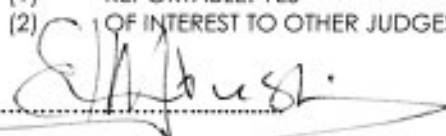


**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case Number: 35043/2020

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
	
E.M. KUBUSHI	DATE: 14-09-2020

In the matter between:

POST OFFICE RETIREMENT FUND

APPLICANT

and

THE SOUTH AFRICAN POST OFFICE SOC LTD

FIRST RESPONDENT

**MINISTER OF COMMUNICATIONS AND
DIGITAL TECHNOLOGIES**

SECOND RESPONDENT

SOUTH AFRICAN POSTAL WORKERS UNION

THIRD RESPONDENT

COMMUNICATION WORKERS UNION

FOURTH RESPONDENT

DEMOCRATIC POSTAL AND COMMUNICATIONS UNION

FIFTH RESPONDENT

JUDGMENT

KUBUSHI J

This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines.

THE INTRODUCTION

[1] This application is brought against the backdrop of the National State of Disaster that resulted in a lockdown of the country. The National State of Disaster emanated from the declaration by Government of the coronavirus pandemic as a national disaster. Lockdown measures, which had and continue to have profound economic implications, were put in place to try and limit the spread of the coronavirus. All businesses in South Africa were, in terms of the lockdown measures imposed, forced to adhere to those measures without exception.

[2] The country, like many other countries across the globe, found itself confronted not only by the virus that has infected thousands of people in the country and millions across the globe, but by also a prospect of a very deep economic recession that is going to cause many businesses to close resulting in many people losing their jobs. Governments have the difficult task of balancing the positive health effects of lockdowns against their economic costs, particularly the burdens lockdowns impose on business. The burdens of the lockdown imposed on businesses continue to be felt today and possibly will have a knock-on effect throughout the year if not for the coming few years. The future is uncertain, only time will tell.

[3] The lockdown measures put in place by Government resulted in the closure of all non-essential businesses from midnight on 26 March 2020 as a means to try and limit the spread of the virus by means of what is referred to as 'flattening the curve'. Though much-needed, these containment measures brought massive disruption to the country's economy. In particular, service oriented businesses that came to a complete halt, and resulted not in a case of reduced turnover but no turnover at all during the time they were closed. The effects thereof, have in many instances, been disastrous.

[4] The first respondent, the South African Post Office SOC Limited ("SAPO"), is one such business that shut down completely. The COVID-19 pandemic has had a profound impact on SAPO's business as it will be shown hereunder.

[5] As stated in its preliminary answering affidavit the COVID-19 pandemic and the appurtenant lockdown regulations have severely impacted SAPO's revenue, and have been devastating to its business. The Postal Services and Couriers & Parcel revenue streams in particular are struggling to generate revenue at the same level as before the lockdown.

[6] As at 31 July 2020 SAPO had 1 416 operational post office branches, of which only 55 were profitable. Postal Services' revenue for July 2020 was R125 million, which is below budget by 49%, mainly due to the effect of the COVID-19 regulations. Bulk mail revenue for July 2020 was R91 million which is 39% below budget, with a year to year decline of 41%, R64 million. It is said that there were even more substantial declines in the months March to June 2020.

[7] It is indicated that SAPO's year to date revenue of R744 million is below budget by 55% (R922 million) with a year to year decline of 42% (R534 million). Within these figures, Postal Services' year to date revenue is below budget by 70% (R715 million) with a year on year decline of 66% (R617 million).

[8] SAPO Group revenues of R348 million for July 2020 were lower than its expenses, resulting in a net loss of R97 million after non-operating items. This is said to be nearly triple the Group net loss in July 2019, which was R34 million. The Group's year to date revenue of R1 131 million is below budget by 47% (R985 million), with a year on year decline of 38% (R706 million).

[9] Additional, unforeseen, costs for personal protective equipment, sanitation, social distancing, hygiene chemicals and deep cleaning of facilities have been and will be incurred for the foreseeable future. Year to date, SAPO has spent R36 million on COVID-19 related costs. It is alleged in the papers that these costs (unlike the amounts due to the Fund) are necessary and critical for the protection of the health and safety of employees and customers, including the already vulnerable social grant recipients.

