

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 108955/2024

1. REPORTABLE: NO
2. OF INTEREST TO OTHER JUDGES: NO
3. REVISED: YES

Date: 12 November 2024

A handwritten signature in black ink, which appears to be "G. J. J.", is written over a black rectangular redaction box.

In the matter between:

MAMOTLHABANE MARTHA MOLOISANE

First Applicant

and

GOVERNMENT EMPLOYEES PENSION FUND

First Respondent

BETHUEL R. MOLOISANE

Second Respondent

MINISTER OF POLICE

Third Respondent

Flynote: *Revision of ex tempore judgment – extent of permissible supplementation - in civil proceedings includes supplementation of reason, but not insertion of supplementary reasons.*

Urgent anti-dissipation application – pension fund interest of non-member spouse married in community of property, pending division of joint estate

JUDGMENT

K. Strydom AJ

Introduction

- [1] On the 10th of October 2024, this matter was heard in the urgent court and a reasoned *ex tempore* judgment was handed down. The transcript of proceedings reveals that, after all was said and done, on the very cusp of adjourning the Court, an urgent-court-addled brain relayed the following befuddlement to the parties:

“Should the parties require written reasons, they are directed to apply for same within five days hereof where my judgment would then be supplemented, bearing in mind that this is interim relief.” [Underlining my own reflection of the emphasis relayed audibly in Court)

- [2] The second Respondent promptly availed himself of this invitation and sent a request for written reasons. A party would be remiss if it failed to seize, not only the opportunity to have the *ex tempore* judgment transcribed at the behest of the Court, but also the chance (however slight) that the ‘supplementation’ of the judgment may be favourable to his cause.
- [3] The manner in which the invitation was phrased is regrettable and does not convey the true intention: that parties may request a transcript of the judgment, which I would duly revise for clarity and formatting and editing, whereafter such a written and revised reflection of the *ex tempore* judgment would be furnished to the parties.
- [4] Whether or not ‘supplementation’ of an *ex tempore* judgment by way of revision is permissible, however, requires further consideration.

Legal principles relating to revision and variations of *ex tempore* judgments

- [5] The fallibility of a Judge (especially one who is called upon to make urgent pronouncements), without the benefit of grammar, spelling, or lucidity checks afforded by to her by the written Word¹ and, crucially, the wisdom of revision with fresh eyes, has been known since the days of Johannes Voet.
- [6] That wise old Dutchman was of the opinion that: “...*post pronunciationem ejus judex etiam supplere possit eodem die reliqua omnia, quae ad consequentiam*

¹ Microsoft Word

quidem jam statutorum pertinent, sed sententiae adhuc desunt nec non explicare ea, quae in sententia obscure sunt posita, ita actorum verba emendare, tenore sententiae perseverantea”²

- [7] Three centuries later, the South African Court of Appeal not only translated the passage, but also confirmed Voet’s wisdom. In *S v Wells*³ the Appeal Court (as it was known then) was presented with two versions of an *ex tempore* judgment by the Court a quo (one being revised and one not). In determining which version should be considered at the appeal, Joubert JA held that:

“According to the strict approach á judicial official isincapable of alteration, correction, amendment or addition by him in any manner at all..... A variant of this strict approach permits a judicial officer to effect linguistic or other minor corrections to his pronounced judgment without changing the substance thereof.

The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment provided that the sense or substance of his judgment is not affected thereby (tenore substantiae perseverante)....

According to Voet a judge may also, on the same day, after the pronouncement of his judgment add (supplere) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (explicare) what has been obscurely stated in his judgment and thus correct (emendare) the wording of the record provided that the tenor of the judgment is preserved.

In my judgment Voet’s approach should be accepted as a correct statement of our common law on this matter. It moreover accords with South African practice.

A careful comparison of the unrevised and revised judgments establishes that both of them basically dealt with the same rationes decidendi excepting that the revised judgment did so in much greater elaboration but without changing or violating the tenor of the unrevised judgment.”⁴ [Underlining my own]

- [8] Note is taken of the fact that the Constitutional Court, in 2022, in *Tuta v S*,⁵ revisited the enlightened approach per Wells. There the majority found that:

² See D42.1.46, Donellus (1527-1591) ad D42.1.45 nr 4, 1 Hollandsche Consultation c 290 and Voet (1647-1713) 42.1.27

³ *S v Wells* (152/89) [1989] ZASCA 154; [1990] 2 All SA 1 (A) (27 November 1989))(Wells”)

⁴ *Wells* (supra) at at 820E-F.

