Reportable: YES / NO Circulate to Judges: YES / NO Circulate to Magistrates: YES / NO Circulate to Regional Magistrates: YES / NO

IN THE HIGH COURT OF SOUTH AFRICA

(Northern Cape Division)

Case Nr: 1076/2006

Case Heard: 08/12/2006
Date delivered: 15/12/2006

In the matter between:

SectionI.1NOMTHETHO YVONNE ELESANG APPLICANT

and

SectionI.2PPC LIME LIMITED FIRST RESPONDENT
SectionI.3PPC LIME EMPLOYEES PROVIDENT FUND SECOND RESPONDENT
SectionI.4MARAPELO JUSTICE ELESANG THIRD RESPONDENT
SectionI.5STANDARD BANK OF SOUTH AFRICA FOURTH RESPONDENT

Coram: Olivier J

JUDGMENT

OLIVIER J:

PARTIES AND BACKGROUND

1. The applicant, mrs Nomthetho Yvonne Elesang, and the third respondent, mr Marapelo Justice Elesang, are married to each other in community of property. There is one minor child born of their marriage.

2. The applicant has instituted divorce proceedings in which she claims, **inter alia**, one half share of the third respondent's pension interest as at the date of divorce, and maintenance in respect of the minor child.

3. The third respondent had been in the employment of PPC Lime Limited (the first respondent) and he had in such capacity been a member of PPC Lime Employees Provident Fund (the second respondent). The third respondent had, apparently after the issue of summons, left the employment of the first respondent and in the process he became entitled to payment (by the second respondent) of what was referred to (by the deponent for the second

respondent) as a withdrawal benefit.

4. The applicant then approached this Court for a provisional order to the effect that, pending the finalisation of the divorce action, the second respondent pay half of the amount of the third respondent's *"pension interest"* into the trust account of the applicant's attorneys, alternatively (and in the event that the amount had already been paid to the third respondent) that the fourth respondent, the Standard Bank of South Africa Limited, be ordered to pay half of such amount into the said trust account, and that the third respondent, and any other respondent who opposed the application, be ordered to pay the costs jointly and severally.

5. A rule **nisi** to that effect was granted. On the return day the application was opposed by only the second respondent.

6. The application was founded upon allegations that the applicant was entitled to half of the money by virtue of her marriage in community of property to the third respondent, that the third respondent had neglected to provide financial assistance in respect of the minor child and that the applicant feared that the third respondent would *"not meet his present of future maintenance commitments and that he* (would) *abuse the monies …. without making provision for the …. payment of maintenance"* and that he would *"waste the pension monies and that* (she would) *be seriously disadvantaged thereby"*.

<u>OPPOSITION</u>

7. These allegations have not been denied by or on behalf of the second respondent and, as already mentioned, the third respondent did not even oppose the application.

8. In its opposing papers the second respondent opposed the application on the grounds, broadly speaking:

8.1. that the concept of *"pension interest"*, as envisaged and defined in the Divorce Act, no 70 of 1979, could only be applicable if, at the time of the divorce, the particular party is still a member of a fund as envisaged in section 1 of the Divorce Act and that, because the third respondent would not be such a member when their marriage is dissolved, the applicant would not be entitled to the relief envisaged in subsections (7) and (8) of section 7 of the Divorce Act; and

8.2.that, in any event, the provisions of section 37A(1) of the Pension Funds Act, 24 of 1956, would preclude the second respondent from paying any part of the amount (to which the third respondent had become entitled) *"to a party other than the member spouse (the Third Respondent) and/or the non-member spouse (the Applicant) and/or dependants of the member"*.

PENSION INTEREST

9. It is so that the applicant, in her notice of motion, referred to the amount to which the third respondent had become entitled as his *"pension interest"*. When regard is had to the definition of this phrase in section 1 of the Divorce Act (with reference to pension funds) it:

9.1.appears to apply only where one of the spouses **is** a member of a pension fund at the date of the divorce; and

9.2.means *"the benefit to which that party …. **would have been entitled** … if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office"*.

