

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2024-047652

[1] REPORTABLE: YES / NO

[2] OF INTEREST TO OTHER JUDGES: YES / NO

[3] REVISED:NO

Date:

M.JORDAAN

In the matter between:

LESEDI LOCAL MUNICIPALITY
APPLICANT

And

NATIONAL FUND FOR MUNICIPAL WORKERS
RESPONDENT

1ST

MPHAHLELE MAHLOGONOLO

2ND RESPONDENT

This judgment was handed down electronically by circulation to the parties/and or parties' representatives and uploading on CaseLines. The date and time of hand-down is deemed to be 10 May 2024 at 10h00.

JUDGMENT

JORDAAN AJ

[1] The applicant brought this urgent application in terms of Rule 6(12) of the Uniform Rules of court seeking interim interdict to restrain the first respondent from paying the pension interest and/or processing the pension fund payout of the second respondent pending the finalization of forensic investigation regarding the maladministration and misappropriation of bursary funds which the second respondent was responsible to administer as an employee of Lesedi Local Municipality prior to her dismissal as an employee.

[2] During the second respondent's tenure as an employee, she was charged with serious acts of gross misconduct and subsequently found guilty of amongst others of fraudulent misrepresentation of the bursary funds, which was meant to skill and equip the employees of the municipality and as a consequence the second respondent was dismissed.

[3] The applicant has not recovered the misappropriated bursary funds, which was grossly abused by the second respondent to a suspected amount of more than R200 000-00.

[4] Consequently, the applicant launched this application seeking the following relief:

4.1 Directing that this application be heard on an urgent basis and condoning noncompliance with Rule 6(12) of the Uniform Rules of Court relating to service and set down;

4.2 That the first respondent is interdicted and restrained from making a payment of pension interest to the second respondent pending a finalization of forensic investigation into maladministration and misappropriation of bursary funds.

4.3 That the first respondent is interdicted and restrained from processing the second respondent's claim for pension fund payout pending the finalization of the forensic investigations into misappropriation of bursary funds, and maladministration.

4.4 That any party which elects to oppose the relief sought must be ordered to pay the costs of application on attorney and client scale.

[5] The 2nd respondent opposed the application and filed a notice of opposition, but failed to file an answering affidavit. Her attorney, Mr. Temba opposed the application on urgency.

[6] In the case of *Sars v Hawker Air Services Pty Ltd 2006(4) SA 292 SCA* it was stated that before a court makes a finding on the merits of an urgent application, the court must first consider whether the application is indeed so urgent that it must be dealt with on the urgent court roll. Where an applicant does not succeed in convincing the court that he will not be afforded substantial redress at a hearing in due course, the matter will be struck from the roll. This will enable the applicant to set the matter down again on proper notice and compliance. It is trite that the test to be applied in urgent applications is whether or not an applicant will be afforded substantial redress in due course.¹ If the applicant can not be afforded substantial redress at a hearing in due course then the matter qualifies to be heard as an urgent application.

[7] The applicant submitted that they were not dilatory. The second respondent was found guilty on the 30th January 2024 and was dismissed on 14 February 2024. The second respondent then appealed the dismissal. On the 27th of March 2024 the applicant requested the first respondent to withhold the pension interest of the second respondent after the appeal process was heard. The second respondent simultaneously on the 27th of March 2024 made an application for the withdrawal of her pension interest. The first respondent having verified the request, responded on the 8th of April 2024 refusing to withhold the pension in the absence of a valid court order to so withhold the pension interest. The first respondent granted the applicant until 19 April 2024 to produce such a court order.

[8] Due to the internal mechanism within local government regarding the appointment of legal representatives the applicant's instructing attorney was only

¹ East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and others [2011] ZAGPJHC 196

appointed on the 23rd of April 2024 and counsel on the 24th of April 2024. Consultation was had on the 26th of April 2024 and the application was then drafted over the weekend and issued on the 29th of April 2024.

[9] It was submitted by the applicant that if the matter had to be heard on a normal roll, the first respondent would have long made payment of the pension interest to the second respondent and a court order would then serve no effect as the second respondent would squander same, meaning that the applicant would not be able to get substantial redress at a hearing in due course. The respondent submitted that the application was not urgent.

[10] It was submitted by the applicant that the circumstances submitted by them renders the matter urgent and there was no delay on the side of the applicant.