⁵ *Tuta v The State* (CCT 308/20) [2022] ZACC 19; 2023 (2) BCLR 179 (CC); 2024 (1) SACR 242 (CC) (31 May 2022) (“Tuta”)

[62] In busy criminal courts, the extempore judgment is often a necessary part of judicial practice. No discouragement of this useful practice is warranted. Infelicities of style, grammar, spelling and word choice may require revision; and they should be permitted. A patent error or omission may be corrected. However, the substantive reasons for the judgment, handed down in court, must stand. That is the authoritative pronouncement of the court, conveyed to the accused. Importantly, it is through this judgment that the accused is convicted and it also through it that the reasons for the conviction are reflected. If an ex tempore judgment is given, its reasons are authoritative, and they may not be altered or embellished to give further expression to what the court meant to convey. The time for that is when the judgment is handed down by the court. This is a somewhat less permissive holding as to the competence of a trial court to vary its judgment in a criminal case than was allowed in *Wells*, a pre constitutional era decision.”

[9] In terms of the majority’s approach, a Judge may therefore not elaborate on, contextualise or interpret her *ex tempore* reasons during revision. However, it is important to note that the limitation imposed by the majority in *Tuta* was done within the context of criminal proceedings and the constitutionally entrenched fair trial rights of accused.

[10] In civil proceedings, on the other hand, the competence of a Court to vary its judgment is governed by Uniform Rule 42 and the principles of common law. The Supreme Court of Appeal (SCA) in *HLB International (South Africa) v MWRK Accountants and Consultants*⁶ described these principles as follows:

“Rule 42(1)(b) of the Uniform Rules of Court provides that the high court may, in addition to any other power it may have on its own initiative or upon the application of any party affected, rescind, or vary an order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission.

.....

There are, however, exceptions that relate to ‘the correction, alteration and supplementation of a judgment or order’. It was, the court held, ‘against this common law background, which imparts finality to judgments in the interests of certainty, that Rule 42 was introduced’, catering for the rectification of the same types of mistakes that the common law had recognised.”⁷

⁶ *HLB International (South Africa) v MWRK Accountants and Consultants* [2022] ZASCA 52; 2022 (5) SA 373 (SCA). (“*HLB International*”)

⁷ *HLB International* at para 9

“The exceptions recognised in the pre-constitutional case law are referred to in Firestone South Africa (Pty) Ltd v Genticuro. They include the exceptions that the court may: (a) ‘clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter “the sense and substance” of the judgment or order’; and (b) ‘... correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention’, which ‘... exception is confined to the mere correction of an order in expressing the judgment or order so as to give effect to its true intention’ and ‘does not extend to altering its intended sense or substance’.”

- [11] The competence of a Court, in civil proceedings, to correct errors, clarify ambiguity and/or interpret its own decision and order, therefore more closely aligns with the enlightened approach as per Voet and *Wells supra*. In revising a transcribed *ex tempore* judgment, it is permissible for a Judge to elaborate and clarify its reasoning, provided that the sense and substance thereof remains unaltered.
- [12] To this extent the majority in *Tuta’s* pronouncement that:” , *the substantive reasons for the judgment, handed down in court, must stand*“ finds equal application in civil proceedings. Simply put: in revising an *ex tempore* judgment, it is not open to a Judge to insert new substantive reasons that may not have been apparent to her at the time of handing down of the *ex tempore* judgment. Save where the failure to include such a reason in the *ex tempore* was as a result of obvious error or omission, adding such new reasoning *ex post facto* amounts to an impermissible alteration of the sense and substance of the judgment.

Framework for revision in casu

[13] The present revision will be dealt with as follows:

- a. The transcript of the *ex tempore* judgment and the transcript of the proceedings will be uploaded to Caselines simultaneously with this judgment.
- b. Contextualisation, referencing the papers and certain pertinent aspects and concepts, will first be provided.