[10] The Groups' year to date expenditure is R2, 1 billion. As at 31 July 2020, SAPO creditors, including accruals, amounted to nearly R1, 6 billion. Trade creditors were at R362 million, and accruals totalled R469 million. Thus, SAPO needs to prioritise these payments, which on a monthly basis include: transport costs in the amount of R59

million, including R42 million for vehicle leases and R11 million for fuel; national line haul expenses of R3 million year to date; property costs of R205 million, including rental expense of R118 million; IT costs of R154 million, including R115 million incurred for data lines, R20 million for software costs and R13 million for telephone costs; security costs of R201 million.

[11] As a result of the economic downturn and constraints on its business, SAPO's year to date loss as at 31 July 2020 was R1, 066 billion. Year to date staff cost as at 31 July 2020 are R1, 2 billion. Staff costs constitute 61% of total expenses. Despite the risks in not paying creditors, SAPO has done everything it can to continue to pay employees' basic salaries, even if it cannot afford to cover all fringe benefits, especially medium to long term ones such as pension fund contributions. Not all creditors are being paid. And, once critical payments have been made, SAPO has no cash left. For instance, SAPO maintains that once the August 2020 salaries have been paid, SAPO will need to accumulate cash during the course of September to pay the September salaries.

THE APPLICATION

[12] It is against the background sketched above that the applicant, Post Office Retirement Fund ("the Fund"), brought this application, in the urgent court. In the application, the Fund seeks relief in the form of a declaratory order and a mandamus, the purpose of which is to enforce timeous compliance by SAPO of its statutory obligations under the Post Office Retirement Fund Rules ("the Rules") read with the Post and Telecommunication-Related Matters Act 44 of 1958 ("the Act"). The application is geared at enforcing SAPO's obligation to remit to the Fund arrear contributions and timeous payment of future employer and employee contributions, in accordance with rule 3.3 of the Rules ("Rule 3.3").

[13] The relief sought by the Fund is stated as follows, in the Notice of Motion:

"1. An order dispensing with the forms, service and time periods prescribed in terms of the Uniform Rules of Court and directing that the matter be heard as one of urgency in terms of rule 6 (12) of the Uniform Rules of Court.

2. That the South African Post office SOC Ltd ("SAPO") be declared to be in breach of Rule 3.3 of the South African Post Office Retirement Fund Rules ("the Rules").
3. That SAPO be directed to remit to the Fund, within five (5) days of this order, all outstanding arrear contributions (i.e. employer and employee contributions) in respect of the periods May 2020 and June 2020 inclusive of interest at 9.75% *per annum*.
4. That going forward, SAPO be directed to continue to timeously pay contributions to the Fund as they fall due, in accordance with the Rules.
5. In the event of opposition, any such respondent who opposes this application be directed to pay the costs of this application on a punitive scale (attorney and own client), including the costs of two counsel."

[14] The application itself, emanates from the allegation by the Fund that SAPO has failed to remit its employees' monthly pension contributions to the Fund as mandated by Rule 3.3. These contributions are invested by the Fund on behalf of employees of SAPO to fund their retirements. At the time of launching the application, only contributions for the months of May and June 2020 were in arrears. And, as at the date of deposing of the founding affidavit the arrear contributions (exclusive of interest) that were due and payable by SAPO to the Fund amounted to approximately R81 290 185, comprising of member contributions, employer contributions and additional voluntary contributions. At the time of preparing for the hearing the amount had escalated to an amount in excess of R121 000 000 (exclusive of interest) being contributions for May, June and July. As things stand, so the Fund argues, SAPO will not be in a position to honour payments for August 2020 let alone those in the medium to long term.

[15] The Fund has launched this application because it has serious reservations regarding SAPO's ability to settle its arrears and to continue to make timeous payments of obligations as they fall due in the medium to long term. Of special concern is that member contributions are deducted from salaries but are not paid over to the Fund.

[16] In the preliminary answering affidavit, SAPO takes issue with both urgency and the merits, whilst in the same breath unequivocally accepting its indebtedness.

[17] The parties entered into "without prejudice" discussions and correspondence before and after the launch of the application but they could not reach each other and the discussions broke down.

THE PARTIES

[18] The Fund is the applicant in the papers before me. The Fund was established in terms of s 9 (1) of the Post Office Act 44 of 1958 ("the Post Office Act") and operated as a defined benefit fund until 1 December 2005, when it was converted (as for defined benefit members) from defined benefit arrangement to a defined contribution arrangement and simultaneously became known as the Post Office Retirement Fund. The Fund is not regulated by the Pension Funds Act 24 of 1956. The Fund has approached court acting in terms of s38 of the Constitution. It does so, acting in its own interest and in the interests of its members.

