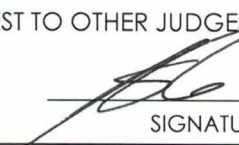


**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG**

**CASE NO: 24470/2017**

<b><u>DELETE WHICHEVER IS NOT APPLICABLE</u></b>	
(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
01/06/2021	
DATE	SIGNATURE

In the matter between:

**MASSYN VERVOER CC**

Applicant

and

<b>ROAD FREIGHT &amp; LOGISTICS INDUSTRY PROVIDENT FUND</b>	First Respondent
<b>PENSION FUNDS ADJUDICATOR</b>	Second Respondent
<b>SHERIFF OF THE HIGH COURT, WITBANK</b>	Third Respondent
<b>SA TRANSIT SERVICES CC</b>	Fourth Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 01 June 2021

---

**JUDGMENT**

---

**YACOOB J:**

1. On 08 June 2017 the Pension Funds Adjudicator ("the PFA"), the second respondent in this matter, made a determination against the applicant ("Massyn") in favour of the first respondent ("the Fund"), in terms of section 30M of the Pension Funds Act, 24 of 1956 ("the Act"), directing Massyn to submit outstanding contribution schedules for January 2016 – January 2017 within two weeks, directing the Fund to calculate the contributions and interest owed either in terms of those schedules or in terms of schedules it reconstructs itself, and ordering Massyn to pay the outstanding contributions and interest.
2. On 14 June 2017 Fund filed the determination in this court in terms of section 30O of the Act, which give the determination the force of an order of court. During October 2019 a writ of execution was obtained for payment of an amount that was calculated on the basis of schedules eventually provided to the Fund.
3. The applicant, ("Massyn") seeks the setting aside of a determination by the Pension Funds Adjudicator ("the PFA") made against it and in favour of the first respondent ("the Fund"), the setting aside of the noting of the award, and of the writ of execution issued on 31 October 2019 pursuant to the noting. It also seeks the stay of the sale of the goods attached under the writ, pending the determination of this application. However that last head of relief was later obtained in urgent court.
4. The Fund complained to the Pension Funds Adjudicator that Massyn Vervoer had not paid contributions on behalf of its employees who were members of the Fund. The determination records that Massyn had been requested to respond to the

complaint before the determination and had not done so. Massyn does not deny that it had been requested to respond.

5. Massyn contends that it does not have any employees who are or were members of the Fund, and that the determination should not have been made against it. Massyn also contends that this is not an application for review, but simply an application for “setting aside”. Massyn contends also that this court did not have jurisdiction as the noting ought to have been done only in the Gauteng division or the Mpumalanga division.
6. I will state upfront that there is no merit to the jurisdiction point. Mr Krüger erroneously relied on the erstwhile limited jurisdiction of this court, when it had a smaller jurisdiction than the Gauteng division. However since January 2016 the Gauteng division and the Gauteng Local division shared concurrent jurisdiction, and at the time the determination was noted this court had jurisdiction.
7. I proceed now to set out the facts leading up to this application, after the determination was made.
8. During 2018, the Fund’s attorneys and Massyn and its attorneys corresponded about the outstanding amount, and about the determination. For convenience, where I refer to correspondence from “the Fund” this includes correspondence from the Fund’s attorneys, and reference to correspondence from Massyn includes correspondence from its attorneys, unless otherwise indicated.

