REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER: 2016/13170

(1) REPORTABLE: NO	
(2) OF INTEREST TO OTHER JUDGES: NO	
(3) REVISED	
	26 November 2021
.....	.....
SIGNATURE	**DATE**

In the matter between:

HENDRIK JACOBUS ROELOFSE N.O. Applicant

in his capacity as Receiver and Liquidator

and

MARTHINHUS WILHELMUS LIEBETRAU First Respondent

FIRST NATIONAL BANK Second Respondent

Delivered: 26 November 2021 - This judgment was handed down electronically.

JUDGMENT

Karachi AJ:

Introduction

1. On 1 July 2021, the applicant filed an urgent *ex parte* application in terms of which he sought the following orders:

    1.1. That the first respondent be interdicted from utilizing R 366 746, 38 and be ordered to pay the said amount in the trust account of the applicant;

    1.2. That the second respondent freeze the funds to the value of the said amount in the first respondent's bank account; and

    1.3. In the alternative to paragraphs 1.1 and 1.2 above, that the first respondent be interdicted from utilizing the funds for any purpose and that such funds be paid to the trust account of the applicant until the finalisation of this application.

2. On 6 July 2021, a *rule nisi* was issued by the court calling upon the respondents to show cause on 31 August 2021 why the order should not be made final. The court further ordered that paragraphs 1.1 and 1.2 above shall serve as an interim interdict until the return date.

3. The first respondent subsequently filed his answering affidavit and the applicant, his reply. On 31 August 2021, the *rule nisi* was extended to 25 October 2021. This matter came before me on the return date.

4. In opposing the application, the first respondent argues that:

4.1. the applicant is not entitled to the relief;

4.2. the applicant is *functus officio* pursuant to a compromise which was reached alternatively the applicant fulfilled his functions and duties by preparing a final division order and giving effect thereto and therefore has no further power to recover from the applicant any amount;

4.3. the relief granted is not competent;

4.4. the applicant failed to disclose all the material facts in the exparte urgent application and should therefore be ordered to pay costs *de bonis propriis*.

Background

5. On 15 December 2016, the first respondent and Mrs Tereza Liebetrau (“Mrs Liebetrau”) dissolved their marriage according to a deed of settlement which was made an order of court. The parties were married in community of property

and the applicant was appointed as the receiver and liquidator in respect of the division of the joint estate.

6. In terms of the deed of settlement, the applicant had the following powers and functions:

"5.2.1 To realise the assets of the joint estate;

5.2.2 To demand from the Plaintiff and the Defendant a true and correct account of any portion of the assets which either of them may have taken possession of, or which either of them may have dealt with;

5.2.3 To demand from Plaintiff and the Defendant the payment or delivery of any such portion of the assets of the joint estate;

5.2.4 Have the right to make physical inspection of assets and to take inventories;

5.2.5 Have the right to question the parties and to obtain all explanations deemed necessary by them"

7. After the applicant was appointed as receiver and liquidator on 15 December 2016, he requested proof from the first respondent as to his pension interest.

8. The first respondent provided the applicant with an Old Mutual Fund Select Annuity Quotation dated 16 July 2016. As appears from this document, the first respondent was a member of the Protektor Preservation Pension Fund; the date of retirement was listed as 1 July 2016; the fund credit as at 16 July 2016, was R733 492. 76; and the pension would be due from the date the first respondent retires payable monthly in arrears on the 25th of each month.

9. The applicant proceeded to prepare a draft division order.

10. On 14 April 2020, the first respondent addressed an email to his attorneys. As appears from this email, the first respondent made various corrections to the draft division order. Paragraph 5.1 of the draft provides that the Old Mutual Pretektor Preservation Pension Fund does not form part of the joint estate due to current case law. The first respondent further provided an excel spreadsheet to the applicant. In terms of the spreadsheet, no reference is made to the first respondent's pension held with Old Mutual Protektor Preservation Fund under the heading 'Pension'.

11. On 13 May 2020, the applicant wrote to the first respondent's attorneys in terms of which the applicant enquired about the first respondent's pension. He specifically enquired why the first respondent had said that Mrs Liebetrau was not entitled to 50% thereof. According to the applicant, Mrs Liebetrau was entitled to the 50% share amounting to some R 400 000.

