IN THE GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 75404/2013

In the matter between:

SENTINEL RETIREMENT FUND	Applicant
and	
CHOICE MTAMBO	1st Respondent
CLEMENT KATEMBWE MTAMBO	2nd Respondent
THE MAGISTRATE, RANDBURG MAGISTRATE COURT	3rd Respondent
THE MAINTENANCE OFFICER	4th Respondent
RANDBURG MAINTENANCE COURT	5th Respondent

JUDGMENT

JANSEN J

[1] This matter was initially brought as an urgent application divided into a Part A and a Part B.

[2] On the date of the urgent hearing the matter could not be heard as an answering affidavit was filed on 23 December 2013. The matter was removed from the roll on 24 December 2013 by Tolmay J because it had become opposed.

[3] The nub of the application is that the Sentinel Retirement Fund on 10 July 2013 received a court order of the same date, ordering it to pay arrear maintenance from the member, namely the second respondent's benefit, to the first respondent and to withhold his benefit for an apparently indefinite period.

[4] This order was made by the third respondent, namely the magistrate of the Randburg magistrate/maintenance court. The fourth respondent is the maintenance officer for the Randburg magistrate's court, Mr Paul Thotobolo.

[5] No entity called the Sentinel Mining Pension Fund exists. The correct entity is the Sentinel Retirement Fund ("**Sentinel**"), a pension fund organisation as defined in section 1 of the Pension Funds Act 24 of 1956 (the "**PFA**"). Furthermore, the Sentinel Retirement Fund was given no notice of the proceedings and the only notice it received thereof was the court order referred to above.

[6] A maintenance officer, Mr Ramalata, contacted Sentinel and requested a progress report regarding the payment ordered in terms of the of the July 2013 order.

[7] The Sentinel Retirement Fund stated that such information was confidential and could only be given on provision of a subpoena which was duly obtained. The information was furnished as requested but Sentinel was informed that a new order would be obtained from the Randburg magistrate/maintenance court. This was duly obtained and differed *toto caelo* from the first order. This new maintenance order was obtained on 15 August 2013 from the Randburg magistrate/maintenance court.

[8] Once again, Sentinel, although cited as a party, was never informed of the proceedings. Neither was the principle of *audi alteram partem* adhered to and the second respondent only heard of the maintenance proceedings through Sentinel. Both maintenance orders were obtained *ex parte*.

[9] Sentinel wrote a letter to the magistrate/maintenance court stating that paragraphs 4 to 6 of the 15 August 2013 order in respect of the payment of future maintenance is unenforceable, and furnished full reasons why past maintenance could be paid from the fund but not future maintenance.

[10] The second respondent's attorneys informed Sentinel that they would apply to the magistrate/maintenance court for the orders to be rescinded, but had difficulties in finalising the application because the second respondent was in Uganda. In the interim, Sentinel was being threatened by employees of the magistrate/maintenance court that contempt of court proceedings would be brought against it.

[11] On 25 November 2013 a further court order was served on Sentinel. For ease of reference, the court order is annexed to this judgment as "**FA1**". Yet a further order, differing in wording from "**FA1**", was received by Sentinel on 4 December 2013. This order is also dated 25 November 2013 and is attached to this judgment marked "**FA2**". The maintenance officer now contends that the valid court order is annexure "**FA1**".

[12] The argument put forward by Sentinel is that whichever of "**FA1**" or "**FA2**" is the alleged "valid" court order, none of them is *de facto* valid in that it orders the payment of future maintenance which is not allowed by the **PFA**.

[13] Initially it appeared as though the new orders of 25 November 2013 were based on applications filed by the second respondent's attorneys to

suspend the 10 July 2013 and 15 August 2013 court orders due to technical defects. These applications were set down for hearing on 15 January 2014. A complaint was also filed by the second respondent's attorneys with the chief magistrate on 29 November 2013.