[19] The first respondent is SAPO. SAPO is an organ of state and is regulated, amongst others, in terms of the South African Post Office SOC Ltd Act 22 of 2011 ("the SAPO Act"). SAPO is opposing the application and has filed a notice of intention to oppose and the preliminary answering affidavit out of time, but has applied for condonation for such late filing. The notice to oppose was filed 13 days late and the preliminary answering affidavit 5 court days late. This delay is in my view negligible particularly when account is taken of the truncated time periods involved in this matter. The Fund is not opposing the condonation application and on consideration thereof and in the interest of justice, I am of the view that it ought to be granted.

[20] The second respondent, the Minister of Communications and Digital Technologies, who is cited herein as the Executive Head of the Department of Communications and Digital Technologies ("the Department") is SAPO's shareholder representative (S3(2) (b) of the Act) on behalf of the Government of South Africa.

[21] The third, fourth and fifth respondents are registered trade unions whose members are SAPO employees, namely, the South African Postal Workers Union, the

Communication Workers Union, and the Democratic Postal and Communications Union, respectively.

[22] There is no relief sought against the second to fifth respondents, who have been cited for whatever interest(s) they may have in this application. These respondents have not filed opposing papers and have made no appearance when the application was set down for hearing.

URGENCY

[23] As earlier stated, this matter is heard in the urgent court. The Fund's stance is that the application, at its core, is a rule of law challenge and thus, by design, it is inherently urgent and should, as a result, be adjudicated with the urgency that it deserves. To the contrary, SAPO argues that the matter is not urgent. My view is that the issues raised in this matter deserves to be heard in the urgent court. I intend to deal with the merits.

[24] On the papers as they stand I have also to mention that the interdictory relief the Fund seeks in this application is final in nature. The Fund approached the court on application well knowing that disputes may arise. It is trite that in a final interdict factual disputes are in general decided on the version of the respondent.¹

ARGUMENTS

The Fund

[25] The Funds' case is founded on the provisions of the Rules which require SAPO to deduct retirement contributions from its employees, who are also members of the Fund, and pay them over to the Fund. In terms of Rule 3.3 such contributions must be paid to the Fund monthly in arrears, not later than the first working day after the end of the calendar month to which the contributions relate.

¹ Plascon Evans Paints Limited v Van Riebeeck Paints Limited 1984 (3) SA 623 (A) at 634-635; SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others 2019 (1) SA 370 (CC) para 11.

[26] The gravamen of the Fund's claim is that those contributions, although already deducted from SAPO's employees, SAPO has not paid them over to the Fund. Already at the time of the launch of this application two months' contributions, for May and June 2020, were in arrears.

[27] It is the Fund's submission that SAPO's failure to comply with Rule 3.3 constitutes a material breach of the Rules and the principle of legality. According to the Fund, SAPO is obliged in terms of the Rules to remit the contributions once they have been deducted from the employees' salaries and failure by SAPO to do so amounts to self-help. The Fund argues that remittal of pension contributions is a legal obligation which must be complied with.

[28] It is argued that the Fund is required to act in accordance with its Rules and comply with the provisions of the Act together with its regulations. Relying on the judgment in *ABSA Bank Limited v South African Commercial Catering and Allied Workers Union National Provident Fund*,² the Fund asserts that the Rules of the Fund are its constitution and are thus binding on the Fund and its members. The contention being that SAPO's proposition that the Fund's Rules do not give rise to statutory obligations but are at best contractual obligations, is wholly incorrect.

[29] The Fund is concerned that the non-payment of its members' retirement contributions will directly affects each member's investment portfolio, particularly upon the occurrence of a cessation event. In addition, SAPO's retention of the retirement contributions will erode the benefit of growth that a member would have enjoyed had the funds (as they should have been) been timeously invested with the Fund. The impact results in the members' share will be much lower and the pensions which can thus be bought also be much lower. In addition, the annual pension increases will be impacted as there will be loss on the full effect of the compound interest. Such non-payment will, also, have a serious impact on the Fund's operational expenses and its general reserve fund which would be depleted in 4 to 5 months if the contributions are not received.

² [2012] 1 All SA 121 (SCA) (27 September 2011).

