



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GQEBERHA)**

CASE NO: 3572/2021

In the matter between:

SANDILE WASHINGTON MHLONTLO

Applicant

And

THE GOVERNMENT EMPLOYEES PENSION

FUND

Respondent

JUDGMENT

Zono AJ

Introduction

[1] The applicant approaches this court for an order more fully set out in the notice of motion. Stripped of verbiage, the applicant seeks a relief that takes the form of a declaratory order, especially if regard is had to

paragraph 1 of the notice of motion. With regard to the subsequent relief, they are in the form of a mandatory interdict.

[2] Perhaps it is apposite to give a full text of the notice of motion for proper understanding and contextualization. The relief sought in the notice of motion is as follows:

- “1. *Declaring that the respondent’s failure to comply with the order granted by this Honourable Court on 19th August 2021 in Case 2398/20, constitutes an ongoing violation of its duties under constitution of the Republic of South Africa, 1996.*
2. *Directing that the respondent:*
 - 2.1 *Take all administrative and other steps necessary to ensure that the respondent complies with the aforementioned order within 15 days as from the date of the further order granted herein; and*
 - 2.2 *Deliver a report in writing to the Registrar of this Honourable court and to the applicant’s attorneys within the same period, of the manner and extent of its compliance with the order in paragraph 2.1 above.*
 - 2.3 *Declaring that if the respondent fails to comply with the order referred to in paragraph 2 above, the applicant is given leave to supplement his Notice of Motion and founding Affidavit and to enrol this application on reasonable notice to the respondent, for further hearing on and determination of such further relief and complaints of contempt of court as the applicant might then seek;(sic)*
 - 2.4 *Directing that the order served on the respondent by the applicant’s attorneys by fax or e-mail;*
3. *Granting such further and/or alternative relief as to the above Honourable Court may seem meet.*
4. *Directing that the respondent pay the applicant’s costs.”*

Declaratory Relief

[3] A declaratory order is an order by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent.¹ A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action would entitle the litigant to an appropriate remedy.²

[4] The failure the applicant complains about relates to the transgressions the respondent committed in the past. The bedrock of the declaratory relief sought by the applicant is that the respondent has failed to comply with the order this court granted on 19th August 2021 under **Case No 2398/2020**. In essence the court order in the judgment of this court is worded as follows:

“1. The respondent is ordered to forthwith to take all steps necessary to procure the proper and comprehensive calculation of the applicant’s pension benefits in terms of the Government Employees’ Pension Law, 1996, and to thereafter process the applicant’s claim for further payment of pension benefits.”

This order is followed by an order of costs against the respondent.

[5] The present application was instituted on 23rd November 2021. Part of paragraph 3 of applicant’s founding affidavit sets out the basis of this application as follows:

“3. This application has been necessitated by the respondent’s failure to comply with an order granted by this Honourable Court on 19th August 2021 in Case No

¹ Section 21(1) (c) of the Superior Court Act 10 of 2013.

² *SA Onderlinge Brand en Algemene Verskeringsmaatslopy Be perk v Van Den Beg En’ Ander*, 1976(1) 602 AD; *NAPTOSA and Others v Minister of Education Western Cape Government and Others* 2001 (2) SA 112 (C).

2398/2020. Essentially the respondent failed to properly calculate my pension benefits following in my retirement as an educator in the employ of the Department of Education, Eastern Cape.”

In paragraph 6 the applicant makes the following assertions:

“6. The respondent has taken no steps to deal with the matter. It remains in default of compliance with the order and it is this default and failure which has necessitated the launching of these further proceedings.”

- [6] The default and failure complained about lie in the past. In the light of the authorities referred to in paragraph 3 above it would not be appropriate in these proceedings to grant a declaratory relief. A declaratory relief in these circumstances would not have any practical benefit for the applicant. It would remain hypothetical and for academic interest only. I accordingly find that a relief for a declaratory relief sought in paragraph 1 of the notice of motion cannot be granted. The impugned failure would better have been dealt with in the context of contempt of court proceedings, which these proceedings are not. I will deal further in paragraph 29 with the issue of contempt of court.

