

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

APPEAL CASE NO: 37226/14

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|--|
| (1) <u>REPORTABLE: YES / NO</u> |
| (2) <u>OF INTEREST TO OTHER JUDGES: YES/NO</u> |
| (3) <u>REVISED.</u> |

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DATE

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SIGNATURE

In the matter between:

DATE: 26/6/2015

LINKIE TSHWARANO MANTSHO

Applicant

And

**THE MANAGING DIRECTOR OF THE
MUNICIPAL EMPLOYEE PENSION FUND**

First Respondent

AKANI RETIREMENT FUND ADMINISTRATOR

Second Respondent

**CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

Third Respondent

M M LE GRANGE N.O.

Fourth Respondent

COUNCILLOR M I T MAHLANGU N.O.

Fifth Respondent

COUNCILLOR B J MODISAKENG N.O.

Sixth Respondent

C L SECHELE N.O.

Seventh Respondent

N E SETHOLE N.O.

Eight Respondent

M S MATHIVHI N.O.

Ninth Respondent

G MOKOMANE N.O.

Tenth Respondent

COUNCILLOR L T QHASHA N.O.

Eleventh Respondent

COUNCILLOR C V N MADINI N.O.

Twelfth Respondent

J U D G M E N T

DEWRANCE AJ

- [1] In this application, the applicant seeks orders holding the third to eleventh respondents (“respondents”) in contempt of a determination made by the Pension Funds Adjudicator on 19 March 2015 under case number PFA/GP 00006246/2013/MD; that the respondents be sentenced to pay a fine in the amount of R250 000.00 within 30 (thirty) days of the order, failing which the respondents were sentenced to a period not exceeding 6 (six) months (on the same papers if need be).
- [2] On 4 December 2013, the Pension Fund Adjudicator received a complaint from the Ombudsman for Long-Term Insurance. The crux of the complaint was that the applicant alleges that the first respondent failed to provide her with a benefit statement from 2005 to 2013. She noticed on her “*member’s record card*” that there was a withdrawal claim in June 2007 which was later cancelled. She does not have knowledge of the claim. The first and second respondents failed to provide her with information regarding the withdrawal. She eventually received a benefit statement for 2012.
- [3] She approached the Pension Fund Adjudicator to compel the first respondent to provide her with benefit statements from 2005 to 2013 and information regarding the withdrawal benefit claim made in 2007.

- [4] On 20 December 2013, the Pension Fund Adjudicator forwarded the complaint to Akani Retirement Fund Administrators (Pty) Ltd (“the second respondent”) and the City of Tshwane Metropolitan Municipality (“the third respondent”), affording them an opportunity to file responses by 20 January 2014. Only the third respondent submitted its response.
- [5] After considering the complaint, the Pension Fund Adjudicator made the following determination:

“1. In the result, the order of this Tribunal is as follows:

- 1.1 the first respondent is ordered to provide the complainant with a copy of her latest benefit statement and information regarding a withdrawal claim that the claimant submits was made in 2007, within two weeks of this determination;*
- 1.2 the third respondent must notify the first respondent of the complainant’s termination of service and forward all the necessary claim documentation to the first respondent, within two weeks of this determination;*
- 1.3 the first respondent is directed to pay the complainant the withdrawal benefit, constituting contributions received for the period August 2005 to November 2013, less any deductions permitted in terms of the Act, within two weeks of receipt of the documentation referred to above; and*
- 1.4 upon making payment in terms of paragraph 6.1.3 above, the first respondent is ordered to provide the complainant and this Tribunal with a detailed breakdown of her withdrawal benefits, within two weeks of making such payment.*

