

REPUBLIC OF SOUTH AFRICA



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

Case Number: 2025-158149

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

25 August 2026

DATE

SIGNATURE

In the matter between:

EMFULENI LOCAL MUNICIPALITY

Applicant

and

MUNICIPALITY GRATUITY FUND

First Respondent

AZWINDINI SILENCE MUNWAI

Second Respondent

Delivered: This judgment was prepared and authored by the judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of hand-down is deemed to be 25 August 2026.

JUDGMENT

CARELSE, AJ

Introduction

- [1] The applicant, Emfuleni Local Municipality, seeks to recover remuneration paid to its former employee, the second respondent, Mr Azwindini Silence Munwai. It alleges that, from October 2020 until his resignation on 24 July 2023, Mr Munwai neither reported for duty nor rendered services to it, although he continued to receive remuneration. It also seeks an order that, should he fail to repay the amount claimed, the first respondent, the Municipal Gratuity Fund (“the Fund”), pay it from his pension interest.
- [2] The application was brought in two parts. Part A came before Kruger AJ on an urgent basis on 19 September 2025, when an order was issued interdicting the Fund from processing or paying any portion of Mr Munwai’s pension interest pending the determination of Part B. Part B is now before me.
- [3] The central question is whether the Municipality has established the factual premise on which its claim depends: that Mr Munwai rendered no services during the period in question. Because final relief is sought on motion, that question must be determined in accordance with the ordinary principles governing disputes of fact in motion proceedings. If the Municipality cannot establish that premise, the declaratory and monetary relief cannot follow. The further relief sought against the Fund raises separate questions under section 37D(1)(b) of the Pension Funds Act (“the Act”).¹

The Parties And The Relief Claimed

- [4] The Municipality is a local authority established under the Local Government: Municipal Structures Act.² The Fund is a registered pension fund. Mr Munwai was employed by the Municipality from 1 November 2010 as a Senior Engineering Technician in its Parks and Cemeteries Department and resigned with immediate effect on 24 July 2023.

¹ 24 of 1956.

² 117 of 1998.

- [5] The Fund does not oppose the application and did not appear at the hearing. In correspondence dated 5 March 2026, its Chief Executive Officer stated that the Fund would not oppose an application should it comply with section 37D of the Act. The Fund has filed no affidavit. Its rules are not before Court, nor has it placed before Court any decision concerning a deduction from Mr Munwai's benefit.
- [6] In Part B the Municipality seeks a declaration that Mr Munwai failed to report for duty and/or to perform any task for its benefit from October 2020 until his resignation, alternatively, as claimed in prayer 2, that he absconded during that period. It also seeks repayment of remuneration, allowances and bonuses paid to him and, failing repayment, payment of that amount by the Fund from his pension interest. Costs are sought on the attorney and client scale, alternatively scale C.
- [7] The claim originally advanced was for R 4 221 412.25. In a signed supplementary affidavit delivered on 30 October 2025, the Municipality reduced it to R 2 523 882.02, calculated for the period October 2020 to September 2023. At the hearing, counsel confirmed that the reduced amount was pursued and did not persist in prayer 2 of the notice of motion, which had been omitted from the draft order handed up.
- [8] The material background facts that follow are common cause or established on the papers.
- [9] Mr Munwai reported at first to Mr Azwindini Mundalamo, the Assistant Manager: Cemeteries, and from February 2015, after Mr Mundalamo was suspended, to Ms Xithembiso Ngobeni, the Manager: Parks and Cemeteries.
- [10] The relationship between Mr Munwai and Ms Ngobeni deteriorated. On 11 May 2016, the Magistrates' Court granted a final protection order in her favour under the Protection from Harassment Act,³ which prohibited Mr Munwai, amongst other things, from threatening to kill her, following or stalking her, and verbally engaging with her. He was thereafter seconded to the Sports and Recreation

³ 17 of 2011.

Department under Mr Benjamin Manzi, where it is common cause that he rendered services.