[14] However, as set out above, on 25 November 2013, two irreconcilably destructive court orders were issued by the magistrate of the Randburg magistrate/maintenance court. These orders neither rescinded nor amended the 10 July 2013 and 15 August 2013 court orders.

[15] The effect of annexure "**FA1**" was to: —

[15.1] attach a so-called "said debt" without clarifying to which amount reference was being made;

[15.2] require Sentinel to pay to the first respondent an amount of R80 640 in arrear maintenance, without explaining how such amount is calculated or in respect of which months' arrears it relates; and

[15.3] to require Sentinel to pay to the first respondent a lump sum of R144 000 in respect of future maintenance.

[16] The effect of annexure "**FA2**" was to: —

[16.1] require Sentinel to pay to the first respondent an amount of R80 640 in arrear maintenance, without explaining how such amount was calculated or stipulating to which months' arrears this amount relates, especially considering that this amount is not a multiple of R12 000 (the monthly maintenance payable);

[16.2] require the fund to pay to the Randburg Magistrate Court (not the first respondent per the first 25 November order) an amount of R161 280.00 (not R144 000 per the first 25 November order) for the benefit of the first respondent; and

[16.3] substitute the orders dated 10 July and 18 August 2013 (presumably this is meant to be a reference to the order dated 15 August 2013) without any reference to the first 25 November 2013 order.

[17] On 9 December 2013, the fourth respondent, namely the maintenance officer, informed Sentinel that there were no applications for rescissions filed by the second respondent's attorneys and that the valid order which had to be enforced was annexure "**FA1**".

[18] In terms of annexure "**FA1**", read with section 30 of the Maintenance Act 99 of 1998 (the "**Maintenance Act**"), an amount of R161 280.00 had *de facto* been attached. Payment of the future maintenance of R161 280.00

was allegedly due and payable to the first respondent. This amount, on a proper construction, so Sentinel argues, is an amount in relation to future maintenance which is not due and payable.

[19] However, as set out in the applicant's supplementary heads of argument and supplementary affidavit, yet a further maintenance order was obtained on 11 March 2014. This order was brought to the applicant's attention in terms of section 16(5) of the Maintenance Act. This order is annexed to this judgment marked "**FA3**"

[20] A timeline setting out the events subsequent to the 24 December 2013 hearing is instructive and of assistance to understand the facts of this case: —

[20.1] On 24 December 2013, Tolmay J did not, as the first respondent stated under oath, strike the matter off the roll allegedly declaring the 25 November 2013 order valid. The first respondent deliberately misled the magistrate's court in this regard.

[20.2] Instead, as evidenced by the confirmatory affidavits of Hannine Drake and Lauren Sue Richards-Wiehe as well as the order made by Tolmay J, the matter was simply removed from the roll because it became opposed.

[20.3] The first respondent in her affidavit dated 11 March 2013 alleges, on the one hand, that the matter was removed and, in the same breath, also alleges that the matter was struck from the roll in her presence. Clearly these two contradictory statements are mutually destructive.

[20.4.] On 14 February 2014, the applicant filed its replying affidavit.

[20.5] On 4 March 2014 the third respondent postponed the second respondent's rescission application on the basis that the matter is *lis pendens* in the High Court.

[20.6] However, on 11 March 2014, the first respondent obtained the 11 March order which seeks to set aside all previous orders issued by the magistrate/maintenance court, and therefore all four orders which are the subject matter of the main application, under misleading circumstances. The 11 March 2014 order was granted without any knowledge of or notice to the applicant or the second respondent.

[20.7] On 12 March 2014, the applicant filed its main heads of argument in this application.

[20.8] On 24 March 2014, the first respondent filed her heads of argument in this application, which she personally signed.

[20.9] On 27 March 2014 the applicant became aware, for the first time, of the 11 March 2014 order when the order was served on the applicant by the third respondent accompanied by a notice in terms of section 16(3) of the Maintenance Act.

[20.10] On 31 March 2014 the second respondent became aware, for the first time, of the 11 March 2014 order when the applicant informed it thereof.