9. The letters from the Fund were addressed to “Massyn Vervoer” and referred to the determination against “Massyn Vervoer CC” and the debt of “Massyn Vervoer CC”.
10. In the first letter, on 14 August, 2018, addressed to “frans@massynvervoer.co.za” the Fund states that since Massyn had not submitted the outstanding schedules, the Fund had reconstructed the schedules using information it already had, to calculate the outstanding contributions, and informs Massyn of the amount due, both in respect of outstanding contributions and interest. This letter is annexed to the founding affidavit.
11. Next Massyn annexes a letter to the founding affidavit from the Fund dated 29 August 2018, which refers to a response from Massyn on 22 August 2018, in which Massyn apparently disputes the calculation, but which is not annexed to the papers. The Fund expresses its willingness to recalculate the amounts if the payroll schedules for the period are provided.
12. Although Massyn has not provided its own letter of 22 August 2018, the Fund annexes it to the answering affidavit. There is no suggestion in the letter that the determination is against the wrong entity.
13. The letter of 29 August is addressed to SA Transit Services (the fourth respondent) trading as Massyn Vervoer CC.
14. On 12 March 2019 the Fund wrote again to Massyn, informing it that the payroll schedules had been provided by the fourth respondent trading as the first respondent and informing it of the new amounts calculated. Massyn again does not annex those payroll schedules, nor any correspondence emanating from its office. The letter from the Fund refers to an allegation that Massyn has transferred



to another fund, but nothing about Massyn being the wrong party or not being an employer or contributor.

15. The schedules provided by Massyn to the Fund have been annexed to the Fund's answering affidavit. However there is nothing in those schedules which indicates by whom the employees are employed.
16. Massyn annexes to its papers proof of payment by the fourth respondent to a provident fund, it is not clear that it is the same fund as the Fund. However these are two payments in September and October 2018 and do not prove that payment for the period at issue was made. In addition, the amounts are far less than the amount owing. Further, there is no indication as to which employees these payments referred to.
17. This application to set aside the determination was instituted in February 2020, two years and eight months after the determination.
18. According to Massyn, the fourth respondent employs the employees whose contributions are the subject of the determination. It says that at the time of the determination it had no employees who were members of the Fund, and that the fourth respondent "had employed the members of the first respondent". It provides no proof of this. The implication of the allegation is that the fourth respondent took over the employees at some point, but Massyn does not disclose when the fourth respondent took over these employees. Nor does it provide any evidence that the Fund was informed that the employees are now employed by the fourth respondent.

19. In the replying affidavit, Massyn then contradicts itself, saying that Massyn had no employees “at any stage” (rather than at the time the determination was issued). In any event the relevant time is the period for which the contributions were owing, rather than when the determination was issued.
20. According to Massyn, the fourth respondent trades under the name Massyn Vervoer and is apparently a related entity. It is noted that the member of the fourth respondent, according to its letterhead, is a trust whose trustee is “FB Massyn”, the same initials and surname as the deponent to the founding affidavit. However the deponent does not take the court into his confidence regarding the nature of the relationship. However the CIPC report on Massyn discloses that the same trust is its member. In the replying affidavit for the first time it is disclosed that the deponent to the two affidavits and the trustee are not the same person, but that they are father and son with identical names.
21. It is also worth noting that email correspondence annexed by the Fund to its answering affidavit shows a certain Frans Massyn (it is not clear which Frans Massyn this is) corresponding with the Fund’s administrator regarding the contributions arrears, that that person’s emails have a signature referring to Massyn Vervoer, that the relevant email address is [frans@massynvervoer.co.za](mailto:frans@massynvervoer.co.za) and that there is no reference anywhere on those emails to the proper employer being the fourth respondent. These emails were in 2015 and 2016, and it will be remembered that the relevant time is January 2016 – January 2017.
22. Massyn does not annex any proof of the fourth respondent’s registration with the Fund as a contributing employer, or of its list of employees. Nor does it make any

disclosure of what its own position is, to bolster the bald allegation that it is not a contributing employer and that it does not have employees.

23. According to Massyn the Fund has attached a truck belonging to the fourth respondent, who Massyn contends is the correct party against whom the determination should have been taken, to sell in execution of the debt. Massyn seeks an order staying the sale of the truck, pending the determination of this application, but that order has already been given in an urgent application. If I were to deal with that head of relief, it is not clear what *locus standi* Massyn has to seek any relief regarding a truck it does not own.