- [11] Ms Ngobeneni was subsequently suspended and dismissed. Mr Munwai returned to Parks and Cemeteries and acted in her position from May 2017 until her reinstatement in May 2019. He then returned to his substantive position. The protection order remained in force and materially complicated direct interaction between him and Ms Ngobeneni.
- [12] By October 2020, the Municipality sought to resolve the difficulty by transferring Mr Munwai permanently to Sports and Recreation. Mr Diek Mahlaba, the Manager: Human Resources, commenced consultations with him. Mr Munwai raised concerns about the level of the proposed post and his conditions of service. On 29 October 2020, Mr Mahlaba recommended that he be consulted further so that the matter could be resolved.
- [13] The proposed transfer was never finalised. Mr Mahlaba confirms that. The papers disclose no subsequent formal resolution of Mr Munwai's reporting line. That unresolved position forms an important part of the factual dispute which followed.
- [14] On 25 February 2021, Mr Munwai addressed a memorandum to the Executive Director: Community Services seeking guidance on his reporting line. He recorded that Mr Mundalamo was leaving the Municipality and stated that, pending feedback, he would report directly to Human Resources. There is no evidence of a response directing him elsewhere.
- [15] On 19 March 2021, Mr Munwai signed for a notice of a disciplinary hearing set down for 23 and 24 March 2021. Mr Sebego Hlongwane was the employer's representative. Mr Munwai says that the hearing convened, that he attended and that it was postponed but never reconvened. The Municipality points out, correctly, that the charges concerned earlier conduct and did not concern his attendance after October 2020.
- [16] The Municipality nevertheless continued to remunerate Mr Munwai during his employment. Further payments were made after his resignation: on his version

he received payments for August and September 2023 and again in February 2024.

- [17] On 21 July 2023, a newspaper reported that the Municipality was investigating allegations that Mr Munwai had received remuneration while absent from work. On 24 July 2023, he resigned with immediate effect. He attributed his resignation to the working conditions and to life-threatening telephone calls received after publication of the report.
- [18] An internal investigation followed. Its report recorded that attendance registers for periods between January 2022 and May 2023 bore checking signatures which the investigators could not attribute to the relevant managers and described the registers as fraudulent. The report also recorded failures in the Municipality's own controls: a 2021 headcount had not established whether Mr Munwai was reporting for duty; the absence of timesheets had not been detected; and the reporting issue had not been escalated. The investigators recommended recovery from Mr Munwai's pension benefit.
- [19] The Municipality laid a charge of fraud and theft against Mr Munwai. The docket printout in the papers records that the docket was closed as undetected on 15 August 2024.
- [20] In June 2024, Mr Munwai instituted proceedings to compel the Municipality to complete the documents required for payment of his pension benefit. In August 2024, the Municipality proposed a settlement requiring an admission of liability for R 4 221 412.25, which he rejected. His exit documentation was ultimately completed on 25 July 2025.
- [21] In argument, the Municipality treated the matter as involving two principal stages. The first was whether Mr Munwai had rendered no services and was consequently obliged to repay the remuneration received. The second was whether the facts established the dishonesty or other qualifying conduct required by section 37D of the Act so that the pension benefit could be reached. When the distinction was put to counsel, he accepted that a money judgment not founded upon dishonesty would not, without more, permit recovery from the Fund under section 37D.

- [22] I begin with the first issue, which is decisive of the application. Because the section 37D issue was fully argued and bears directly upon the pension relief sought, I deal with it thereafter only to the extent necessary.
- [23] The Municipality seeks final relief on motion. The familiar rule in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*⁴ is that, where a genuine dispute of fact arises, final relief may ordinarily be granted only on the facts stated by the respondent together with those facts in the applicant's affidavits which the respondent admits. A respondent's version may be rejected on the papers where it is so far-fetched or clearly untenable that it can properly be rejected without oral evidence. Motion proceedings are not designed to determine probabilities where genuine disputes of fact exist.⁵
- [24] It is common cause that Mr Munwai did not report to Ms Ngobeni or to Mr Manzi during the period in question. That is not an admission that he did not report for duty at all. His case is that he reported to Mr Mundalamo, the Assistant Manager: Cemeteries, until Mr Mundalamo left the Municipality's employ in 2021 and to human resources and Mr Mahlaba thereafter.
- [25] The affidavits of Ms Ngobeni and Mr Manzi establish that Mr Munwai did not report to either of them. Mr Hlongwane, the Assistant Manager in the Sports and Recreation Department, says that he never received Mr Munwai as a subordinate, never acted as his line manager and gave him no instructions. That evidence establishes where Mr Munwai was not. It does not establish that he rendered no services to the Municipality at all. The Municipality disputes Mr Munwai's account of his alternative reporting arrangements but the evidence placed before me does not answer the important parts of that account.
- [26] Mr Mundalamo has deposed to a confirmatory affidavit filed by Mr Munwai, in which he describes himself as the applicant's former Assistant Manager responsible for Cemeteries and confirms the answering affidavit insofar as it concerns him. The Municipality's answer, in its supplementary affidavit, is that reliance on a person who has since resigned is nonsensical because that person

⁴ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C.