Interdict

- [7] The relief sought in paragraph 2 and its subparagraphs of notice of motion effectively takes the form of a mandatory interdict. Counsel for the applicant, when asked in court about the nature of the present proceedings, she made a clear submission that they are in the nature of an interdict. To use her words, she submitted that the application

seeks an order for “*structural interdict*.” She conceded that the requisites for the kind of interdict the applicant is seeking are not different from those applicable in the case of a final interdict.

[8] There are three requisites for the grant of a final interdict, all of which must be present.³

- (a) A clear right on the part of the applicant.
- (b) An injury actually committed or reasonably apprehended.
- (c) The absence of any other satisfactory remedy to the applicant.

[9] It is pivotal to give clarity on the nature of mandatory interdict. This is an order requiring a person to do some positive act to remedy a wrongful state of affairs for which he is responsible, or to do something which he ought to do if the complainant is to have his rights. It has been said that a mandatory interdict can serve to compel the performance of specific statutory duty or to remedy the effects of unlawful action already taken.⁴

[10] The applicant seeks an order essentially directing the respondent to take all administrative steps and other steps necessary to ensure that the respondent complies with the judgment of this court granted on 19th August 2021. He seeks to compel the respondent to take positive steps necessary to calculate and process applicant’s claim for further payment of pension benefits. What is required here is a positive act to

³*Setlogelo v Setlogelo* 1914 AD 221 at 227.

⁴ *Baxter: Administrative Law 690; Transnet BPK v Voorsitter Nasionle Vervoerkommissie* 1995 (3) SA 844 (T) 847 (F).

be taken to remedy a wrongful state of affairs, or to do what ought to have been done in terms of the judgment. The judgment was giving effect and applying the provision of **Government Employees Pension Law, 1996**.

Clear Right

[11] The judgment gives rise to two rights, namely, right to calculation of applicant's pension benefits and the processing of his claim for further payment of pension benefits. It admits of no doubt that the steps required to be taken in terms of the judgment aforesaid were designed to benefit the applicant. The applicant, both in terms of the judgment and the **Government Employees Pension Law, 1996** is entitled as of right to an accurate calculation of his pension benefit.⁵ Use of the word "*calculation*" in **Section 26 of Government Employees Pension Law** can only refer and mean correct and accurate calculation.⁶

[12] Both the law and the Judgment creates a clear right for the exercise by the applicant, that steps need to be taken by the respondent to procure accurate calculation of applicant's pension benefits. This must be

⁵Section 3 of the Government Employees Pension Law ,1996

⁶ Section 26 of Government Employees Pension Law, 1996.

(1) Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or beneficiary entitled to such benefit within a period of 60 days from the benefit becoming payable to the member, pensioner or beneficiary, which 60 days shall be calculated from the day following the date on which the benefit becomes payable: Provided that a benefit shall become payable to a member, pensioner or beneficiary on the last day of service at the employer of that member or pensioner or the death of that pensioner. [Sub-s. (1) substituted by s. 6 (a) of Act 21 of 2004.]

(2) Interest shall be paid by the Fund to the member, pensioner or beneficiary on any part of the amount of the benefit not paid within a period of 60 days referred to in subsection (1) from the date on which the benefit became payable, at the rate prescribed, which interest shall be calculated from the day following the date on which the benefit became payable. [Sub-s. (2) substituted by s. 6 (b) of Act 21 of 2004.]

looked at against the backdrop that the respondent's core function, among others, is to provide an accurately calculated Government Employees pension benefits.⁷

[13] I am accordingly satisfied that the applicant has established a clear right and such right is enforceable against the respondent. Where there is right there is remedy (*Ubi jus, ibi remedium*). It is a vain thing to imagine a right without a remedy. The rights are enforceable by courts of law. Mandatory interdict is a remedy that is part and parcel of a right.⁸

Injury Committed or Reasonably Apprehended

[14] The judgment directed that the prescribed steps must be taken forthwith. The gravamen of applicant's case is that the respondent failed to take steps in compliance with the judgment. He pertinently asserts that no steps to deal with this matter were taken. He concludes by saying that the respondent remained in default of compliance with the judgment. The right to accurate calculation of his pension benefits and processing of his claim for further payment of pension benefits is effectively infringed by respondents' default.