[30] The Fund submits that the conduct of SAPO amounts to self-help. SAPO's Board is said to be acting with impunity and through self-help and raises skittles along the way to avoid judicial scrutiny. SAPO as an organ of state, and as argued by the Fund, has a heightened duty to advance the rule of law.

[31] While taking note of SAPO's present challenges, the Fund argues that such challenges should not be taken as a justification for SAPO's self-help outside of remedial measures contained in the legislation. According to the Fund, the remittal of pension contributions is a legal obligation not a product of the Board's benevolence.

[32] The Fund contends that SAPO's Board ought to have known of the predicament SAPO finds itself in because its financial woes are not recent but pre-date COVID-19, which has only served to expose the extent of the problem. The Fund, as such, decries the non-payment of the contributions by SAPO on the ground that the SAPO Board having prior and intimate knowledge of SAPO's historical and aggravated financial difficulties did not timeously forewarn the Fund of its inability to discharge its obligations in terms of the Rules.

[33] The Fund further submits that it has met the requirements of an interdict as set out in the Constitutional Court decisions in *Pilane v Pilane and Another* ³ and *Masstores (Pty) Limited v Pick and Pay Retailers (Pty) Limited* ⁴ which endorsed the earlier decision in *Setlogelo v Setlogelo* ⁵ and is thus entitled to the relief sought.

SAPO

[34] SAPO does not deny that it ought to have remitted the amounts claimed by the Fund to the Fund as mandated by the Act and the Rules. It however, contends that under the prevailing circumstances, it is unable to do so.

[35] Its submission is that the pay-no-matter-what interpretation proffered by the Fund is not a natural interpretation of the statutory provisions of Rule 3.3, let alone one which vindicates the Constitution. The relevant provisions can and should be interpreted to avoid "possible constitutional concerns which may arise if a different

³ 2013 (4) SA 409 para 18.

⁴ [2016] ZACC 42 at para 8.

⁵ 1914 AD at 227.

interpretation is adopted". Thus, it argues that an interpretation which would force SAPO to pay no matter what, and irrespective of the fulfilment of its core obligations, would do violence to constitutional values and rights in the Bill of Rights.

[36] SAPO argues that Rule 3.3 is not framed in imperative terms, let alone such terms as to warrant the drastic relief sought in this application. The Rule merely records the anticipated timing of the contributions. Failure to pay the contributions timeously does not carry with it any statutory penalties or consequences, but rather contractual interest on "*outstanding amounts*". The Rules expressly contemplate that there may be outstanding amounts, and they will simply accrue interest. The Rule thus compensate the Fund for the time value of money through provision of interest.

[37] A further submission is that, the Post Office Act is also not peremptory or prescriptive in its treatment of the payment contributions. Whilst failure by the employer to pay contributions under the Pension Act, 1956 carries with it certain statutory consequences, including personal liability on the part of the relevant employer's prescribed officers, the Post Office Act has no similar provisions. This according to SAPO is clearly because the legislature understood that government entities such as SAPO, must allocate their limited financial resources to critical expenses which will further their core statutory obligations, in service of the Republic as a whole which might cause a prioritisation of funding away from the Fund.

[38] SAPO argues that paying pension fund contributions is not one of its primary statutory and constitutional obligations, and interpreting the Rules to require it to pay in these kinds of circumstances would not be constitutionally compliant, and would place contractual provisions applicable to a few above the constitutional rights of millions of marginalised South Africans.

[39] It, thus, contends that it be given time to amass funds to pay off the pension contributions.

DISCUSSION

[40] For the reasons that follow hereunder, I have to agree with SAPO that this application cannot just be categorised as a simple monetary claim of a creditor against

a debtor. It is a constitutional matter which implicates constitutional and statutory duties of organs of state and indeed the protection of fundamental rights. The claim takes place against the background sketched in the opening passages of this judgment. Ordinarily, SAPO would be expected to comply with the provisions of Rule 3.3 without much ado. These, however, are not ordinary times. The imperatives of the time require a fresh look at the provisions and requirements of the Rule.

[41] As stated in the preliminary answering affidavit, the main duties of SAPO is to provide universal postal services and facilitate the payment of grants throughout the country. Besides SAPO's duties as set out in section 4 of the Act, SAPO's strategic mandate includes the provision of dignified, safe, convenient, and health mechanisms for the payment of social grants to the deserving and vulnerable grant recipients on behalf of the State.

