

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
07.03.2025	
DATE	SIGNATURE

Case Number: 2023-036840

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD

Applicant

and

H KHELEDI

First Respondent

PRIVATE SECURITY SECTOR PROVIDENT FUND

Second Respondent

MA LUKHAIMANE N.O.

Third Respondent

SHERIFF OF THE COURT

Fourth Respondent

Case Number: 2023-057409

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD

Applicant

and

MT MATJENA

First Respondent

PRIVATE SECURITY SECTOR PROVIDENT FUND

Second Respondent

MA LUKHAIMANE N.O.

Third Respondent

SHERIFF OF THE COURT

Fourth Respondent

Case Number: 2023-085922

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD

Applicant

and

MULALO VIOLET MAFUNE

First Respondent

PRIVATE SECURITY SECTOR PROVIDENT FUND

Second Respondent

MA LUKHAIMANE N.O.

Third Respondent

SHERIFF OF THE COURT

Fourth Respondent

Case Number: 2023-086107

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD

Applicant

and

MTHOKOZISI JEROME MKHIZE

First Respondent

PRIVATE SECURITY SECTOR PROVIDENT FUND

Second Respondent

MA LUKHAIMANE N.O.

Third Respondent

SHERIFF OF THE COURT

Fourth Respondent

JUDGMENT

JM BERGER AJ:

[1] In each of these four applications, which were heard together, the applicant – Mafoko Security Patrols (Pty) Ltd – seeks substantive relief in three parts:

- a. First, an order reviewing and setting aside a determination made by the third respondent, in her capacity as the Pension Funds Adjudicator ("PFA"), in terms of section 30M of the Pension Funds Act 24 of 1956;
- b. Second, an order reviewing and setting aside the computation of arrear contributions made by the second respondent, the Private Security Sector Provident Fund, as directed by the PFA in her impugned determination; and
- c. Third, an order directing that the dispute *"between [the] Applicant and the First and Second Respondent[s] be adjudicated de novo"*.

[2] At the heart of each application was Mafoko's repeated failure, in some cases over years, to pay contributions due on behalf of an employee to the Fund. In each case, the former employee in question had lodged a complaint with the PFA, which was then sent to Mafoko and the Fund, with the PFA giving them a period within which to attempt to resolve the matter. In each case, the complaint remained unresolved, requiring an investigation and subsequent determination by the PFA, which was made after requesting the parties' input. In each case, Mafoko simply ignored the PFA.

[3] In terms of section 30O(1) of the Act, a determination of the PFA *"shall be deemed to be a civil judgment of any court of law had the matter in question been*

heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be." In terms of enforcement, section 30O(2) provides:

"A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged."

[4] It is common cause that no application contemplated in section 30P of the Act was ever lodged in respect of any of the four determinations at issue here. Subsection (1) of that provision empowers any party aggrieved by a determination of the PFA, *"within six weeks after the date of the determination, [to] apply to the division of the High Court which has jurisdiction, for relief"*. In *Meyer v ISCOR Pension Fund*, the Supreme Court of Appeal made clear that what is contemplated by section 30P is not just an appeal (as opposed to a review), but *"an appeal in the wide sense"*.¹

[5] In each case, once the relevant determination was filed with the Registrar of this Court, the former employee in question sought and obtained a writ of execution. It was at that point, in each case, that Mafoko finally responded, approaching this Court for urgent interdictory relief pending the determination of part B in each application. It is the part B relief in each application that is currently before me, with part A having effectively been decided by Windell J on 13 February 2024 in *Mafoko Security Patrols (Pty) Ltd v Moeketsi and Others*.²

[6] I was advised by counsel for the applicant and the first respondent in each case, Mr Mureriwa and Mr Mokwena respectively, that the parties agreed to be bound by the judgment in *Moeketsi*, in which Windell J granted the following substantive order:³

"Pending the determination of Part B, the first, second, third and fourth respondents are hereby interdicted and restrained from executing the writ of execution issued out of the court on 18 September 2023."

[7] In that matter, the second to fourth respondents, as is the case here, were the Fund, the PFA, and the Sheriff respectively.

