



**HIGH COURT OF SOUTH AFRICA
LIMPOPO LOCAL DIVISION, THOHOYANDOU**

CASE NO: 1155/2022

- | | |
|-----|----------------------------------|
| (1) | REPORTABLE: YES |
| (2) | OF INTEREST TO OTHER JUDGES: YES |
| (3) | REVISED: YES |

26/10/2023

In the matter between

NEMANDIVHE TAKALANI VINCENT

APPLICANT

And

MINISTER OF HIGHER EDUCATION

FIRST RESPONDENT

**VHEMBE TECHNICAL AND VOCATIONAL
EDUCATION AND TRAINING COLLEGE**

SECOND RESPONDENT

**THE PRINCIPAL, VHEMBE TECHNICAL
AND VOCATIONAL EDUCATION AND
TRAINING COLLEGE N.O**

THIRD RESPONDENT

REASONS FOR THE ORDER

DENGE AJ

INTRODUCTION

[1] This is an opposed application for a final interdict. The applicant prays for an order premised on the following prayers: (1) that the 2nd respondent refrain from making demands to the applicant, for payment of the sum of R 484 119-00 (Four hundred and eighty-four, one hundred and nineteen rands); (2) that the respondents be interdicted from attaching the pension benefits of the applicant to recover the monies stated in prayer (1); and (3) that the respondents pay the costs of the application on a party and party scale, jointly and severally, the one paying, the others to be absolved.

[2] Only the 1st respondent filed papers in opposition to the application. The other respondents filed a notice to abide by this Court's decision.

[3] Having read all papers filed of record, and having heard arguments of both counsel for the applicant and the 1st respondent, it became clear that the applicant had failed to make a case for the relief sought.

[4] Condonation for the late filing of the 1st respondent's answering affidavit was granted as prayed for, on the other hand the 1st respondent was mulcted with a wasted costs order occasioned by his abandoned *points-in- limine*.

[5] In the result, the application was dismissed with costs.

[6] On 19 September 2023, the applicant's attorneys filed a notice for the request for reasons for the order dismissing the application. The requested reasons appear hereinafter.

FACTUAL BACKGROUND

[7] The applicant has been in the employ of the Department of Higher Education from the year 1999 to date. He is attached to the Vhembe Further Education and Training College (2nd respondent), an institution established and governed in terms of Continuing Education and Training Act 16 of 2006 as amended; and for which the 3rd respondent is principal. The 1st respondent is the Minister of Higher Education, tasked with the running of institutions of higher learning; which institutions the 2nd respondent is part of.

[8] The applicant is currently Deputy Manager, Finance (Expenditure and Budget), and he has been occupying that position from 14 April 2009. During the year 2016, the applicant and others felt the need to be upgraded from salary level 09 to salary level 10. The 3rd respondent specifically recommended the applicant to the Acting-Chief Executive Officer of the 2nd respondent, for the said salary level upgrade to be approved.

[9] The 2nd respondent submitted the 'request for approval letter' to the Directorate, Human Resource Management and Development. As a consequence, the applicant was upgraded from salary level 09 to salary level 10; when in fact according to a Limpopo Province Department of Education Memorandum, the applicant did not qualify for a salary level upgrade then.

[10] It transpired that the transaction letter for the salary upgrade was implemented on PERSAL system, without the approval of the Director-General, or without following the Job Evaluation (JE) process. The transaction was also implemented without the involvement of the Organisational Development (OD) unit within the Chief Directorate, Human Resource Management and Development.

[11] On 23/11/2018 the Deputy Director-General Corporate Service, Higher Education and Training, addressed a letter to the 3rd respondent, (1) in which letter she set out how the applicant's salary upgrade was incorrectly implemented and advised that the applicant should be informed about the Department's intention to undertake a corrective measure, to correct the mistake.

[12] A Ms. M.G Mapheto, Chief Director, Human Resource Management and Development had by then in a memo addressed to a Mr. Reyneke, (2) called for an

investigation into the circumstances surrounding the said incorrect implementation of the salary upgrade. She also therein sought to establish the identities of the officials who implemented the relevant transaction, so that the necessary action could be taken.

