

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023-076255

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
.....	13 FEBRUARY 2024
SIGNATURE	DATE

In the matter between:

MAFOKO SECURITY PATROLS (PTY) LTD

Applicant

v

K.E. MOEKETSI

First Respondent

PRIVATE SECURITY PROVIDENT FUND

Second Respondent

LUKHAIMANE M.A Nomine Officio

Third Respondent

SHERIFF OF THE COURT

Fourth Respondent

Summary: Pension — Pension fund — Enforceability and interpretation of determination of pension fund adjudicator — Execution creditor entitled to enforce determination — Execution creditor not entitled to late payment interest in terms of section 13A (7) of the Pension Funds Act 24 of 1956.

ORDER

1. The application is urgent and any non-compliance with Rule 6 (12) is condoned.
 2. 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.
 3. Each party to pay its own costs.
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JUDGMENT

WINDELL, J:

Introduction

[1] This is an application in two parts. In Part A (currently before this court) the applicant, Mafoko Security Patrols (Pty) Ltd, seeks an order interdicting and restraining the respondents from executing a writ of execution issued out of this court, pending the outcome of Part B. In Part B the applicant seeks, inter alia, an order for the review and setting aside of a determination dated 2 August 2023 taken by the third respondent, the pension funds adjudicator M.A. Lukhaimane N.O. (the adjudicator) established in terms of s 30B of the Pension Funds Act 24 of 1956 (the Act). Only the first respondent, Mr Moeketsi, opposes the application.

[2] The facts leading up to the application are common cause. Mr Moeketsi was employed by the applicant as a security officer from 5 May 2014 to 31 May 2022. He was a member of a pension fund, the second respondent, Private Security Provident

Fund (the Fund), until he was dismissed. The business of the Fund is to collect contributions payable every month in respect of its members from the participating employers and to invest them in accordance with the registered rules of the Fund until such time that the members, like Mr Moeketsi, leave the service of the applicant. On termination of employment a benefit is then calculated and paid to such employee in terms of the registered rules of the Fund.

[3] When Mr Moeketsi's employment was terminated, he did not receive his full withdrawal benefit from the Fund and was only paid an amount of R19 034.61. On 19 January 2023, he lodged a complaint with the adjudicator against the applicant, for amongst other things, its failure to timeously register him as a member of the Fund and to pay all the provident fund contributions that were due to him over to the Fund. He also reported the applicant to the Financial Services Conduct Authority.

[4] The adjudicator sent the complaint to the applicant and the Fund for comments and response in terms of s 30F of the Act. Both the Fund and the applicant were given until 24 February 2023 to resolve the complaint. The complaint was not resolved, and they were subsequently notified that the complaint would be investigated by the adjudicator and that they were required to submit their responses to the complaint. A response to the complaint was received from the Fund on 3 March 2023. On 22 March 2023, a follow up letter was sent to the applicant requesting it to submit its response by 31 March 2023. No response was received from the applicant.

[5] In terms of s 13A of the Act, the applicant had an obligation to deduct contributions to the Fund from Mr Moeketsi's salary and transmit such contributions to the Fund. The adjudicator's investigation revealed that the applicant was non-compliant in terms of s 13A of the Act. The Fund advised the adjudicator that the applicant was in arrears and its liability in respect of Mr Moeketsi's outstanding

contribution was computed in the sum of R45 033.22 (“the arrears”). The applicant was also deemed liable for late payment interest (LPI) in the amount of R 35 772.24. On 30 June 2023 the adjudicator made the following determination in terms of s 30M of the Act:

[6] ORDER

6.1 In the result, the order of the Adjudicator is as follows:

6.1.1 The employer is ordered to pay to the fund the amount of R45 033.22 representing arrear contributions for May 2016 to August 2016, October 2016 to April 2017 and May 2018 to May 2022, within three weeks of this determination;

6.1.2 The fund is ordered to re-calculate the amount of LPI due on the arrear amount in paragraph 6.1.1 above in terms of section 13A (7) of the Act and provide same to the employer for payment;

6.1.3 The fund is ordered to pay the complainant his outstanding withdrawal benefit which represents the arrear contributions remitted by the employer in paragraph 6.1.1 above, within two weeks of receiving payment from the employer; and the Fund is ordered to provide the complainant with a breakdown of the withdrawal benefit paid in paragraph 6.1.3 above, within seven weeks of this determination.'

[6] The Fund subsequently re-calculated the LPI due on the arrears in terms of paragraph 6.1.1 of the order. The total LPI amounted to R40 289.35.

[7] Section 30O of the Act provides:

'(1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter been heard by such court, and shall be so noted by the clerk of the court or the registrar of the court, as the case may be.

(2) 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 30(P) has been lodged.'

[8] The determination was filed with the Registrar of this court on 2 August 2023 and thus became an enforceable court order. During September 2023 Mr Moeketsi instructed his attorneys of record to enforce the order. Before a writ of execution is issued, the Registrar of the court requires the judgment creditor to depose to an affidavit setting out the amount due in terms of the order. Mr Moeketsi deposed to an affidavit in which he alleged that the applicant's liability in respect of his contribution amounted to R85 322.57 (R45 033.22 for arrear contributions and R40 289.35 in relation to LPI).