[11] Having regard to the submissions, the applicant's contention that the matter is urgent passes judicial muster for the following reasons:

11.1 The applicant had to await the outcome of the disciplinary appeal process before the pensionable interest would become due to the second respondent. Both the applicant and second respondent submitted their requests to the first respondent simultaneously on the 27th of March 2024;

11.2 The applicant showed that it will not be afforded substantial redress at a hearing in due course.

[12] In the circumstances this matter is enrolled and heard as an urgent application in terms of Section 6(12) of the Uniform Rules of Court.

[13] I now turn to deal with whether the applicant has succeeded in establishing the requirements for an interim interdict.

[14] It was submitted that the applicant was found guilty of fraudulent misrepresentation of the bursary funds belonging to the municipality resulting in financial loss to the municipality.

[15] In order to investigate the extent of the misappropriation of funds by the second respondent, the municipality has appointed a forensic investigator.

[16] In terms of Section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956, an employer may deduct any amount due by a member to his employer in respect of compensation including any legal costs recoverable for any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member and in respect of which the member has in writing admitted liability to the employer; or judgment has been obtained against the member in any court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.

[17] The applicant submitted that it has a right to claim the damages caused by the second respondent by reason of any theft, dishonesty, fraud or misconduct by the second respondent as contemplated in Section 37 D (i)(b)(ii)(bb) of the Pensions Fund Act, Act 24 of 1956 and it should be successful in such an action for damages having regard to the second respondent's actions which led to her dismissal. This right, the applicant submitted, is threatened or likely to be infringed by payment of the pension benefits to the second respondent, which will cause irreparable harm.

[18] In *Kwacha Pension Fund and Another v Pension Fund Adjudicator and Another* (76848/2013) [2014] ZAGPHC 481 at paragraph 20 held:

"....., the withholding of the complainant's withdrawal benefit by the Respondent, pending the outcome of the criminal charge is permitted by the rules and the law".

[19] The first respondent, the applicant submitted, indicated that it will pay the pension benefit in the absence of a court order. The forensic audit seeks to establish the extent of the loss the applicant suffered at the instance of the second respondent.

[20] The applicant contends that it's right, to recover funds lost through the fraudulent misrepresentation by the second respondent, will be irreparably infringed should the pension interest be paid to the second respondent and she spent it while the harm that the second respondent will suffer on an interim withholding of the funds for forensic investigation is minute in comparison as it's only a interim hold.

[21] The applicant contented that it's right will be infringed if the relief said is not granted in that the 2nd respondent will squander the pension benefits and the applicant will not be able to recover the misappropriated monies.

[22] The applicant submitted that having regard to the evidence in the disciplinary hearing, the charges the applicant was found guilty of in the disciplinary hearing and her subsequent dismissal, the applicant has prospects of success in respect of impending claims for damages caused by the second respondent by the misappropriation of funds and therefore, the balance of convenience favours the relief sought.

[23] The applicant submitted that no alternative remedy except for an interim interdict of the payment of the second respondent's pension benefit, pending finalisation of forensic investigations of the misappropriation of bursary funds on a scheme akin to corruption, exists.

[24] Having regard to the affidavits, the submissions against the law applicable, I find that the applicant made out a case for the interim relief sought.

[25] The general rule in awarding costs, is that costs must follow the result. The second respondent in this matter opposed the application without so much as filing their answering affidavit in circumstances where the matter stood down to accommodate them from 07 May 2024 until 9 May 2024. Nothing in case warrant deviation from this principle.

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

1. The application is enrolled as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court.
2. The respondent is hereby interdicted and restrained from making a payment of pension interest to the second respondent pending finalisation of the forensic investigation into maladministration and misappropriation of bursary funds.
3. The first respondent is interdicted and restrained from processing the second respondent's claim for pension payout pending finalisation of the forensic investigations into misappropriation of bursary funds and maladministration.
4. The second respondent is ordered to pay the costs of this application on an attorney and client scale.

M JORDAAN
ACTING JUDGE OF THE HIGH COURT
GAUTENG JOHANNESBURG

APPEARANCE FOR THE APPLICANT:
INSTRUCTED BY:

ADV PERCY MTHOMBENI
RAPHEA ATTORNEYS INC

APPEARANCE FOR THE RESPONDENT:
INSTRUCTED BY:

ADV THABISO THEMBA
SHIBAMBO ATTORNEYS

DATE OF ARGUMENT:

9 MAY 2024

DATE OF JUDGMENT:

10 MAY 2024