[13] On 06/12/2018 the 3rd respondent directed a letter to the applicant, (3) which letter advised that the department would correct the error from the date when the upgrade was effected.

[14] HR informed Mr. Fhatuwani Makungo, HR Manager at the 2nd respondent in an email dated 21/10/2020, (4) that they had been advised to downgrade the applicant's salary as from 2015 April, as applicant's salary upgrade had been done incorrectly. They also informed Mr. Makungo that they have already effected the downgrade and asked him to notify the applicant, so that the applicant could make arrangements for payment with Finance.

[15] That email is the one that the applicant referred to in his papers as "a demand" for the payment of the amount of R 484 119. 00 that the respondents have made against him.

[16] The applicant approached his attorneys who, in turn directed an email (5) to the 2nd respondent; the 3rd respondent; Mr. Fhatuwani Makungo and to the Deputy Principal Corporate of the 2nd respondent, wherein they demanded, as per the applicant's instructions, that the recipients should refrain from their "unlawful and or unconstitutional demands for payments."

[17] In the same email, the applicant's attorneys registered 2 (two) concerns; namely, (1) that the applicant may not be held liable to pay R 484 119. 00, as according to them, the applicant had not recommended himself for the said upgrade or he has not upgraded himself, and (2) that it was even both unlawful and unconstitutional for the respondents to demand such payment from the applicant, utilising subsection 38 (2)(b)(i) of the Public Service Act, (6) as the same Act had, according to them, been declared unconstitutional by the Constitutional Court judgment on 07/12/2017. (7)

[18] The concerns raised in the email were repeated in the body of the applicant's affidavits as the bases for the applicant's application for a final interdict. This,

notwithstanding the fact that the applicant does not dispute that the amount of monies demanded from him, had been paid to him in error. And further, notwithstanding, the fact that in their correspondences referred to above, the respondents have never indicated that they intended to use the instrumentality of the provisions of subsection 38 (2) (b) (i) of the Act, to recover their monies.

[19] In the same email the applicant's attorneys directed the attention of the recipients to a communique from the Acting Director-General; which communique, according to them, advised on the so-called unconstitutionality of the Act. The applicant's attorneys also stated that the said communique advised the departments to utilise other available legal processes to recover "such amounts", which processes may include recovery through a court of law or through processes in compliance with section 34 of the Basic Conditions of Employment Act (8).

[20] The application has its genesis in the letter that I have referred to above, which letter the Deputy Director-General Corporate Services, Higher Education and Training directed to the 3rd respondent. The letter reads thus:

"Kindly be advised that the Department will rectify the incorrect implementation of upgrading Mr. Nemandivhe to salary level 10 with effect from 1 April 2015 in line with the Public Service Act, section 38(1)(a) which clearly stipulates that "if an incorrect salary, salary level, salary scale or reward is awarded to an employee, the relevant executive authority shall correct it with effect from the date on which it commenced."

[21] A reference in that letter to subsection 38(1)(a) of the Public Service Act merely had to do with the decision of the Department to correct or downgrade the applicant's salary level, which decision the Department has since executed.

[22] That reference had nothing to do with the provisions of subsection 38(2)(b)(i) of the same Act. Also, the subsection, as I indicated above, did not feature anywhere in all of the Department's or respondents' correspondences.

[23] The applicant submitted in the alternative that, even if he were to be found to be liable to pay those monies, the procedures adopted by the respondents in demanding the monies were both wrong and unconstitutional. Again, the applicant was making reference to subsection 38(2)(b)(i) of the relevant Act. In that regard,

the applicant lamented that he would not be able to repay the monies, as his salary had been downgraded.

[24] The applicant feared that as his lawyers' email had drawn no response from any of the recipients, the respondents might want to attach his pension benefits, in order to recover the money.

[25] The 1st respondent answered, and contended that as much as the applicant was entitled to his pension benefits, the department was equally entitled to recover the money incorrectly paid to him, in terms of the provisions of subsection 21 (3) of the Government Employees Pension Law (Pension Law) (9) if, at the time of his retirement, resignation or discharge from public service, the applicant has not settled his debt to the Department.

