) the court stated that the Municipal Officers face personal liability and that it has been confirmed to be the law in the case preceding this case. For their non-compliance, Brody JA ordered that the first, second and third respondents were in contempt of court by failing to comply with the court order granted under case number 2377/2022 on 13 September 2022; the second and third respondents were committed to imprisonment for a period of 30 days, suspended for a period of 30 court days on condition that the first, second or third respondents, within 30 court days of the granting of the order, complied with the court order granted under case number 2377/2022 on 13 September 2022; the Sheriff and the South African Police Services were authorised and ordered to take all necessary steps to commit the second and third respondents to imprisonment in the event that the condition of suspension was not fulfilled within the period stipulated; and the first, second and third respondents were ordered, jointly and severally, to pay the costs of the application on a scale as between attorney and client, including costs associated with travelling for applicant's counsel and the attorney of record.

[54] The High Court in the Brody-judgment condemned the municipality and its officers for contempt of court, emphasising their repeated disregard for legal obligations under the PFA. The Municipality's liability was established under section 13A(1), and the personal liability of the officers concerned was based on ss 13A(8) and 13A(9).

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<sup>43</sup> *Municipal Workers Retirement Fund v Groot Kei Municipality and two others* (2377/2022) [2024] ZAECKMHC 137; [2025] 1 All SA 258 (ECG) (22 August 2024).

[55] On 2 November 2023 Reinders J of this division ordered in *Municipal Workers Retirement Fund v Letsemeng Local Municipality and others* (Case number 3447/2023; unreported judgment) that the Municipality, the Municipal Manager and the Chief Financial Officer shall jointly and severally make payment to the applicant of interest prescribed in terms of s 13A(7) of the PFA. *Ex tempore* reasons for judgment were apparently handed down. The circumstances in fact and law in which the order was made are not known. The fact remains that Municipal Officers were held liable in their personal capacity and cited by their names.

### **Conclusion**

[56] The law is clear and unambiguous. Section 13A of the PFA might raise some eyebrows and be described as draconic and unfair, but it emphasises the fact that organs of state and specifically municipalities and its office bearers must protect the constitutional ethos and democracy diligently. It is at the core of their designation. Neither the Municipal Officers nor the Administrator can claim ignorance of the provisions of s 13A and the fact that they shall be personally liable for not paying the retirement contributions and the injury it causes. They accepted the responsibility when they took office.

[57] The date of appointment and resignation is irrelevant to the liability. What is significant is that the respondents were in office at the time the claim was lodged. The claim that is based in the period May 2021 to January 2024 constitutes one claim and cannot be segmented into the timeframes wherein Municipal Officers and the Administrator held office or divided between them. It will cause total anarchy in the management of municipalities. It is not required that Mr. Mkaza must be the employer, accounting officer or administrator himself. This was well-justified in the replying affidavit<sup>44</sup> with facts and law stated by the applicant that were well known to Mr. Mkaza. The litigation was embarked upon on 25 March 2024. The respondents are liable for the debt as a whole.

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<sup>44</sup> Para 12 at p 99-102.

### **The History and Costs**

[58] In the Cronje-judgment, a stern warning was issued in that the time may have arrived that functionaries should be called upon to show cause why they should not be ordered to pay costs *de bonis propriis* in litigation over this indisputable claim.

[59] The history of the litigation by the Fund with Mafube Local Municipality, and this case, is a conspicuous and disappointing example of the destruction of the sacrosanct constitutional ethos of the Republic of South Africa by the very institution and its officers that must protect it. The conduct of the Municipality and the other respondents causes a malfunction of the rule of law. The consequences for the employees-members, that are innocent bystanders, are grave.

[60] The tragedy in our legal history is depicted in the founding affidavit and furthermore, some recent litigation. The outcome of the case to order personal liability of the Municipal Officers and the Administrator is necessary to even the scales of justice; there is not any other remedy that will suffice. Their conduct is criminal according to the PFA. The legal costs that sustained the litigation since 2011 and surely come from the pockets of the taxpayer, paint a bleak picture. The undisputed history of the litigation was depicted by counsel for the Fund:

'64. The court cases were:

64.1 2011: Section 13A application for arrear pension contributions.

