
Aantekeninge/Notes

Recognition of the concept of Contempt of 'Determination' of the Pension Fund Adjudicator's Determination: A missed opportunity – with particular reference to *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others (37226/14)* [2015] ZAGPPHC 408 (26 June 2015)

1 Introduction

In order to ensure that the determinations issued by the Pension Funds Adjudicator are enforced, such determinations are deemed to be judgments of courts of law thus regarding such matters as having been heard by courts. Should those affected by the determination fail to act in accordance thereto within six weeks of the issuing of the determination, the person or institution in whose favour the determination has been issued can approach the clerk or registrar of the civil court to issue a writ of execution in order for such determination to be executed by the sheriff of the court. The execution of such a determination would be ordinarily possible where the Adjudicator has ordered among others that any person or institution should pay a sum of money or has ordered the fund to compute and determine the amount payable and provide the employer with same to pay to the member. This is because, there would be a determinable amount which would allow the sheriff to attach property if needs be to satisfy the debt. However, it remains unclear as to how the determination which merely orders the fund and/or the employer to provide certain documentation to the member, such as the latest benefits statements, withdrawal claim, or detailed breakdown of withdrawal benefits would be enforced.

A number of questions which will be engaged in this paper arise as far as the effective enforcement of the Adjudicator's determination is concerned. (1) Is it not necessary in instances where the Adjudicator's determination is not complied with and the sheriff cannot enforce such orders, to introduce the criminal law remedy of 'contempt' in order to ensure compliance with the Adjudicator's determination? (2) Would interpreting such a remedy as the exclusive reserve of 'courts' not prejudice members of pension funds who would be in desperate need for the enforcement of the Adjudicator's determination? (3) Should failure to adhere to the Adjudicator's determination be deemed as contempt of the

order of a civil court, since such a determination is already deemed an order of such a court? This paper through the assistance of the facts of *Mantsho v Managing Director of the Municipal Employee Pension Fund and Others* (37226/14) [2015] ZAGPPHC 408 (*Mantsho* case), explores the possibility of introducing the concept of contempt of the Adjudicator's determinations, with a view to examine whether such a criminal law remedy can be justified as an attempt to ensure all the Adjudicator's determinations are enforceable. In this note, I recommend that the PFA should be amended to provide for deeming provisions which would allow civil courts to hold those who fail to obey Adjudicator's orders in contempt of court. First, I will start by outlining the general principles relating to civil contempt of court in South Africa. Secondly, I will look at the establishment of the office of the Pension Fund Adjudicator. Thirdly, I will outline the brief facts of *Mantsho* case with a view to discuss and illustrate the necessity of deeming failure to comply with the Adjudicator's determination in instances where execution by the sheriff is virtually impossible as contempt of court.

2 Relevant Legal Principles

2.1 Contempt of Court of Civil Judgments

The crime of contempt of court, as it exists in South Africa today, is directly derived from English law (Jordaan 'The 'gagging writ' and contempt of court – the correct means to the correct end? A comparative analysis of South African and English law' 1990 *CILSA* 220). It has been held that

The institution of contempt of court has an ancient and honourable, if at times abused, history. If we are truly dealing with contempt of court, then the need to keep the committal proceedings alive would be strong because the rule of law requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained. ... In respect of contempt of court, the common law drew a sharp distinction between orders *ad solvendam pecuniam*, which related to the payment of money, and orders *ad factum praestandum*, which called upon a person to perform a certain act or refrain from specified action. Failure to comply with the order to pay money was not regarded as contempt of court, whereas disobedience of the latter order was (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 60).