[42] SAPO's infrastructure and post office branch network, therefore, exist to render the universal postal services to which all citizens are entitled. These services provided by SAPO not only fulfil its principal statutory mandate, but serve to protect, promote and fulfil a variety of rights in the Bill of Rights under the Constitution. Millions of South Africans rely on SAPO infrastructure for the payment of grants on a monthly basis. SAPO is the sole distribution agent for social grants, including COVID-19 related grants. These grants are often the sole lifeline for recipients, particularly in the prevailing harsh economic conditions.

[43] SAPO's technological, financial and physical infrastructure also supports the Postbank, which banks millions of South Africans and plays a pivotal role in the distribution of grants.

[44] Similarly, millions of South Africans depend on SAPO for their everyday communications to and from family, friends, service providers and the like. This includes the millions who do not have access to electronic mail or online resources and those that do have access, but still use the SAPO infrastructure and services.

[45] Various statutory processes are also required to, or may, by virtue of legislative provisions, be served by registered post. Moreover, SAPO makes available affordable

local and international mailing services, at comparative and competitive rates, and on which millions of South Africans depend and which they use.

[46] Over and above that, SAPO employs 16, 112 employees, many of whom depend on their take home pay (money in their pocket) from SAPO on a monthly basis.

[47] All these according to SAPO, are critical not only in directly fulfilling socio-economic rights like those under s 27 and 28 of the Constitution, but also in supporting and strengthening the fulfilment, promotion and realisation of almost every other right in the Bill of Rights, including those found in sections 9, 10, 12, 14, 16, 22, 23, 32, 33 and 34 of the Constitution, in line with the mandate of the State under s 7 (2) of the Constitution.⁶ Thus, SAPO argues, correctly so, that to jeopardise the ability of SAPO to fulfil its core functions would be to imperil key constitutional rights and values.

[48] There appears to be no dispute on the papers that SAPO failed to remit pension contributions to the Fund for the months of May to July 2020 or that it may not be able to pay the contributions in the immediate future. Instead what SAPO is saying is that the Fund give it time to gather funds to be able to pay off the amounts owing.

[49] The crux in this matter is whether SAPO should be ordered to pay the amounts it accepts owing on the time lines suggested by the Fund. Remember, the Fund wants SAPO to pay the outstanding contributions in the amount of R121 000 000, excluding interest, within five (5) days of this order and to continue with the monthly payments of R40 000 000. The question is, is this feasible?

[50] The Post Office Act establishes retirement funds for postal and telecommunications employees⁷ and provides for rules to be established to govern those funds, including 'the amount and nature of contributions by members and contributions and other payments by the postal employer or the telecommunications employer'.⁸

⁶ This being Urgent Court I do not intend to go into the sections individually.

⁷ Section 9 (1).

⁸ Section 10(1).

[51] Rule 3.3 provides that "Contributions are payable to the FUND monthly, in arrears, not later than the first working day after the end of the calendar month to which the contributions relate."

[52] I do not think it necessary to go into the interpretation of Rule 3.3 as the parties seek to do in their papers. What is fact, is that Rule 3.3 requires SAPO to make monthly payments. What is also fact, is that the prevailing circumstances are not conducive and are not of the making by SAPO. Like SAPO contends, the Rules cannot be read and/or interpreted to require payment where this is impossible, which is the case here.

[53] I have to accept, without deciding, that interpreting Rule 3.3 and the overarching legislation in a manner that requires payment no matter what, and even in circumstances where SAPO would not have the funds to fulfil its core statutory mandate to the extent of its collapse, would not promote constitutional values. Moreover, as it is argued by SAPO, such an interpretation would cause a regression in the promotion, protection and fulfilment of rights in the Bill of Rights. A retrogressive step in the fulfilment of fundamental rights is constitutionally impermissible.

[54] If this court were to rely on the interpretation given by the Fund on Rule 3.3 and compel SAPO to pay tens of millions of Rand to the Fund in the prevailing economic conditions, that are not of its own making and that were unforeseen (as I keep repeating), it would fundamentally jeopardise the ability of SAPO to fulfil its core functions and imperil key constitutional rights, if not the total collapse of SAPO.