⁵ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at para 26.

himself reported to Ms Ngobeni. That answer, however, constitutes argument. It does not answer Mr Mundalamo's confirmation that Mr Munwai reported to him.

[27] The position of Mr Mahlaba is more significant. The Municipality states in its supplementary replying affidavit deposed to by its Municipal Manager that Mr Mahlaba has deposed to a confirmatory affidavit in which he expressly stated that Mr Munwai never reported to him and that the allegation is therefore denied. However, Mr Mahlaba's affidavit says nothing of the sort. It appears in the papers in unsigned and signed form, and in both he deals with the proposed transfer in October 2020, with Mr Munwai's concerns about it, with the email of 29 October 2020, and with the fact that the transfer was never finalised. He says nothing about the period after May 2021 and does not address the allegation that Mr Munwai reported to him. There is, accordingly, no direct evidence from Mr Mahlaba answering that allegation.

[28] The memorandum of 25 February 2021 is consistent with Mr Munwai's version. It is a contemporaneous document, on the Municipality's own letterhead and addressed to an Executive Director, in which he stated that pending resolution of his reporting line, he would report to human resources. There is no evidence that the Municipality rejected that arrangement or directed him elsewhere.

[29] The disciplinary proceedings of March 2021 do not establish that Mr Munwai was rendering services. They do show that the Municipality remained in communication with him during the period in which it says he had ceased reporting altogether. That the charges concerned earlier conduct does not answer that narrower point.

[30] A further evidential gap emerged in argument. Asked to identify the work Mr Munwai was required to perform and the output by which his alleged non-performance could be tested, counsel for the Municipality described his duties in general terms as work on the ground in the cemeteries. Mr Munwai's own evidence, which the affidavits do not dispute, is that he was a Senior Engineering Technician who drafted bid specifications, evaluated projects, took part in bid adjudication, and managed contracts and invoicing. The significance of the exchange is not what counsel said. It is that the Municipality's affidavits do not

identify the work that ought to have been performed, any particular task left undone, or any output whose absence would show that no services were rendered.

[31] The Municipality's own conduct adds to the difficulty. It remunerated Mr Munwai for almost three years. It never disciplined him for absence. It never terminated his employment. It began to investigate only after a newspaper report and three days after he had resigned. Its own investigators found that the systems intended to monitor attendance had failed. None of that shows that Mr Munwai rendered services, but it does make it harder to draw the inference the applicant asks for, that throughout the period he rendered none.

[32] Mr Munwai's version is not without difficulty. The investigation report records that he told the investigators he had never worked since 2020. He disputes having been interviewed as the report suggests and says he received a telephone call after he had resigned and neither investigator has confirmed the report on affidavit. His papers identify no work product generated during the period and he accepts that from May 2021 he had no office. Those matters weaken his account of events but do not render it so far-fetched or clearly untenable that it may be rejected on the papers. His version of his reporting arrangements is detailed, supported in material respects by contemporaneous documents, and unanswered where it matters most.

[33] The dispute was also foreseeable. Mr Munwai had denied liability well before these proceedings were instituted. The Municipality, nevertheless, elected motion proceedings and sought final relief on a factual premise that it knew was contested.

[34] The Municipality has therefore not established on these papers that Mr Munwai rendered no services between October 2020 and his resignation. That is the factual premise upon which the declarations and the claim for repayment depend. Without it, neither can succeed.

[35] I have considered the discretion under rule 6(5)(g) of the Uniform Rules of Court to refer a disputed issue to oral evidence or trial. Neither party sought such a referral. The dispute was reasonably foreseeable when the Municipality chose

motion proceedings, and no basis was advanced for the Court to exercise the discretion of its own accord. A referral would also prolong an interim restraint which has prevented Mr Munwai from accessing his pension benefit since September 2025. In those circumstances I decline to order one.

[36] This conclusion is not a finding that Mr Munwai did render services during the period in question. I make no such finding. The evidence in these motion proceedings does not permit a final finding either way.

Would The Municipality Have Been Entitled To Repayment?

[37] The Municipality nevertheless argued that proof of non-performance would necessarily entitle it to repayment under the principle of “no work, no pay.” The principle reflects the reciprocal obligations under a contract of employment and may justify the withholding of remuneration where services are not tendered.⁶ It does not follow without further analysis that remuneration already paid over an extended period is recoverable merely by invoking that principle.