[26] The 1st respondent further averred that the Department would embark on a legal process to recover the relevant monies from the applicant, and that the Department would not attach the applicant's pension benefits without first obtaining a court order.

APPLICATION OF THE LAW TO THE FACTS

[27] The Court has a discretion to refuse an (final) interdict. In order to succeed in obtaining a final interdict, the applicant must establish the following requirements:-

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended; and
- (c) the absence of similar protection by any other ordinary remedy.⁽¹⁰⁾

[28] Hereunder, I deal with the relevant requirements, chronologically.

'A clear Right'

[29] A right that forms the subject matter of the application for an interdict must be a legal right⁽¹¹⁾, and it must be enforceable in law. It is also trite that that right must be established on a balance of probabilities⁽¹²⁾.

[30] The applicant submitted that he has a right not to have the payment of the monies in question demanded from him, notwithstanding the fact that he does not

deny that the relevant salary level upgrade and the resultant payments were made in error. The result is he was unduly enriched thereby.

[31] The applicant's contention that the pension benefits that he has a clear right on might in due course be exposed to attachment contrary to the provisions of subsection 37A (1) of the Pension Fund Act (13), when in fact he had not acquired those monies through fraud or theft, or as the first respondent had not suffered loss, as a result of negligence on his part, is of no consequence in my view. The Department or the 1st respondent may take refuge in the provisions of subsection 21 (3) (a) of the Pension Law (14) eventually, as the last step in the legal process that they might embark upon to recover the relevant monies.

[32] The applicant cannot have a right to the monies that he admits had been paid to him by the department in error. The Department or the 1^s respondent was and still is entitled to recover the money. It does not matter that the applicant has not upgraded himself nor does it matter that he was not aware that the upgrade has been incorrectly implemented.

[33] Consequently, the applicant has failed to establish on a balance of probabilities that he has a clear right.

'An Injury actually committed or reasonably apprehended'

[34] There is no injury because the department or the respondents have not done anything that caused the applicant any injury or harm or prejudice. It was, however, enough for the applicant to show on a balance of probabilities that he had grounds for a reasonable apprehension that his rights would be infringed (15).

[35] The applicant averred that he feared that the respondents might attach his pension benefits so as to get back the monies, as they had commenced to make demands for payment of the monies, yet they have not responded to his demand that they should refrain from making demands.

[36] The applicant also submitted that on those bases, he apprehended harm which must be interdicted from occurring. That is a non-starter. There was no reasonable apprehension of harm, as there is no right that can be infringed through the recovery of

moneys that have been paid in error. Therefore, the applicant has failed to establish the relevant requirement on a balance of probabilities.

'The Absence of Similar protection by any other Ordinary remedy.'

[37] The applicant submitted that there can be no other remedy to protect him from the harm of attachment of his pension benefits that he has a clear right over, other than a final interdict.

[38] The applicant also contended that subsection 37A(1) of the Pension Fund Act (16) prohibits attachment of pension benefits, save in 2 (two) instances in terms of the Maintenance Act 23 of 1963 (17) and the Income Tax Act (18), respectively. On the other hand, the 1st respondent suggested, and incorrectly so, in my view, that the Fund may make deductions from the applicant's pension benefits in terms of subsection 37D(b)(ii) of the relevant Act (19), to compensate for losses or delictual damages caused to the Department as a result of negligence on the part of the applicant. The applicant has not committed a delict.

[39] However, that is beside the point. Subsection 21(3)(a) of the Government Employees Pension Law provides that any amount which is payable to the employer by any member in the employment of such employer on the date of his or her retirement or discharge, or which the employer is liable to pay in respect of such member, may be deducted from the benefit payable to such member; pensioner or beneficiary under that Law in a lump sum, or in such instalments as the Board may determine.

[40] In order to prevent the Department or the 1st respondent from further demanding the relevant monies and or instituting legal proceedings against him, for the recovery of the relevant monies and to further prevent the attachment of his pension benefits when he retires or he is discharged from the service of the State __ because that is what the application amounts to in my view, the applicant has another remedy.