[15] In answer to these pertinent allegations the respondent contends that upon receipt of the court order the respondent took the necessary steps as ordered by the court. The membership section checked the file and the findings were made. What singularly does not appear in the whole tenor of the answering affidavit is the fact that those findings were

⁷ Section 3 of Government Employee Pension Law, 1996.

⁸ *Masemola v Special (Pension Appeal Board and Another* 2020(1) SA (1) (CC) Para 51.

communicated to the applicant. This shortcoming is very much important as I will deal with it hereinafter.

[16] What the judgment sought to achieve is that administrative actions must be taken to ensure that proper and accurate calculations are made or had been undertaken and that applicant's application for pension benefits is processed. It is implied in that injunction that the affected party must be advised of the outcome of those actions, otherwise contrary interpretation could result in absurdity.⁹

[17] Communication of the outcome is what brings finality to an administrative decision. Without communication of the decision, no finality has been reached. I find solace for this proposition on the Case of ***MEC for Health, Province of the Eastern Cape NO and Another v Kirland 2014 (3) SA 219 SCA Para 15, Plasket AJA*** authoritatively remarked therein as follows:

*“15 The fact that the decisions were not communicated or otherwise made known has an important effect: because they were not final, they were subject to change without offending the functus officio principle. In **President of the Republic of South Africa & others v South African Rugby Football Union & others** the Constitutional Court, in dealing with the President's power to appoint a commission of enquiry, held that the appointment ‘only takes place when the President's decision is translated into an overt act, through public notification’ and that prior to this overt act, he was ‘entitled to change his mind at any time’. More generally, Hoexter sums up the position as follows:*

In general, the functus officio doctrine applies only to final decisions, so that a decision is revocable before it becomes final. Finality is a point arrived at when

⁹ ***Cools Ideas 1186 CC v Hubbard and another*** 2014 (4) SA (CC) Para 28.

the decision is published, announced or otherwise conveyed to those affected by it.”

[18] It is now plain that no final decision had been taken by the respondent about the steps necessary to procure proper and comprehensive calculation of applicant’s pension benefits and the processing of applicant’s claim for further payment of pension benefits. There is nothing precluded the respondent from taking the steps in terms of the judgment, and once those steps are taken the respondent should have informed the applicant about the outcome thereof.

[19] The judgment required the steps to be taken forthwith. There is no room for the delay. That includes the consequent step of notifying the applicant of the outcome of their action or steps. Promptitude by public officials is meritorious. Even if it can be accepted that some of the steps were taken, it is not stated when and by whom those steps and actions were taken. This brings me to a point that was strongly argued by Ms Morris, Counsel for the applicant about the probative value of the answering affidavit.

[20] Applicant’s Counsel argued that, the whole answering affidavit is of hearsay nature and for that reason cannot be admitted in evidence. There are no confirmatory affidavits accompanying the main answering affidavit.

[21] Firstly, Mr Lange describes himself as a Legal Manager of the respondent. He states that where the relies on information obtained from others, he believes that information to be true and correct. Apparently Mr Lange, in dealing with this matter would necessarily rely on the officials outside his office.

[22] The kind of steps and actions that were necessarily to be taken in terms of the judgment relate to calculation of the applicant's pension benefits and processing of applicants claim for further payment of pension benefits. This is a matter that requires financial expertise than legal skills. That makes him not to be qualified to make such kind of assertions without confirmation by the officials who are doing day to day work in that field of expertise. To be precise, Mr Lange is not an official reposed with power to calculate and process employee's claims for pension benefits. He depends on officials who are well skilled and trained in that field.

[23] The deponent made nebulous statements, full of unwarranted generalization without any specific reference to any official who dealt with the matter. The answering affidavit is replete with assertions affecting activities of the so called "*membership section*" within GPAA. He further deals with a withdrawal from fund application form which he says is a multipurpose prescribed form. To be precise I refer to the entire submissions made in paragraph 11 of the answering affidavit.

[24] Mr Lange, the deponent submits as follows:

“11.1 The allegations that the respondent failed to comply with a court order, failed to properly calculate pension benefits and has ignored the bulk of pension contribution are denied.

11.2 In amplification of the denial:

11.2.1 Upon receipt of the court order the respondent took necessary steps as ordered by the court. Before the claim is processed for payment documentation is pre-verified by membership section to ensure that all the information and supportive documentation is available and validated.