[38] The founding affidavit also speaks of payment under a mistaken belief and of unjust enrichment. Those are conceptually distinct bases of recovery with their own requirements. Because the foundational fact of complete non-performance has not been established and because neither alternative cause of action was developed in a manner that requires determination, it is unnecessary to decide whether either could otherwise have sustained recovery.

[39] Pension benefits enjoy statutory protection. Section 37A(1) of the Act provides, subject to specified statutory exceptions, that a benefit provided for in the rules of a registered fund may not be reduced, transferred, ceded, pledged or hypothecated, or attached or subjected to execution under an order of court. Section 37A(3) recognises a reduction effected under section 37D as one such exception.

⁶ *Coin Security (Cape) (Pty) Ltd v Vukani Guards and Allied Workers' Union* 1989 (4) SA 234 (C) at 239I-240A and *Mpanza v Minister of Justice and Constitutional Development and Correctional Services* (2017) 38 ILJ 1675 (LC) at para 32.

- [40] Section 37D is therefore an exception to the general protection afforded to pension benefits. The Supreme Court of Appeal has held that such exceptions are to be interpreted restrictively, particularly where the general rule protects a class of persons whom the Legislature has considered worthy of protection.⁷
- [41] In its current form, section 37D(1)(b) permits a registered fund to deduct an amount due by a member to an employer in respect of compensation for damage caused to the employer by reason of the member's theft, dishonesty, fraud or misconduct, where the member has admitted liability in writing or judgment has been obtained against the member, and to pay that amount to the employer from a benefit payable in terms of the fund's rules.⁸
- [42] The written admission or judgment is therefore an additional requirement. The judgment contemplated by the subsection must establish liability for compensation in respect of damage caused by conduct of the character described in the section. A money judgment arising on a different footing does not, merely because it exists, satisfy that requirement.
- [43] A judgment merely declaring that Mr Munwai rendered no services and ordering repayment of remuneration would not, without more, satisfy the section. Non-performance or absence from work does not, without an additional dishonest

⁷ *Absa Bank Ltd v Burmeister* [2004] ZASCA 16; 2004 (5) SA 595 (SCA) at para 14.

⁸ The current formulation of section 37D(1)(b) reads:

“(1) A registered fund may:

(a) ...

(b) deduct any amount due by a member to the member's employer on the date of retirement, the date on which the member ceases to be a member of the fund or the date on which the member's employment with a participating employer in a retirement fund is terminated in accordance with the Income Tax Act and the Tax Administration Act, 2011 (Act 28 of 2011), in respect of compensation, including any legal costs recoverable from the member in a matter contemplated in subparagraph (ii), in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which

(i) the member has in writing admitted liability to the employer; or

(ii) judgment has been obtained against the member in any court, including a magistrate's court, and includes a compensation order granted in terms of section 300 of the Criminal Procedure Act, 1977 (Act 51 of 1977), from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay that amount to the employer concerned; ..

(bA) ...”.

element, establish damage caused by theft, dishonesty, fraud or qualifying misconduct.

[44] In *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund*,⁹ this Division, following *Moodley v Scottburgh/Umzinto North Local Transitional Council*,¹⁰ held that “misconduct” in this context denotes intentional conduct containing an element of dishonesty and that negligence is insufficient. The mere absence or failure to render services does not, without more, therefore establish dishonest misconduct for purposes of section 37D.

[45] The Municipality does, however, allege more than absence. Its founding papers allege that Mr Munwai submitted falsified or forged attendance registers in order to mislead the Municipality into paying him and that he did so with an intention to deceive or defraud it. The question is, however, whether the allegation has been established.

[46] The first difficulty is one of both period and completeness. The investigation report records that the Leave Section had four timesheets belonging to Mr Munwai and that the four attendance registers obtained from it bore four different checking signatures. The four registers annexed to the founding papers are for January 2022, May 2022, November 2022, and April 2023. Yet the report treats the period of the allegedly fraudulent registers as extending from January 2022 to May 2023. The evidential material, therefore, comprises four isolated months within that period, not a continuous set of registers. In any event, the claim commences in October 2020, and the papers do not explain what allegedly induced the payments made before January 2022.

[47] There is also no evidence identifying the person whose signature appears under “checked by” on the registers. Mr Munwai does not deny his own signature as compiler but says that he does not know who supplied the checking signature.

⁹ *South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund* 2019 (4) SA 608 (GJ) at para 81.

¹⁰ *Moodley v Scottburgh/Umzinto North Local Transitional Council* 2000 (4) SA 524 (D) at 532C-E.