Generally, court orders that will attract committal for contempt are those instructing persons against whom they are made to perform certain acts or refrain from performing certain acts (*Lujabe v Maruatona* (35730/2012) [2013] ZAGPJHC 66 (15 April 2013) para 9). This is due to the fact that in terms of section 106 of the Magistrate's Court Act No 32 of 1944 a wilful failure to comply with an order of the Magistrate's Court is a criminal offence punishable by a fine, or imprisonment, or both. Snyman defines contempt of court as a crime which 'consists in unlawful and intentionally (a) violating the dignity, repute or authority of a judicial body or a judicial officer in his judicial capacity [...]' (*Criminal Law* 6ed

(2014) 315). In other words, contempt of court can be seen as a deliberate effort of making a mockery of the judicial officer's efforts in ensuring that justice is served as well as the total disregard of the administration of justice when court orders are not complied with. It is worth noting that contempt of court can appear in a variety of forms, the discussion of which is beyond the scope of this paper. It suffices nonetheless; to highlight that South African criminal law recognises both civil law and criminal law contempt of court. There has been a debate regarding the distinction drawn between criminal and civil claims for contempt of court. Such a discussion is centred on the onus which a private individual or entity which an order has been granted in his, her or its favour has to discharge when seeking to commit another for contempt of court. The discussion sought to clarify whether the appropriate onus to be discharged in civil proceedings is the same as that of the state in criminal proceedings, that of proof beyond a reasonable doubt or the onus of an ordinary civil matter, that of balance of probabilities should be followed. In this note, I am dealing with failure to comply with determinations (orders) of the Pension Funds Adjudicator, particularly where execution by a sheriff of court of such determinations in terms of civil law is virtually impossible. As such, I will rely solely on principles relating to contempt of court in terms of failure to comply with civil orders of court.

It is worth noting that a thorough discussion relating to the onus of proof is beyond the scope of this paper. It suffices however, to mention that over the years there has been recognisable controversy on this issue:

It appeared, as regards the applicable standard of proof in civil contempt proceedings, that it had been held in some reported cases that guilt had to be established beyond reasonable doubt, whilst others had expressed reservations about the correctness of that approach' (see the headnote of *Laubscher v Laubscher* 2004 (4) SA 350 (T)).

[In that] once a failure to comply with a court order that was within the personal knowledge of the respondent has been established, the wilfulness and *mala fide* character of the conduct of the respondent will be inferred and the *onus* will then rest on the respondent to rebut the inference of wilfulness on a balance of probabilities (*Laubscher* para 11).

However, in *Citibank NA v Van Zyl and Another* (3805/2004) [2004] ZAFSHC 131 (9 December 2004), the court rejected the interpretation in *Laubscher* and held that '[i]t is in conflict with section 35(3)(h) of the [1996] Constitution to convict a person upon a mere balance of probabilities and to place a so-called reverse onus on that person'. The Court was virtually of the view that if there is a threat of imprisonment, then the onus of proof has to be that of beyond a reasonable doubt. Nonetheless:

[it] is now settled that in an application for committal to prison for contempt of court, an applicant must, in order to be successful, prove the contempt beyond reasonable doubt, that there is an underlying court order and that the respondent with the knowledge of the order acted in a manner which is in

conflict with the terms of that order (*Dezius v Dezius* (37655/05) [2006] ZAGPHC 77 (21 August 2006) para 16).

Furthermore, the issue relating to the constitutionality of civil contempt of court orders will not be discussed in this paper. It suffices however; to acknowledge a convincing account of Pickering J in *Uncedo Taxi Service Association v Maninjwa and Others* 1998 (3) SA 417 (E) in this regard. Pickering J held that the common law civil committal for contempt procedure was in conflict with the Constitution insofar as an *onus* was placed on the offender and proof of guilt was required only on a balance of probabilities (at 428A-B). However, he was of the view that civil contempt proceedings for committal are competent provided that the proceedings are conducted fairly in accordance with the principles of fundamental justice measured against the yardstick of the provisions of section 35 (3) of the Constitution (429C-D and 429 F-J). In *S v Mamabolo (E TV and Others intervening)* 2001 (3) SA 409 (CC), the Constitutional Court upheld the constitutionality of the crime of contempt of court, in the form of scandalising the court, in the face of a strong freedom of expression challenge to its existence. Contempt of court has in general terms received a constitutional 'stamp of approval, since the rule of law 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained' (*Coetzee v Government of the Republic of South Africa* 1995 (4) SA 631 (CC) para 61).

