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

Case Number: 2023/115917

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

DATE: **27 March 2024**

SIGNATURE

In the matter between:

LEBOHANG EDWIN MLATE NO

Applicant

ID NO: 9[...]

(In his capacity as executor in the
estate late of Kedibone Steve Mlate)

and

METJA SANDRA SITHOLE

1st Respondent

ID NO: 7[...]

GOVERNMENT EMPLOYEES PENSION FUND

2nd Respondent

JUDGMENT

COWEN J

1. The applicant is Lebohang Edwin Mlate NO, the executor of the estate of his late father, the deceased. The applicant has approached this court urgently in order to obtain an interim interdict restraining the pay-out of the deceased's pension by the second respondent, the Government Employees Pension Fund (GEPF).
2. The first respondent is Metja Sandra Sithole, who says she is the surviving spouse of the deceased. The first respondent is, in context of the estate administration, in dispute with the applicant about her status as a surviving spouse, and there are application proceedings pending in this court in that regard (the main application). In the main application, the first respondent seeks four substantive orders: a) a declarator that her customary marriage with the deceased be recognised as a marriage in community of property under the Recognition of Customary Marriages Act 120 of 1998 (the Recognition Act); b) an order that Home Affairs registers the marriage posthumously; c) an order that the Master of the High Court not prejudice the interests of the applicant in her ability to claim from the deceased estate; and d) an order that the Master remove the applicant from his position as executor and appoint the first respondent as executrix. There is also a counter-application pending in which the applicant seeks a declarator that the deceased's last Will dated 19 November 2013 be declared his last will and testament. The Will is not initialled on each page: thus the counter-claim. However, in that document, the testator purports to distribute his pension fund as between his son, the applicant, (70%) and daughter, a Marlene Stephanie Mlate (30%).
3. I am satisfied that the application is urgent as it appears likely on the papers that there is an imminent payout of the pension fund. Furthermore, the

applicant has attempted to obtain redress directly with the GEPF but this has not yielded any success and he was in fact informed that he should approach a Court should he want to stop payment of the pension. It is understood that GEPF intends to pay out the pension benefit in part to the first respondent (60%), in part to the applicant (20%) with the remaining portion (20%) being paid to his sibling. The relief sought is to restrain the payout pending the finalisation of the application and counter-application referred to above.

4. A pension benefit does not ordinarily form part of a deceased estate.¹ The GEPF is, however, subject to the Government Employees Pension Law No 21 of 1996 (the GEP Law) and the Rules made in Proclamation 21 of 19 April 1996 (the GEP Rules). While under that legislation there are residual cases where the benefits may fall to the deceased estate, that is not the default position, which rather entails the exercise of discretion by the GEPF subject to the GEP Law and the GEP rules. There is no suggestion on the facts before me that this is such a residual case.
5. The GEP Law makes provision for the benefits on death, and makes it clear that they are not to be treated as property for purposes of estate duty.²
6. Section 22 regulates payments of gratuities payable on death and provides:

‘22. Payment of gratuity to beneficiaries designated by member.

¹ Under the Pension Fund Act 1956 (specifically section 37A), a pension benefit does not form part of the assets of a deceased estate. See generally, Hunter et al, *The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives and circulars*, at p 682-3. The GEPF is governed by its own set of laws.

² Section 28 which provides:

‘Benefits not property for purposes of estate duty.—Notwithstanding anything to the contrary in any law contained, any benefit or any right to a benefit, due and payable in terms of this Law to the beneficiary of a member, on or as a result of or after the death of that member shall for the purposes of the Estate Duty Act, 1955 (Act No. 45 of 1955), be deemed not to be property as defined in section 3 (2) of that Act.’

(1) If a gratuity is payable on the death of any member to the dependants of such a member or to his or her estate, that member may, on the applicable form of the Fund and subject to the prescribed conditions, notify the Board of his or her wish that the said gratuity be paid on his or her death to the beneficiaries mentioned in that form and be divided among such beneficiaries in the proportion mentioned in that form.

(2) Notwithstanding anything to the contrary in any law contained, the Board may on the death of a member who so notified the Board pay at its discretion the gratuity concerned in accordance with the member's wish'.