[21] The 11 March 2014 order, in relevant part, reads as follows: —

"***1.1 In terms of section 28 of Act 99 of 1998 the court hereby authorizes the attachment of a debt to wit: SENTINEL RETIREMENT FUND, SENTINEL HOUSE, 1 S…………., S…………, P……….. to pay the Applicant an amount of R134 400.00 in respect of arrear maintenance.***

1.2 This amount is to be paid to

BANK : A…….. BANK

ACCOUNT NUMBER : 9…………….

ACCOUNT HOLDER : C. M……………

In favour of the Applicant, Mrs. Choice Mtambo

2. Furthermore, the 2nd Respondent is further ordered to pay an amount of R172 600.00 in respect of monthly

maintenance for a period of 13 months into the account of the MAGISTRATE RANDBURG, A……….... BANK, Account number 4………. Branch code 6………. under reference number 14…………...

3. ***Such payments are to be made immediately as they become due to the 1st Respondent.***"

[22] Because the order is susceptible of various interpretations the applicant still seeks clarity as to whether the maintenance's court can order it to make a lump sum payment of future maintenance. This is similar to the relief sought in terms of prayer 1 of Part B of its Notice of Motion which reads as follows: —

> ***"1. declaring that an order directing the applicant to pay an amount of future maintenance in one lump sum is contrary to the provisions of sections 37A and 37D of the Pensions Funds Act, 1958, read with the Maintenance Act, 1998;"***

[23] Due to the unclear wording of the court order, it still remains unclear whether the magistrate/maintenance court was ordering monthly

payments or a lump sum payment of 13 months' future maintenance. Hence, the applicant continued with the relief sought in this application.

[24] The 31 March 2014 order caused the applicant to amend the relief sought in Part A of its notice of motion as follows: —

"***1. This is an application wherein the applicant seeks interim relief pending the finalisation of the review proceedings as contemplated in Part B of the notice of motion.***

2. Since the Applicant's Heads of Argument were filed (on 14 March 2014) additional facts arose that are pertinent and relevant to the case at hand. These additional facts arise from the issuing by the Third Respondent of a new maintenance order on 11 March 2014 (the '11 March Order') and which was only brought to the Applicant's attention on 27 March 2014. These new facts are set out in detail in the Applicant's supplementary affidavit dated 3 April 2014 and are referred to below to the extent necessary.

3.1 The 11 March Order handed down by the Third Respondent is suspended;

3.2 Staying the notice issued in terms of section 16(3) of the Maintenance Act 1998 ("Maintenance Act"), issued by the clerk of the Third Respondent on 24 March 2014;

3.3 The Applicant is prohibited from making any payment to the First, Second, Third or Fourth Respondents;

3.4 Holding the First Respondent in constructive contempt and imposing a sentence on the First Respondent that the courts deems fit; and

4.5 The First Respondent pays the cost of this application on attorney and client scale."

[25] The parties filed additional heads of argument and affidavits as a result of the 11 March 2014 court order.

Arrear maintenance:

[26] At the court hearing, the applicant consented to the payment of R192 000 in respect of arrear maintenance to the first respondent and this amount was deposited into the account of the Magistrate Randburg Absa Bank. The applicant's consent was made an order of the court.

[27] The amended prayers are sought pending the review of the judicial proceedings leading up to them (as set out in Part B of the Notice of Motion). This would, at first blush, appear not to be competent. Excluded from the definition of "administrative action" in the Promotion

of Administrative Justice Act ("**PAJA**") 3 of 2000 is an action which was not taken by an organ of state insofar as such organ exercises a power in terms of the Constitution or a provincial constitution or exercises a public power or performs a public function in terms of any legislation. "Organ of state" is said to bear "the meaning assigned to it in section 239 of the Constitution". The latter provision defines an organ of state as: —

"***(a)*** ***any department of state or administration in the national, provincial or local sphere of government; or***