¹ 2003 (2) SA 715 (SCA) at para 8. See also, *St Clair Moor and Another v Tongaat-Hulett Pension Fund and Others* 2019 (3) SA 465 (SCA) at para 14.

² [2024] ZAGPJHC 142

³ Para 2 of the order

[8] In oral argument, Mr Mureriwa clarified that – contrary to the relief that is sought in prayer 1 of the notice of motion in each case – Mafoko’s primary concern is not with the PFA’s determination in each case, but rather with the Fund’s calculations, and the manner in which such calculations were made, in Mafoko’s absence. According to him, Windell J’s judgment makes it clear that these calculations are incorrect.

[9] It may well be that Windell J’s finding⁴ that “[t]he amount reflected on the writ of execution [obtained by Moeketsi] is ... incorrect” has direct implications for the calculations made in respect of the arrear contributions due in respect of each of the four first respondents. That said, unless and until the writs at issue in the four cases before me are set aside,⁵ they remain in force and must be treated as valid.⁶

[10] In any event, Windell J’s order did not set aside Mr Moeketsi’s writ of execution; it merely interdicted its execution pending the determination of part B. That was the nature and extent of the relief sought by Mafoko in prayer 2 in part A of the notice of motion in that case, and the very same interim interdictory relief sought in the same prayer in the notices of motion in the four cases at issue here.

[11] Mr Mureriwa correctly conceded that the relief sought in respect of the PFA’s determination cannot be granted. Leaving aside the question of whether such a determination could even be reviewed,⁷ given its status as a deemed civil judgment of the High Court, the review – if pursued – would have faced numerous seemingly insurmountable obstacles, such as non-compliance with section 7(2) of the Promotion of Administrative Justice Act 3 of 2000.⁸ More importantly, no case has been made out even to suggest that the PFA acted in any way that would justify any of her four determinations being reviewed and set aside.

⁴ At paragraph 23 of her judgment

⁵ A writ of execution may be challenged on the principle of legality. See *Rand West City Local Municipality v Quill Associates (Pty) Ltd and Another* [2021] ZASCA 150 at para 6

⁶ *MEC for Health, Eastern Cape and Another v Kirlind Investments (Pty) Ltd t/a Eye & Lazer Institute* 2014 (3) SA 481 (CC) at para 101, citing *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 (6) SA 222 (SCA) at para 26 with approval.

⁷ Not only is there is no need for me to decide this question, but it would be inappropriate to do so in the circumstances.

⁸ The remedy in question, which is set out in section 230 of the Financial Sector Regulation Act 9 of 2017, was not pursued; and Mafoko has not relied on section 7(2)(c) of PAJA effectively to condone its failure to exhaust internal remedies.

[12] In so far as the Fund's calculations are concerned, Mafoko has not set out any basis upon which such "decisions" are reviewable. Two propositions were put to Mr Mureriwa: first, that if the calculations are indeed wrong, that may provide a basis for the writs of execution to be set aside; and second, that if the Fund did not conduct itself in accordance with the PFA's determinations, then it could have been compelled to act lawfully.

[13] In respect of the second proposition, Mr Mureriwa simply had no answer. In respect of the first, he sought to rely on Windell J's judgment in *Moeketsi*, going so far as to suggest – incorrectly I might add – that a dismissal of this review would have no effect on the "interdicted" writs of execution, because they will have to be reissued. But because the alleged unlawfulness of those writs has yet to be considered in any court, let alone determined, they must be treated as valid, and may still be relied upon.

[14] If the relief in prayer 1 of part B of the notices of motion cannot be granted, then it must follow that the relief sought in prayer 2 – to direct the disputes between Mafoko, the Fund, and each former employee to be adjudicated *de novo* – also cannot be granted. That leaves prayers 3 and 4, dealing with costs and "*further and/or alternative relief*", in respect of which no concessions were made. I return to these shortly.

[15] In the hearing, faced with the concerns I had raised regarding the relief sought in the notices of motion, Mr Mureriwa returned to court after the lunch adjournment seeking to withdraw the four cases. At this stage, he had been arguing for less than 30 minutes, having only arrived in court at 10h45, and having failed to return at 12h00, when the hearing was scheduled to resume after the tea adjournment. (I had to attend to another matter at 11h30.) Mr Mureriwa only provided a reasonable excuse for his first absence, and apologised profusely for both.