12. Again, on 29 July 2020 the applicant wrote to the first respondent's attorneys informing them that that Mrs Liebetrau was entitled to a 50% share. He further enquired why Mrs Liebetrau was only offered 50% of an amount of approximately R 223 000. On 31 July 2020, Mrs Liebetrau enquired from the applicant about the amount of R223 000 in respect of the pension and said that the amount should definitely be higher than R233 000 in respect of the 50% share.

13. On 20 November 2020 the applicant sent the first respondent's attorneys a further draft division order for comment. Paragraph 5.1 of the draft division order provided as follows:

"5.1 OLD MUTUAL PROTEKTOR PRESERVATION PENSION FUND

5.1.1 Mr. Liebetrau is the owner of an Old Mutual Protektor Preservation Fund with a fund credit of R 732 141. 96 as on 30 June 2016 which forms part of his assets and therefore part of the joint estate.

5.1.2 Accordingly, Mrs. Liebetrau is entitled to half of the fund value as at date of divorce being R366 070.90."

14. On 25 November 2020, the first respondent's attorneys wrote to the applicant informing him that they had discussed the matter with their client, the first respondent, and that, with reference to relevant case law, Mrs Liebetrau had no claim in respect of the capital of the first respondent's 'living annuity'. The

applicant was referred to the judgment of the Supreme Court of Appeal in *Montanari v Montanari* (1086/2018) [2020] ZASCA 48 (5 May 2020) where the SCA held that the capital of a living annuity did not fall within the annuitant's estate. Essentially, the SCA found that if a spouse holds a living annuity at the time of divorce, the capital of the annuity is not an asset in his estate however, the future annuity revenue stream is an asset and should be valued.

15. The applicant therefore proceeded on the assumption that the first respondent had a living annuity and therefore wrote to the first respondent's attorneys on 1 December 2020, stating that he has taken note of the *Montanari* judgment and that even though the *"annuitant's capital (Martin's ± R 733 492. 76) will not form part of his estate but the monthly income stream will be an asset in his estate"* and that either an actuary be appointed to calculate the amount or the parties agree to an amount.

16. Subsequent thereto, the first respondent's attorneys informed the applicant that, for settlement purposes, the first respondent would accept R500 000 into their trust account. Nothing was specifically stated about the annuity revenue stream.

17. On 15 February 2021, the applicant wrote to the first respondent's attorneys stating that *"Since* [the applicant] *cannot without any legal justification from you make the requested payment into your trust account,* [the applicant] *referred the matter to an actuary since* [the applicant] *cannot just simply ignore your client's pension which forms part of the joint estate"*.

18. Subsequent thereto, the applicant wrote to the first respondent's attorneys enquiring whether they could agree to a settlement amount on the pension interests of the parties without incurring costs of an actuary given the Montanari case.

19. The applicant provided the first respondent's attorney with the draft division order and summary of the breakdown of the division of the assets and liabilities. In terms of this summary under the heading *"Claims against each other not yet dealt with"* the applicant listed among others the following:

"Claims in favour of Mrs Liebetrau:

B.3	*MONTANARI MATTER:*	*R 00000.00*
	Total	*R 00000.00"*

20. The applicant informed Mrs Liebetrau's attorneys that at the time of divorce, the first respondent had already converted his pension into a living annuity and that in the calculation of the draft division, 50% of the first respondent's pension was included when it should not have because it was a living annuity and accordingly did not form part of the division.

21. The attorneys on behalf of Mrs Liebetrau informed the applicant that the Old Mutual Protektor Preservation Fund was in fact not a living annuity and that the

applicant should therefore rectify the draft order to include Mrs Liebetrau's interest in the relevant pension fund.

22. On 15 June 2021, the applicant wrote to the first respondent and his attorneys in terms of which he states that there were various communications with the first respondent in terms of which the first respondent confirmed that he had a living annuity and that he accordingly required proof thereof by close of business on 18 June 2021.

23. On 22 June 2021, the first respondent informed the applicant that the applicant had the information for over 4 years and that the division was finalised in March 2021 when payment was made to the first respondent by the applicant in respect of the division of assets and liabilities.

24. The first respondent stated that reference by his attorneys to a 'living annuity' was a bona fide mistake by his attorneys and contended that nothing turns on this.

25. During the same time, the applicant became aware that the first respondent had received the funds in respect of his pension.

