

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

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

Date: **24th April 2023** Signature:

CASE NO: 031329/2023

DATE: 24th April 2023

In the matter between:

MATLOSANA LOCAL MUNICIPALITY

Applicant

and

AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD

First Respondent

MUNICIPAL EMPLOYEES PENSION FUND

Second Respondent

VAN SCHALKWYK, JOHANNES JERRY

Third Respondent

Neutral Citation: *Matlosana Local Municipality v Akani Retirement Fund Administrators and Others (031329/2023) [2023] ZAGPJHC 369*
(24 April 2023)

Coram: Adams J

Heard: 18 April 2023

Delivered: 24 April 2023 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to *CaseLines* and by release to SAFLII. The date and time for hand-down is deemed to be 10:30 on 24 April 2023.

Summary: Anti-dissipation interdict – proceeds of a pension fund pay-out – erstwhile employer seeking interim order preserving ex-employee's pension interest to recover contractual damages –

Uniform Rule of Court 6 (12) – the applicant should set forth explicitly the reasons why the matter is urgent – application should be brought expeditiously – self-created urgent non-suits applicant – application struck from the roll for lack of urgency.

ORDER

- (1) The applicant's urgent application be and is hereby struck from the roll for lack of urgency.
 - (2) The applicant shall pay the third respondent's costs of the urgent application.
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JUDGMENT

Adams J:

[1]. In this opposed urgent application, the applicant applies for a preservation order of sorts in respect of the funds standing to the credit of the third respondent's pension fund held at the second respondent, which pension fund is administered by the first respondent. The third respondent was previously employed by the applicant at its Fresh Produce Market as an Administrative Officer. On 21 November 2021, whilst facing disciplinary charges brought against him by the applicant relating to fraud and/or theft involving about R66 million, the applicant resigned from his employment with the applicant and he thereafter became entitled to payment of the proceeds from his pension fund.

[2]. The applicant has however instituted legal proceedings against the third respondent, claiming from him the R66 million+ on the basis *inter alia* that the

first respondent had breached the terms of his employment contract in that he, in the performance of his duties, failed to comply with the provisions of the Local Government: Municipal Finance Management Act¹, which caused the applicant to suffer damages in the said amount. That action is presently pending in the Northwest Division of the High Court in Mahikeng.

[3]. In this application the applicant asks for an interim order preserving the proceeds of the third respondent's pension fund pending the final determination of the action in Mahikeng, which, the applicant avers, has good prospects of success. The third respondent disagrees and contends that he has a valid and sustainable defence against that claim. He denies any wrongdoing and/or misconduct whilst in the employ of the applicant. In fact, so the case goes on behalf of the third respondent, he extended to the customers of the applicant credit as he was authorised to do in terms of his contract of employment and the applicant could and should simply have claimed these amounts from its clients.

[4]. The applicant is of the view that, because of the dire financial position the third respondent finds himself in – he reportedly has been unemployed since leaving the employ of the applicant –, he will most likely not be able to pay any judgment debt obtained against him by the applicant. This would then mean, so the argument on behalf of the applicant goes, that, in the event of them obtaining a judgment against the third respondent, same would be a hollow one. And to counter such eventuality an anti-dissipation order is applied for presently.

[5]. The applicant's case is based on an anti-dissipation interdict, which would require it to show that the third respondent is likely to spirit away the proceeds from the pension fund pay-out to the detriment of the applicant. In *Knox D'Arcy Ltd and Others v Jamieson and Others*², Grosskopf JA discussed the nature and effect of the so-called anti-dissipation interdict and found that what is required is for the applicant to show a certain state of mind of the

¹ Local Government: Municipal Finance Management Act, Act 56 of 2003;

² *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A); [1996] 3 All SA 669; [1996] ZASCA 58.

respondent, ie that the debtor is getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Grosskopf JA goes on to say that this interdict is sought

'by the petitioners ... to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question.' Grosskopf JA then turns to the effect of the interdict and finds that it is to 'prevent the respondent from freely dealing with his own property to which the applicant lays no claim'.

[6]. This is the relief sought by the applicant *in casu*. What it essentially applies for is an interim interdict to secure the proceeds of the pension fund pay-out, pending the finalisation of the High Court action. The question to be considered is whether the applicant has made out a case for such relief.

[7]. In my view, the applicant has not, in this application, established that it has a *prima facie* case against the third respondent for payment of the amount of about R66 million. In that regard, the applicant's case is sketchy at best and speculative in general. Very little details are provided by the applicant and even less evidence is furnished in support of the applicant's claim against the third respondent for the millions of rands of damages allegedly suffered by the applicant as a result of the third respondent's alleged breach of contract. I am singularly unpersuaded that the applicant's claim against the third party as set out in this urgent application is sustainable. For this reason alone, I am of the view that the application should be refused. It therefore follows that the applicant is not entitled to a preservation order. The simple point is that the applicant has not, in my view, shown that it has a case, let alone a fairly strong one, for the payment of damages. Moreover, no case is made out that the first respondent intends secreting his assets with the intention of thwarting the applicant's damages claim.