[16] Although I was unaware at the time, Mafoko's attorneys electronically delivered four notices of withdrawal at about 14h15, with each indicating that the reason for the withdrawal was because "*the Applicant intends to amend its papers.*" (None of the notices mentions costs.) What exactly this means was therefore not put to counsel, and accordingly, cannot be taken any further. That said, Mr Mureriwa was clear that his instruction was simply to withdraw the matters, and tender costs, and that the applicant committed to paying the arrear contributions in question to the Fund.

[17] When asked if his clients were willing to consent to the cases being withdrawn, Mr Mokwena noted their ambivalence, and was not able to give an unequivocal answer. I decided to proceed with the hearing so as not to waste time, and to avoid any potential for delay, reserving any decision on whether I could still decide the matter on the merits. At that time, I formed the view that given how long it had taken for the matters to be heard, I was dutybound – at the very least – to hear full argument.

[18] By the end of the hearing, it was made clear to me by Mr Mokwena that his clients did not consent to the matters being withdrawn. Accordingly, for the purported withdrawals to come into effect, my consent is required.⁹ While recognising that it is *“not ordinarily the function of a court to force a party to proceed with an action against its will or to investigate why the party wishes to abandon such action”*,¹⁰ I am of the view that the following factors militate against the grant of consent.

- a. The parties agreed that, as was the case in *Moeketsi* (before Windell J), these cases were to serve a similar purpose. If these cases are simply withdrawn, many others will be left unresolved. That would be to the former employees' detriment, and would result in this Court's opposed motion roll being unnecessarily burdened with cases that could (and should) have been speedily resolved.
- b. Each of the four cases before me was set down by the first respondent's attorneys, with the applicant in each only delivering heads of argument and a practice note once directed to so by this Court. Just two weeks before the hearing, the applicant had attempted, without first securing the first respondents' consent, and without tendering costs, to remove the matters from the roll. Consent for the removals was not granted.
- c. Mafoko's failure to participate in the proceedings before the PFA, and its failure after securing interim interdictory relief to take any steps to get part B of each review set down for hearing, strongly suggests that it is in no hurry to have its former employees' complaints resolved. By allowing it to

⁹ Rule 41(1)(a)

¹⁰ *Bondev Midrand (Pty) Ltd v Puling and Another and a Similar Case* 2017 (6) SA 373 (SCA) at para 8

withdraw the four cases before me, I would be making it more difficult for the systemic problems to be resolved.

[19] In the circumstances, I cannot consent to the four cases being withdrawn.

[20] This then leaves the issues of costs, and *"further and/or alternative relief"*.

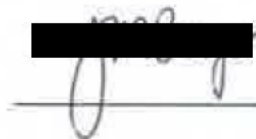
[21] Although I am unhappy with how the applicant has litigated these matters, including by taking up space on the opposed motion roll unnecessarily, effectively crowding out other cases, I do not think that its conduct rises to the level justifying the punitive costs order sought by each of the first respondents. If the tender of costs was indeed authorised, that would provide another reason not to grant such a costs order.

[22] Regarding prayer 4, I cannot agree with Mr Mureriwa that it provides me with the necessary jurisdiction to grant relief that not only was not expressly pleaded, but also not contemplated in any of the applicant's papers. Contrary to his submissions, this Court's inherent jurisdiction to regulate its own process cannot be used for the purpose sought – to resolve the underlying dispute without regard to the pleaded case.

ORDER

[23] In the result, I make the following order in respect of the applications brought under case numbers 2023-036840, 2023-057409, 2023-085922, and 2023-086107.

- a. The application is dismissed,
- b. The applicant is directed to pay the first respondent's costs, including the costs of counsel.



JM BERGER
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Dates:

Hearing: 5 March 2025

Judgment: 7 March 2025

Appearances:

For the applicant in each case:

Mr I Mureriwa, instructed by Baloyi
Masango Incorporated

For the first respondent in each case:

Mr I Mokwena, instructed by Fisha
Attorneys