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**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 2973/2021

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

ALETTA CORNELIA FOURIE (née ERASMUS

Applicant

and

VRYSTAAT MUNISIPALE PENSIONFONDS

1st Respondent

REGISTRATION NUMBER: 12/8/412

MALCOM NEIL CAMPBELL N.O.

2nd Respondent

FRITZ FOURIE

3rd Respondent

IDENTITY NUMBER: [....]

HEARD ON: 03 FEBRUARY 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 10h00 on 20 May 2022.

[1] The issue to be determined in this matter is whether a non-member spouse is entitled to the share of the pension benefit assigned to her in terms of a decree of divorce issued after the pension benefit was withheld by a Pension Fund in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 ("The PFA") as security pending the determination of the civil claims instituted by the employer against the member.

[2] The applicant claims payment of the amount of R12million against the first respondent a pension fund organization (The Fund) duly registered in terms of section 4 of the PFA. The claim is premised on the grounds that the payment is due to her by virtue of a decree of divorce incorporating a settlement agreement in terms of which the third respondent, a former employee and member of the Fund allocated a portion of his accrued pension benefit or interest to the applicant.

[3] The background facts are generally of common cause: the third respondent was the Fund's chief executive officer until he retired on 31 July 2017 barely three weeks after an on-site inspection of the Fund revealed financial irregularities in the administration of the Fund which were attributed to the third respondent as the chief executive officer of the Fund. The Fund was subsequently placed under the curatorship of the second respondent (the Curator) and civil claims were instituted against the third respondent to recover the misappropriated funds.¹

[4] On 6 October 2017 the Curator invoked the provisions of section 37D(1)(b)(ii) of the PFA and withheld the third respondent's pension benefit pending the determination of the civil claims instituted by the Fund and the Curator in respect of the damage caused to the Fund by reason of the third respondent's misappropriation of funds.

¹ The Fund and the curator issued summons in this court under case number 879/2019, 2972/2019 and 4184/2019.

[5] Approximately a month later, on 15 November 2017 the third respondent apportioned R12million of his retained pension benefit to the applicant in accordance with their divorce settlement agreement² which provides thus:

“2.2.2 Ingevolge Ar 7 vandie Wet op Egskeidings 70 van 1979 sal ‘n bedrag gelykstaande aan R12,000,000.00 &Twaalf Miljoen Rand) van die Verweerder se gesegde netto pensioenbelang en/of pensioenvoordele in die Pensioenfonds bekend as die VRYSTAAT MUNISIPALE PENSIOENEFONDS en waarvan die Verweerder op 31 Julie 2017 afgetree het (met lidnommer: 0450000), op datum van toestaan van ‘n finale egskeidingbevel, die Eiseres toekom.

2.2.3 Ingevolge Artikel 37D (4) (b) (ii) (bb) van die Pensioenwet oefen die Eiseres reeds hiermee haar keuse uit die gemelde pensioenfonds die volle bedrag van R12 000,000.00 (Twaalf Miljoen Rand) wat kragtens paragraaf 2.2.2hierbo deur die pensioenfonds aan haar betaalbaar is aan haar uitbetaal moet word en kom die partye ooreen dat die Hof gelas dat die gemelde bedrag vry van enige aftrekkings en/of belasting in die Eiseres se volgende bankrekening inbetaal word naamlik:

NAAM VAN REKENINGHOUR: MEV A C FOURIE
BANKNAAM: NEDBANK- TJEKREKENING
REKENINGNOMMER: [....]
KROONSTAD TAK”

[6] During May 2019, the third respondent launched an application against the Fund and the Curator in this court under case number 2367/2019 seeking payment of his entire pension benefit. The Fund and the Curator opposed the application and simultaneously launched a counter-application wherein they sought an order authorizing the Fund and the Curator to retain the third respondent’s pension benefit pending the finalization of the civil claims. This matter was settled, the parties took an order by agreement on 6 February 2020 essentially agreeing that the application

² Annexure “ACF3” on the applicant’s founding affidavit is a copy of the settlement agreement.

be postponed *sine die*, the third respondent would be paid only an amount of R2million and payment of the rest of the pension benefit namely, R19 739 733.41 was suspended pending the final determination of the civil claims.³

[7] The summary of the parties' contentions is the following: it is the applicant's case that she was not a party to the proceedings in which the third respondent agreed to the retention of his pension benefit therefore, the Fund and Curator are not entitled to disregard the divorce order by withholding her portion of the benefit along with that of the third respondent.

[8] The third respondent abides by the decision of this court.

[9] According to the Fund and the Curator, the applicant is not entitled to the payment she seeks on the following grounds namely, that:

9.1. The divorce order upon which the applicant relies as the basis of her claim is a nullity. At the time of the divorce, the third respondent had no pension interest to apportion to the applicant. He retired and exited the fund before the divorce and his pension benefits which had accrued to him were subsequently withheld by the Fund in terms of section 37D (1) (b) (ii) of the PFA and also by virtue of mutual agreement between the Fund, the Curator and the third respondent pending the finalization of the civil claims the Fund and the Curator has instituted against the third respondent for the recovery of the misappropriated funds. Pursuant to section 7(8)(b) of the Divorce Act,⁴ the retention of the third respondent's pension benefit applies *mutatis mutandis* to the applicant as a non-member spouse;

9.3. The Fund as was not a party to the divorce proceedings accordingly, the order is unenforceable against the Fund. It does not constitute a judgment debt against the Fund; and

³ Annexure "ACF4" of the applicant's founding affidavit is a copy of the judgment granted by Daffue, AJP in that regard.

