



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION – MAKHANDA)**

**Reportable/Not Reportable**

**Case no.: 2377/2022**

**Matter heard on: 15 August 2024**

**Judgment delivered on: 22 August 2024**

In the matter of:

**THE MUNICIPAL WORKERS RETIREMENT FUND**

Applicant

and

**GROOT KEI MUNICIPALITY**

First Respondent

**LAWRENCE MAMBILA**

Second Respondent

**NGENSISILE TEKILE**

Third Respondent

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**JUDGMENT**

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**BRODY AJ**

1. This matter has a long history dating back to 2007, some sixteen years ago. The applicant, the Municipal Workers Retirement Fund (“the fund”), a pension fund organisation registered as such in terms of section 4 of the

Pension Funds Act, Act 24 of 1956 (“the Act”) brought an application against the Groot Kei Municipality (“the municipality”) which has its principal office at 17 Main Road, Komga, for an order compelling the municipality to furnish information from January 2007 within ten days of the order. The order to compel was handed down on the 5<sup>th</sup> of February 2019 by Mbabane AJ and this was essentially an order compelling the municipality to furnish information in terms of Regulation 33 of the Pension Funds Regulations (published under GNR98 in GG 162 of 26 January 1962, as amended) as read with section 13A(2) of the Act.

2. In that order the municipality was required to furnish the name and identity of the fund in respect of which pension fund contributions were payable and the name and address of the employer, or pay-point which made the deduction, together with the responsible person to contact at the “employer”.
3. Despite service of this order on the relevant officials of the municipality, nothing was done by the municipality and an application for contempt was then brought on the 16<sup>th</sup> of April 2019 and an order made by Malusi J in which he found that the municipality and the municipal manager were in contempt of court of failing to comply with the earlier order, and that the municipal manager was committed to imprisonment for a period of thirty days, suspended for a period of twenty court days on condition that the order was complied with. The usual order by the sheriff to take the necessary steps in the event of a failure to comply was also granted. Costs were also granted on the scale as between attorney and client.
4. That order too was served on the respondents in the contempt application.
5. This order too was ignored by the municipality and the municipal manager, and a writ for imprisonment of Mr Olwethu Kwababaana was issued. It transpired that Mr Kwababaana had in fact resigned and could not be located.

6. After extensive correspondence between the fund and the municipality during the period August 2019 to February 2022, the municipality refused to furnish the necessary minimum information as required by the statute.
7. On the 13<sup>th</sup> of September 2022 Rugunanan J handed down a personal liability order in which the municipality and its officials were required to furnish the information, as previously set out, and costs were payable on an attorney and client basis.
8. This order was not only served by the sheriff but also emailed to all the relevant officials of the municipality and there can be no doubt that they were aware of the order.
9. None of the information was furnished to the fund after which the present application was brought on the 7<sup>th</sup> of August 2023.
10. In the municipality's answering affidavit the general defence was raised by the second respondent that the municipality "*endeavoured (through its legal representatives) in good faith, to resolve the issue by tendering to settle the matter out of court subject to the applicant's representatives availing themselves for settlement negotiations.*"
11. A further explanation was that advocate Patel, who had been instructed to deal with the matter, had furnished the fund with "*documentation*" and that "*it was discovered that the documentation so required was destroyed in a fire that burnt down the municipal building in which they were kept, during May 2018.*"
12. The fund challenged the veracity of these defences and, in particular, indicated that there was no detail regarding the alleged fire.
13. This led to an application for the admission of the filing of a further affidavit by the second respondent, and after hearing argument, I ordered that the supplementary affidavit be accepted, after which the matter was argued.

This supplementary affidavit gave more detail about the alleged fire and indicated again that the municipality was unable to comply with the court orders as it did not have the necessary documentation, or information.

14. There can be no doubt that the liability of the municipality and the present officials has already been determined in the previous court order and the liability of the municipality is based on the provisions of section 13A(2) of the Act.
15. There can also be no doubt that this court granted an order against the second and third respondents in the personal liability order in terms of the provisions of section 13A(8)(c) as read with section 13A(9)(b) of the Act.
16. The second respondent, as the municipal manager, is also the responsible person tasked with overseeing the implementation of court orders against a municipality<sup>1</sup>
18. In *Fakie N.O. vs CCII Systems (Pty) Ltd* 2006(4) SA 326(SCA) it was held that a litigant who has obtained a court order requiring an opponent to do, or not to do something, is permitted to approach the court again in the event of non-compliance with a further order declaring the non-compliant party in contempt of court and imposing a sanction.
19. The essence of a contempt offence lies in violating the dignity, the repute or authority of the court. The rule of law requires that the dignity and authority of the courts, as well as their capacity to carry their functions should also be maintained.
20. An applicant must prove the requisites of contempt, being the order, service of the order, knowledge of the order, and non-compliance with the order and wilfulness and *mala fides*.<sup>2</sup>

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<sup>1</sup> *Meadow Glen Home Owners Association and Others vs Tshwane City Metropolitan Municipality and Another* 2015(2) SA 413(SCA), paragraph [24], page 424E - H

<sup>2</sup> *Fakie*, paragraph (42) (c), page 344H - J

21. Cameron JA stated the following:

*“But, once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: Should the respondent fail to advance evidence that establish a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond any reasonable doubt.”*

22. In argument, it was clear that the order, and the terms thereof, were known to the respondents and there was no doubt that they had received the personal liability order.