(My emphasis)

10. The third respondent will not be a member of the second respondent if and when an order of divorce is granted, because he has already left the employment of the first respondent.

11. In view of the fact that the third respondent has already become entitled to the benefits and has already left his employment, long before the date of the divorce, the formula based on benefits to which he *"would have been entitled"* in the event of a resignation, can also strictly speaking no longer apply. It is clear that the hypothetical event upon which this formula was intended to be based is a resignation "*on the date of the divorce"* and that the calculation was intended to be made on this basis when the pension benefits eventually accrued to the member at some time after the divorce.

12. Any other interpretation would mean that the non-member spouse would also become entitled to pension interest made up of contributions made by the member spouse after the date of the divorce, which would be senseless and clearly contrary to the fundamental principle that the joint estate is to be divided *"as it existed at the date of the divorce"* (see **Maharaj v Maharaj and Others** 2002 (2) SA 648 (D) at 649H-I and **Sempapalele v Sempapalele and Another** 2001 (2) SA 306 (OPD)).

13. Section 7 (7)(a) of the Divorce Act provides that a *"pension interest"* (as defined in section 1) will be deemed to be a part of the assets of a party and if the amount to which the third respondent has become entitled could no longer be seen as a *"pension interest"*, as envisaged in the provisions of section 7 (7)(a) of the Divorce Act, it could not in terms of these provisions be deemed to be part of the assets of the third respondent.

14. The common law position was simply that a party's pension **interest** did not form part of the assets of a joint estate (see **De Kock v Jacobson and Another,** 1999 (4) SA 346 (W) at 348, **Sempapalele v Sempapaplele and Another, supra,** and **Maharaj v Maharaj and Others, supra**, at 651) and this was in all probability the reason for the enactment of section 7 (7)(a) of the Divorce Act. It is therefore only by means of this deeming provision (and the provisions of subsections (7) and (8) of section 7 of the Divorce Act) that a non-member spouse would be able to secure a part of a pension **interest**.

15. Section 7 (8) of the Divorce Act provides for the payment of part of a *"pension interest"* to a non-member spouse *"when any pension benefits accrue in respect of that member"*. It seems to be clear that these provisions envisage a future accrual of benefits (after the date of divorce), which is also no longer possible in this case.

16. It was also submitted on behalf of the second respondent that the amount being held by the second respondent (who stated that it had not yet been paid to the third respondent and that the *"benefit …. is still pending payment from the Second Respondent"*) can no longer been seen as a *"pension interest"*, as envisaged and defined in the Divorce Act and in the sense of denoting a right to or interest in certain benefits as and when they accrue at some time in future (after the date of divorce), and that the amount now constituted the third respondent's pension **benefits**.

17. It is of interest to note that both the phrases *"pension interest"* and *"pension benefits"* are used in section 7 (8)(a)(i) of the Divorce Act, apparently as referring to the nature of a member's rights prior to date of the accrual and subsequent thereto respectively (see **De Kock v Jacobson and Another, supra,** at 349A-C).

18. It was on the basis submitted (on behalf of the second respondent) that the applicant would not, under these circumstances, be entitled to any relief in terms of the provisions of sections 7 (7) and 7 (8) of the Divorce Act. On the face of it this contention appears to be correct, as eventually also conceded on behalf of the applicant. These provisions quite clearly apply only to a pension **interest** which has not yet accrued as at the date of the divorce and which belongs to a party who is still a member of the particular fund as at the date of divorce (see **De Kock v Jacobson and Another, supra,** at 349 and **Sempapalele v Sempapalele and Another, supra**, at 311-312).

19. This does not, however, mean that the applicant will not be entitled, in the divorce action, to any part of the pension **benefits** which have accrued to the third respondent.

20. As already pointed out a pension **interest** does not by common law form part of the assets of a joint estate. A distinction must, however, be drawn between a pension **interest** which has not yet accrued and one which has accrued and has in the process been converted into a pension **benefit** (see **Sempapalele v Sempapalele and Another, supra,** at 311). In the case of a pension **benefit** the accrued right would form part of the joint estate (see **De Kock v Jacobson and Another, supra,** at 349H, **Sempapalele v Sempapalele and Another, supra,** at 311C and **Maharaj v Maharaj and Others, supra,** at 650-651).