- c. Save for the usual editing of spelling or linguistic errors, the removal of interjections and addition of citations, the *ex tempore* judgment, as transcribed, will be reproduced below.
- d. Where the *ex tempore* reasoning is obscure and requires clarification or further context, such contextualisation or clarifications will be clearly demarcated in italics following the designation: “Insert:”
- e. Where the *ex tempore* judgment omitted findings made or reasons given during the proceedings, these findings or reasons will likewise be demarcated in italics following the designation: “Insert:”

Contextualisation

- [14] The Applicant and the second Respondent are married in community of property and are presently embroiled in divorce proceedings.
- [15] The crux of the present application revolves around the pension benefit held by the second Respondent with the first Respondent and the Applicant’s potential entitlement to 50% thereof at finalisation of the divorce.
- [16] The Applicant alleges that the second Respondent informed her telephonically that he intends to resign from his employment with the third Respondent in order to obtain access to the full pension benefit before finalisation of the divorce. Whereas she could only become entitled to 50% of the pension benefit by virtue of their marital regime once a Court determines the division of the joint estate, the second Respondent, prior to such Court ordered division, could (dependant on the provisions of the particular pension fund) be entitled to 100% of the benefit upon resignation. In that event, the Applicant fears that he would he dissipate 100% of the benefit in frustration of her claims in the joint estate.
- [17] She is unaware of his employment status, the details of his pension benefit and whether or not same had already been paid out by the first Respondent to the second Respondent.
- [18] The second Respondent denies that the telephonic conversation occurred and states that it would have been impossible as he was not in possession of a phone at that time. Conspicuously absent from his answer is a pertinent denial of the assertion that he intends to retire. Admittedly, seen in isolation, the vague

response to the applicant's averments regarding the telephone call are innocuous. However, as indicated to counsel for the second Respondent during the hearing, in view of the importance of his current employment status and pension benefit details and/or status, I found the following perplexing and, frankly disingenuous:

a. In paragraph 2 of the founding affidavit, the Applicant alleges that:

The Second Respondent is BETHUEL R. MOLOISANE, an adult South African male currently residing..... The second Respondent was, at the time of the institution of the divorce proceedings, under the employment of the South African Police Services holding the rank of Captain at the Moeka — Vuma police station situated in Garankuwa. The second Respondent is a member of the first Respondent's pension fund, however the further particulars concerning the membership information such as the membership number of such second Respondent are unknown to me, and this has been the case throughout the subsistence of the marriage.

b. In his answering affidavit, the second Respondent answers as follows:

Save to disclose that my current residential address is at.....the contents of this paragraph, in so far as they relate to me, are noted, the rest I cannot admit or deny as they are not known to me

[19] It is implausible that the second Respondent is unaware of his own employment status or membership of the first Respondent.

[20] The Applicant also relied on an incident that occurred in April 2024, to substantiate her fear that the second Respondent intends to dissipate assets. On the 4th of April 2024 she was informed by her son that the matrimonial home was being advertised. Upon enquiry, the transferring attorney confirmed that the house had already been sold, that it was registered in the name of the second Respondent and his brother and that they (the attorneys) were unaware that the second Respondent was married in community of property. The attorney proposed that the Applicant ratify the sale “..as they were ready to lodge at the Deeds office...”, but that payment of the sale amount would be held in trust pending finalisation of the divorce.⁸

⁸ Founding affidavit paras 5.27 to 5.29

[21] In answer to these allegations, the second Respondent asserted that:

“.....the property complained about was purchased jointly by myself and my younger brother, Nicholas Moloisane, two years before I entered into matrimony with the Applicant. The sale of the property was known to the Applicant. The Applicant left the common property in February 2024, and the movables were shared between ourselves then. I admit that the Applicant did not sign the sale agreement, opting to sign a written consent, which she ultimately did before the transfer was registered. The unfounded allegations contained, in the entire paragraph 5 of the Applicant's Affidavit are wild allegations bereft of any substance whatsoever, and the contents thereof are denied.”

[22] Notably, this answer is vague as to the timeline of the Applicant's alleged knowledge of the sale. It completely fails to address the assertion that, when the property was sold, the attorneys involved had not been informed of the second Respondent's marital regime. Neither does it admit or deny that a compromise was reached regarding the withholding of the purchase price, as a result of the dispute relating to the property. The only positive assertion is an admission that the Applicant did not sign the sale agreement and that she “ultimately” signed a written consent before the transfer was registered. The phrasing of this answer skirts around the cardinal allegation that he had attempted to sell the matrimonial home, without her consent or knowledge.