23. At paragraph 7.4 of the fund’s replying affidavit, the following was stated:

*“7.4 The prescribed information which the municipality is required by statute to furnish is not extensive or difficult to obtain. I refer to the personal liability order (annexure “MWRF3”, to the founding affidavit, page 30). I point out that much of the information required is common cause, ie the name of the Fund (the applicant), the name and address of the employer (being the municipality) and the percentage or amounts of contributions split between member and employer (it follows from the rules of the Fund), and is known to the Fund and the municipality.”*

24. I was advised in argument by Mr van der Berg SC that the municipality did in fact comply with that information.

25. 7.6 of the reply, however, states the following:

*“Accordingly, what is essentially required is the particulars of each employee who is a member of the Fund, and his pensionable*

*emoluments for the relevant period. This is information that can be reconstructed or should be electronically available, but the Municipality has made no effort to furnish the prescribed information. The Municipality has literally had years to do so but elected to do nothing.”*

26. I was advised by Mr van der Berg SC that this information has still not been furnished by the municipality, and in particular, the second respondent, in violation of the personal liability order.
27. The difficulty with the “fire” defence is that this was raised for the first time in this application and was not raised at all before this application, and before the previous orders were obtained. The fire allegedly took place on the 2<sup>nd</sup> of May 2018 and all the orders granted by this court, postdate that event. The municipality, including the present municipal manager, did not raise the fire defence prior to the granting of the order by Rugunanan J on the 13<sup>th</sup> of September 2022.
28. A further difficulty that I have with the “fire” defence is that we live in a world where records are usually kept electronically and digitally. I agree with Mr van der Berg SC that no explanation is given why certain of this information could not have been obtained, or reconstructed, from electronic data.
29. It is clear from the papers, and the various orders, that the prescribed information required is not extensive, or difficult to obtain. The name of the fund, the name and address of the employer, and the percentage of amounts of contributions split between member and employer is not an onerous task.
30. The municipality must be in possession of a list of employees with their starting dates, and their salary scales. What is required is that the particulars of each employee, who is, or was, a member of the fund, and his or her pensionable emoluments for the relevant period of their employment.

31. In addition to the above, the respondents did not oppose the personal liability application and which, in itself, raises the question whether they had any defence at all.
32. It must be emphasised that the information now sought from the fund was information that should have been given on a monthly basis to the fund in terms of the Act as far back as 2007.
33. No document, or schedule, was put up by the respondents in this application to even suggested that the municipality, and the remaining respondents, had attempted to comply with the court order, and to furnish the fund with the required information.
34. Ms Sidlai, on behalf of the municipality, argued that the third respondent, namely the executive mayor, could not be held liable for contempt as this was not his function in the municipality.
35. Unfortunately for the third respondent, that horse bolted when the order was granted by my brother, Rugunanan J on the 13<sup>th</sup> of September 2022. The third respondent was the third respondent in that order and he was required to place evidence before this court as to how he in fact attempted to comply with the court order, (and could not do so, if that was his defence).
36. There were repeated references in the answering affidavit and the replying affidavit, and also in argument, that the municipality and the other respondents sought to meet with the fund to try and resolve issues. I do not understand this defence as the order of Rugunanan J is clear and concise. All that is required is the information sought by the fund and in terms of the Act which should be available to the municipality, and not the fund. I agree with Mr van der Berg SC that it is not up to the fund to provide the information, however, it is the municipality.
37. As indicated above, no evidence was placed before this court that any attempt had been made to finalise a schedule, or even part of a schedule.

Had it been done, this would undoubtedly have been attached to the opposing affidavits, or the replying affidavit.

38. South Africa is a constitutional democracy where the rule of law is paramount. Compliance with court orders ensures that municipalities act within the bounds of the law and respect the legal system.
39. The Constitution mandates that all Organs of State, including municipalities, must adhere to judicial rulings and that non-compliance could result in a violation of the Constitution, which is the supreme law.
40. Municipalities, and in particular municipal managers, are responsible for providing an essential service to the public. Adhering to court orders is part of good governance and accountability.
41. The failure to comply can lead to mismanagement, inefficiency, and a loss of public trust.
42. Non-compliance with a high court order must result in a finding of contempt of court, and especially in circumstances where there are *mala fides*, which I find there is in the present application.
43. There is no doubt that once the lists are received by the fund, substantial sums will be due by the municipality to the fund for non-compliance in terms of the Act.
44. The municipality, by ignoring the previous court orders, has led to a conflict between itself and the fund which will have consequences for all members of the fund throughout South Africa. Compliance with a high court order is essential for obtaining the rule of law, ensuring good governance, and upholding the Constitution.
45. In the result the following order is granted:



- 45.1 it is declared that the first respondent, the second respondent and the third respondents are in contempt of court by failing to comply with the court order granted under case number 2377/2022 on 13 September 2022;
- 45.2 The second respondent and the third respondent are committed to imprisonment for a period of 30 days, suspended for a period of 30 court days on condition that the first respondent or second respondent or third respondent within 30 court days of the granting of this order, comply with the court order granted under case number 2377/2022 on 13 September 2022;
- 45.3 The Sheriff and the South African Police Services are authorised and ordered to take all necessary steps to commit the second and third respondents to imprisonment in the event of the condition of suspension referred to in paragraph 45.2 is not fulfilled within the period stipulated herein;
- 45.4 The first, second and third respondents are ordered, jointly and severally, to pay the costs of this application on a scale as between attorney and client, including costs associated with travelling for applicant's counsel and the attorney of record.

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**B B BRODY**

**ACTING JUDGE OF THE HIGH COURT**

**APPEARANCES:**

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