(b) ***any other functionary or institution —***

(i) ***exercising a power or performing a function in terms of the Constitution or a provincial constitution; or***

(ii) ***exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.***"

[28] Sentinel states that this problem can be resolved by falling back on the provisions of section 24 of the Supreme Court Act 59 of 1959 which provide as follows: —

"***24. Grounds of review of proceedings of inferior courts.***[1]

(1) The grounds upon which the proceedings of any inferior court may be brought under review before a provincial division, or before a local division having review jurisdiction, are —

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

[1] A maintenance court constituted in terms of the former Maintenance Act 23 of 1963 (this statute has now been supplanted by another) has been held to be an 'inferior court' falling within the ambit of the above definition, as was the children's court for purposes of this section. See ***Holtzhausen v Linde* 1978 (3) SA 27 (O)** at 31; ***Nodala v The Magistrate, Umtata* 1992 (2) 696 (Tk)**.

> ***(2) Nothing in this section shall affect the provisions of any other law relating to the review of proceedings in inferior courts.*”**

(Currently, the relevant section is section 22 of the Superior Courts Act, 2013 which came into operation on 12 August 2013. The current application was, however, launched on 31 July 2013.)

[29] A 'gross irregularity' in proceedings can occur in many different ways, particularly in the case of administrative bodies. In regard to inferior courts, there are relatively few examples, although the following have occurred: the making of an obviously unlawful adoption order; conduct of a magistrate precluding a full hearing of an application for the rescission of a judgment; substantially defective court proceedings flowing from the failure by a clerk of the children's court to comply with the provisions of the rules of that court; and a magistrate misdirecting himself on questions of fact and/or law in such a manner as to constitute a gross irregularity in the proceedings. A gross irregularity must also be prejudicial before review proceedings will succeed.

[30] An erroneous interpretation by a judicial officer of provisions of the Constitution of the Republic of South Africa, 1993, having the effect that the judicial officer did not apply the supreme law of the land, has been

held to be as fundamental an irregularity as one can get. Hearing matters on an ex parte basis for no reason whatsoever is grossly unconstitutional as is the grant of incompatible orders, on the same day in the same matter which, by necessity, will prejudice a party.

[31] Sentinel's reliance on this section of the Supreme Court Act 59 of 1959 in the circumstances of this case, where so many gross, prejudicial procedural irregularities were committed by the magistrate's court, is warranted. It is thus strictly speaking unnecessary to have prayer 2 of Part B of Sentinel's Notice of Motion postponed to a later date. The magistrate clearly misdirected himself on questions of law in such a manner as to constitute a gross irregularity in the proceedings. However, the manner in which Part A of the Notice of Motion was amended has been set out above. (Why it was sought to amend the Notice of Motion in this manner is unclear to the court.) Hence, regard is only had to the amended relief set out in the amended Notice of Motion with the addition of prayer 1 of part B of the Notice of Motion which is a declaratory order pertaining to the correct legal position.

Is Sentinel Retirement Fund entitled to a stay of the court orders?

[32] An analysis of the provisions of the Pension Fund Act 24 of 1956 is called for.

[33] Section 37A(1) of the **PFA** provides as follows: —

> "***37A(1)*** ***<u>Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998</u>, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such of a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be able to be attached or subjected to any form of execution under a judgment or order of court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken***

> ***into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Court Act, 1944 (Act No.32 of 1944), and in the event of a member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend any benefit in pursuance of such contributions, or part thereof: <u>Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependent or dependants during such period as it may determine</u>***."
>
> [emphasis added]

[34] Section 26(4) of the Maintenance Act 99 of 1998 provides as follows: —

> "***26(4) Notwithstanding anything to the contrary contained in any law, <u>any pension</u>, annuity, gratuity or***

> ***compassionate allowance or other similar benefits <u>shall be liable to be attached or subjected to execution under any warrant of or any order issued or made under this Chapter in order to satisfy a maintenance order</u>***." [emphasis added]