[55] It is indeed so that organs of state are often faced with limited resources which they must apply in a manner which is appropriate and which best fulfils their mandate. I have to accept, that SAPO's limited resources that have now been ravaged by the effect of the COVID-19 pandemic must be applied to achieving a government developmental mandate and to maintain the infrastructure for the payment of social grants. The Constitutional Court in *Soobramoney*⁹ recognised that there is a hierarchy

⁹ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC).

of rights - favouring the good of the many above the good of the few. This principle should also apply in this instance. The rights of the many should trump the few.

[56] Rule 3.3 must, therefore, be given a meaning that is subject to SAPO's overarching statutory and constitutional obligations, and subject to the recognition that payment of the expenses which are necessary to fulfil these obligations must be prioritised over other payments.

[57] SAPO's claims that on a monthly basis, given the current economic environment and the impact of COVID-19, it has to choose between paying money, for instance, over to MEDIPOS Medical Scheme or the Fund, and, on top of that, invariably has to come to the conclusion that it is more important to pay its employees' salaries (rather than any fringe benefits) so that those employees may continue to provide for themselves and their families whilst the COVID-19 pandemic ravages South Africa's health and wealth, are indeed valid.

[58] Besides, from the papers as they stand, any unqualified obligation to pay this court may make, is at present not capable of being fulfilled. A court cannot make an order the implementation of which would not come to fruition. SAPO's stance is that even if it can be compelled to pay the amounts claimed by the Fund by a court order, it will be impossible for it to pay.

[59] The Fund knows and has accepted that it will be impossible for SAPO, in the present circumstances, to pay the amount it is claiming or any amount at all. The Fund puts it succinctly in its founding papers that:

"What is clear, is that SAPO is facing a serious existential crisis in the absence of an immediate and all-inclusive governmental response to its financial woes. In the absence of an immediate commitment from government to address SAPO's precarious financial position, SAPO's Board has fiduciary responsibilities to pursue remedies available to it in law . . ."

[60] It also states in the founding affidavit that *"it is difficult to appreciate the facts being what they are, how SAPO intends (even with some form of financial assistance from government) to manage such an overwhelming deficit and further bring its*

financial position to a place where it is up to date with the Fund's contributions as they become due and payable."

[61] Its papers and heads of argument are replete with arguments that confirms the Fund's knowledge of SAPO's financial status. Arguments like the ones that follow hereunder can be found across the Fund's papers:

"On SAPO's own version - it is trading under hopelessly insolvent circumstances".

"Ex facie SAPO's allegations it appears that SAPO is a company that is in desperate need of immediate statutory interventions. Its Boards' conscious decision to continue to trade under these circumstances potentially constitutes a serious dereliction of their duties under the Companies Act et al."

"... on SAPO's version, there is no definite end in sight for its financial woes."

"The essence of SAPO's case is that it is hopelessly insolvent and operating recklessly and that the pensions are potentially irrecoverable."

[62] In terms of our law, the general rule is that impossibility of performance excuses performance of legal obligations, at least for the duration of the impossibility.¹⁰ It is on this basis that I am of the opinion that SAPO be excused from paying over its employees' retirement contributions, at least for the duration of the impossibility. SAPO states in its preliminary affidavit that it does not actually deduct payments from its employees' salaries. The position is that SAPO is intended to pay both the member and employer contributions, out of its own funds. The member does not actually place SAPO in funds to pay any contributions. The member's portion of pension fund contributions show up as a notional "deduction", simply as a matter of payroll accounting or book entry, on the employees' payslip. No funds are being diverted from the employees, because not such funds exist.

¹⁰ *MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owners of MV Snow Crystal* 2008 (4) SA 111 (SCA) para 28.

[63] It is also a rule of our law that where the causes of the impossibility were unforeseen, the obligations are extinguished. Relying in *Bischofberger*¹¹ SAPO wants to argue for the debt to be extinguished because the causes of the impossibility, in this instance, were not foreseen. I would not go that far. It is indeed so that in this instance the causes of the impossibility were not foreseen but in trying to salvage other rights, others should not be trampled upon, this would not be in the interest of justice. The retirement contributions that are sought by the Fund, as it is, are meant for the benefit of SAPO's employees, that right must also be respected.