Ex tempore finding on urgency

[23] With regards to urgency, this application is predominantly anti-dissipatory of nature.

[24] The applicant has raised issues of the conduct of the attorney and the second respondent in the divorce. I cannot attach any value thereto.

[25] As to undue harm, however, the undisputed fact is that whilst the property was not dissipated, there was an attempt to do so in April 2024.

[26] Upon becoming aware thereof, the applicant contacted the transferring agent. A settlement was reached in terms of which the transferring agent would retain 50% of the purchase price of the property pending outcome of divorce.

[27] That is essentially what is also sought in the present application: that the funds in the second respondent's Government Employment Pension Fund be retained pending the outcome of the divorce.

[28] It is appropriate to mention the trite principles as elucidated in for instance *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154F-H where Price, JP stated:

"If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in an affidavit."

[29] This was also confirmed in *Transnet v Rubenstein* 2006 (1) SA 591 (SCA) 26 and 27 where it was held that:

"The respondent is required to make necessary allegations to set up a defence or grounds for opposition and support such allegations by evidence."

[30] In this instance two predominant issues lend towards a reasonable apprehension that the applicant would not obtain substantial redress in due course:

- a. Firstly, the attempted disposition of the property, which on the papers before me are not contested, and
- b. Secondly, the disconcerting fact that in his answering affidavit the second respondent has taken the stratagem of denying basic facts within his knowledge, such as his employment status and his membership of the first respondent by stating that these facts insert: are merely noted or do not fall within his knowledge.

[31] Clearly on a common-sense approach the last-mentioned cannot be true. I raise this because it is of utmost importance to this application given that the applicant states that she does not know whether he has retired or whether he is still employed and what the status insert: of his pension benefit is.

[32] Insert:

- a. *In view of the persisting uncertainties as to the status of employment of and/or pay-out of benefits to the second Respondent, the potential harm (dissipation of assets) complained of by the Applicant remains imminent and ongoing. In basic terms: there is a real risk that the second Respondent could or has already resigned and that the pay out of the benefits could occur at any time. Once that occurs, substantial redress in due course would not be obtained.*
- b. *The Applicant's apprehension as to the bona fides of the second Respondent vis-a-vis the distribution of assets,(especially when viewed against the prior attempt to sell the property without her knowledge), becomes more tangible when one considers the manner in which the second Respondent has answered the present application. His recalcitrance in providing any information as to his employment or the pension benefits is ominous to say the least.*
- c. *The second Respondent's reliance on Plascon Evans to argue that, the Applicant's averments have effectively been 'nullified' by his bare denials and contrary averments, is misplaced. As reiterated to counsel during the hearing, the present matter concerns interim relief. Plascon Evans does not apply. In fact, in interim proceedings, the converse position applies. As confirmed by the Supreme Court of Appeal in Simon NO v Air Operations of Europe AB and others 1991 (1) SA 217 (SCA) at 228 G-H:*

"The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicants, together with such facts as set out by the respondent that are not or cannot be disputed and to consider whether, having regard to their inherent probabilities, the applicants should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, he cannot succeed".

[33] As such I find that there is sufficient urgency for the matter to proceed to argument on the so-called merits thereof.

Ex tempore finding on the interim interdict

[34] In this matter I have already made my order pertaining to urgency, having found the matter to be urgent.

[35] The applicant essentially applies for an interim interdict against the first respondent prohibiting it from transferring 50% of the second respondent's pension pending the outcome of the divorce proceedings.

[36] I have during course of argument already indicated to the applicant that certain of their prayers pertain to final relief, which this court will not grant and have given direction in that regard.

