IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, EAST LONDON CIRCUIT COURT)

Case No:EL766/2024

In the matter between:

A[…] T[…] **Applicant**
(BORN M[…])

And

S[…] C[…] T[…] **1st Respondent**

OLD MUTUAL SUPERFUND PENSION FUND **2nd Respondent**
(REGISTRATION NUMBER:[…])

JUDGMENT

Zono AJ

Introduction

[1] The applicant approached this court on urgent basis on 03rd May 2024. The enrolment of this matter for hearing on urgent basis was a sequel to a

directive dated 30th April 2024. The directions for urgent matter issued by the learned Judge are as follows:

> *"1. The matter may be enrolled on the basis of urgency.*
> *2. The first respondent must be served per sheriff. The second respondent can be served per email.*
> *3. The matter may be heard on Friday, 3rd May 2024 at 09:30."*

[2] In breach of the directions given by the learned Judge, papers were not served by the sheriff. They were not even served upon the first respondent, but on the attorneys who were at the time not representing the first respondent. It appears that the application papers were served upon the attorneys on behalf of the first respondent per email on 02nd May 2024 at about 10:54. No papers were left in the court file. Application papers were only brought back into the court file after 09:30 am on 03rd May 2024, which was the scheduled time for hearing of the matter. No reasonable explanation was given by the applicant about the conduct of only bringing the papers back into court file after the scheduled time for hearing, and also a conduct of putting the court under such inconvenience of not timeously preparing for the hearing of the matter. The applicant's representatives even suggested that they may be heard even without having read the papers. That submission was curious. For the sake of innocent litigants, the matter was rescheduled to be heard at 11:30 am on 03rd May 2024. This demonstrates the tardy manner in which this application was handled by the applicant.

[3] The applicant seeks relief in her notice of motion that is couched in the following terms:

> *"1. That the forms and service provided for in the Rules are dispensed with and that the matter is disposed of as one of urgency at the time and place set out herein, in terms of Rule 6(12) of the Uniform Rules of court.*
>
> *2. That Rule Nisi be hereby issued, calling upon the respondents or any interested party to show cause, if any on 21st May 2024 (the return date) or so soon thereafter as the matter may be heard as to why the following order should not be made final:*

*2.1 The first respondent is interdicted and prevented from accessing or utilizing or dealing with the applicant's 50% share of the pension fund of the first respondent, pending the finalization of the litigation instituted at Makhanda High Court, under case Number **CA 67/2024.***

*2.2 The second respondent is directed to safeguard, preserve and or ensure the applicant's 50% share of the pension interests, pending the finalization of the litigation instituted at Makhanda High Court under Case Number **CA67/2024.***

3. That 2.1 and 2.2 shall operate as an interim interdict with immediate effect, pending the finalization of this matter.

4. That the applicant is granted leave to serve all papers, notices, or process in those proceedings via email to the second respondent.

5. Costs of suit.

6. Any further and/or alternative remedy that may be granted, as may be necessary".

[4] The first respondent vehemently opposes the matter. He has done so by delivering his notice of opposition and answering affidavit. The first respondent, besides his opposition on merits, raises a point in *limine* relating to urgency of the matter.

<u>Urgency</u>

[5] The starting point under this topic should be the provisions of Rule 6(12)(b) of the Uniform Rules of Court, wording of which is as follows:

"(*b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is (sic) averred render (sic) the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."*

[6] Appreciating that there are no paragraphs in the founding affidavit in which circumstances which render this matter urgent are set forth, the Counsel for the applicant contended that, as this application is an application for an anti-dissipation order, it is urgent in nature. In a long winded answer, the Counsel

could not direct the attention of the court to any paragraph or part of the affidavit where the circumstances which render this matter urgent are set out explicitly. He further sought refuge to the annexures annexed to the founding affidavit. Even those annexures could not assist.

