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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

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

(3) REVISED.

DATE

SIGNATURE

Case Number: 19424/2021

In the matter between:

M[....] S[....] S[....] (born R[....])

Applicant

And

M[....] P[....] S[....].

First Respondent

THE CHIEF OF THE SOUTH AFRICAN

NATIONAL DEFENCE FORCE

Second Respondent

GOVERNMENT EMPLOYEES PENSION

FUNDS (GEPF)

Third Respondent

JUDGMENT

MADIBA AJ

Introduction

- [1] This is an application in which the applicant seeks an order in the following terms:
- (a) That the second and third respondents be ordered not to pay the pension interest due to the applicant pending the finalisation of the divorce proceedings between the applicant and the first respondent in the regional court.
 - (b) An order is sought in the alternative that the second and third respondents be directed to pay 50 % of the applicant's pension interest into an account nominated by the first respondent within sixty days of the date of the order.
 - (c) Further that a costs order be granted in the event of opposition of the application.
- [2] The first respondent opposes the application on the basis that there was no proper service effected on him and that this court lacks jurisdiction as the

matter is pending in the regional court. It is contended on behalf of the first respondent that the application is bad in law and that the relief sought by the applicant has become moot.

Factual background

- [3] The applicant and the first respondent got married in community of property on the 11th of January 2019.

Both parties in this matter are employed by the South African National Defence Force and are members of the Government Employees Pension Fund.

There is a divorce action pending in the regional court which was instituted by the first respondent during July 2020. It is defended by the applicant.

The first respondent has since served notice to amend his particulars of claim to incorporate a prayer for forfeiture of benefits against the applicant. The application is also opposed.

There is no indication from the papers before this court whether the application to amend has been dealt with or not. The first respondent has since retired from his employment at the South African National Defence Force effective 30 June 2021.

Issues to be decided

- [4] Whether a case has been made out to justify the relief sought by the applicant in terms of the notice of motion.

Points *in limine*

- [5] The first respondent raised the following points *in limine*.

First point *in limine*

The first respondent contends that there was no proper service effected contrary to what the Rules of this court prescribe. He alleged that the application was forwarded to him by the third respondent.

The applicant disputes this allegation and submit that the sheriff served the application on the first respondent as the sheriff's return of service denotes. It is indeed true that service of the notice of motion was served by the sheriff as it can be gleaned from the sheriff's return of service marked "MS1" attached to the documents before this court. The point *in limine* therefore falls to be dismissed.

Second point *in limine* – Jurisdiction and *Lis Pendens*

The lack of jurisdiction is premised on the fact that the divorce action between the parties is before the regional court in Pretoria Magistrates court. The first respondent's contention is further that the composites of the joint estate and the spouses' respective entitlement shall be determined in the regional court.

It is the applicant's submission that this court has inherent jurisdiction to entertain this application unless it is specifically excluded.

Section 21 of the Superior Courts Act 13 of 2013 provides that a High Court has jurisdiction over all persons residing or being in and in relation to all causes arising within its area of jurisdiction.

It is common cause that the defendant (applicant in the divorce action) resides within the area of jurisdiction of this court and that the plaintiff (first respondent) is employed by the SANDF with its place of employment's head office situated in Pretoria which is within the area of jurisdiction of this court.

Our common law provides that one of the most important factors to be considered when dealing with the issue of jurisdiction is the doctrine that the issue of jurisdiction depends upon the power of court to give an effective judgment to issues before it. See ***Steytler N.O. v Fitzgerald* 1911 AD 205** at 346.

I am of the view that since the parties fall within the area of jurisdiction of this court, the inherent powers it enjoys, this court is empowered to deal with the application. I find that effective judgment can be given by this court and it thus have jurisdiction to entertain the application.

Lis pendens

The first respondent's view is that the relief sought in this application is a subject to be decided in the regional court, Pretoria. It is contended by the applicant that the issue of *lis pendens* finds no application. The applicant is not seeking the division of the parties' joint estate, but to prohibit the first respondent from accessing his pension fund interest before the finalisation of the divorce action.