[35] Furthermore, an order in terms of section 16(2) of the Maintenance Act may direct the pension fund on a monthly basis to pay maintenance payments on behalf of that member from the member's pension fund.[2]

[36] For ease of reference section 16(2) is quoted in full: —

> **"*16 Maintenance and ancillary orders***
>
> ***(1) …***
>
> ***(2)(a) Any court: —***
>
> ***(i) that has at any time, whether before or after the commencement of this Act, made a maintenance order under subsection (1)(a)(i) or (b)(i);***
>
> ***(ii) that makes such a maintenance order; or***
>
> ***(iii) that convicts any person of an offence referred to in section 31(1),***

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[2] ***S v Botha* 2001 (2) SACR 281 (E)**.

shall, subject to paragraph (b)(i), make an order directing any person, including any administrator of a pension fund, who is obliged under any contract to pay any sums of money on a periodical basis to the person against whom the maintenance order in question has been or is made, to make on behalf of the latter person such periodical payments from moneys at present or in future owing or accruing to the latter person as may be required to be made in accordance with that maintenance order if that court is satisfied: —

(aa) in the case of subparagraph (i), after hearing such evidence, either in writing or orally, as that court may consider necessary;

(bb) in the case of subparagraph (ii), after referring to the evidence adduced at the enquiry or the application for an order by default, as the case may be; or

(cc) in the case of subparagraph (iii), after referring to the evidence at the trial,

that it is not impracticable in the circumstances of the case.

(b) A court-

(i) ***contemplated in paragraph (a)(i) shall only make an order referred to in paragraph (a) on application; and***

(ii) ***that convicts any person of an offence referred to in section 31(1) shall make such order whether or not any penalty is imposed in respect of that offence or any order is made under section 40(1).***"

[37] In the matter of ***Mngadi v Beacon Sweets and Chocolates Provident Fund and Others*** **[2003] 7 BPLR 4870 (D)** at page 4874 it was held that it is clear from section 26 of the Maintenance Act, and in particular section 26(4) thereof that arrear maintenance is referred to and not amounts which will become applicable in the future. The court however held at page 4874 that: —

"***It is clear from the above section, including subsection (4) that arrear maintenance is referred to and not amounts which will become applicable in the future. It is clear from the case of S v Botha 2001 (2) SACR 281 (E) per Jansen J and Liebenberg J that where an order had been made for the payment of maintenance in terms of section 29 of Maintenance Act there is no bar to <u>making a</u>***

> ***<u>continuing order for payment</u> from accused's pension fund, the Government Employees Pension Fund.***" [emphasis added]

[38] Thus, what is clear from this judgment is that benefits which have already accrued to a member of a pension fund may be attached and the pension fund ordered to pay it over to the party requiring the maintenance for the children. An order may also be made that, as and when benefits will accrue, in future, they are to be attached and paid over to the party requiring the money for purposes of the maintenance of children.

[39] However, the court went further and held that, at common-law, a wife can impugn a disposition made by a husband from a joint estate where such disposition was made in fraud of his wife's rights and with appreciation that it would prejudice those rights. The order made by Nicholas J was to order the pension fund and (incorrectly the employer as well) to retain the father's withdrawal benefit so as to make equitable and proper provision for the support and maintenance of the children.

[40] It was further held at page 4875 of the ***Mngadi*** judgment that: —

"***An analysis of section 37A(1), which has been set out earlier in this judgment, can be conveniently divided into its constituent parts as follows –***

1. ***The savings preamble that preserves the position in the Pension Funds Act itself, the Income Tax Act 58 of 1962, and the Maintenance Act, 1998, and expressly makes the rest of the subsection subject to those Acts.***

   (Conspicuous in its absence is the Divorce Act 70 of 1979.)