No handwriting or other forensic evidence identifies the signatory. The criminal investigation instituted by the Municipality was ultimately closed as undetected.

[48] Furthermore, the necessary causal connection between the alleged falsification and the payments has not been established. In argument, counsel for the Municipality accepted that payment of Mr Munwai's salary was not dependent upon submission of a monthly timesheet. He submitted that the Municipality's primary case was that remuneration followed from the reciprocal obligations under the employment contract. Later in argument it was submitted that the allegedly false registers nevertheless constituted representations which induced continued payment. The papers do not establish that causal link. They do not identify who received the registers, what payroll process they triggered, or that any particular payment was made because of them. On this evidence, I cannot find that the Municipality's alleged loss was caused by the alleged falsification.

[49] Finally, the evidence does not permit a finding on motion that Mr Munwai committed fraud. It is trite that fraud will not lightly be inferred, particularly on affidavit.¹¹ The investigation report describes the registers as fraudulent, but neither investigator has deposed to an affidavit in these proceedings. Mr Munwai disputes the relevant interaction with the investigators, and the identity of the person who supplied the checking signatures remains unknown. The report and the unexplained signatures raise questions requiring answers; they do not, without more, justify a final finding that Mr Munwai forged signatures or perpetrated a fraud upon the Municipality.

[50] It follows that the Municipality has not established the dishonest conduct and causation required to bring the claim within section 37D. Had the Court merely granted a money judgment on the basis that no services were rendered, without a finding that the loss was caused by theft, dishonesty, fraud or qualifying misconduct, that judgment would not by itself satisfy section 37D.

¹¹ *Loomcraft Fabrics CC v Nedbank Ltd* 1996 (1) SA 812 (A) at 817G-H and 822H-I; and *Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) at paras 16-17.

The Relief Sought Against The Fund

- [51] There is a further difficulty with the consequential order sought against the Fund. It is unnecessary to determine the full extent of a court's power in relation to a deduction under section 37D, because the statutory foundation for any deduction has not been established in this case.
- [52] My view in short is that section 37D provides that a registered fund may make the deduction. In *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*,¹² the Supreme Court of Appeal recognised a fund's discretion to withhold a benefit pending determination of the member's liability. In *Hansen + Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund No 2*¹³ this Division cautioned that it does not follow merely from that discretion that section 37D or a fund rule itself supplies a basis upon which a court may compel a fund to act. The Fund's statutory discretion therefore cannot simply be treated as an automatic execution mechanism following upon any money judgment.
- [53] In this matter, the Fund's rules are not before the Court. Nor is there a decision by the Fund to deduct or refuse to deduct, which is under challenge. The Fund's statement that it would not oppose an application which complied with section 37D is not an exercise of its discretion to make a deduction and is not consent to the payment order sought. These circumstances provide a further reason not to make the consequential order against it.

Declaratory Relief And The Interim Order

- [54] The declaratory relief suffers the same fate. The declarations sought require final findings that Mr Munwai failed to report for duty, rendered no services, or absconded. Those are precisely the facts which remain genuinely disputed on the affidavits. For the reasons already given, final declaratory relief cannot be granted.

¹² *Highveld Steel & Vanadium Corporation Ltd V Oosthuizen* 2009 (4) SA 1 (SCA) at paras 19-20.

¹³ *Hansen + Genwest (Pty) Ltd v Corporate Selection Umbrella Retirement Fund No 2* 2023 JDR 0380 (GJ) at para 12.

[55] Paragraph 2.1 of the order granted in Part A was to operate pending finalisation of Part B. Part B is now finally determined. For certainty, paragraph 2.1 will be expressly discharged. The costs of Part A were ordered to be costs in the cause. Those costs accordingly follow the outcome of Part B. The remainder of the Part A order is unaffected.

[56] Costs should follow the result. Part B concerned a claim exceeding R 2.5 million, a substantial motion record and moderately complex issues concerning section 37D and pension benefits. Costs on scale B are appropriate for both parts of this application.

[57] In the result, the following order is made:

- (a) Part B of the application is dismissed.
- (b) Paragraph 2.1 of the order granted by Kruger AJ on 19 September 2025 in Part A of this application is discharged.
- (c) The applicant is ordered to pay the second respondent's costs of Part A and Part B of this application on scale B.

C CARELSE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

For the Applicant : EN Sithole
Instructed : Madhlopa & Thenga Inc

For the First Respondent : Unrepresented

For the Second Respondent : R Nelwamondo

Instructed : Madima Attorneys Inc

Date of hearing : 25 May 2026
Date of Judgement : 25 August 2026