21. It is therefore not really necessary, at this stage, to decide whether the applicant will still be able to utilise the provisions of section 7 of the Divorce Act as a means to claim half of the accrued right (see **Sempapalele v Sempapalele and Another, supra**). The fact is that the accrued right (pension benefit) is in any event going to be a part of the joint estate and, in principle at least, the applicant is going to be entitled to one half of the nett value of that estate (see **Maharaj v Maharaj and Others, supra,** at 649I and 652).

22. Apart from simply claiming (in the divorce action) a one half share of the third respondent’s pension interest in terms of the provisions in section 7 of the Divorce Act, the applicant also claims an order for the division of the joint estate. The third respondent (who is also the defendant in the divorce action) has not opposed this application and there is therefore no indication

before this Court that, for example, the applicant might on some or other basis be ordered to forfeit the patrimonial benefit pertaining to the accrued pension benefit.

23. In heads of argument filed on behalf of the second respondent it was submitted that it *"may be found, when the value of the joint estate is determined, that the applicant is entitled to an amount which is less than 50% of the pension interest"*. This might be so, but in the absence of any contrary indication it must be assumed to be at least equally possible that the applicant is going to be entitled, as her share in the nett value of the joint estate, to an amount at least equal to 50% of the accrued pension benefits.

24. It should be born in mind that the applicant is not at this stage claiming payment of her half share. The relief she claims in this application is aimed at merely securing an amount equal to 50% of the accrued pension benefits, pending finalisation of the divorce action, and, by necessary implication, also pending determination of her share of the joint estate and its value. Even if she is not going to be able, in the divorce action, to claim payment of half of the pension benefit on the basis of section 7 (7) of the Divorce Act, she has the right to secure at least half of the pension benefits (which in any event now form part of the joint estate) to protect her interest in the joint estate.

25. In fact, in my view the applicant might possibly have been entitled to move for an order securing the whole of the accrued pension benefits **pendente lite**. It is not only half of the pension benefits that now forms part of the joint estate, but all of it, and if a case was made out that the third respondent might squander any part thereof to the detriment of the joint estate, the applicant would have been entitled to protect it pending finalisation of the divorce action (see **The South African Law of Husband and Wife,** Hahlo, 5th edition, pp 197-198 and 256, **Ex parte Dean** 1946 (1) PH B29 (CPD), **Family Law Service (Commentary)**, Schäfer, pp 21-22 and section 20 of the **Matrimonial Property Act**, 88 of 1984).

26. The applicant stated under oath that she is receiving no co-operation from the third respondent in the divorce action and that she indeed fears that the third respondent is going to squander the pension money. The third respondent and his attorney (who has in the meantime withdrawn from

record) apparently failed to react to requests for an undertaking that half of the amount would be paid over to be held *"pending the result of the divorce action"*.

27. These averments have not been contradicted and in these circumstances, and in the absence of any opposition by the third respondent, the balance of convenience clearly favours the applicant in her bid to secure at least half of the pension money payable to the third respondent. It appears that it is only one lump sum that is concerned here.

28. The second respondent has chosen not to disclose what the amount of the *"withdrawal benefit"* is going to be, but this would not have rendered the orders in the rule **nisi** unenforceable. The second respondent would quite clearly know what the amount (and half thereof) is and the fourth respondent would in all probability have been able to identify the source and nature of such a deposit (had it been paid over into the third respondent's bank account).

29. In the second respondent's heads of argument it was furthermore submitted that *"the prayer against the third respondent is not competent as the applicant has not set out the value of the pension interest"* and he referred to the **dicta** in the **Sempapalele** case at 311G-H and the **Maharaj** case at 650H-I. The facts in the **Sempapalele** case were entirely different from those in this matter. The applicant in the **Sempapalele** case claimed final payment of a specific amount, **viz** half of the pension benefit paid to the first respondent when he had resigned more than a year after the date of their divorce. She would, however, quite obviously only have been entitled to a part of the pension interest calculated as if the first respondent had resigned on the date of the divorce, and she failed to prove what the value of the pension interest (and of her half portion) was at the date of the divorce.