In *Burchell v Burchell* (ECJ 010/2006) [2005] ZAECHC 35 (3 November 2005) para 13, the court held that 'committal for civil contempt of court orders remains a particular form of the crime of contempt of court under the new constitutional order, and that a respondent brought before court for committal in civil contempt proceedings is an "accused person" under s. 35 (3) of the Constitution'. However, the Supreme Court of Appeal has rejected this view, and thus emphasised that the person or institution against which contempt of court proceedings have been brought is not an 'accused person' but is entitled to analogous protections as are appropriate in motion proceedings (*Fakie NO v CCI Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42). In fact, the SCA laid down the bases for a conviction of contempt of court as follows:

- (a) The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.
- (b) The respondent in such proceedings is not an 'accused person', but is entitled to analogous protections as are appropriate to motion proceedings.
- (c) In particular, the applicant must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and *mala fides*) beyond reasonable doubt.
- (d) 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 establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond reasonable doubt.

- (e) A declarator and other appropriate remedies remain available to a civil applicant on proof on a balance of probabilities (*Fakie* para 42).

The SCA held that the civil contempt procedure is a valuable and important mechanism for securing compliance with court orders, and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements (para 42). This means that a person in whose favour an order of court has been granted has an option to institute contempt proceeding by launching motion proceedings against a person who failed to comply with such an order. This was confirmed in *Laubscher v Laubscher* 2004 (4) SA 350 (T) para 10, where the court held that '[c]ontempt procedure is usually initiated by way of notice of motion. The applicant must prove that the order of court with which the respondent has failed to comply came to the respondent's personal notice. The applicant must obviously also prove that the respondent thereupon failed to comply with the court order'.

In the contempt of court application, all the elements of such contempt must be proved. The essential elements of contempt of court are: unlawful; contempt; judicial body; and fault (Burchell *Principles of Criminal Law* 4ed (2014) 840). The crime of contempt of court arises from unlawful and intentionally disobeying an order of court (*S v Beyers* 1968 (3) SA 70 (A)). This crime enables the person or institution which has obtained an order against another who has failed to comply with such an order to again approach the court for a further order declaring such a party to be in contempt of court and thus impose a criminal sanction. In order to determine whether there was a failure to comply with the civil judgment, it must be established whether the disobedience was deliberate and in bad faith (*Jayiya v Member of the Executive Council for Welfare, Eastern Cape* 2004 (2) SA 602 (SCA) paras 18 and 19). The Supreme Court of Appeal has held that failure or refusal to obey the court order should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt. ... [T]he offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces' (*Fakie v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 10). Sustained disobedience of a civil order could lead to a public prosecution because it is calculated to injure and diminish the authority and status of the court (*S v Beyers* 1968 (3) SA 70 (A) at 80C-H). According to Snyman:

There are cases where there has been non-compliance with a court order in a civil case, and where the litigant in whose favour the court has made the order seeks to implement it by requesting the court to punish the defaulting party for contempt of court if the order is not complied with. It has now been settled, however, that these so-called cases of 'civil contempt' also constitute

the crime of contempt of court: the Director of Public Prosecutions is free to charge a person with contempt of court in these cases too (Snyman 316).

It is not clear how effective civil contempt of court proceedings are as far as providing the person or entity instituting them the desired relief is concerned, which is ultimately that the order which was not complied with be complied with. Nonetheless, the SCA has held that '[a]lthough some punitive element is involved, the main objectives of contempt proceedings are to vindicate the authority of court and coerce litigants into complying with court orders' (*Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another* 2015 (2) SA 413 (SCA) para 16). It appears however, that in civil contempt of court proceedings, while courts would convict those who failed to comply with court orders to prison, they are nonetheless generally reluctant to commit such persons to prisons. This they do by passing suspended sentences. In criminal proceedings, a suspended sentence is generally 'used as a weapon of deterrence against the reasonable possibility that a convicted person may again fall into the same error (or at least one substantially similar)' (*S v Gardener & Another* 2011 (1) SACR 570 (SCA) para 75). However, it seems like in civil proceedings, suspended sentences are used to ensure compliance with court orders, in that should the person ordered to comply with a court order again fail to comply thereto, he or she would be committed to prison. I submit therefore that in actual fact, civil contempt of court proceedings are threats orientated, in that they are instituted to force the defaulter to comply with the order failing which there will be a threat of facing jail sentence. In other words, it seems like the idea behind civil contempt of court proceedings is comply or go to jail. Indeed, such a remedy would not be effective if the defaulter chooses to go to jail rather than complying with the order. Such can be a case in matrimonial and maintenance disputes. In *Dezius* (para 8), the court held that:

[c]ivil contempt of court provides the ultimate sanction against the defaulter who refuses to comply with an order of court. The form of committal is to imprisonment or a fine. Such punitive coercion is intended to assist the complainant to enforce his or her remedy. This objective is very rarely attained in matrimonial cases. It is unlawful to intentionally disobey an order of court since it savours of criminality.

I am of the view that the above principles properly constructed may assist in the context of non-compliance with determinations issued by the Pension Funds Adjudicator in instances where execution by the sheriff would be impossible, as it would be argued below.

2 2 Office of the Pension Funds Adjudicator

It is worth noting that there is a fundamental difference between a court of law and a tribunal which has been created to deal with disputes arising from a particular industry. While all courts are generally viewed as tribunals, specialised tribunals are generally not regarded as courts. In terms of section 166 of the 1996 Constitution, the recognised courts in

South Africa are the Constitutional Court, Supreme Court of Appeal, various divisions of the High Courts or any High Court of Appeal which may be established by statute, Magistrates' courts or any courts established by statute which has a similar status as either the High Court or Magistrate court. In terms of section 165 (1) of the 1996 Constitution, judicial authority in South Africa is generally vested in the courts. This means that specialised tribunals are not vested with judicial authority even though they are quasi-judicial in nature and to some extent function like courts.

The Adjudicator's office is one such tribunal, and it is has been established to deal with disputes arising from pension funds regulated by the PFA. This office has been established in terms of section 30B of the PFA, to dispose of complaints in a procedurally fair, economically and expeditious manner (section 30D of the PFA). This office is presided over by the Adjudicator, who is empowered to make the order which any court of law may make (section 30E (1)(a)). However, because this office is not a court of law, it does not have the power to hold entities and persons in contempt of its determinations if they fail to comply with them. Nonetheless, the PFA empowers those in whose favour the determinations have been granted to execute the Adjudicator's determinations in civil courts. This is because the Adjudicator's determination is deemed to be a civil judgment of any court of law had the matter in question been heard by such a court, which should be noted by the clerk or the registrar of the court if the need arise for execution purposes (section 30O (1) of the PFA). This simply means that once the determination has been noted in a specific court, it can be enforced through execution processes by the sheriff of court. This would work well when the Adjudicator in the determination has ordered, for instance payment of money, because the sheriff may be able to attach property to satisfy the debt. But such procedure becomes virtually useless if the Adjudicator merely ordered one of the parties to release a certain item or provide certain documents to the other party, and such a party fails to do so. In such cases, clearly the sheriff would not be able to assist, more particularly if the whereabouts of such items or documents is unknown. As such, it is not clear how such an order can practically be carried out if the party against whom it has been granted fails to comply with it.

The PFA does not address how the issue of 'contempt of a determination' should be resolved. Due to the fact that the Adjudicator's office is not a court of law, then principles relating to contempt of court discussed above are not applicable in the context of determinations issued by this office, which might be prejudicial to those such determinations have been granted in favour of. As such, the question is: in order to ensure that those in whose favour determinations are granted are able to ensure compliance with such orders, more particularly, in circumstances where execution is virtually impossible, should there be a procedure similar to contempt of court proceedings of civil court which they can utilise to ensure that such determinations are complied with? While the court in the *Mantsho case* was not directly confronted by this

question, nonetheless, the facts of this case necessitate that this question should be investigated, as it will be done below.