24. Massyn does not annex any proof of authority or resolution for the bringing of this application.

25. The Fund in its answering affidavit annexes the proof of registration of Massyn with the Bargaining Council for the Road Freight Industry. It alleges that Massyn was taken over by the Fund in a bulk transfer when the Fund's contributions began to be administered separately from the Bargaining Council in 2013. The registration form refers to Massyn Vervoer CC and was completed in 2003 by Mr Frans Barend Massyn who appears to have the same ID number as the Mr Massyn who is the representative trustee on Massyn's CIPC report.

26. The Fund also annexes a form filled in by a former employee attempting to claim benefits on retirement, which was endorsed by the employer "Massyn Vervoer" and on which there is no mention of the fourth respondent. It includes the same "file number" as that referred to in the registration form.



27. Mr Massyn in reply confirms that all employees of both Massyn and the fourth respondent use the same domain name for the email addresses. He complains that the Fund fails to differentiate between the corporate identities of Massyn and the fourth respondent. However it is clear that, until the launching of this application, Mr Massyn and those people representing Massyn and/ or the fourth respondent also did not differentiate between the two.

28. Mr Massyn contends that the registration with the Bargaining Council does not prove which entity was registered. There is no merit to this contention. On the papers before this court it is clear that the Bargaining Council registered Massyn. It is also clear that the distinction now sought to be relied upon in this court was never brought to the attention of the Fund or any of its representatives, or the PFA, at any point before this application.

29. Mr Krüger submitted for Massyn that it mattered not that the procedure for a review was not followed, as the relief sought was the same. An application for rescission was also made in argument.

30. The Fund contends that the application stands to be dismissed because

30.1. Massyn has not followed the correct procedure for review proceedings and has prejudiced the Fund in its defence;

30.2. Massyn has no *locus standi* regarding the relief in prayer four [the stay of the sale of the truck];

30.3. Massyn has annexed no proof of authority, and there is no indication that the deponent to the affidavit has any authority or connection with Massyn;

30.4. Massyn has not proved that it is the “wrong party”;



30.5. Massyn has not come to court with clean hands as it has taken advantage of the various corporate identities Mr FB Massyn (senior) appears to be the member of in his capacity as a trustee;

30.6. Massyn cannot seek rescission as no case has been made out and in any event it is not the appropriate relief.

31. I consider that there is some merit in the preliminary points raised by the Fund but I do not deal with them. It is clear that, once one gets to the merits, Massyn has simply not made out a case. The court is expected to simply accept the bald allegation that Massyn has no employees (whether at the time of the determination or ever) who are members of the Fund, and that the fourth respondent does, when there is no proof of the fourth respondent's registration or of its employment of any members of the Fund.

32. Even before one considers the answering affidavit Massyn has made out no case. Once one considers that the Fund has adduced proof of Massyn having registered with the Bargaining Council under the name of Massyn Vervoer, of it endorsing the retirement application of its employee with the name Massyn Vervooer, and the fact that Massyn never responded to the Fund or the PFA to say that it was the wrong party, it is clear that the decks are overwhelmingly stacked against Massyn. It appears that this application is nothing more than an attempt to delay paying contributions for employees who are entitled to have had those contributions paid and who are prejudiced in the benefits they are able to claim.


33. Far from being a victim of the Fund's and the PFA's confusion, it appears that Massyn and the fourth respondent and their controlling entity have taken

advantage of their various corporate identities, the similarity in the names of Massyn and the fourth respondent's trading name, and the fact that the two Mssrs Massyn have exactly the same name, to obfuscate and avoid their indebtedness.

34. It is also clear that Massyn has not made out any case for rescission.

35. For the reasons set out above, I make the following order:

The application is dismissed with costs.

  
S. YACOOB  
JUDGE OF THE HIGH COURT  
GAUTENG LOCAL DIVISION, JOHANNESBURG

**Appearances**

Counsel for the applicant:	TP Krüger SC
Instructed by:	Jordaan & Smit Incorporated
Counsel for the first respondent:	Ms L Bedhesi
Instructed by:	Lennon Moleele & Partners
Date of hearing:	25 June 2020
Date of judgment:	01 June 2021