30. In the matter at hand the applicant is not claiming payment of any amount in these proceedings. She intends doing so in the divorce action and it will be only then that the value of the pension benefits might become relevant. Furthermore the pension benefits in the present matter accrued before the date of the divorce and not thereafter (as in the **Sempapalele** case), and the value of such benefits as at the date of the divorce therefore does not come into play here.

31. The facts in the **Maharaj** case were different from those in the **Sempapalele** case, but insofar as the latter case was approvingly referred to therein, the clear distinction between the facts in the **Sempapalele** case and the present matter should not be lost sight of.

32. It is so that it was held in the **Sempapalele** case that a *"share of the pension interest … is not to be awarded … without more ado"* and that there should be sufficient evidence to enable the Court to decide the extent or **quantum** of the share to be awarded. Once again, however, the applicant is not at this stage claiming the award of any share.

33. The applicant, however, went further in her founding affidavit and also made out a case to the effect that the third respondent had been neglecting his maintenance obligations. These allegations have also not been denied or disputed and it is trite that a High Court can grant an order securing pension benefits to protect children and to ensure that such funds remain available for their maintenance (see **Soller v Maintenance Magistrate, Wynberg, and Others** 2006 (2) SA 66 (C), **Mngadi v Beacon Sweets & Chocolates Provident Fund and Others** 2004 (5) SA 388 (D), **Magewu v Zozo and Others** 2004 (4) SA 578 (C) and **Burger v Burger and Another** 2006 (4) SA 414 (D)).

34. Mr Coetzee eventually appeared on behalf of the second respondent at the hearing of this matter. He had not been the author of the heads of argument which had been filed on behalf of the second respondent and, while he did not in so many words abandon or concede the submissions therein, he limited his argument to only one submission, **viz** that the applicant had failed to prove an apprehension of irreparable harm.

35. I am afraid that I do not agree. In the first place the applicant has to my mind made out a strong **prima facie** case as regards her rights to the third respondent's pension benefits (see **Commissioner for Inland Revenue, Transkei, and Another v JALC Holdings (SA) (Pty) Ltd and Another** 1991 (4) SA 646 (Tk) at 654G).

36. In the second instance the requirement of *"a well-grounded apprehension of irreparable harm if the interim relief is not granted"* (see **Coalcor (Cape) (Pty) Ltd and Others v Boiler Efficiency Services CC and Others**

1990(4) SA 349 (C) at 353G) entails no more than a *"'reasonable apprehension' of injury … one which a reasonable man might entertain on certain facts"*, and the applicant was not required *"to establish that, on a balance of probabilities flowing from the undisputed facts, injury will result"* (see **Interdicts and Related Orders**, Meyer, p 70).

37. Against the background of the third respondent failing to respond to requests to secure half of the pension benefits, and not only neglecting his maintenance obligations towards the minor child, but even taking steps to deprive the child of medical support, the applicant's apprehension is in my view more than reasonable.

38. It was not argued that there would under the circumstances have been any alternative remedy available to the applicant and in my view the requirements for an interlocutory interdict have been satisfied.

SECTION 37 A(1) OF THE PENSION FUND ACT

39. In my view the second respondent's submissions regarding the provisions of section 37 A(1) of the Pension Funds Act is devoid of any merit. The relevant provisions of section 37 A(1) read as follows:

"… no benefit … or right to such benefit … 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, … : Provided that the fund may pay any such benefit … or part thereof to any one or more of the dependants of the member or beneficiary or to a guardian or to a trustee for the benefit of such dependant or dependants ..."

40. It is clear that these provisions are intended to render pension benefits and the right to such benefits incapable of being *"reduced, transferred or otherwise ceded"* or of being *"pledged or hypothecated … or subjected to any form of execution under a judgment or order of a court of law"*, but subject to the proviso that it may be paid to, **inter alia**, a dependant or a guardian *"for the benefit of such dependants …"*.