⁴ Act 70 of 1979.

9.4. Any claim that the applicant might have had against the Fund has prescribed as it was not instituted within three years from the date the debt allegedly became due and payable.

[10] With regard to the challenge regarding the validity and enforceability of the divorce order against the Fund, sections 7(7) (a) and 7(8) (b) of the Divorce Act provide that at the time of a divorce, a member's pension interest will be considered as part of his assets in the determination of the patrimonial benefits to which a non-member spouse may be entitled to and, once a court has granted a decree of divorce awarding a non-member spouse a portion of a member's pension interest, the Fund **must** (I emphasize) deduct the apportioned pension interest and pay it over to the non-member spouse minus the deductions allowable in terms of section 37D (1) (b) (ii) of the PFA. Accordingly, it is not required that the Pension Fund be cited as a party to the proceedings.

[11] A pension interest in these circumstances is a benefit that accrues to a member when he exits the Fund upon resignation⁵ in other words, it is a benefit that accrues to a member if his membership and employment is terminated on the date of the divorce.

[12] In this matter, the third respondent's pension interest ceased to be an asset to which the applicant would be entitled to in terms of section 7(7) when he resigned from his employment and the Fund approximately four (4) months before the divorce. As a result, the provision in the divorce order directing the Fund to pay a portion of his pension interest to the applicant is ineffectual.⁶

[13] As regards the applicant's entitlement to the withheld pension benefits, section 37D (1) (b) (ii) of the PFA read with section 7(8)(b) of the Divorce Act, permits the Fund as an employer of the third respondent to deduct any amount for which the third respondent is liable to the Fund for damage caused by reason of his misappropriation of funds and in the Fund and also for the purpose of determining

⁵ Section 1, *supra* at fn 4.

⁶ *De Kock v Jacobson and Another* 1999 (4) SA 346 (W) at 350.

the pension interest to which the applicant would have been entitled to at the time of the divorce.

[14] The claims instituted against the third respondent in total amount to R76 552 041.00. The amount exceeds the third respondent's pension benefit significantly the Fund was thus entitled to withhold the entire pension benefit pending the finalization of the claims.

[15] The provisions of section 7(8)(b) of the Divorce Act apply *mutatis mutandis* to the applicant's right to the portion of the third respondent's pension benefit.

[16] Prescription is governed by the Prescription Act. Sections 11 (a) (ii) and (d), 12(1) and (3) of the Prescription Act are the relevant provisions in this matter. They essentially provide that a judgment debt shall be extinguished by prescription after a lapse of 30 years since it became due and any other debt prescribes after three years. A debt is deemed to be due when the creditor had knowledge of the identity of the debtor and of the facts from which the debt arises.

[17] In asserting the basis of her claim, the applicant alleged that her claim against the Fund is for unpaid pension benefits which were due and payable to her as per the divorce order incorporating a Deed of settlement granted on 15 November 2017. In terms of this order, the Fund was ordered to pay her a portion of the third respondent's pension benefit within fourteen (14) days after the order was issued.⁷ Based on these facts, as at the date of the divorce order the applicant had knowledge of both the facts from which the debt arises and the identity of her debtor.

[18] Upon receipt of the Fund's opposing papers, the applicant sought to modify her claim in her replying affidavit and the heads of argument by categorizing it as a demand to release assets under attachment to which Prescription does not apply, alternatively a judgment debt which prescribes after 30 years. There is also a belated variation of the date on which the debt became due. The applicant alleges that the debt only became due on 6 February 2020 when the Fund was granted an order to

⁷ Paragraphs 11, 25 and 35 of the applicant's founding affidavit.

withhold the third respondent's pension benefit or on the date of this judgment. Another version is that the attachment of the applicant's pension is continuous wrong therefore prescription runs from day to day.

[19] It is trite that an applicant for relief must (save in exceptional circumstances) make her case and produce all the evidence she desires to use in support of her case in her case, in her founding affidavit. An applicant is not permitted to supplement her case in the replying affidavit.⁸

[20] On the facts of this matter it is quite clear from the applicant's founding affidavit that her claim is a claim for unpaid monies which were due and payable. I therefore agree with counsel for the Fund and the Curator that the applicant's claim prescribed on 15 November 2020. I'm of the view that the Fund's "debt" to wit, the obligation to pay the portion of the third respondent's pension benefit to the applicant has been extinguished by prescription.

[21] In conclusion, I'm of the view that no proper case has been out for the granting of the order sought by the applicant. The applicant is not entitled to the payment she seeks. I have consequently arrived at the conclusion that the application ought to be dismissed.

[22] There is no reason why the costs should not follow the result.

[23] In the premises, the following order is granted:

- (1) The application is dismissed with costs.
- (2) The applicant shall pay the respondents' costs, including the costs of two counsel.

N.S. DANISO, J

⁸ *Bayat and others v Hansa and Another* **1955 (3) SA 547** (N) at 553D; *Poseidon Ships Agencies (PTY) LTD v African Coaling and Exporting CO (Durban) (PTY) LTD and Another* **1980 (1) SA 313** (D) at 315 E-H and 316A.

APPEARANCES:

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Instructed by: Wessels & Smith

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