It is indeed so that the applicant will not be able to claim against the first respondent's pensionable interest in the event that the first respondent received payment of his pension interest before the finalisation of the divorce action. All that the applicant is asking for is the protection of her interest in the first respondent's pension interest. I therefore hold that the *lis pendens* is not a suitable recourse for the first respondent under the circumstances.

Third point in limine

It is submitted on behalf of the first respondent that the applicant's submission that she has no alternative remedy in law to protect her interest cannot be accepted. The applicant could have asked for immediate division of the joint estate in terms of section 20 of the Act 88 of 1984 so submitted the first respondent. According to the first respondent his application should be dismissed on this point alone as it is bad in law.

For the applicant, the contention is that, it is within the prescripts of the law that in terms of section 78 of the Divorce Act 70 of 1979 it is permissible for the deduction to be made against the first respondent's pensionable interest.

The argument that the appropriate relief for the applicant was to apply the provisions of section 20 of Act 88 of 1984 is not sustainable. As alluded above, the applicant is not seeking the division of the joint estate in her interlocutory application, but is asking the court to preserve and protect her interest in the pensionable interest of the first respondent.

The Pension Fund Act 24 of 1956, section 370(1)(d) and sections 7(7) and 7(8) of the Divorce Act of 1979 provides that deductions indeed are allowed on the first respondent's pension interest under certain circumstances. However, in the event the first respondent could manage to withdraw his

pension interest before the finalisation of the divorce action, the pension fund would not be competent to make the deduction from a member's pension benefit. The Pension Fund in terms of section 37D and 37A expressly provides how the deductions are to be made. That is the deductions will only be permissible to be made in favour of a non-member spouse in terms of a decree of divorce dissolving the parties' marriage.

See ***Eskom Pension Fund and Provident Fund v Krugel and another*** (689/2010) [2011] ZASCA 96 (31 May 2011); [2011] 4 All SA 1 (SCA).

The fact that the first respondent was to retire on the 17th of June 2021 effective 30 June 2021, left the applicant with little space to manoeuvre. The best option was to approach the court in the form of an interlocutory application. I can find no alternative remedy for the applicant under the situation she found herself under.

Fourth point *in limine*

The point taken by the first respondent is that the relief sought by the applicant has become moot. The first respondent's retirement on the 30th of June 2021 and the fact that the application was not brought as a matter of urgency, makes the applicant a victim of mootness according to the first respondent. As such the applicant is not entitled to state that she will suffer irreparable harm if the relief sought is not granted.

With respect it is not a requirement in our law that an interlocutory application is to be brought on urgent basis in view of the other party's intended retirement. Should urgency not be raised by the applicant she is not prohibited from relying on irreparable harm to be suffered by her.

It is imperative to note that the applicant launched her application well on time before the retirement date of the first respondent during 19 April 2021 and it was not in my view necessary for an urgent application.

[6] The issues relating to interdicts are ventilated below.

It is apparent from the application that the applicant seeks to interdict the second and third respondents through an interlocutory application. For the applicant to be successful, the following requirements for an interdict had to be satisfied on a balance of probabilities.

The law and its application

[7] The following are the requirements for the interim interdict:

- (i) a *prima facie* right;
- (ii) a well-grounded fear of irreparable harm if the relief is not granted;
- (iii) an absence of an alternative remedy; and
- (iv) that the balance of convenience favours the grant of the interim relief.

***Setlogelo v Setlogelo* 1914 AD 221** at 227 is instructive in this regard.

See also ***Lipschitz v Wattrus N.O.* 1980 (1) SA 662 (T)** at 673C-D; ***Gool v Minister of Justice and Another* [1953] 3 All SA 115 (C)**.

The first respondent argues that the applicant has to convince the court that she has a *prima facie* right to the first respondent's pension fund, that irreparable harm threatens this right, that the balance of convenience favours her and that she has no alternative remedy in law available to her.

On the other hand it is the applicant's submission that she has demonstrated that the requirements necessary in an interdict application have been established.