2 3 Facts of *Mantsho* Case

In this case, a member of a pension fund requested a benefit statement from her pension fund to which she was contributing. This was after the member realised in her record card that there was a withdrawal claim made in 2007, which she did not have knowledge of, but it was later cancelled. She approached the Adjudicator's office seeking an order to compel the fund to provide her with her benefit statements from 2005 to 2013 as well as information regarding the withdrawal claim made in 2007 (para 2).

The Adjudicator forwarded the complaint to the fund administrator and the employer, with a view to afford the fund an opportunity to respond to the complaint. Only the employer submitted its response. Notwithstanding the fact that the fund failed to respond to the complaint, the Adjudicator issued her determination on the matter. The Adjudicator ordered: the fund to provide the member with her latest benefit statement and information regarding a withdrawal claim that the member submitted was made in 2007; the employer to notify the fund about the employee's termination of employment and to forward all the necessary claim documentation to the fund and; that the fund should pay the member her withdrawal benefits and also to provide the member and the Adjudicator's office with the total breakdown of the withdrawal benefit within two weeks of the determination (para 5).

It is unfortunate that the judgment is not a model of clarity, as it does not really indicate how the respondents failed to comply with the Adjudicator's determination in this case. All that is provided in the judgment is that 'the applicant seeks orders holding the third to eleventh respondents ... in contempt of a determination made by the Pension Funds Adjudicator on 19 March 2015 ...; 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 ...' (para 1). It does not even outline the arguments raised to support the allegation that the respondents were in contempt of the Adjudicator's determination. It seems however, from the conclusion of the court that the member (applicant) argued that the respondents were in contempt of the High Court rather than the Adjudicator's determination. The court held that '[a]ccordingly, 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' (para 26).

3 Discussion

Even though it is not entirely clear from the judgment, if the fund failed to provide the member with the benefit statement as well as the total

breakdown of the benefits, the member would have not been able to use execution proceedings to force the fund to release such information. The court dismissed the application on the basis that the Adjudicator's office is not a court of law, as such, it remains unclear what other legal avenue is available to the member in this regard. This is unfortunate, because it effectively means that the fund would get away with its non-compliance of the Adjudicator's determination, which would be a complete disregard of the administration of justice. The court choose to focus on the distinction between courts and tribunals, leading to an interpretation which seems to suggest that only orders of courts are worthy of being respected and carried out, failing which they can be enforced through contempt of court proceedings. This is clear from the court's contention that '[i]t is a crime to unlawfully and intentionally disobey a court order. 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' (para 7). The court was of the view that '[i]n 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' (para 10). The court relying on section 166 of the 1996 Constitution confirmed that the Adjudicator's office is not a court of law. I submit that while this view is correct as the law stands, it is nonetheless narrow and too restrictive and thus not in the interest of justice. It has the effect of encouraging noncompliance with orders of tribunals in South Africa such as the Adjudicator's office. I submit further that the court missed a golden opportunity to reflect on this possibility, and should at the very least made an obiter remark relating to the potential prejudicial effect of its order. Such a remark would have encouraged discussions in this area of law which hopefully would have led to law reform.

I am of the view that guidance can be obtained from section 300 of the PFA on how to deal with non-compliance with the Adjudicator's determinations. This section provides that '[a]ny 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'. It is submitted that if the Adjudicator's determination can be deemed to be a civil judgment, then any person or entity which fails to comply with such an order should be deemed to be in contempt of a judgment of a court of law. Perhaps it may be ideal that the PFA be amended to ensure that such enforcement mechanism is included in the Act. With the deeming analogy, the person in whose favour the determination has been granted would be able to approach a civil court through the 'deemed' contempt proceeding in order to ensure compliance with the Adjudicator's determination. This will enable the civil courts to use legal principles applicable to civil contempt of court proceedings discussed above to ensure compliance with the Adjudicator's determination. It is worth noting that this recommendation relates only to circumstances where the

