

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

CASE NO: 61254/14

|         |                                     |
|---------|-------------------------------------|
| (1)     | REPORTABLE: YES / NO                |
| (2)     | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3)     | REVISED.                            |
| 22/6/15 |                                     |
| DATE    | SIGNATURE                           |

In the matter between:

22/6/2015

**MATLAKU ROSINA MMOTLANA**

Applicant

and

**MABUSA VINCENT MANYANE**

First Respondent

**GOVERNMENT EMPLOYEES PENSION FUND**

Second Respondent

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**J U D G M E N T**

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**DEWRANCE AJ**

- [1] In this application, the applicant seeks orders declaring that: her ex-husband, the first respondent, is a member of the Government Employees Pension Fund (second respondent); that she is entitled to 50% of her ex-husband's pension interest calculated from 9 March 2006; that the Government Employees Pension Fund be ordered to

effect payment to her of the 50% pension interest as at 6 March 2009 (this is obviously a mistake and should be 9 March 2006) within three months from date of this order. As is customary, she seeks an order that her ex-husband pays the costs of this application.

[2] The background facts leading to this application are fairly straightforward. The applicant was married to the first respondent in community of property. The marriage subsisted from 10 October 2002 until 9 March 2006 when the late Patel J granted a decree of divorce.

[3] The order reads as follows:

- "1 *THE bonds of marriage subsisting between plaintiff and defendant be and are hereby dissolved.*
2. *THAT custody and control of the minor child be and is hereby awarded to the plaintiff, with reasonable access to defendant.*
3. *THAT the defendant pay maintenance for the minor child in the amount of R600.00 per month.*
4. *Division of the joint estate.* (emphasis added)

[4] The application is opposed by the first respondent but no heads of argument were filed by him and neither was there any appearance on his behalf.

[5] Before dealing with the merits of this application, it is important to deal with the following issues, namely:

- [5.1] whether this court lacks jurisdiction to adjudicate this dispute;
- [5.2] condonation for the late filing of the application;
- [5.3] whether the relief sought by the applicant is competent because the order of Patel J did not provide that the applicant is entitled to a pension interest as defined in the Divorce Act 70 of 1979 ("the Divorce Act").

## JURISDICTION

- [6] In his answering affidavit, the first respondent states that he is an *incola* of the North West High Court and that that court is the court of competent jurisdiction and not this court.
- [7] The applicant, on the other hand, contends that this court has jurisdiction by virtue of the fact that the second respondent is an *incola* of this court. She seeks an order that the second respondent effect payment of the 50% pension interest of the first respondent to her, which pension interest is held by the second respondent.
- [8] In *Estates Agents Board v Lek<sup>1</sup>*, it was stated that the question of whether a court has jurisdiction depends on (a) the nature of the proceedings, (b) the nature of the relief claimed therein, or (c) in some cases, both (a) and (b).

[9] In *Kibe v Mphoko and Another*<sup>ii</sup>, it was stated that where the respondent is a *peregrinus* the court has jurisdiction if, in the case of a mandatory interdict, the act is to be carried out within such area, or in the case of a prohibitory interdict, the act against which the interdict is claimed, is about to be done in such area.

[10] In the matter at hand, the applicant seeks a declaratory order directed at the order of Patel J as well as an order directing the second respondent, who is an *incola* of this court, to perform an act. The act must be performed in this jurisdiction. If the principles laid down in the *Lek* judgment *supra* are followed, I am satisfied that this court has jurisdiction.

[11] Accordingly, this point *in limine* is dismissed.

## **DECREE OF DIVORCE OF 2006 AND CONDONATION**

[12] I propose to deal with the second and third issues simultaneously because, in my view, they are inextricably linked.

[13] The applicant points out that this application is brought more than eight years after the order of Patel J. She was not aware of the amendment of the “*applicable legislation which enabled [her] to apply for the payment of [her] 50% interest*”. She only became aware of the “*applicable legislation*” recently.

- [14] This is the sum total of the application for condonation. No prayer for condonation is sought in the notice of motion. The applicant's founding affidavit does not identify the applicable legislation which she alleges she became aware of recently.
- [15] The first respondent, in his answering affidavit, contends that the order of Patel J did not provide that the applicant is entitled to a pension interest as defined in the Divorce Act; the court order was also not issued in terms of section 37D(4) of the Pension Funds Act 24 of 1956 ("Pension Funds Act") as it did not set out the percentage of the member's pension interest or specific amount; and that the Fund was not expressly ordered to endorse its records and make payment of the pension interest.
- [16] The applicant, on the other hand, contends that, in terms of the decree of divorce, the joint estate of the parties must be divided. The pension interest of the first respondent formed part of the joint estate which should be divided on an equal basis.
- [17] She stated that the relief sought "*will provide the second respondent with the necessary information to give effect of the decree of divorce regarding the division of joint estate which included the first respondent's pension interest*".
- [18] Section 7(8) of the Divorce Act provides that:

*"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 any pension benefits accrue in respect of that member;*

*(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;*

*(b) ..."* **(emphasis added)**

[19] However, section 7(7) of the Divorce Act deems the pension interest as part of that party's assets. It provides as follows:

*"(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) ..."*

[20] Section 37D(1)(d) of the Pension Funds Act provides that:

*"(1) A registered fund may -*

*...*

(d) *deduct from a member's benefit or minimum individual reserve, as the case may be -*

(i) *any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act, 1998 (Act No 99 of 1998); or*

(ii) *any amount assigned from his or her pension interest to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act, 1979 (Act No 70 of 1979);*

(e) *..." (emphasis added)*

[21] Section 37D(4) deals with the mechanics of effecting payment of the pension interest.

[22] An interpretation of section 7(7)(a) read with section 7(8) suggests that any order made in terms of section 7(8) must be made simultaneously with the order for a decree of divorce.

[23] Patel J did not make an order that a portion of the pension interest should be assigned to the applicant. It merely states that the joint estate should be divided. In the absence of an application for varying the order of Patel J, this application is still born.

[24] Turning back to condonation, it is common cause that this application has been brought eight years from the date of divorce. The reasons for condonation and the prospects of success are weak.

[25] Therefore, the application for condonation stands to be dismissed.

[26] Accordingly, the following order is made:

[26.1] the application for condonation is dismissed;

[26.2] the main application is dismissed;

[26.3] no order as to costs.

  
DEWRANCE, AJ

#### **Representation for the applicant**

Counsel

Adv A R Venter

Instructed by Attorneys:

Jordaan and Smith Inc  
73 Thomas Edison Street  
Menlo Park  
Pretoria  
Ref: Mr Johan Jordaan/A027  
Tel: 012 346 1840

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i 1979 (3) SA 104 8 (A) at 106 3F  
ii 1958 (1) SA 364 (O)