- [6] The applicant contends that the respondents have disobeyed the determination and because the determination is “*deemed to be a civil judgment by any court of law*” as contemplated by section 30(O)(1) of the Pension Fund Act, 1956, they are in contempt of this court.
- [7] It is a crime to unlawfully and intentionally disobey a court order.¹ Contempt of court may be adequately defined as an injury committed against the person or body occupying public judicial office, by which injury the dignity and respect which is due to such office or its authority in the administration of justice is intentionally violated.²
- [8] A division of the High Court has jurisdiction to punish summarily anyone who *ex facie curiae* commits a contempt of an inferior court which has no power to deal summarily therewith.³
- [9] In *Fakie*,⁴ Cameron JA (as he then was) said that “[t]his type of contempt of court is part of a broad offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court”. In essence, it requires that the dignity and authority of courts, as well as their capacity to carry out their functions, should always be maintained.⁵
- [10] In order to establish whether there was indeed contempt of court, it is important to establish whether the Pension Fund Adjudicator can be accorded the status of a court. That is the first hurdle which the applicant must jump.

- [11] Section 166 of the Constitution⁶ identifies courts as the Constitutional Court; the Supreme Court of Appeal; the High Courts, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from High Court; the Magistrates' Courts; and any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts.
- [12] Section 6 of the Superior Courts Act⁷ provides that the High Court of South Africa consists of the following divisions: Eastern Cape Division; Free State Division; Gauteng Division; KwaZulu-Natal Division; Limpopo Division; Mpumalanga Division; Northern Cape Division; North West Division; and Western Cape Division.
- [13] Each division of the High Court consists of a judge president and one or more deputy judge-presidents and as many other judges as they may determine and approved by the President.⁸
- [14] The Pension Funds Adjudicator is a creature of statute which is appointed in terms of the provisions of the Pension Funds Act.⁹ A Pension Funds Adjudicator (or his deputy or acting adjudicator) may not be appointed unless he or she is qualified to be admitted to practice as an advocate under the Admissions of Advocates Act¹⁰, , or as an attorney under the Attorneys Act¹¹, and has the necessary experience required by section 30C of the Pension Funds Act.

[15] The main object of the Pension Fund Adjudicator is to dispose of complaints lodged in terms of section 30A(3) of the Pension Funds Act in a procedurally fair, economical and expeditious manner.¹² In order to achieve his main object, the Pension Funds Adjudicator:¹³

[15.1] shall investigate any complaint and make an order which any court of law may make;

[15.2] may, if it is expedient, and prior to investigating a complaint, require any complainant first to approach an organisation established for the purpose of resolving disputes in the pension fund industry or part thereof, and approved by the Registrar.

[16] In conducting the investigation, the Pension Funds Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including in an inquisitorial manner.¹⁴ No party is entitled to be legally represented at proceedings before the Pension Funds Adjudicator.¹⁵

[17] After completing the investigation, the Pension Funds Adjudicator must send a statement containing his or her determination and the reasons therefor, signed by him or her, to all the parties concerned as well as to the clerk or the registrar of the court which would have had jurisdiction had the matter been heard by a court.

- [18] The determination may be enforced in terms of the provisions of sections 30O of the Pension Funds Act. It provides as follows:¹⁶

"30O. *Enforceability of determination*

- (1) *Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk 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 30P has been lodged.*

- [19] The person who, in connection with the complaint does anything which is done before a court of law, would have constituted contempt of court, shall be guilty of an offence and liable on conviction to a fine not exceeding R1 million or to imprisonment for a period not exceeding one year, or to both such fine and such imprisonment.¹⁷

- [20] If regard is had to the provisions of the Pension Funds Act, it is clear that the Pension Funds Adjudicator is not a High Court. It is also not "any other court established or recognised in terms of an Act of Parliament, including any court of similar status to either the high courts or the magistrates' courts".¹⁸

- [21] In *Joint Municipal Pension Fund and Another v Marthinus and Another*,¹⁹ the court, *per Snyders J* (as she then was), after analysing sections 30M read with section 30O, said the following:

