

REPUBLIC OF SOUTH AFRICA



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

CASE NO: 2019/14264

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

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SIGNATURE

DATE __ November 2023

In the matter between:

MAMBA STRIKE FORCE CC

Applicant

and

SHERIFF GERMISTON NORTH N.O.

First Respondent

ALFRED MATHYE

Second Respondent

THE PRIVATE SECURITY SECTOR PROVIDENT FUND

Third Respondent

JUDGMENT

STAIS AJ:

This judgment is handed down electronically by circulating it to the parties' representatives by email and by uploading on CaseLines.

- [1] This is an application for rescission of judgment.
- [2] It has its genesis in a complaint lodged on 28 September 2018 with the third respondent ("Fund") by the second respondent ("Mathye"), a former employee of the applicant ("Mamba Strike Force"). The complaint pertained to Mathye's contributions to and benefits due to him from the Fund, which culminated in an investigation and reasoned determination by the Pension Funds Adjudicator ("Adjudicator") on 28 March 2019.

Relief Sought

- [3] Mamba Strike Force and those advising it, appear not to have been able to discern the judgement that was to be the subject of this application. They clearly failed to have regard to the relevant provisions of the Pension Funds Act, 1956 ("Act"), despite having been referred thereto on several occasions.
- [4] Neither the notice of motion nor founding affidavit identifies the judgement sought to be rescinded, nor the legal basis for the rescission. The notice of motion refers simply to "*the judgment granted*" in this court, whilst the founding affidavit refers to "*a judgment*" that "*was made or taken in the absence of the Plaintiff by way of an administrative procedure that the Applicant was unaware of through the submission of a certificate of the Pension Fund Adjudicator to the Register of the High Court*" (sic).
- [5] Moreover, the heads of argument filed on behalf of the applicant does not identify the judgment sought to be rescinded but informs that the rescission

was brought in terms of Rule 31 alternatively Rule 42 further alternatively in terms of the common law, because the applicant was not aware “*how exactly the Second Respondent obtained a judgment against the Applicant.*”

- [6] It is necessary therefore to refer to the history of the matter and to the relevant provisions of the Act, which are to be found in Chapter VA thereof – ‘Determination and Adjudication of Complaints’. It is necessary to do so also for the purposes of the cost order I intend to make.

The Act

- [7] The Act empowers the Adjudicator to investigate any complaint and make the order which any court of law may make,¹ whereafter a statement containing the determination and the reasons therefor shall be sent to all parties and to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court.²
- [8] The Adjudicator’s determination shall be deemed to be a civil judgment of that court, shall be so noted by the clerk/registrar, and a writ or warrant of execution may be issued by the clerk/registrar of the court and executed by the sheriff after expiration of a period of six weeks after the date of the determination, on condition that no application for relief was lodged with the High Court.³

¹ Section 30E(1)(a) of the Act.

² Section 30M of the Act.

³ Section 30O of the Act.

- [9] A party aggrieved by the Adjudicator’s determination is entitled to seek relief from the court within six weeks after the date of the determination, and the court is entitled to consider the merits of the complaint and may make any order it deems fit.⁴

Applicant’s Conduct

- [10] The Adjudicator twice unsuccessfully invited Mamba Strike Force to submit its response to the complaint, reviewed the written submissions (including a response to the complaint filed by the Fund) and arrived at a reasoned determination and order on 28 March 2019 (“Order”).
- [11] The Order was forwarded to the Registrar of this court and bears the Registrar’s official stamp dated 17 April 2019; the allocated case number that has been used by the parties in all subsequent filings; and informs in the express words used by the Legislature in the relevant sections of the Act, that the determination “*shall be deemed to be a civil judgment of any court of law had the matter been heard by such court*” and further that “*a writ or warrant 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 30(P) has been lodged (sic).*”
- [12] Despite being warned of the consequences that follow upon the Adjudicator’s determination, Mamba Strike Force failed to seek relief from the court. It also failed to act on advice of the Adjudicator’s office that it had the right to apply to the Financial Services Tribunal (“Tribunal”) within 60 days after being notified of the

⁴ Section 30P of the Act.

determination (or such longer period as may be allowed by the Tribunal) for a reconsideration of the determination in terms of section 230 of the Financial Sector Regulation Act, 2017.

- [13] The Order *inter alia* compelled Mamba Strike Force to participate in a defined process to facilitate the computation of Mathye's outstanding contributions within four weeks, failing which the Fund was to reconstruct the contribution schedules based on information in its possession.
- [14] Mamba Strike Force failed to adhere to the terms of the Order despite receiving a request for information from the Fund on 23 August 2019. The Fund then proceeded to perform an arrear contribution reconstruction as the Order obliged it to do, in the sum of R94,970.43.
- [15] On 6 August 2020 Mathye demanded payment of the contribution amount within two weeks and informed Mamba Strike Force that the Order had been filed at this court and given a case number, and that failure to pay would result in Mathye approaching this court for the relief. At its request, Mamba Strike Force was granted extensions to consider the matter and revert, but it failed to do so. A further demand for payment (including late payment interest) made on 26 February 2021 drew no response from Mamba Strike Force. In both instances, the Order was attached to the demand.
- [16] Mathye duly proceeded in terms of the Act and had the Registrar of this court issue a writ of execution against the Mamba Strike Force. Significantly, the writ refers to the realisation of the sum of R125, 857.96 "*in respect of the calculated contribution reconstruction and late payment interest as per the order filed in [this court] on the 17th April 2019.*"