2. ***The prohibition provides that no benefit in the extended sense provided shall be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. (Even the rules of the Fund cannot provide for such and in addition the Fund is empowered to withhold or suspend payment thereof.)***

3. ***The proviso protecting dependants entitles the fund to pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian***

> ***or trustee for the benefit of such dependant or dependants during such period as it may determine.***

The last mentioned proviso is a general empowering one, which enables the fund <u>to pay to dependants, without specifying those arising out of maintenance orders made in the Maintenance Courts</u>. The provisions of Chapter 5 refer specifically to the enforcement of maintenance orders.

The maxim generalia specialibus non derogant has been applied in countless cases and provides that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, a court is not entitled to hold that earlier and special legislation has been indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intention to do so. See Seward v The Vera Cruz (1884) 10 App Cas 59 at 68, Gentiruco AG v Firestone SA (Pty) Ltd 1972 (1) SA 589 (A) at 603C–E.

The force of that maxim is greatly enhanced when one considers that the special provisions relate to a later Act, ie the Maintenance Act and these must take precedence over the earlier general provisions of the Pension Funds Act. <u>I do not believe that the</u>

> ***<u>Adjudicator can be faulted for holding that the provisions of subsection 26(4) do not permit a Fund to hold moneys for future maintenance</u>.***" [emphasis added]

[41] The court, after careful analysis, held that the provisions of section 26(4), save for certain exceptions, do not allow for the payment of maintenance which is not in arrears.

[42] However in ***Mngadi*** the court held that where a member resigned from a pension fund with the specific objective of thwarting payment then the relevant sections of the Maintenance Act and PFA may be interpreted to include the payment of future maintenance in one lump sum. Section 37A(1), and in particular the proviso thereto of the PFA, is clearly open to such an interpretation.

[43] It was also emphasised in the ***Mngadi*** case that the Maintenance Act was only a partial codification of the common law and that regard should also not be lost of the Constitutional mandate to fashion effective relief for any of the rights entrenched in it as is was in ***Fose v Minister of Safety Security*** **1997 (3) SA 786 (CC)** at paragraph 69.

[44] In the instant case there is a dispute of fact regarding the *bona* or *mala fide*s or otherwise of the second respondent in resigning from his work and this issue cannot be decided on affidavit. Whether the second respondent is dissipating his assets as in the ***Mngadi*** matter is also unclear. In the ***Mngadi*** matter the court ordered that a fund could be ordered to pay a benefit to a member for so long as the member was liable to pay maintenance and to deduct such maintenance from the benefit monthly should such member be *mala fide*.

[45] The point was also taken that Sentinel should have been joined as a party in the maintenance proceedings. A very good exposition regarding when a party has to be joined in proceedings is to found in ***Gordon v Department of Health: Kwazulu-Natal* (337/07) [2008] ZASCA 99; 2008 (6) SA 522 (SCA); [2009] 1 All SA 39 (SCA) ; 2009 (1) BCLR 44 (SCA); [2008] 11 BLLR 1023 (SCA) (17 September 2008)** where the following is stated in paragraph [9] at page 44: —

> "***[9] The Du Preez[3] and Traub[4] decisions had nothing to do with non-joinder, a fact acknowledged by the Labour Appeal Court. They were concerned primarily with the audi alteram***

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[3] ***Du Preez and Another v Truth and Reconciliation Commission* [1997] ZASCA 2; 1997 (3) SA 204 (A)**.

[4] ***Traub and Others v Administrator, Transvaal* 1989 (1) SA 397 (W)**.

principle in circumstances where a public body had failed to afford certain individuals a hearing in matters in which their interests and rights were at stake. The issue in our matter, as it is in any non-joinder dispute, is whether the party sought to be joined has a direct and substantial interest in the matter. The test is whether a party that is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned.[5] In the Amalgamated Engineering Union 1949 (3) SA 637 (A) it was found that 'the question of joinder should . . . not depend on the nature of the subject matter . . . but . . . on the manner in which, and the extent to which, the court's order may affect the interests of third parties'.[6] The court formulated the approach as, first, to consider whether the third party would have locus standi to claim relief concerning the same subject-matter, and then to examine whether a situation could arise in which, because the third party had not been joined, any order the court might make would not be res judicata against him, entitling him to

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[5] ***Bowring NO v Vrededorp Properties CC* 2007 (5) SA 391 (SCA) para 21.**
[6] At page 657.

