

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO.: 62311/2020

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

In the matter between:

D[...] O[...] L[...]

First Applicant

D[...] K[...] L[...]

Second Applicant

and

METROPOLITAN FINANCIAL SERVICES

First Respondent

ALEXANDER FORBES PROVIDENT FUND

Second Respondent

JUDGMENT

van der Westhuizen, J

- [1] The applicants launched an application in which they *inter alia* seek relief declaring the purchase by the second applicant of a living annuity to be

unlawful and to be set aside for failure to comply with the provisions of section 15(2)(c) of the Matrimonial Property Act, 88 of 1984. The applicants further seek an order that the first respondent terminates and/or withdraws the second applicant's purchase of the annuity and the repayment of the first applicant's portion of the second applicant's pension claim.

- [2] The respondents opposed the application. The first respondent sought condonation for its late opposition and filing of its answering affidavit. The condonation application was opposed by the applicants.

- [3] The grounds upon which the first respondent relied for condoning its late opposition and filing of its opposing affidavit were as follows:

- (a) It directed correspondence to the applicants' attorneys of record at the time and prior to the institution of the application explaining why the applicants were not entitled to payment of the capital invested in a conventional annuity policy. No response to that correspondence was received from the applicants' attorneys. The first respondent was under the impression that the matter was settled.;
- (b) The application that was subsequently launched was served on a particular branch of the first respondent, where it was mislaid;
- (c) Once the first respondent became aware that the application was enrolled for hearing, it gave instructions to its legal advisers to attend to the necessary in order to oppose.

- [4] It was submitted on behalf of the first respondent that the applicants suffered no prejudice by the late opposition and filing of opposing papers. The applicants averred in opposition to the condoning of the late

opposition and late filing of the opposing papers, that the first respondent failed to provide a proper explanation for the lateness and further that it did not comply with the trite principles in that regard. It was submitted on behalf the applicants that no good cause was shown.

- [5] In my view, the applicants were partly to blame. The application was not correctly served in that it was served at the wrong address for service. The applicants would suffer no prejudice. I hold that the first respondent has made out a proper case for condoning the late opposition and the late filing of opposing papers. Accordingly, the late opposition and late filing of opposing papers stand to be condoned.

- [6] The applicants were married in community of property. That marriage was dissolved by decree of divorce granted on 24 August 2020. Division of the joint estate was ordered. Divorce proceedings were instituted on 3 January 2020 after the second applicant retired late 2019. On 19 February 2020 the first applicant obtained an interdict in the Regional Court, Brits, restraining the second applicant and the second respondent from paying out any pension interests accruing to the second applicant or disposing of the provident fund interest of the second applicant. That order was only served upon the second respondent on 21 February 2020, after the purchase of the vexed living annuity and whilst that process was under way. It was submitted on behalf of the second respondent that the order was not served at the appropriate address for service and further that only an incomplete order was served.

[7] In terms of the Common Law, a member's interest in a pension fund was considered not to be an asset in his estate and hence it did not form an asset in the joint estate. But for the provisions of section 7(7) of the Divorce Act, 70 of 1979, the pension interest does not form an asset in the joint estate.¹ The pension interest is defined in the Divorce Act. That

definition relates to the "benefits" to which the member would have been entitled in terms of the rules of the fund. The said section provides that for purposes of calculating the patrimonial benefits in divorce proceedings, the pension interest is deemed to be an asset.

[8] The second applicant was a member of Glencore Provident Fund that was held with the second respondent in terms of his employment conditions. The Glencore Provident Fund was administered by the second respondent. It merely administered that fund. The second respondent was appointed in terms of section 13B of the Pensions Fund Act, 24 of 1956, to administer the fund. The second respondent acts in accordance with the Rules of the Fund. It is a creature of instructions.

[9] The Glencore Provident Fund and the second respondent are two separate and distinct entities. They hold different and separate obligations towards members of the fund. Furthermore, the second respondent has no statutory or other obligations towards members of the funds that it administers and holds no decision-making power in respect of the enforcement of the rules or, of the purchasing of any annuities.

[10] In its answering affidavit, the second respondent, gave an excursus of the applicability of membership of pension funds due to the terms of their employment with their employer who established a pension fund for its employees. The following is relevant:

¹ Section 7(7)(a) read with the definition of pension interest; see also LAWSA Vol 20 paragraph 333

- (a) In terms of Rule 5 of the rules of the fund, a member may retire from his employment on reaching the agreed date of retirement;
- (b) On that date, a member shall become entitled to an annuity or annuities of such amount as can be purchased with his fund credit, provided that such member can elect to commute part or whole of such benefit as a lump sum;
- (c) Any annuity or annuities which become payable in terms rule 5.2.1 shall be purchased in the member's name from a registered insurer of the member's choice;
- (d) The annuity or annuities so purchased shall be subject to the provisions of the Income Tax Act, the Long-Term Insurance Act, and any requirements specified by the revenue authorities from time to time;
- (e) On the purchase of the annuity or annuities, the fund shall have no further liability in respect of such member. The registered insurer shall have liabilities towards that member who purchased such annuity or annuities.