[9] A writ of execution was therefore issued in the amount of R85 322.57 and executed against the applicant in favour of Mr Moeketsi. It is common cause that the applicant has not complied with the determination or the writ and has not paid over any amount to the Fund or to the applicant. Nor has it tendered to do so.

[10] At the hearing of the application the applicant raised two preliminary issues. Firstly, it is contended that it is evident from a reading of the adjudicator's determination that the Fund—rather than Mr. Moeketsi—is the actual judgment creditor. He was thus not entitled to execute the writ in his favour. Secondly, the amount on the writ of execution was incorrect, as Mr Moeketsi is not entitled to the LPI in terms of s 13A (7). The parties reached consensus that the resolution of any of these two preliminary matters in favour of the applicant would result in the suspension of the writ of execution and provide guidance for a number of analogous applications that are presently adjudicated in this court. Therefore, it is unnecessary for this court to address the remaining arguments presented in the papers.

Is Mr Moeketsi the judgment creditor?

[11] A portion of an employee's salary is deducted as a contribution to a pension fund in order to provide for future benefits upon the employee's retirement, when they are no longer able to work.¹ In *Registrar of Pension Funds v ICS Pension Funds*² the Supreme Court of Appeal held that there are at least two kinds of pension funds:

'[14]One is a 'defined benefit fund'. In such a fund members become entitled to fixed benefits that are circumscribed by the rules, irrespective of the performance of the investments that are made by the fund. If the investments of the fund produce insufficient income to meet those obligations then the employer underwrites the shortfall. If the investments that are made by the fund perform better than expected a surplus will accrue to the fund. The other is a 'defined contribution fund'. In such a fund the benefits that are payable to members are directly linked to the performance of the investments that are made by the fund. If the investments perform well then the benefit will accrue to members directly and they will likewise bear the brunt of poor performance. Such a fund thus relieves the employer of the risk of poor performance of its investments and likewise promises to members the direct benefit of sound performance.'

[12] In this instance, the determination of the adjudicator suggests that the fund in question is a defined contribution fund. This is due to the explicit provision in the determination that the outstanding contribution must be paid to the Fund so that it can be paid to the member. The contributions therefore fund the member's benefits. If this was a defined benefit fund, the member would be entitled to a benefit determined in accordance with a formula, regardless of contributions paid.

¹ *Municipal Employees Pension Fund and Another v Mongwaketse* 2022 (6) SA 1 CC para 61.

² *Registrar of Pension Funds v ICS Pension Funds* 2010 (4) SA 488 (SCA) para 14.

[13] The Rules of the Fund provide that where the employer has failed to pay contributions, the Fund shall not be liable for payment of any benefit payable in terms of the Rules which would have been secured by the contributions that were not paid to the Fund. It follows that the Fund can only pay to Mr Moeketsi what is credited to his share account at the time he lodges his claim. It is for this reason that Mr Moeketsi was only paid a withdrawal benefit of R19 034.61 on 29 August 2022 representing contributions for June 2014 to April 2016, September 2016 and May 2017 to April 2018.

[14] The adjudicator held that the applicant failed to remit all Mr Moeketsi's contributions to the Fund and determined that it is in arrears for the following periods: May 2016 – August 2016, October 2016 – April 2017, and May 2018 – May 2022 in the amount of R45 033.22. The adjudicator ordered the applicant to make payment of R45 033.22 to the Fund (par 6.1.1) within three weeks of the determination and the Fund to make payment to Mr Moeketsi of 'his outstanding withdrawal benefit which represents the arrear contributions remitted by the employer in paragraph 6.1.1' within two weeks of receiving payment from the applicant. Significantly, the time elapses within a mere two weeks from the date the applicant receives the funds until the date on which the benefit is scheduled to be disbursed to Mr. Moeketsi. The determination thus does not allow the Fund to retain the money received from the applicant or invest it.

[15] It is evident that the adjudicator rendered a verdict in favour of Mr. Moeketsi and granted relief with the intention of restoring him to the position he would have been had the applicant remitted the entirety of the Fund contributions on his behalf. Having obtained a judgment in his favour, Mr Moeketsi is entitled to obtain satisfaction of it from the applicant, who is the judgment debtor. It matters not that the determination stipulated that the R 45 033.22 must first be paid to the Fund and

then to Mr Moeketsi. It is his accrued benefit that has been reduced and the claim for the arrears continues to be his and not the Fund. The Fund, as far as the arrears contribution is concerned, is in a neutral position. It suffered no loss and is simply a conduit through which the benefit is to be paid to Mr Moeketsi.

[16] Consequently, I am persuaded that Mr Moeketsi is the ultimate beneficiary of the determination in par 6.1.1 and is entitled to issue and execute the writ against the applicant. The proceeds of the sale in execution must however be paid over to the Fund in accordance with the determination and not directly to Mr Moeketsi.