> ***approach the courts again concerning the same subject-matter and possibly obtain an order irreconcilable with the order made in the first instance.[7] This has been found to mean that if the order or 'judgment sought cannot be sustained and carried into effect without necessarily prejudicing the interests' of a party or parties not joined in the proceedings, then that party or parties have a legal interest in the matter and must be joined.[8]***"

[46] On a proper construction of the above dictum Sentinel and the second respondent should have been jointed in the proceedings.

[47] Section 7 of the Divorce Act 70 of 1979 potentially creates an exception to the payment of a lump sum in respect of future maintenance.

[48] Whilst section 37A of the Pension Funds Act appears to be the only section allowing any reduction of a pension benefit, this is not the case by virtue of subsections 7(7) and 7(8) of the Divorce Act which read as follows: —

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[7] See also ***Collin v Toffie* 1944 AD 456** at 464; ***Home Sites (Pty) Ltd v Senekal* 1948 (3) SA 514 (A)** at 521A and ***Peacock v Marley* 1934 AD 1** at 3; ***Burger v Rand Water Board* 2007 (1) SA 30 (SCA)** para 7.
[8] ***Bekker v Meyring, Bekker's Executor* (1828– 1849) 2 Menz 436.**

"*(7)(a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.*

(b) . . .

(c) . . .

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund —

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that —

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when <u>any pension benefits accrue in respect of that member</u>;

(ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;

(b) ***any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned***". [emphasis added]

[49] In this regard paragraph 10 (at page 5701) of the matter of ***Griffin v Central Retirement Annuity Fund*** **[2004] 5 BPLR 5700 (PFA)** is instructive.

[50] Thus the provisions of the Divorce Act override section 37A of the Pension Funds Act. In terms of the Judicial Matters Second Amendment Act 55 of 2003, section 7 of the Divorce Act was amended as follows: —

"*11.* ***Section 7 of the Divorce Act, 1979, is hereby amended by the substitution in subsection (8)(a) for subparagraph (ii) of the following subparagraph:***

(ii) ***the registrar of the court in question forthwith notify the fund concerned that an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party***

> ***and that the administrator of the pension fund furnish proof of such endorsement to the registrar, in writing, within one month of receipt of such notification;***".

[51] Hence, the conclusion one has to reach, by way of analogy, is that the Pension Fund does <u>not</u> have to be joined, but must be informed of an order against it by the registrar of the court in divorce proceedings only but not in other proceedings.

[52] Although it is trite that the maintenance court has powers to substitute and amend its orders, it is also trite that this does not allow the maintenance court to disregard trite principles of law.

[53] Cases which also find application are the cases of ***Witvlei Meat (Pty) Ltd v The Agricultural Bank of Namibia and Another Others*** **(A220/2012) [2013] NAHCMD 216 (26 July 2013)**; ***Herf v Germani*** **1978 (1) SA 440 (T)** and the obiter dictum in ***Ondjava Construction CC v Haw Retailers*** **2010 (1) NR 268 (SC)** which held that the *status quo* should be retained and a stay of execution granted in instances where the dictates of real and substantial justice require it.