- [8] In my view, with regard to the *prima facie* right, such right has been satisfied by the fact that the application is married to the first respondent in community of property and that entitlement arises as a result that the first respondent's pensionable interest due to the first respondent on his retirement or at finalisation of the divorce action form part and parcel of the joint estate for purposes of the determination of the joint estate.

As aforementioned, the Pension Fund and Divorce Act permits deduction from the first respondent under the circumstances alluded to above.

I find that the applicant has established that she has a right to the first respondent's pensionable interest. The assertion by the first respondent that the applicant has an alternative remedy, has been dealt with in the previous paragraphs above and is accordingly rejected. The first respondent further contends that the applicant has failed to establish that she will suffer irreparable harm if the relief sought are not granted.

What is required is for the applicant to satisfy the court that a well-grounded fear of irreparable harm does exist.

The first respondent has clearly indicated that he does not want the applicant to share in his pension fund. The applicant's fear will be realised if the first

respondent can be awarded on retirement all of his pensionable interest before finalisation of their divorce action.

I hold the view that the applicant's fear is justifiable under the circumstances and the balance of convenience tilts in the applicant's favour.

- [9] The submission by the first respondent that he has retired and he be allowed to cash in his pensionable interest before the finalisation of the divorce action cannot be supported. It would have been a different ball game if the assertion was to the effect that a portion of first respondent's pension interest be released to him pending finalisation of the divorce action. The applicant will indeed be irreparably harmed in the event the first respondent utilised all his pension interest disregarding the interests of the applicant in the first respondent's pension interest. It seems the pension interest is the major asset of the joint estate with a reasonable value. Nothing prohibits the first respondent from claiming 50 % of the applicant's pensionable interest as the law permits him to do so.
- [10] I find that the applicant has succeeded in satisfying the requirements of an interim interdict. The focus now turns to the relief sought by the applicant that the pensionable interest of the first respondent be frozen until the finalisation of the divorce action, is not equitable and justifiable. The fact that the first respondent has retired means he may not have other financial reserves to sustain himself until the conclusion of their divorce process. This is confirmed by the applicant herself by stating that the first respondent is a man of straw. Denying the first respondent to even have access to a portion of his pension interest will have a disastrous effect on his life during his pension days until the sun sets on him. Accordingly the first relief sought is not acceptable.

The alternative relief sought has an effect of being a final interdict. There is no basis warranting payment of 50 % of the first respondent's pension interest into a banking account nominated by the applicant. The difficulty will be in the event the divorce court deciding that the applicant should forfeit the entire benefit of the joint estate of the parties.

The first respondent will be greatly prejudiced and will suffer irreparable harm if the alternative relief is granted.

Conclusion and costs

Conclusion

- [11] The applicant has succeeded in establishing that an interim order be granted in this application and the relief sought could not be acceded to in view of the circumstances of the application. After careful consideration, the court finds that the first respondent be permitted to have access to a portion of his pensionable interest. The balance thereof to be held over by the third respondent until the finalisation of the divorce action which will give effect to a determination regarding the parties' joint estate.

Costs

- [12] It is indeed so that the court has a discretion when the issue of costs is to be considered. In view of the court's conclusion as determined aforesaid, it will be just and fair that no order as to costs be awarded to either party in this matter.

Order

- [13] In the premises the following order is made:

- (a) That 50 % of the pensionable interest due and payable to the first respondent on his retirement, be paid as at date of retirement as determined.
- (b) That 50 % of the first respondent's pensionable interest be held over by the Government Employees Pension Fund pending the finalisation of the divorce action of the parties and payment be effect as per the determination of the divorce court.
- (c) Each party to pay its own costs.

S.S. MADIBA
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

CASE NUMBER: 19424/2021

HEARD ON: 14 February 2022

FOR THE APPLICANT: ADV. K.J. MALEKA

INSTRUCTED BY: Leshilo Inc. Attorney

FOR THE FIRST RESPONDENT: ADV. B. BERGENTHUIJN

INSTRUCTED BY: NR Voyiatzakis Attorneys

DATE OF JUDGMENT: 25 February 2022