11,2,2 The court ordered that the respondent “..... to take all steps necessary to procure the proper and comprehensive calculation of the applicant’s pension benefits in terms of the GEP Law, and to thereafter process the applicant’s claim for further payment of pension benefits:

11.2.3 The judgment/ order was forwarded to the membership section within GPAA for verification of the applicant’s records of employment within the persal system and for purposes of complying with the court order.

11.2.4 The membership section checked the file and all of the applicant’s scanned documents and the finding were as follows:

11.2.4.1 Several contributions were not deducted or paid over to the fund;

11.2.4.2 Calculations for the outstanding contributions with interest were done and cannot confirm that the debt was paid to the fund in full;

11.2.4.3 There is documentation indicating the transfer from Fund 91 (temporary employees pension fund) to the Transkei Fund on 30 November 1975 and even though the member was transferred it does not appear that the applicant further contributed pension and there were gaps in the contributions;

11.2.4.4 There were no pension contribution deductions from 1991 until 1996 as there was 0% contributed by the member to the pension fund.

11.2.4.5 The last deduction that was found was for 1986;

11.2.4.6 *There is a schedule for 1988, 1989, 1990 and 1991 but cannot see pension deductions or contributions;*

11.2.4.7 *The membership section confirmed that the applicant did work under Ciskei (contributed to the 91 fund), transferred to Transkei and later transferred to the external fund in 1981, the membership section can confirm that as from 1991 the member was still working but not contributing to a pension fund and that the contributions started in September 1996;*

11.2.4.8 *According to the membership section there are breaks in contribution and the member's former employer must assist. The membership section need to understand why the employer admitted the member on September 1996 if the applicant managed to repay the outstanding debt (contribution) and arrears.*

I refer this Honourable Court to annexure "A1-A4" being the e-mail from membership section.

11.2.4.9 *Departments are responsible for keeping of records of employees and GPAA is responsible for keeping of records related to pension pay out which are submitted by Department.*

11.2.5 *Unfortunately, the court dismissed the point in limine that was raised by the respondent for the non-joinder of the employer department.*

11.2.6 *The allegations that the respondent failed to comply with the court orders are denied; necessary steps were taken as ordered by court.*

11.2.7 *Pension benefits are calculated upon submission of pension pay-out documents by the employer department to GPAA.*

11.2.8 *A WITHDRAWAL FROM FUND APPLICATION FORM*

(Z102) is a multipurpose prescribed form completed by the employer on the occurrence of a particular event that has an influence on the pension interest of its employees. The form must be certified by the relevant employer to contain information that is correct. Pension benefits are processed and paid upon receipt of a duly completed Z102 form.

11.2.9 *Pension benefits were properly calculated as per the Z102 form that was submitted by the employer and its was certified by the employer to contain information that is correct.*

11.2.10 *Any amendments to the respondent's system can only be effected upon receipt of the amended Z102 form and outstanding contributions from the employer department*

11.2.11. The allegations that the respondent ignored the bulk of pension contributions are denied.

11.2.12 The start date is the employment service as opposed pensionable service. The start of employment does not mean that pension was being deducted and paid to the fund by the employer”.

[25] What is singularly lacking is the confirmatory affidavit of an official working in the membership section who made the alleged findings and observations.

[26] In addition to paragraph 11 referred to above, paragraph 14 and 17 do no better to clarify the matter. They obfuscate the issues even further.

[27] Paragraph 19 of the answering affidavit compounds the problem by not giving specific reference to the official who allegedly complied with the judgment. The content of that paragraph appears as follows:

“19.1 The contents hereof are denied.

19.2 I am opposing orders sought by the applicant.

19.3 The respondent has complied with the court order.

19.4 The respondent was ordered to take all necessary steps to procure the proper and comprehensive calculation of the applicant’s pension benefits in terms of GEP Law and thereafter process the applicants claim for further payment of pension benefits.”

[28] Hearsay evidence is generally not admissible. I emphasise that no confirmatory affidavit has been filed in this matter. This evidence or

answering affidavit lacks the necessary probative value¹⁰ and must accordingly be excluded. There are no facts placed before this court explaining why a pure hearsay evidence, lacking in probative value must be admitted.