[7] The founding affidavit is devoid of an explicit averment which contains reasons why the applicant claims that she could not be afforded substantial redress in due course. I next deal with the nature of the provisions and consequences of failure to comply therewith.[1]

[8] There is legal authority for proposition that:

> "*A statutory requirement construed as peremptory needs exact compliance for it to have the stipulated legal consequence, and any purported compliance falling short of that is a nullity.*"[2]

Non-compliance with a peremptory provision results in nullity[3]. The wording of the subrule demonstrates that the provisions are peremptory. The use of the word **"Must"** in a text usually demonstrates the peremptory nature of the provisions and they need exact compliance. In the absence of the requisite allegations the application cannot be heard as one of urgency.

[9] There is another reason why this matter cannot be heard as matter of urgency. There is a court order dated 19th February 2022 annexed to the papers as annexure AT5. That court order was granted by the Regional Court, East London. The second respondent was directed thereby to "*withhold 50% of the pension interest due and payable to the first respondent by virtue of his resignation from Old Mutual Superfund Pension Fund administered by the second respondent under member number […]pending finalization of the divorce proceedings.*"

[10] Divorce proceedings were finalized on 19th April 2024. The present proceedings were instituted on 30th April 2024, approximately 11 days after the finalization of the divorce proceedings in the Regional Court, East London. No explanation was made by the applicant for such a delay or failure to

[1] ***Mangala v Mnagala*** 1967 (2) SA 415 (E)
[2] ***Shalala v Klerksdorp Town Council and another*** 1969 (1) SA 582 (T) at 587 A-C
[3] LAWSA, Part 1, Vol 25, Page 399; G.M Cockram: Interpretation of Statues, 3rd Edition, Page 163

expeditiously institute the present proceedings except for a mere justification that on 26th April 2024 the applicant acted with speed to institute the review application in Makhanda High Court seeking to set aside the Judgment granted on 19th April 2024. No explanation was proffered as to why this application was not lauched simultaneously with the review application in Makhanda High Court.

[11] It is well established that the applicant cannot create its own urgency by simply waiting until the normal rules can no longer be applied.[4]

There are degrees of urgency and it is well established that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. **Plasket AJ** (as he then was)[5] held that:

"[*37] It is trite that applicants in urgent applications must give proper consideration to the degree of urgency and tailor the notice of motion to that degree of urgency. It is also true that when courts are enjoined by rule 6(12) to deal with urgent applications in accordance with procedures that follow the rules as far as possible, this involves the exercise of a judicial discretion by a court 'concerning which deviations it will tolerate in a specific case.*

[38] …… it is not every case in which the applicant may have departed from the rules to an unwarranted extent that the appropriate remedy is the dismissal of the application. Each case depends on its special facts and circumstances. This is implicitly recognised by Kroon J in the Caledon Street Restaurants CC case when he held – looking at the issue from the other perspective, as it were – that the 'approach should rather be that there are times where, by way of non-suiting an applicant, the point must clearly be made that the rules should be obeyed and that the interest of the other party

[4] ***Ngquma and another v State President; Damons No v State President; Jooste v State President*** 19884) SA 224 at 243 D-E; ***Sokhani Development and Consulting Engineers (Pty) Ltd v Alfred Nzo District Municipality (***1254/2024) [2024] ZAECMKHC 44 (26 April 2024) Para 12

[5] ***Nelson Mandela Metropolitan Municipality and Others V Greyvenouw CC and Others*** 2004 (2) SA 81 (SE) Para 37-38

and his lawyers should be accorded proper respect, and the matter must be looked at to consider whether the case is such a time or not."

[12] It is well established that in pronouncing on the issue of urgency, the court exercises a wide discretion.[6] For the exercise of that discretion the court require sufficient facts, which in this case are lacking.

[13] This matter was heard on an extremely urgent basis and on a day other than the normal court day. The respondent and his lawyer were afforded only one day to prepare their opposing papers, in circumstances where the matter was not extremely urgent. Lack of proper regard to degrees of urgency is an abuse of court process. If I were to consider the issue of urgency alone I would struck the matter of the roll with costs. In the light of the fact that the matter was fully argued before me, I am inclined to dispose of the matter in its entirety.