Prima facie right

[37] Briefly stated, I am satisfied that by virtue of being married in community of property the applicant has a *prima facie* right in this regard. See for instance *M.S.S (born R) v M.P.S and Others (19424/2021) [2022] ZAGPPHC 113 (25 February 2022)* ("MSS v MPS"), where the learned judge, quite rightly, remarked that:

*"In my view, with regard to the prima facie right, such right has been satisfied by the fact that the applicant is married to the first respondent in community of property and that entitlement arises as a result of first respondent's pensionable interest due to the first respondent on his retirement or at finalisation of divorce."*⁹

[38] Insert:

- a. *In the present context, my agreement with this statement relates to the vesting of the Applicant's entitlement to 50% of the pension interest at date of division of the joint estate by order of Court.*

[39] I pause to add here that at this stage there is no determination as to the entitlement or percentage thereof, however, for purposes of a *prima facie* right one references the interest in such a right which by virtue of the marriage in community of property the applicant has satisfied in proving.

⁹ *M.S.S (born R) and M.P.S (19424/2021) [2022] ZAGPPHC 113 (25 February 2022)* at para 8

[40] Insert:

- a. *During the hearing I referred counsel for the second Respondent to the following excerpt from MSS v MPS, which more lucidly explains the nature of the prima facie right:*

“[5].....As alluded to 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 and section 7(7) and 7(8) of the Divorce Act 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 the pension benefit. The Pension Fund in terms of section 37D and 37A expressly provides how the deductions are to be made.”

Apprehension of harm

[41] Pertaining to the issue of a well-grounded fear of irreparable harm if the relief is not granted, I had enquired from the second respondent’s counsel whether this matter does not fall into the so-called quasi-vindictory actions where delivery of the specific property is claimed under some legal right to obtain possession in which case as the applicant need not allege irreparable loss in as much as there is a presumption, which may be rebutted by the respondent, that the injury is irreparable nor need the applicant show that it has no other satisfactory remedy.

[42] Insert:

- a. *This query emanated from the second Respondent’s reliance, in his heads of argument on Stern & Rusken No v Appleson 1951 3 SA 800 (W) 813 B-C, where the court held that:*

“The claims now under consideration being neither vindictory nor quasi-vindictory the applicants cannot obtain an interdict unless they prove in addition to a prima facie case an actual or well grounded apprehension of irreparable loss if no interdict is granted. In the case of vindictory or quasi-

vindictory claims this is presumed until the contrary is shown. In the case of all other claims it must be established by the applicant for the interdict as an objective fact. It is not sufficient to say that the applicant himself bona fide fears such loss."

- b. *As neither the Applicant, nor the second Respondent sought to argue the Applicant's claim as being vindictory or quasi-vindictory, the only import of this questioning is that no presumption of harm exists and the Applicant has to prove same..*

[43] In this regard see for instance *V.B.P v K.M.P and Another* [2022] ZAECHC 39 (30 August 2022) ("VBP"), Insert: *where the Court explained the difference between anti-dissipation orders and preservation orders based on vindictory or quasi vindictory actions :*

"[24] The nature and effect of the anti-dissipation interdict is to establish or show a certain state of mind of the respondent, regarding his assets. The crucial consideration is that the debtor is in some way getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors. Accordingly, the anti-dissipation interdict is available to petitioners who seek to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets. This is not a usual case where the purpose is to preserve an asset which is an issue between the parties. Here, the petitioners lay no claim to the assets in question."

[44] In *M.W.S v N.S.S and Another* 2021 (6) SA 201 (NWM) (9 March 2020) ("MWS") the Court applied the following dictum from *Eskom Pension and Provident Fund v Krugel and Another*¹⁰ to similar circumstances as *in casu*:

"His pension interest, which is a benefit determinable only at the time of resignation, had already become payable."

[45] By parity of reasoning, the Court in *M.W.S* then explained that::

"If the pension benefit becomes due and payable before finalisation of the divorce action, the pension benefit will be paid to the first respondent, which amount will form part of the joint estate together with all their assets of the joint estate, for

¹⁰ *Eskom Pension and Provident Fund v Krugel and Another* 2004 (4) SA 578 (C) at para 12

purposes of determining the patrimonial benefits to which the parties are entitled as at the date of divorce.”

[46] Herein lies the Applicant’s apprehension of harm for purposes of an anti-dissipation order: The second respondent has submitted that the applicant did not make any averments regarding irreparable harm. That is incorrect. She clearly states in the founding affidavit paragraph 8.3 the irreparable harm lies in the disposition of any such pension fund interest paid prior to date of divorce.