[29] The upshot and effect of the exclusion of the answering affidavit, for it constitutes hearsay evidence is that, it is accepted that the second requirement of the final interdict has been satisfied. There is an injury committed. Applicants right to calculation of pension benefits and his right to processing of his claim for further payment of pension benefit have been infringed by the respondent.

The Absence of any other Satisfactory Relief

[30] It has been submitted that there is no other alternative satisfactory remedy available to the applicant. Non has been suggested by the respondent.

[31] The court *mero motu* enquired if contempt of court proceedings would not have afforded the applicant a satisfactory remedy. The applicant contended that a declaration that the respondent is in contempt of court order will not bring joy to the applicant's case. It will not satisfy what the court sought to achieve in terms of its judgment delivered on 19th August 2021. Payment of fine or imprisonment of an intransigent employee of the respondent is not a satisfactory remedy. I agree. I am

¹⁰ Section 3 of the Law of Evidence Amendment Act 45 of 1988.

satisfied that there is no alternative satisfactory remedy available to the applicant. The applicant is interested in the accurate calculation of his pension benefits and processing of his claim for further payment of pension benefits.

[32] Lastly, parties were engaged about the jurisdiction of this court. The applicant convincingly contended that there is nothing in the papers to suggest that the steps needed to be taken in terms of the judgment cannot be taken in the respondent's offices situating at Kwantu Towers, Govern Mbeki Avenue, Port Elizabeth. The respondent's Counsel was at pains to direct this court to an allegation in the papers that says that the judgment of 19th August 2021 can only be carried into effect only in the respondent's head offices. I find that this court does have jurisdiction.

Costs

[33] This matter involves non-compliance with the judgment of this court. There is no tangible reason why that has been the case. A knee-jerk response to this application has been given. An answering affidavit which did not attempt to enlighten this court about specific endeavours to give effect to the judgment of this court was filed. I find that the answering affidavit was wasteful. The applicant has substantially succeeded in this matter.

[34] Respondent's conduct violates dignity, repute and authority of this court. Respondent's conduct is an affront to the Constitution of this country. The respondent is saddled by **Section 165(4) of the Constitution** with constitutional responsibility to assist the court.¹¹ This court must therefore show its displeasure of this conduct by mulcting the respondent in costs on punitive attorney and client costs.

[35] The respondent should have done better, especially that it is an organ of state.¹² It should have taken this court into its confidence.

[36] **Leach JA in *Kalil No AND Others V Mangaung Metropolitan Municipality and Others***¹³ remarked as follows:

*“[30] That having been said, the manner in which the Municipality approached the appellants' application militates against a costs order in its favour. This is public interest litigation in the sense that it examines the lawfulness of the exercise by public officials of the obligations imposed upon them by the Constitution and national legislation. The function of public servants and government officials at national, provincial and municipal levels is to serve the public, and the community at large has the right to insist upon them acting lawfully and within the bounds of their authority. Thus where, as here, the legality of their actions is at stake, it is crucial for public servants to neither be coy nor to play fast and loose with the truth. On the contrary, it is their duty to take the court into their confidence and fully explain the facts so that an informed decision can be taken in the interests of the public and good governance. As this court stressed in *Gauteng Gambling Board and another v MEC for Economic**

¹¹ Section 165(4) provides: organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.

¹² Section 239 of the Constitution.

¹³ **2014(5) SA 123 SCA Para 31; 2014 (30 ALL SA 291 SCA Para 31**

Development, Gauteng, our present constitutional order imposes a duty upon state officials not to frustrate the enforcement by courts of constitutional rights.”

[37] In the result the following order shall issue:

37.1 The respondent is hereby directed to take all administrative and other steps necessary to ensure that it complies with the judgment of this court delivered on 19th August 2021 foreshadowed in paragraph 4 of this judgment, within 15 (fifteen) days of this order.

37.2 The respondent is hereby directed to deliver a report in writing to the Registrar of this Honourable court and to the applicant’s attorneys within 30 (thirty) days hereof and advise of the manner and extent of its compliance with the order in paragraph 37.1 above.

37.3 That the Respondent shall pay costs of this application on a scale as between attorney and client.

**ZONO AJ
ACTING JUDGE OF THE HIGH COURT**

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