[14] The applicant herein seeks an interdictory relief, which shall operate as an interim interdict pending final determination of the review application instituted in Makhanda High Court under case number **CA 67/2024.** The applicant, somehow creates a confusion in paragraph 3 of her notice of motion wherein she seeks that the interim interdict must operate pending finalization of this matter. This attest to the tardiness and inept manner in which this matter has been conducted, regard being had to paragraph 2 above. While the lifespan of the interim interdict sought remains unclear the nature of the proceedings is easily discernible. This is an application for an interim interdict.

[16] The requirements which the applicant for an interlocutory interdict has to satisfy are the following:[7]

"(a) Prima facie right;

[6] ***Cornerstone Logistics (Pty)Ltd v Zacpak Cape Town Depot (Pty) Ltd*** 2022 (1) ALL SA 13 SCA Para 30
[7] ***Setlogelo v Setlogelo*** 1914 AD 221at 227, ***National Treasury v Opposition to Urban Tolling Alliance*** 2012 (6) SA 223 (CC) at 235 D-E

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and ultimate relief is eventually granted;

(c) Balance of convenience in favour of the granting of the interim relief; and

(d) The absence any other satisfactory remedy."

[17] The applicant is of the view that she is entitled to 50% portion or share of first respondents pension benefits by virtue of their marriage that was in community of property. In the Regional Court part of the order that was granted on the 19th April 2024 reads as follows:

"(a) A decree of divorce is granted.

(b)The defendant shall forfeit all benefits arising out of a marriage in community of property, in favour of the plaintiff in relation to the following property: -

(i) Immovable property, a house situated at […]

(ii) Pension interest of plaintiff held in the Old Mutual Superfund Pension Fund with member number […].

(iii)Motor vehicle- Volkswagen 2014 Polo TSI registration[…]"

It is this Regional Court Judgment that is subject of Review in Makhanda High Court.

[18] Two requirements were hotly debated in court during the hearing of the matter. Whether or not the applicant satisfied that the kind of harm she will suffer is irreparable in the event that this interim order is not granted; and that there was no satisfactory remedy available to the applicant was subject of

debate. These two requirements, evinced themselves as elephant in applicant's room.

Irreparable Harm

[19] Irreparable harm or loss may be defined as the loss of property (including incorporeal property or money) in circumstances where its recovery is impossible or improbable.[8] Irreparable loss will occur when a person entitled to a particular thing is forced to take merely its value, or is obliged to expend money which he cannot possibly recover.

[20] The Counsel for the applicant was at pains to grapple with a proposition that, if the respondents decide to dissipate the money, he still has the avenue available to her, which is an action for recovery of 50% share from first respondent's estate or property. We now know that, besides the pension interest or benefits held with the second respondent, the first respondent has an immovable property situated at[…]. We know from the judgment of the Regional Court that the first respondent has a motor vehicle bearing registration letters and numbers[…]. It stands to reason that any harm that may occur, is not one that is irreparable. Applicant's Counsel did not contend that it would be impossible or improbable to institute proceedings for recovery of lost money, if it happens to be dissipated.

[21] It is not only the harm that must be established, but most importantly, the irreparability of the harm is always pivotal and central to the enquiry. Not every harm entitles applicant to a relief- the harm must be of such a nature that it is irreparable. Infact there is no case made out in the founding affidavit from which it can be deduced that the harm that may occur in the event that this order is not granted is irreparable.

[8] Erasmus: Superior Court Practice, 2nd Edition, Volume 2 Page D6-19

[22] **Diemont JA**[9] re-emphasized the trite principle that an applicant must make out its case in the founding affidavit. The learned Judge aptly put his point as follows:

"*When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is. As was pointed out by Krause J in Pountas' Trustee v Lahanas 1924 WLD 67 at 68 and as has been said in many other cases: '…….an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny.*"[10]

On this ground alone this application cannot succeed. There is yet another reason why this application cannot succeed.