[47] Insert:

- a. *The judgments in VDP and MWS were also cited as examples of similar cases where the Courts anti dissipation orders were also sought within the context of pension benefits accruing to a non member spouse in divorce proceedings.*
- b. *The Courts in both VDP and MWS, reiterated that, in addition to the requirements for an interim interdict, an applicant in an anti-dissipation application also must prima facie prove that the respondents has an intention to defeat the Applicant’s claims or to render them hollow, by secreting or wasting assets.¹¹*
- c. *In VDP, it was confirmed that the Respondent had retired and that the pension fund benefits due to him would be paid out prior to finalisation of the divorce. The anti-dissipation application was refused on the basis that the Applicant had at all times been aware of the pension fund benefits, as well as the age at which the Respondent would retire. (i.e, the fact that he retired was not indicative of an intent to frustrate her claims).*
- d. *Furthermore, as the Respondent in VDP would only receive a third of the total pension benefit as a lumpsum and thereafter monthly payments, the Court held that he could not dissipate the benefit in the manner alleged by the Applicant.*

¹¹ In MWS at para 32 the Court held that an Applicant must prove “... *prima facie* that the respondents had an intention to defeat the petitioners’ claims, or to render them hollow, by secreting their assets” whilst in VDP at para 24, the Court stated that: “...*The nature and effect of the anti-dissipation interdict is to establish or show a certain state of mind of the respondent, regarding his assets. The crucial consideration is that the debtor is in some way getting rid of funds or is likely to do so, with the intention of defeating the claims of creditors.*”

- e. *Overall, in VDP, the Court found that the Applicant did not establish the requisite mal fide intent on the part of the Respondent.*
- f. *In MWS, the Respondent resigned from her employment approximately 6 months after the institution of the divorce proceedings. The Applicant alleged that she resigned in order to deprive him of his share of the pension interest or with the intention of dissipating the pension fund to his prejudice.*
- g. *In contrast to the present application, however, the Respondent in MWS described her financial position at length. She also established to the satisfaction of the Court that her resignation was due to her ill health and not as a result of mala fide intent.*

Balance of convenience

[48] The second respondent submits that the Applicant has not any averments in respect of the prejudice she would suffer should the order not be granted. Given her submissions relating to the harm apprehended (as set out supra), this submission is untenable. The prejudice lies in the disposition of any monies due to her prior to the date of divorce.

[49] *Insert:*

- a. *The highwater mark of the second Respondent's submissions regarding the balance of convenience, seems to be that the Applicant, in her founding affidavit, failed to pertinently reference "balance of convenience". These being motion proceedings, affidavits serve a dual purpose of pleadings and essential evidence.¹² It more often than not happens that a single factual contention supports several legal conclusions. In casu, for instance, the Applicant's assertion regarding harm by their very nature also address her prejudice to be suffered. As stated in her replying affidavit:*

"In furtherance to the foregoing, the Second Respondent further submits that "...she also fails to allege that she stands to suffer financial loss...". I respectfully submit that anyone in the position of the Second Respondent has a clear understanding that pension benefits and/interests are in no any

¹² *Foize Africa (Pty) Ltd v Foize Beheer BV & Others* 2013 (3) SA 91 (SCA) para 30

other form than financial, and I have clearly demonstrated that I stand to lose my share of the pension interests.”¹³

- b. *In this regard, the second Respondent’s opposition consists of a list of averments allegedly not made in the founding Affidavit. He concludes that:*

“The Applicant failed to allege that the balance of convenience favours the grant of the interim interdict in favour of the Applicant. She also failed to allege that it is also in the public interest that the scales of justice tilt in her favour, more so when one takes into consideration the prejudice that the Applicant will suffer vis-a-vis the prejudice to be suffered by the Second Respondent.”¹⁴

[50] I note that the second Respondent has failed to indicate what prejudice he would suffer should an interim order be granted.

[51] Insert:

- a. *By way of comparison, in MWS, the Respondent had taken the Court into her confidence by disclosing the dire straits she found herself in because of her ill-health. She explained that she needed her share of the pension interest to support herself and pay for her medical expenses as well as pay debts of the joint estate. Her candour tipped the scales in her favour.* ¹⁵

[52] The balance of convenience favours the granting of an interim order.