Adjudicator's determination cannot be enforced through execution proceedings provided for in section 30O (1) of the PFA, as was the case in *Montsho* case. In this case, the fund was ordered to provide withdrawal statements as well as the breakdown of the withdrawal benefit, and surely obtaining a writ of execution to enable the sheriff to execute would not have assisted the member of the pension fund to obtain such information. In such circumstances, 'deemed' civil contempt of court proceedings would be more appropriate, in a sense that the member would have launched motion proceedings for contempt of court in the High Court in order to ensure compliance with the Adjudicator's determination. Should such procedure be made available, it would induce those determinations have been granted against to ensure that they comply with such orders, knowing that if they fail to do so they would expose themselves to first a criminal conviction and secondly, committal to prison.

The approach recommended in this note would ensure that the dignity of the Adjudicator's office is preserved and further that no one would be allowed to make a mockery of the Adjudicator's determinations, especially when they are aware that execution of such orders would be virtually impossible. The deeming provisions would allow civil courts to punish summarily anyone who commits contempt of the Adjudicator's orders, which office does not have the power to deal summarily therewith. The deeming provisions would ensure that civil courts impose penalties which would assist in vindicating the honour of the Adjudicator's office upon the disregard of its order (*Protea Holdings (Pty) Ltd v Wriwt and Another* 1978 (3) SA 865 (W) 868B).

It cannot be disputed that, while tribunals are not courts of law, the mere fact that they have been established means that they play a pivotal role in the resolution of disputes within the South African retirement industry. As such, it is a constitutional imperative that their orders are obeyed, and those who are dissatisfied with such orders take them either on review (section 30P of the PFA). Accordingly, disobeying such orders cannot be a viable option for those who were subjected to the jurisdiction of the Adjudicator's office. In a constitutional state such as South Africa, it is crucial that the rule of law is observed and orders of courts as well as those of specialised tribunals are respected and carried out. In terms of section 34 of the 1996 Constitution '[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. It cannot be then that priority is provided to ensuring that only decisions by recognised courts are enforced through contempt of court proceedings. Hence, there is a need that a mechanism be created that decisions made by tribunals are also carried out. Section 34 of the 1996 Constitution guarantees the protection of the judicial process to persons who have disputes that can be resolved by law and that the right of access to court is foundational to the stability of an orderly society (*Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 13). Equally so, the right to

have access to tribunals which have been established to resolve disputes in dedicated industries should be respected, and the efforts of such tribunals should not be frustrated. As such, it is clear that there is a public interest in enforcement of Adjudicator's decisions, in that 'whenever a litigant fails or refuses to obey a court order, he or she thereby undermines the Constitution. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest' (*Victoria Park Ratepayers' Association v Greyvenouw CC and Others* (511/03) [2003] ZAECHC 19 (11 April 2003) para 23). Failure to enforce Adjudicator's orders effectively has the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and thus may impact negatively on the rule of law (See *Kies v Strydom and Other* (25846/2014) [2014] ZAGPPHC 396 (19 June 2014)). It is submitted, further, that the deeming provisions would enable civil courts to not only act as vigilant sentinels of the orders they make, but also those made by the Adjudicator. It is in the interest of the community at large for courts to also guard jealously orders made by the Adjudicator. I submit that failure to comply with the Adjudicator's determination constitutes the unlawful and intentional violation of the dignity, repute and/or authority of the Adjudicator and her office. Non-compliance with such determinations should be seen as a deliberate effort of making a mockery of the Adjudicator's efforts in ensuring that justice within the retirement industry is achieved.

5 Conclusion

It is hoped that this note would spark debate around this issue, which would induce the legislature to respond by creating a mechanism to ensure that Adjudicator's determinations, in instances where execution is not competent, are enforced. With the recommended deeming provisions, the applicant in his or her application for committal to prison for deemed contempt of court must also in order to be successful, prove the contempt beyond reasonable doubt, that there is an underlying determination issued by the Adjudicator and that the respondent with the knowledge of the order nonetheless deliberately failed to comply with it.

C MARUMOAGAE

University of the Witwatersrand