[54] As stated in the textbook by Rosemary Hunter, Johan Esterhuizen, Tashia Jithoo and Sandile Khumalo entitled **The Pension Funds Act, 1956: A Commentary on the Act, regulations, selected notices, directives and circulars** Hunter Employee Benefits Law 2010, a high court may grant the following orders: —

"

- ***For the deduction of maintenance from the provision held by a fund for a member's future benefit <u>as and when the maintenance becomes payable</u> (although, in the view of one of the authors, it should have remained unpaid for a period of 10 days before an equivalent amount may be deducted from the member's benefit and paid to the maintenance creditor[9]); and***
- ***When the member becomes entitled to a benefit, or if the member is already entitled to a benefit, that***
    - ***Payment by the fund of the benefit be withheld as security for the payment by the member in the future of maintenance; and***
    - ***As and when an amount of maintenance becomes payable (and, again in the view of one author, has remained unpaid for a period of at least 10 days) the fund must deduct the***

[9] This would thus be different to the ***Mngadi***-type orders in which the fund's obligation to pay the maintenance was not dependent on the member's payment default.

> ***amount of that maintenance from the benefit and pay it to the maintenance creditor.***" [emphasis added]

[55] In ***De Rebus*** **September 2014** the following is stated by the learned author Naleen Jeram at page 45: —

> "***Where orders are to be made against retirement funds, the fund/s must be clearly identified and the amount to be attached must be specified. It must also be noted that the maintenance amount deducted from the pension benefit payable by the fund is subject to tax. Moreover, the method of payment (whether payment should be made to the court or some other mode of payment) should be contained in the order. The common practice is for the fund to pay the maintenance ordered as a capitalised lump sum to the court, which in turn, pays the maintenance creditor on a monthly basis. Maintenance officers or debtors and their representatives, in any maintenance inquiry, can contact retirement funds or their administrators directly to establish membership and current benefit values. It is important to note that a private retirement fund is a separate juristic person and registered as such in terms of section 4 of the Pension Funds Act 24 of 1956 (and state funds are established in terms of various Acts of parliament). The***

participating employer in the fund (the employer of the debtor) is a distinct separate entity from the fund and hence any order made against the employer is not binding on the fund. The practical difficulty facing many maintenance claimants is that often they are not aware that the member (maintenance debtor) has left service and is entitled to a benefit payable by the retirement fund. ... Thus, maintenance creditors, to secure any future order granted by the court, may request the fund to withhold the benefit."

[56] The Part A relief sought, as amended, is in the form of a restoration order pending the variation of the magistrate's court order or the rescission thereof, or whatever course of action the applicant seeks to take in terms of Part B of the Notice of Motion.

[57] In the premises the court grants the order sought in Part A of the amended Notice of Motion as set out above. The relief regarding constructive contempt is also granted as the timing set out in the applicant's supplementary heads of argument clearly indicates that the obtainment of the 11 of March 2014 court order was in order to frustrate the hearing in this matter.[10]

[10] ***Tourvest Holdings (Pty) Limited v Henning*** **(20239/13) [2015] ZAGPPHC 63 (11 February 2015).**

Order

[58] The following order is made in respect of part A of the Notice of Motion as amended: —

1. Declaring that an order directing the applicant to pay an amount of future maintenance in one lump sum is contrary to the provisions of sections 37A and 37D of the Pensions Funds Act, 1956, read with the Maintenance Act, 1998.

2. The 11 March 2014 Order handed down by the third respondent is suspended.

3. Staying the notice issued in terms of section 16(3) of the Maintenance Act 1998 ("Maintenance Act"), issued by the clerk of the third respondent on 24 March 2014.

4. The applicant is prohibited from making any payment to the first, second, third or fourth respondents.

5. Holding the first respondent in constructive contempt and imposing and sentencing the first respondent to pay an amount of R6 000.00 (six thousand rand) within 15 days of this order.

6. The first respondent is ordered to pay the costs of this application on an attorney and client scale.

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JANSEN J
JUDGE OF THE HIGH COURT

For the Applicant **Advocate MA Dewrance**
Instructed by Bowman Gilfillan c/o Boshoff Inc c/o Nortje Attorneys
(Reference: Natasha Nortje) (012-424 7500/012 807 3192)

For the First Respondent C Mtambo (in person)

For the Second Respondent
Instructed by Ndweke Attorneys (Reference: CMAT31326/MR VAN RENSBURG/EG
(012-435 9444)