41. Payment of the benefits into a trust account pending the finalisation of the divorce action, and possibly an order of that Court in respect of such money,

could not in my view amount to a contravention of the provisions of section 37 A (1). The rule **nisi** can by no stretch of the imagination be seen as having the effect, at this stage, of reducing, transferring, ceding, pledging, hypothecating or subjecting the benefits in any way envisaged in those provisions (compare **Van Aartsen v Van Aartsen** 2006 (4) SA 131 (T)).

42. It was common cause that the provisions of section 37 A(1) would not prevent payment of such benefits to, **inter alia,** a non-member spouse. Any other interpretation of these provisions would have rendered the provisions of subsections (7) and (8) of section 7 of the Divorce Act meaningless. Payment into the trust account of the applicant's attorneys would quite clearly have amounted to payment to her agent. In any event, the orders in the rule **nisi** are clearly not aimed at final payment of any amount into the hands of any party, but merely at securing an amount pending another Court's ruling on whether the applicant is entitled to payment thereof on any basis at all.

43. In the second respondent's heads of argument it was also submitted that, because section 7 (8)(a) of the Divorce Act empowers only a *"court granting a decree of divorce"* to order payment of a part of a pension interest or benefit, this Court is precluded from confirming the rule **nisi**. In view of what has already been said, this argument can never be correct. It is, as already mentioned, quite clear that the effect of the rule **nisi** was not to order payment as envisaged in section 7 (8)(a), but rather to secure part of the benefits to enable the Court which is going to grant the decree of divorce, to order such final payment.

<u>COSTS</u>

44. It is so that the third respondent failed to agree that half of the pension benefits be paid into the trust account of the applicant's attorneys pending finalisation of the divorce action. In view of the second respondent's opposition (and the basis thereof) it is, however, unlikely that it would in any event have agreed to honour such an undertaking by the third respondent. The money is in fact still being held by the second respondent and has not even been paid into the bank account at the fourth respondent. In argument on behalf of the applicant it was eventually indicated that a cost order was no longer sought against the third respondent

45. The second respondent chose to oppose the application on

grounds which in my mind are entirely without merit and I can see no reason why it should not be ordered to pay the costs of the application.

RELIEF

46. In view of the fact that the second respondent has not yet paid the amount to the third respondent (or into his bank account with the fourth respondent) the order contained in paragraph 1.2 of the rule **nisi** (which would have compelled the fourth respondent to pay over the money into the trust account of the applicant's attorneys) can be discharged at this stage.

47. Due to the fact that it was apparently not known to the applicant, when the application was initiated, whether the second respondent had already paid the benefits to the third respondent, paragraph 1.1 of the rule **nisi** contains the introductory words *"In the event that the PPC Lime Employees Provident Fund has not yet paid the pension interest of Marapelo Justice Elesang to him"*. The second respondent has now disclosed that it has not yet paid out the money to the third respondent and these introductory words may therefore be deleted.

48. Furthermore, and in view of the above, the phrase *"pension interest"*, in the remainder of paragraph 1.1 of the rule **nisi**, should be amended (as requested on behalf of the applicant) to read *"pension benefits"*.

49. The following orders are therefore made:

1. **Paragraph 1.1 of the rule nisi issued on 5 September 2006 is amended by deleting the introductory words *"In the event that the PPC Lime Employees Provident Fund has not yet paid the pension interest of Marapelo Justice Elesang to him"* and by substituting the phrase *"pension interest"* with the phrase *"pension benefits"*.**
2. **So amended paragraph 1.1, as well as paragraph 1.3, of the rule nisi are confirmed.**
3. **The second respondent is ordered to pay the costs of the application.**

____

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

For the Applicant: Mr V Haddad
On behalf of: Elliott Maris Wilmans &Hay
KIMBERLEY

For the 3rd Respondent: Adv W Coetzee
On behalf of Majila & Partners
KIMBERLEY

(i)