[8]. It requires reiteration that the applicant has not, in my judgment, satisfied the other requirements relating to the granting of an anti-dissipation order. In

particular, it has not been demonstrated by the applicant that the third respondent intends spiriting away the proceeds of the pension fund so as to subvert the alleged applicant's unassailable claim. For this reason alone the applicant's application should fail.

[9]. There is another reason why – in my view, the main one – the applicant's application should not succeed. That relates to urgency.

[10]. The salient facts in the matter which are relevant to the issue of urgency are the following. On 21 November 2021 the third respondent resigned from his employment with the applicant. There can be little doubt that that would or ought to have been the first time that the applicant realised that the third respondent would be cashing in his pension fund. They would also have realised then that there is a need for them to preserve the funds standing to the third respondent's pension fund in view of their allegations against the third respondent that he had misconducted himself, which caused them millions of rands of damages. They should have applied to court then for the anti-dissipation order – that is most certainly what a diligent employer with a claim against his erstwhile employee would have done. The applicant failed to do so and it has to accept the consequences of its inaction.

[11]. Subsequently, during July 2022, the applicant caused summons to be issued against the third respondent, claiming the amount of about R66 million. Again, it can safely be said that the applicant would have realised then that it has a claim against the third respondent and that one way of securing payment of such claim or at least a portion thereof would be by obtaining a preservation order in respect of his pension fund. This the applicant failed to do. They also did not act when the third respondent, during or about the same period, called on the Pension Fund Adjudicator to intervene in the matter on his behalf, whereafter the applicant was directed to process the third respondent's pay-out.

[12]. All of the foregoing translate into a conclusion that any urgency complained of by the applicant is self-created, which means that it cannot obtain relief on an urgent basis. In that regard, I do not accept the applicant's explanation that it had received an undertaking from the first and second

respondents that they would not be paying out the third respondent's pension and then had a change of heart under pressure from the Adjudicator. The point is simply that the applicant should have known all along that the third respondent is entitled to insist on being paid out his pension interest in the pension fund after his resignation from the Pension Fund, which would be legally obliged to make such payment unless it is prevented from doing so by an order of court. The difficulty which the applicant faces is the fact that as early as November 2021, it should have been clear to it that the third respondent's pension fund ought to be preserved. It should have been crystal clear to the applicant that it needed to take action in order to protect its claim for damages against the third respondent. The applicant did not do so. Instead, it sat on its laurels. And the explanation proffered by the applicant for not acting expeditiously is, in my view, wholly unacceptable.

[13]. The salient facts in this matter are no different from those in *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others*³, where Fabricius J held as follows at para 12:

'[12] It is my view that Applicant could have launched a review application calling for documents, amongst others in terms of the Rules of Court, in February 2016. On its own version, it was also ready to launch an urgent application by then, even without the so-called critical documents. The threatened internal appeal also did not materialize.

[13]

[15] This Court has consistently refused urgent applications in cases when the urgency relied-upon was clearly self-created. Consistency is important in this context as it informs the public and legal practitioners that Rules of Court and Practice Directives can only be ignored at a litigant's peril. Legal certainty is one of the cornerstones of a legal system based on the Rule of Law.' (Emphasis added)

[14]. For all of these reasons, I am not convinced that the applicant has passed the threshold prescribed in Rule 6(12)(b) and I am of the view that the application ought to be struck from the roll for lack of urgency.

Costs

³ *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others* (74192/2013) [2014] ZAGPPHC 191 (14 March 2014);

[15]. The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there are good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances. See: *Myers v Abramson*⁴.

[16]. I can think of no reason why I should deviate from this general rule.

[17]. Accordingly, I intend awarding costs in favour of the third respondent against the applicant.

Order

[18]. Accordingly, I make the following order: -

- (1) The applicant's urgent application be and is hereby struck from the roll for lack of urgency.
- (2) The applicant shall pay the third respondent's costs of the urgent application.

L R ADAMS

*Judge of the High Court of South Africa
Gauteng Division, Johannesburg*

⁴ *Myers v Abramson*, 1951(3) SA 438 (C) at 455.

HEARD ON: 18th April 2023

JUDGMENT DATE: 24th April 2023 – judgment handed down electronically

FOR THE APPLICANT: Advocate L A Mayisela

INSTRUCTED BY: Shuping Attorneys, Rustenburg

FOR THE FIRST RESPONDENT: No appearance

INSTRUCTED BY: No appearance

FOR THE SECOND RESPONDENT: No appearance

INSTRUCTED BY: No appearance

FOR THE THIRD RESPONDENT: Advocate I Essack

INSTRUCTED BY: Petker & Associates Incorporated