Ex tempore finding on costs

[53] With regards to the issue of costs the applicant has requested a punitive cost order. In this regard she referred to the conduct of the second respondent in opposing the application well knowing there is no prejudice to them. That has not been fully canvassed, and it is not borne out by evidence. I have already indicated I am not inclined to make punitive cost order in urgent interim applications. In any event, in my discretion I decline to make such an order, *in casu*.

[54] Pertaining to the scale of fees of counsel on the party and party costs in the high court, the Applicant contended for Scale C (in the alternative to costs on an

¹³ Replying affidavit at para 11.3(b)

¹⁴ Answering affidavit at para 15.1(d)

¹⁵ MWS at paras 37 and 38

attorney-client basis), whilst the second Respondent argued that Scale A would be appropriate.

[55] I pause here to note that the second respondent in view of my prima facie indication of the wording of the order (below), argued that it seems to be a partial upholding of the notice of motion. As such, the argument went, each party (being partially successful) should pay its own costs. This is not a correct exposition. The applicant is not “only partially” successful.

[56] The portion of the notice of motion that I have greatly amended pertains to an alternative order sought by the Applicant as a result of the fact that, to date hereof, the second respondent has, by a way of bare denial, failed to indicate whether he is still employed or whether he has received the pension funds etc.

[57] In my ruling on urgency I have already alluded to the fact that litigation is not a game or a stratagem of ‘catch me if you can’. Where a respondent is called upon to answer a certain averments by an Applicant, a “bare denial” of said averments will not suffice in motion proceedings.¹⁶

[58] I am satisfied that costs on a scale B would be justified given the relative complexity of the matter.

[59] Insert:

- a. *Albeit stated within the context of final relief, the dictums in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd; 1984 (3) SA 623 (A) at 634E-635C in as well as Wightman t/a JW Construction v Headfour (Pty) Ltd [2008] 2 All SA 512 (SCA) para 13 provide a detailed exposition of what is required from a party in furthering its opposition in motion proceedings. As stated in Wightman::*

“There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge

of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.¹⁷ [Underlining my own]

Ex tempore Order

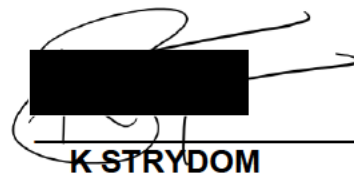
[60] In view hereof I make the following order:

1. That the applicant's noncompliance with the Uniform Rules of the honourable Court relating to form, service and time periods is condoned and this matter is dealt with as a matter of urgency in terms of Rule 6(12) of the rules of this court.
2. That the first and third respondents are interdicted and restricted from paying out and/or distributing the 50 percent share of the pension interest due to the second respondent should such second respondent resign prior to the finalisation of the presently ongoing divorce proceedings between the applicant and the second respondent in the Ga-Rankuwa Regional Court under case number NW/ODI/RC427/22.
3. That 50 percent of the second respondent's pensionable interest be withheld by the first and/or the third respondents pending the finalisation of the divorce action between the parties and for the payment of such pensionable interest

¹⁷ Wright at para 13

pending determination of the pension interest of the Applicant in the divorce court, if any, to be affected as per the determination of the divorce court.

4. In the event that the first and/or the third respondents have already paid out or distributed the pension interest and such funds have been transferred to the second respondent's bank account, that the first, second and/or third respondents be ordered to disclose the entire amount of the pension interest paid to the second respondent and the date such payment was made by the first respondent.
5. The second respondent and/or the first and/or the third respondents are ordered to disclose the Government Employees Pension Fund membership number of the second respondent.
6. The second respondent is ordered to pay the costs of this application with counsel fees determined on scale B.



A handwritten signature in black ink, appearing to be 'K. Strydom', is written over a solid black rectangular redaction box. The signature is fluid and cursive.

K STRYDOM
ACTING JUDGE OF
THE HIGH COURT OF
SOUTH AFRICA,
GAUTENG DIVISION,
PRETORIA

Date of hearing and ex tempore judgment: 10 October 2024.

Request for reasons received: 17 October 2024

Transcript (proceedings and ex *tempore* judgment) obtained: 4 November 2024

Revised and signed Judgment handed down: 12 November 2024

For the Applicant:

Ms D Moekoena instructed by D Mokoena Attorneys.

For the Respondent:

Adv W Mathebula instructed by Mmusetsi Sefanyetso Attorneys