[11] It is common cause that the second applicant retired on 30 November 2019 prior to the institution of the divorce proceedings and the grant of the decree of divorce. His pension interest in the fund accrued to him and was to be dealt with in terms of the provisions of Rule 5.2 of the Funds rules. On 9 January 2020, a completed retirement notification form was submitted. As he was entitled to do in terms of the rules of the fund, the second applicant elected to receive a portion of his accrued fund credit. An amount was deducted to repay a housing loan in terms of his employment conditions. The remainder of the accrued credit was utilised to purchase an annuity.

[12] In accordance with the retirement notification, the second respondent took the following steps:

- (a) On 10 January 2020 the second applicant's benefit was disinvested from the market;
- (b) The amount to be paid in respect of the housing loan was determined on 19 February 2020 and paid on 20 February 2020;
- (c) A tax directive was applied for on 13 February 2020 and received from SARS on 14 February 2020;
- (d) Payment of the retirement benefit of the second applicant was paid in terms of the notification form on 26 February 2020, i.e. that portion that constituted the lump sum as well as the portion relating to the purchased annuity.

[13] As recorded earlier, only the front page of the interdict order was served on the second respondent's Pretoria office, and not at the dedicated address for service of the second respondent. The aforementioned payments could not be stopped due to an incomplete court order and primarily due to the fact that the payment system of the second respondent is automated. It could not be stopped. By the time when the incomplete court order was purported to be served, the tax directive was applied for and approved and the housing loan valued and settled.

[14] It is to be noted that the party that was sought to be interdicted was cited as "Alexander Forbes" without any indication which entity was indeed intended to be interdicted. In these proceedings, the applicants have again been unclear as to which entity of "Alexander Forbes" it intended to cite. There are different entities that bear the common pre-

fix “Alexander Forbes”. The applicants are only to be blamed for their own ineptness to correctly cite the appropriate entity.

[15] By the time that the interim interdict was obtained, the second respondent had already retired and the divorce proceedings had not yet progressed to the grant of a divorce order. Consequently, no “claim”, as stated in the court order, could be preserved.

[16] Section 7(7) of the Divorce Act is to be read with section 7(8) of that Act and with section 37D(4)(a) of the Pension Fund Act. In terms of the provisions of that section, and for the purposes of section 7(8)(b) of the Divorce Act, the portion of the pension interest assigned to the non-member spouse (the first applicant) in terms of a divorce order, only accrues to that non-member on the date upon which the divorce or decree for the dissolution of a customary marriage is granted. Section 37D(4) of the Pension Fund Act provides for a deemed accrual date. Where the member retired prior to the grant of the divorce, his pension interest accrued to him on the date of retirement and no deduction could be made by the Fund in terms of section 37D(4) of the Pension Fund Act.²

[17] The purchase of the annuity was done in accordance with the Rules of the Fund giving effect to the first applicant’s election to receive a portion of his accrued fund credit in a lump sum.

[18] On the purchase of the annuity in the first respondent, the second applicant only holds a right to the payment of a monthly pension. He holds no right in the capital amount. That capital amount is an asset of the first respondent.

[19] It follows from the foregoing that the provisions of section 15(2)(c) of the Matrimonial Property Act finds no application.

² *Eskom Pension and Provident Fund v Krugel et al* 2012(6) SA 143 [11]

[20] It is trite law that the grant of a declaratory order is dependent upon a two stage enquiry. Firstly, whether the applicant for a declaratory order holds any existing, future or contingent right that is sought to be protected. Secondly, on determining an existing or future or contingent right worthy of protection, the court is to determine whether in the exercise of its discretion to either grant or refuse the declaratory order.³

[21] It follows from all of the forgoing that the applicants have failed to prove an existing or future or contingent right worthy of protection. Consequently, the applicants have failed to prove that the first applicant was entitled to repayment of any amount. The application stands to be dismissed.

I accordingly grant the following order:

1. The application is dismissed;
2. The applicants are to pay the costs, jointly and severally, the one paying the other to be absolved.

C J VAN DER WESTHUIZEN
JUDGE OF THE HIGH COURT

On behalf of the Applicants: Ms J W Kiarie
Instructed by: Molale Pebe Inc. Attorneys

On behalf of the First Respondent: Ms L Liebenberg
Instructed by: Basson & Veldtman

On behalf of the Second Respondent: L Peter
Instructed by: Thyne Jacobs Inc.

³ *Competition Commission of South Africa v Hosken Consolidated Investments Ltd et al* (CC296/17) [2019] ZACC2 (01 February 2019)

Date of Hearing:	24 April 2023
Judgment Handed Down:	19 June 2023