7. A "beneficiary" is defined in the GEP Law to mean 'the dependant or nominee of a member or pensioner, as the case may be;'. A dependant, is defined, 'in relation to a member or pensioner', to mean:

(a) any person in respect of whom the member or pensioner is legally liable for maintenance;

(b) any person in respect of whom the member or pensioner is not legally liable for maintenance, if such a person—

(i) was, in the opinion of the Board at the time of the death of the member or pensioner in fact dependent upon such member or pensioner for maintenance;

(ii) is the spouse of the member or pensioner, including a party to a customary union according to indigenous law and custom, or to a union recognised as a marriage under the tenets of any religion; or

(c) a posthumous child of the member or pensioner; and

(d) a person in respect of whom the member or pensioner would have been legally liable for maintenance had that person been a minor;

8. Rules 14.5 and 14.6 make detailed provisions for how the GEPF must distribute benefits on the death of a member and how to distribute benefits on the death of a pensioner.³ The Courts have, furthermore, given consideration on several occasions to the scope and contours of the GEPF's discretion to distribute the benefits, which is subject to judicial review.⁴
9. It is, moreover, apparent that there is an Ombud available to determine disputes that may arise regarding the distribution, and the review remedy is available to an aggrieved interested party.
10. Once this legal framework is appreciated, it becomes apparent that there are material difficulties with this application.
11. The first is that the applicant has approached the Court as the executor of the deceased's estate. In this regard, he appears to be labouring under a mistaken belief that he has a formal role in respect of the distribution of the pension in his capacity as the executor of the estate. That is not his role. It is for the trustees of the GEPF to distribute the pension fund in accordance with its governing statute and rules. Indeed, the primary interest that the applicant has is not in his capacity as an executor but in his capacity as a beneficiary of the pension. This is not to say that there are no circumstances where an executor may have standing in a case of that sort but that case is not made

³ I do not repeat these provisions simply due to their length but they must be considered by those involved in this dispute.

⁴ No argument has been provided on this issue but even a cursory consideration of the databases show that there are many cases to hand. See eg. *Rousseau and others v GEPF and others*, [2022] ZAFSHC 285 to which the applicant's counsel drew my attention, and the cases referred to in that case.

out here. Nor is it to say that the GEPF may not be obliged to duly afford the applicant *audi alteram partem* before determining the pension distribution, either as executor (who is privy to relevant information) or as a beneficiary, but that too is not the case made out.

12. A second, related difficulty, is that the interim relief that the applicant seeks would suspend payment of the pension pending the resolution of proceedings which are not directly concerned with who is entitled to benefit from the pension and to which the GEPF is not a party. The counter-claim has no bearing on the question of who is entitled to benefit from the pension fund. It may be relevant to the GEPF to know that there is a will, possibly a valid one (though that is *sub judice*), that purported to distribute the pension fund on death in a particular way, but even if that will is valid, the decision as to how to distribute the benefit is for the GEPF to make in accordance with its governing laws. The main application is similarly focused on estate administration and concerns, at least centrally, the dispute in that context between the applicant and the first respondent. Nonetheless, determination of the first substantive prayer – concerning the validity of the customary marriage – would determine that dispute as between the applicant and the first respondent and the other parties to that litigation. It would not, however, bind GEPF, which is not a party and which presumably has its own systems and procedures for verifying marriages and where they are not valid, determining dependency.

13. Thirdly, even discounting the above difficulties, the applicant faces a serious difficulty in that he has satisfactory alternative remedies in the form of the Ombud – to the extent available – and review. Both of these remedies can, if asserted, redress any harm to an applicant of an unlawful payout if made.

14. In submissions addressed after the hearing, the applicant implored the Court to grant interim redress pending the determination of any dispute with the Ombud or on review. It would not be fair for me to entertain that relief on the

papers before me, as it was not sought. Neither the GEPF nor the first respondent had due notice and neither have had an opportunity to respond to that case.

15. Indeed, there is no clarity whether a decision has already been taken by GEPF. If it has not, it may be that to act lawfully, fairly and rationally, the GEPF should take further steps to duly hear the applicant further but I cannot determine that fairly on the papers before me. Moreover, if GEPF has taken its decision and cannot revisit it, then it is incumbent upon GEPF duly to notify the interested parties so that they can exercise any rights they may wish to either on review, with the Ombud or otherwise. In this regard, the only fair order I can make is to direct the applicants to deliver a copy of this order to GEPF with a request that GEPF duly consider the issues raised with reference to the papers that were served on GEPF.

16. On costs, I must conclude that they should follow the result and, as submitted by the first respondent, should not burden the estate. The first respondent has been put to significant costs responding to a misconceived case in circumstances where he should have approached the Court in a different capacity.

17. I make the following order:

17.1. The application is heard as one of urgency and the Court dispenses with the periods, manner of service and practice directives in terms of Rule 6(12) and the practice manual;

17.2. The application is dismissed with costs on a party and party scale.

17.3. The applicant is directed to deliver a copy of this judgment to the GEPF to enable it to consider the issues raised.

SJ Cowen

Judge, High Court, Pretoria

Date of hearing: 20 March 2024

Date of judgment: 27 March 2024

Appearances:

Applicant: Adv W Botes instructed by Shapiro & Ledwaba Attorneys

First respondent: Adv K Mpenyama instructed by ML Malatji Attorneys