- [17] It appears that execution by the third respondent failed to realise the full claim and during May 2022, Mathye initiated steps to recover the balance of the debt in terms of section 65A in the Magistrates Court Act, 1944. On 30 June 2021 Mamba Strike Force launched an application to reclaim possession of the goods removed by the sheriff and to stay the writ pending final determination by the Tribunal for reconsideration of the Adjudicator's "*decision*" ("Stay Application"); and relied on the then-pending Stay Application to delay the section 65A proceedings.
- [18] The status of the Stay Application is unknown, but this is irrelevant because (a) it is common cause that Mamba Strike Force has not challenged the Order and (b) Mamba Strike Force and Mathye settled the section 65A proceedings in terms of a consent order whereby Mamba Strike Force agreed to pay Mathye R90,237.96 by 10 August 2022.
- [19] Mamba Strike Force failed to comply with the consent order too. The claim by Mamba Strike Force, that its representative at the Section 65A proceedings was not authorised to settle the matter because she did not have the approval of its sole shareholder, was raised for the first time in its replying affidavit and is, on the facts, legally indefensible.
- [20] In the result, Mamba Strike Force failed to participate in the hearing by the Adjudicator despite two demands to do so; ignored the Adjudicator's determination and Order; failed to challenge the Order; failed to comply with the Order; failed to pay Mathye pursuant to receiving two demands to do so; and failed to honour the Magistrate Court's consent order.

The Rescission

- [21] Mamba Strike Force filed this rescission application on 16 September 2022. In doing so, it did not heed the wise words of Miguel de Cervantes – “*forewarned, forearmed; to be prepared is half the victory.*”
- [22] I referred above to Mamba Strike Force’s inability to identify the judgment that I am asked to rescind. In the replying affidavit, it makes the surprising allegation that it did not approach the Tribunal because it “*would have been pointless in the light of the issue of a judgment in the High Court in this matter under this case number [and the] ... Tribunal has no jurisdiction over the High Court.*” The emphasis is mine, because it is apparent that even at such a late stage of the proceedings initiated by Mamba Strike Force, it remained unaware of the relevance and consequences of the Adjudicator’s determination.
- [23] Miss Dreyer, who appeared for Mamba Strike Force (but who was not the author of its papers or heads of argument filed on its behalf) properly accepted that the only judgement that can conceivably be relevant to this application is the Order that was received from the Adjudicator by the Registrar and filed in this court on 17 April 2019 in terms of the Act.⁵
- [24] Rule 31 is clearly not applicable to the facts of this matter, and Ms Dreyer did not press for rescission in terms of the common law. As the Order was not erroneously sought or granted in the absence of Mamba Strike Force, there is

⁵ I use the words ‘judgment’ and ‘order’ interchangeably – see *Neotel (Pty) Ltd v Telkom SA SOC Ltd & Others* [2017] ZASCA 47 at paras 12-13

no room to apply Rule 42. That then should have been the end of the matter and Mamba Strike Force should have been so advised at the outset.

[25] That then leaves the matter of costs.

Costs

[26] Mamba Strike Force seeks principally (in both the notice of motion and its heads of argument) that Mathye's attorney be ordered to pay the costs of the application *de bonis propriis*. There is simply no basis for such an order. As an aside, I did consider that it would not have been inappropriate in the circumstances to deprive Mamba Strike Force's attorneys of their fees herein. However, that should ultimately be a matter between the client and its attorneys of record.

[27] Mathye seeks a punitive cost order against Mamba Strike Force. This is clearly warranted and the order I intend to make shall provide for this.

[28] Mamba Strike Force failed to participate in the adjudication proceedings and ignored the Order. Although it raises objection in the present application to the merits of the Order, it failed to exhaust its internal remedies⁶ and the objection now serves merely to motivate 'good cause' for condonation of the belated filing of a rescission application that was stillborn. It ignored letters of demand and delayed the section 65A proceedings by launching an application that it failed to progress and proffers a disingenuous explanation for what is *prima facie* contemptuous conduct in refusing to honour its obligations in terms of the section 65A consent order.

⁶ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd & Others* 2023 (4) SA 325 (CC) at [215]-[218]

[29] The evidence reveals that Mamba Strike Force exhibited a remarkably supine attitude to its obligations and only requested an update from its former attorney towards the fourth quarter of 2021 – eighteen months after the date of the Order. Despite his alleged tardiness, the former attorney's mandate was terminated only mid the following year. The applicant's conduct since then has been no better, as is evident from the facts traversed above.

[30] It has, through its conduct, unreasonably delayed making payment to Mathye and has kept him out of pocket for four-and-half years.

[31] Adv Davids, who appeared for Mathye, referred me to several passages in the answering affidavit that motivate expressly for a punitive cost order. Despite being afforded the opportunity to provide an exculpatory response, Mamba Strike Force could do no more than reply with bare denials.

[32] In the premises, I make the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application on the scale as between attorney and client.

P STAIS

Acting Judge of the High Court
Johannesburg

This judgment was handed down electronically by circulation to the parties' legal representatives by email and by being uploaded to CaseLines. The date and time for hand down is deemed to be 24 November 2023.

APPEARANCES:

Applicant: Adv Dreyer

Attorney of record: MJ Hood & Associates

Second respondent: Adv Davids

Attorney of record: LG Gouveia Attorneys

Date of hearing: 6 November 2023

Date of judgment: 24 November 2023