CONCLUSION

[64] The economic downturn resulting from the COVID-19 pandemic is of the magnitude that no one could have predicted. Based on the evidence proffered in SAPO's preliminary answering affidavit and as borne out in the figures set out therein it is my finding that SAPO's financial predicament, and specifically its inability to pay the Fund, is directly attributable to the COVID-19 pandemic and the resultant economic downturn. This is made more obvious by the fact that all along SAPO has been able to make monthly pension contribution payments. SAPO was also able to pay during the earlier periods of the lockdown, that is, in the month of March and April 2020. It only encountered difficulties from May 2020, that is, after the lockdown measures were imposed and were already in operation. This despite the Fund's allegation that the downturn existed even before the lockdown.

[65] In addition, SAPO would never have predicted that it would require to spend R36 million for personal protective equipment, sanitation, social distancing, hygiene chemicals and deep cleaning of facilities for the foreseeable future, this was never foreseen as I have already said and obviously not budgeted for. SAPO had no choice but to prioritise the health and safety of its employees and its customers most of which are already vulnerable and compromised due to their age and possible underlying illnesses.

¹¹ *Bischofberger v Vaneyk* 1981 (2) SA 607 (W) at 611B.

[66] The allocation by SAPO of its limited financial resources to critical expenses which will further its core statutory obligations, namely to fulfil and provide universal postal services and facilitate the payment of grants throughout the country, until it stabilises financially, is the correct thing to do. In the meanwhile, SAPO is not hanging its head and doing nothing in trying to alleviate its financial plight, as the Fund suggests in its papers. There, is uncontroverted evidence that SAPO has requested government assistance in July 2020. SAPO says it is unclear when this will be forthcoming, particularly given the parlous financial state of the country and public finances. Given the current state of financial uncertainty in the world, it is not possible to know with certainty when SAPO will reach the point of stabilising its finances. This should not be an albatross on the neck of SAPO. On the bright side, the President of South Africa, Mr Ramaphosa, has recently on National media announced that government has run out of money and that they are busy with a recovery plan, which will be announced shortly.

[67] The Fund contends that it cannot obtain substantial redress at a hearing in due course as there is no tender to settle the interest portion and loss of compounded investment losses. SAPO has, also not made any firm commitments, including whether it will settle the interest and lost investment growth - it is not even undertaking at a primary, to pay for the Fund's modest operational expenses and for risk benefits. Fact is, much as the Fund cannot obtain substantial redress in due course, it still cannot obtain it now.

[68] Both parties must find a way to resolve this matter going forward. The parties are joint at the hip. The demise of SAPO, as it has been argued, will result in the demise of the Fund, as well. The Fund exist because of SAPO. The parties must engage each other to find any alternative legal or practical remedy to this challenge.

[69] I have to hold that SAPO cannot simply allow its branches to close and walk away, or allow its infrastructure to collapse so that grants are not paid: it has a constitutional obligation to ensure that a workable postal service and grant system remains in place. It can also, not be compelled to pay the contributions at the expense of the collapse of the countries' postal services to which all the people of South Africa are entitled and the collapse of its infrastructure on which the payment of social grants for the most vulnerable and compromised people of South Africa depend.

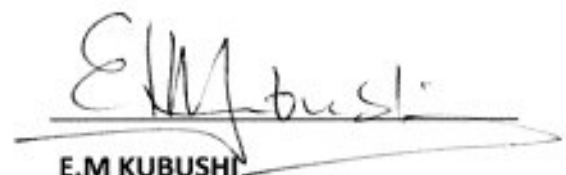
[70] My findings in this judgment does not seek to undermine and/or belittle the rights of SAPO's employees to their retirement benefits that their entitled to, in any way and which, of course, are to be impacted negatively if SAPO's financial situation is not resolved. What I am saying is that the remedies which the Fund seeks to employ to salvage its members' contributions and ultimately the members' retirement benefits, are not appropriate for the reasons I have already stated in this judgment.

COSTS

[71] Both parties prayed for payment of costs on a punitive scale against each other. The general rule is that costs follow the result. SAPO as the successful party is entitled to the costs of the application on an attorney and client scale.

ORDER

[72] Consequently the application is dismissed with costs.


E.M KUBUSHI
JUDGE OF THE HIGH COURT

Appearance:

Applicant's Counsel	: Adv. Terry Motau SC Adv. Realeboga Tshetlo
Applicant's Attorneys	: Norton Fulbright South Africa Inc.
First Respondent's Counsel	: Adv. JPV McNally SC
First Respondent's Attorneys	: Webber Wentzel.
Date of hearing	: 28 August 2020
Date of judgment	: 14 August 2020