64.2 July 2015: Successful application in order for arrear pension contributions of more than R16 million plus interest.

64.3 October 2016: The Municipality brought an application seeking to interdict the Fund from executing an unpaid portion of a prior judgment debt. The application was dismissed.

64.4 July 2019: The Municipality brings another extremely urgent application against the Fund on two hours' notice to suspend or set aside a writ in respect of a prior judgment debt. The application was dismissed.

64.5 July 2019: The Fund discovered that in spite of the pending application to stay the writ, the Municipality had unlawfully transferred about R40 million out of its bank accounts contrary to ongoing court proceedings and a freezing order. The Fund then brought contempt proceedings against the Municipality and certain of its officers. This application was eventually settled to enable the Municipality the opportunity to calculate the amounts due to the Fund for the parties to appoint representatives to agree in such calculations. The Municipality failed to comply with the order, resulting in the Fund issuing a writ for the balance.

64.6 June 2021: The Fund instituted an application for unpaid contributions for the period July 2015 to April 2021. The Municipality raised spurious defences, and the application was successful. An application for leave to appeal was also dismissed.

64.7 March 2023: The Municipality brought an urgent application to stay a writ of execution in respect of a prior judgment debt. The application was dismissed.

64.8 October 2023: The Municipality brought yet another urgent application to set aside or stay a writ. This application was dismissed.

65. In other words, the Municipality has been unsuccessful in each and every single case, and in every case an adverse cost order was made against it, mostly on attorney and client scale.<sup>45</sup> (Emphasis added)

[61] The disdain with which the respondents regard the litigation and courts is astounding. They could not even maintain some respect for the Uniform Rules of Court in this case, as was shown above. This case confirms the personal liability of the Municipal Officers and Mr. Mkaza. All the respondents were aware of their responsibilities when they embarked on the litigation.

[62] The order will comply with the notice of motion filed on 25 March 2024 and as was argued during the hearing. The large amount claimed, the significant implications of the case to affected employees-members and the rule of law, the extensive attention to the

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<sup>45</sup> FA p17-22.

sources in law that had to be regarded to come to a just and equitable solution as the case concerns somewhat novel findings to be made in terms of the *sui generis* principles decreed in the PFA's personal liability provisions, call for costs of two counsel.

[63] **ORDER**

In the result, it is ordered that:

1. The first respondent, Mothusi Lepheana (second respondent), Dimakatso Tryphona Tau (third respondent), Tlhoare Motsoeneng (fourth respondent), and Thomas Mkaza (fifth respondent) are ordered jointly and severally to:

1.1 Make payment to the applicant in the amount of R14 723 639.52;

1.2 make payment to the applicant of interest on the amount of R14 723 639.52 from 1 February 2024 to date of payment at the rate(s) which have been prescribed in terms of section 13A(7) of the Pension Funds Act 24 of 1956; and

1.3 pay costs of this application on attorney-client scale, including the costs of two counsel.

2. The Registrar of this court shall forward a copy of this judgment to the Director of Public Prosecutions: Free State, Bloemfontein forthwith. The Director of Public Prosecutions: Free State, Bloemfontein shall report to the court within 60 days of the date of this order on the progress of the investigation in writing.

  
**M OPPERMAN J**

**Appearances**

Applicant:

**P VAN DEN BERG SC**

**H DRAKE**

Chambers, Sandton

Shepstone & Wylie Attorneys, Sandton

c/o McIntyre van der Post Attorneys

Bloemfontein

Second to fourth respondents:

**MC LOUW**

Chambers, Bloemfontein

Peyper Attorneys

Bloemfontein

Fifth respondent:

**L BOMELA**

Chambers, Bloemfontein

The Office of the State Attorneys: Free State

Bloemfontein