[41] That remedy is in the form of liaising with the Department and make payment arrangements. It is the remedy that was made available to the applicant by the respondents, yet the applicant decided to rush to Court.

[42] The Department or the respondents have not closed the door to him. So he must go there. Consequently, the applicant failed to establish the third requirement for a final interdict.

IN CONCLUSION

[43] That is why in the end, I gave the following Order:-

- (a) Condonation for the late filing of the 1st respondent's answering affidavit is hereby granted with no order as to costs;
- (b) Wasted costs in relation to the abandoned *points-in-limine* raised by the 1st respondent to be borne by the 1st respondent on a party and party scale; and
- (c) The application is dismissed with costs.

N E DENGÉ

ACTING-JUDGE OF THE HIGH COURT

Appearances:

For the Applicant	Advocate M Musetha
Instructed by	Netshilema Attorneys
For the First Respondent	Advocate T Masindi
Instructed by	State Attorney, Thohoyandou
For the Second and the Third Respondents	Advocate J Ngoepe (Watching brief)
Instructed by	Verveen Attorneys, Polokwane

END-NOTES

1. “Annexure NTV4” to Applicant’s Founding Affidavit.
2. “Annexure NTV5” to Applicant’s Founding Affidavit.
3. “Annexure NTV6” to Applicant’s Founding Affidavit.
4. “Annexure NTV7” to Applicant’s Founding Affidavit.
5. “Annexure NTV8” to Applicant’s Founding Affidavit.
6. Number, 103 of 1994.
7. Section 38(2)(b)(i) and not the Act (as in n 6) has been declared constitutionally invalid by the *Labour Court* [see *Public Servants Association obo Ubogu v Head of the Department of Health, Gauteng and Others, Head of the Department of Health, Gauteng and Another v Public Servants Association obo Ubogu SAFLH Cases CCT6/17 and 14/17*]; and subsequent to that, the *Constitutional Court* confirmed the *Labour Court*’s declaration of invalidity. The relevant provisions, which provided for a mechanism to ensure recovery of monies wrongly paid to an employee from the state coffers, were found by the Constitutional Court in that matter to amount to self-help that was, among others in contravention of section 1 (c) of the Constitution, that envisages a society in which the rule of law prevails (para [58] and para [66]). The provisions allowed the state to deduct such monies without recourse to a court of law and to arbitrarily determine monthly instalments without first affording the employee concerned an opportunity to make representations about her or his liability and or even her or his ability to pay the instalments (para [58] and para [65]). The same provisions also provided that the accounting officer could, where the person who had been overpaid is (was) not in the service of the State, recover such monies by way of deducting from any monies owed to him or her by the state or by way of legal proceedings or partly in the former manner and partly in the latter manner. Proper reading of the relevant provisions thus suggested that the accounting officer could even recover such monies from such person’s pension benefits.
8. Number 75 of 1997.
9. Number 21 of 1996.
10. *Setogelo v Setogelo* 1914 AD 221 at 227.
11. *Herbstein & Van Winsen The Civil Practice of the Supreme Court of South Africa (Now the High Court and the Supreme Court of Appeal)* 4 ed Juta & Co Ltd Cape Town at 1066. See also in this work *Minister of Law and Order Bophuthatswana & another v Committee of the Church Summit of Bophuthatswana & others* 1994 (3) SA 89 (B) at 98D-F at 1066 fn 20 and *Wattrus N.O* 1980 (1) SA 662 (T) at 673D at Page 1066 fn 20.
12. *Nienaber v Stuckey* 1946 (AD) 1049 at 1054.
13. Number 24 of 1956.
14. n 9.
15. See *Minister of Law and Order Bophuthatswana & another v Committee of the Church Summit of Bophuthatswana & others* at n11, particularly at 99A-B and *Erasmus v Afrikaner Proprietary Mines Ltd* 1976 (1) SA 950 (W) at 965 : All as shown at fn 70 in *Herbstein & Van Winsen* as at n 11.
16. n 13.
17. Now replaced by Maintenance Act No. 99 of 1998.

18. Number 58 of 1962.

19. n 13 and n 15.