"The purpose of section 30M read with section 30O, is to give effect to the determination by the Second Respondent not to create jurisdiction for the purpose of an appeal as submitted. The proceedings allowed in terms of section 30P is not an appeal in the usual narrow sense of the word, the section specifically states that. The argument that the present proceedings are an appeal effectively from a judgment of this Court is, in my view, fallacious. The determination by the Second Respondent is not a judgment by this Court. It is deemed to be for a specific purpose of giving effect thereto. That is the interpretation on the clear wording of the Act, apparent from sections 30M, 30O and 30P. The legislature, in my view, refrained from referring in section 30P to a Court (as referred to in section 30O(1)). If it did, the First Applicant's submission would have been perfectly valid." (**emphasis added**)

- [22] In *Wright*,²⁰ Magid J had to determine whether section 17(15) of the then Labour Relations Act 28 of 1956 included the power to permit the content of such an order. Section 17(15) provided as follows:

"Any decision, award, order or determination of the industrial court may be executed as if it is a decision, an award, order or a determination made by the Supreme Court."

- [23] The learned judge rejected the proposition that the section includes the power to permit for contempt of such an order. Thus, it stated:²¹

"In my judgment section 17(15) of the Act does not have the meaning or effect contended for by Mr Munks. The words 'as if it is...an order...made by the Supreme Court' do not convert an order of the

industrial court into an order of the supreme court. They simply mean that the procedure for execution of an order of the industrial court is the same as the procedure for execution of a similar order of the Supreme Court. In this regard I agree with the views expressed by Landman AM in National Union of Metal Workers of SA and Others v Med Laboratories (Pty) Ltd (1989) 10 ILJ 499 at 515-6."

- [24] In the *Med Laboratories* case *supra*, the Industrial Court found that a decision of the Industrial Court is not deemed to be a decision of the Supreme Court.²²
- [25] Magid J was of the view that this section was introduced to give effect to enforcing an order of the industrial court. This was the mischief which the legislature intended to cure.²³
- [26] Accordingly, I am of the view that the Pension Funds Adjudicator is not a public judicial officer and his determination is not an order of court. Therefore there can be no contempt of this court.
- [27] Accordingly, the application is dismissed.
- [28] There will be no order as to costs.
- [29] Accordingly, I make the following order:
 - [29.1] the application is dismissed;
 - [29.2] there will be no order as costs.

DEWRANCE, AJ
Representation for the applicant:

Counsel

Adv L Maite

Instructed by Attorneys:

Ndekwe Attorneys

¹ See *S v Beyers* 1968 (3) SA 70 (A)

² See *Melius de Villiers Roman Dutch Law of Injury* (1899) at 166

³ See *Attorney General v Crockett* 1911 TPD 893

⁴ *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at para [6]

⁵ See *Fakie supra* para [6]

⁶ Constitution of the Republic of South Africa, 1996

⁷ Act 10 of 2013

⁸ See section 6(2) of the Superior Courts Act

⁹ See section 30B read with 30c of the Pension Funds Act 34 of 1956

¹⁰ 74 of 1964

¹¹ 53 of 1979

¹² See section 30D of the Pension Funds Act

¹³ See section 30E of the Pension Funds Act

¹⁴ See section 30J of the Pension Funds Act

¹⁵ See section 30K of the Pension Funds Act

¹⁶ Section 30P provides:

30P. Access to court

(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.

(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A(3) and on which the Adjudicator's determination was based, and may make any order it deems fit.

(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.

¹⁷ See section 30V(d)

¹⁸ See section 166(e) of the Constitution

¹⁹ [2007] 1 BPLR 94 (W) at p 97

²⁰ *Wright v St Mary's Hospital, Melmoth and Another* 1993 (2) SA 228 (B and CLD),

²¹ See p 229B-C

²² *National Union of Metal Workers of SA and Others v Med Laboratories (Pty) Ltd* (1989) 10 ILJ 499 pp 515 - 516

²³ See *Wright supra* p 229D