No other Satisfactory Remedy

[23] The satisfactory remedy available to the applicant is discussed at length in the preceding paragraphs under irreparable harm. No contention at all was made to assail this proposition. If the first respondent dissipates the pension benefits in question, it is available to the applicant to institute proceedings for the recovery of her share as demonstrated above.

[24] The history of this litigation is that, Divorce proceedings between the applicant and first respondent were instituted in the Regional Court. In the context of that litigation a court order was granted in terms of which the second respondent was directed to withhold the same 50% of first respondent's pension interest pending final determination of the divorce proceedings.

[9] Director of Hospital Services v Mistry 1979 (1) SA 626 (A)at 635H-636A
[10] ***Nkume v Transunion Credit Bureaus (Pty) Ltd and another*** 2014 (1) SA 134 Para 7

Aggrieved by the judgement of the Regional Court, the applicant instituted review proceedings in Makhanda High Court on 26th April 2024.

[25] A proposition was made to the applicant that the Regional Court has proved itself to be able to grant interdicts, and it has done so in this case. It stood to reason that it could provide an alternative satisfactory remedy. Instead of approaching this court, the applicant should have approached the Regional Court. Similarly, the applicant should have incorporated this application in the review application as Part 1 or A thereof. That would have provided a satisfactory remedy.

[26] Applicant's response to that was to the effect that, those two courts do not provide other satisfactory remedy but a similar remedy. A remedy, so the argument went, is something different but with similar effect. My understanding of the argument is that the two courts mentioned above provide only an alternative forum with a similar remedy. The argument seems to be quite persuasive. However, it does not take away the fact that a claim for recovery of money in the event of this order not been granted and the money is used, it provides the remedy envisaged in our law. On this score too this application must fail.

[27] This application is in the form of an anti-dissipation interdict. It is normally stated that the requirements that must be satisfied to obtain an anti-dissipation interdict are the same as for any other type of interdict.[11] However, it has been held that this kind of interdict is '*sui generis*'[12]

[28] In **Knox D'Arcy** referred to above at 372 F Stegmann J held that:

"The *question which arises from this approach is whether an applicant needs show particular state of mind on the part of the respondent i.e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the*

[11] ***Knox D'Arcy Ltd v Jamieson*** 1996 (4) SA 348 (A) at 373

[12] Herbstein and Van Winsen: The Civil Practice of the High Courts of South Africa, 5th Edition, Volume 2 Page 1492

claims of the creditors. Having regard to purpose of this type of interdict, the answer must be, I consider, yes, except possibly in exceptional cases."

There is no evidence that the first respondent is getting rid of the pension benefit or is likely to do that with an intention to defeat or frustrate the creditors.

[29] In the amalgam of this, the application cannot succeed. I see no reason why costs should not follow the result.

Order

[30] In the result I make the following order.

30.1 The application is hereby dismissed

30.2 The applicant is ordered to pay costs of the application.

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A.S ZONO

ACTING JUDGE OF THE HIGH COURT

Counsel for the Applicant: : **ADV. SELLEM**

Instructed by **:** **F.T Dengana Attorneys**

Applicant's attorneys
36 Chamberlain Road
Berea
East London
Tel: 043 722 1739
E-mail: ftdenganaattorneys@gmail.com

Counsel for the 1st Respondent: **MR GODONGWANA**
Instructed by : **GODONGWNA AND PARTNERS INC**
First Respondent's Attorneys
6 Steward Drive
2nd Floor
Berea
East London
E-mail:loyisog@godongwana.co.za

2nd Respondent: **OLD MUTUAL SUPERFUND PENSION FUND**
E-mail: superfundprincipalofficer@oldmutual.com

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Date Delivered: 10th May 2024