Interest in terms of s 13A (7) of the Act.

[17] The applicant contended that the amount on the writ of execution is incorrect as Mr Moeketsi is not entitled to the LPI in terms of s 13A (7) computed in the amount of R 40 289.35

[18] In the event that contributions are not remitted punctually or in full, s 13A (7) stipulates that interest shall be charged at the prescribed rate. At the time Mr Moeketsi lodged his complaint with the adjudicator, Regulation 33(7) of the Pension Fund Regulations governed interest payable under s 13A (7) of the Act. Regulation 33(7) has since been repealed by the Minister of Finance and replaced by the Conduct Standard 1 of 2022, effective from 20 February 2023.³ However, since the Conduct Standard is not retrospective, Regulation 33 was in effect at the time the LPI became due.⁴

[19] Regulation 33(7) provided that:

'(1) For the purposes of s 13A (7), compound interest on late payments or unpaid amounts must be calculated from the first day following the expiration of the period in

³ The Financial Sector Conduct Authority under s 106(1) of the Financial Sector Regulation Act 9 of 2017 and ss 13A(2)(a), (6)(a), 7(a), 7(b) and (10) of the Pensions Fund Act 24 of 1956 prescribed requirements related to the payment of pension fund contributions.

⁴ *Municipal Workers Retirement Fund v Umzimkhulu Local Municipality and Others* (11458/2015) [2023] ZAKZPHC 80 (10 August 2023) para [19].

respect of which such amounts were payable until the date of receipt by the fund; and (b) is prescribed to be the prime rate plus 2 percent.

(2) Interest referred to in subparagraph (1) shall constitute investment income for the fund and must be payable to the fund by no later than the end of the second month following the month in respect of which the amount is payable.'

[20] I am not persuaded that Mr Moeketsi is entitled to the LPI in terms of s 13A (7). Firstly, the determination did not provide for the payment of the LPI to Mr Moeketsi. In paragraph 6.1.1 read with paragraph 6.1.3 of the determination, the applicant is only ordered to pay the arrears of R45 033.22 to Mr Moeketsi. In addition, in terms of paragraph 6.1.2 of the determination the adjudicator clearly stipulated that *'the fund must re-calculate the amount of LPI due on the arrear amount in paragraph 6.1.1 in terms of section 13A (7) of the Act **and provide same to the employer for payment**'* (emphasis added).

[21] Secondly, s 13A (7) does not stipulate that the LPI payable is for the benefit of the employee. In fact, Regulation 33 (7) provides that, once received, this interest constitutes investment income **for the Fund** (emphasis added). It is rational, considering that the LPI, as defined in s 13A (7), is levied against the employer or the person accountable for transferring contributions to the Fund who neglects to make payments to the Fund within the prescribed time period outlined in s 13A (7). Its penal character is further evident from the requirement that it be computed using the compound interest method.⁵ This is also in line with *Hanekom's* view:⁶

'The intention is that the interest rates prescribed must be of penal nature. In order to discourage employers from utilising the non-payment of contributions as a form of financing their operating costs, it will be higher than the rate of interest available to employers in the open market.'

⁵ The Conduct Standard 1 of 2022 also sets the interest rate for arrear contributions at prime plus 2%.

⁶ *Hanekom et al Manual on SA Retirement Funds and other Employee benefits* (2007) at 9.9.5.

[22] Thirdly, the interest under s 13 A (7) is distinguishable from the interest payable under s 30N. The interest payable in terms of s 30N is interest that the adjudicator determines payable on amounts awarded to the complainant and provides that *'where a determination consists of an obligation to pay an amount of money, the debt shall bear interest as from the date and at the rate determined by the adjudicator.'* Hunter remarks,⁷ that the adjudicator in most instances use the prescribed rate from the date of the award to the date of payment but may also order that interest be calculated from the date the amount awarded should originally have been paid to the complainant. The adjudicator is also free to use a different rate, such as the average rate of inflation, or the rate of fund return, where these would be appropriate or just.⁸

[23] Mr Moeketsi is accordingly not entitled to the LPI in terms of s 13A (7). The amount reflected on the writ of execution is therefore incorrect.

[24] In the result the following order is made:

1. The application is urgent and any non-compliance with Rule 6 (12) is condoned.
2. 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.
3. Each party to pay its own costs.

⁷ Hunter *'The Pension Funds Act: A Commentary on the Act, Regulations, selected notices, directives and circulars.'* 2013 Edition.

⁸ At page 624.

L. WINDELL

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG
(Electronically submitted, therefore unsigned)

Delivered: This judgement 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 for hand-down is deemed to be 13 February 2024.

APPEARANCES

Counsel for the applicant:	Advocate I. Mureriwa
Attorney for the applicant	Baloyi Masango Incorporated
Counsel for the first respondents:	Adv. I.C. Mokwena
Attorney for the first respondents:	Fisha Attorneys
Date of hearing:	15 November 2023 and 13 February 2024
Supplementary heads of argument filed:	17 November 2023 and 21
November	2023
Date of judgment:	13 February 2024