26. As a result, the applicant launched the urgent *ex parte* application interdicting the first respondent from utilising the funds until cause is shown why the order should not be made final.

27. The applicant argues that the first respondent's pension in the Old Mutual Protektor Preservation Pension Fund forms part of the joint estate since the first respondent was still a member of the fund as at date of divorce and that Mrs Liebetrau is entitled to her half share of the value of the first respondent's pension as at date of divorce.

Is the applicant *functus officio* and was there a compromise?

28. The first respondent argues that the applicant became *functus officio* when he made payment, after all issues, disputes and obligations had been resolved between the parties. He further argues that, in respect of his pension, a compromise was reached.

29. The applicant argues that no final division has been issued and/or published and that he has not given effect to the settlement agreement in totality from which he derives his powers and obligations and it is for this reason that he is not *functus officio*. As regards the alleged compromise, the applicant argues that there could be no compromise because neither him nor Mrs Liebetrau were seized with all the facts to make such a compromise. Furthermore, there was a misrepresentation by the first respondent regarding his pension and an alleged living annuity.

30. On the pleadings, it is common cause that the funds relate to a pension and not an annuity.

31. Pension interest of the member spouse of parties married in community of property as at date of divorce is by operation of law part of the joint estate for the purpose of determining the parties benefits. When the joint estate of spouses married in community of property is to be divided, it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one or either of them as at the date of the divorce. This brings the process of giving effect to an order for a division of the estate squarely within the ambit of the legislation.

32. The questions that arise in this case are,

32.1. whether there was a compromise in respect of Mrs Liebetrau's share in the first respondent's pension; and

32.2. whether payment to the first respondent by the applicant had the result of rendering the applicant *functus officio* and ceased the right to demand and claim Mrs Liebetrau's share in the first respondent's pension.

33. On the facts before me, I find that there was no disputed debt for a compromise to have been reached. In other words, the applicant and Mrs Liebetrau were led to believe that the first respondent's pension held with Old Mutual Protektor Preservation Fund was no longer a pension but instead a living annuity and as a result, Mrs Liebetrau was not entitled to the capital of the annuity based on the *Montanari* case. There was no settlement or compromise in respect of the true state of affairs, that is, the first respondent's pension interest. As a result,

the pension interest as at date of divorce is by operation of law part of the joint estate for the purpose of determining the parties benefits.

34. As regards whether payment to the first respondent by the applicant had the result of rendering the applicant *functus officio* and ceased the right to demand and claim Mrs Liebetrau's share in the pension fund to which the first respondent belonged, on the papers, it is clear that no final division order was issued and/or published. The applicant's obligations accordingly did not cease. Only a draft division order was provided to the parties. The applicant is well within his rights, as per the settlement agreement which was made an order of court, to:

34.1. realise the assets of the joint estate;

34.2. demand from the parties a true and correct account of any portion of the assets which either of them may have taken possession of, or which either of them may have dealt with; and

34.3. demand from the parties delivery of any such portion of the assets of the joint estate.

35. I am satisfied that the applicant may demand payment of Mrs Liebetrau's half share of the first respondent's pension as at date of divorce and that he has made out a case for the relief sought.

36. Upon return of the R 366 746, 38, the applicant is to fulfil his mandate and file his final division order accordingly.

Did the applicant fail to disclose material facts as alleged?

37. The first respondent argues that the applicant, in his *ex parte* application, failed to disclose what he has done in the five years since his appointment as the receiver and liquidator of the joint estate and further failed to demonstrate that he has acted diligently since his appointment.

38. The law is settled on the requirements for an *ex parte* order[1]. Some of the broad principles include, among others,

38.1. A full disclosure be made of all material facts which might influence a court;

38.2. A failure of full disclosure of such facts may result in rescission of the *ex parte* order whether such failure was willful or negligent;

38.3. That the *ex parte* applicant does not believe the respondent's version of facts that have been conveyed to the applicant, or believes the respondent's defence to be ethereal, is not a valid basis for suppressing or not disclosing it;

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1 *Recycling and Economic Development Initiative of South Africa NPC v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) (*"REDISA"*) at paras 45-52, and authorities cited therein

38.4. The *ex parte* applicant must also speak for the absent party by disclosing all relevant facts that s/he knows or reasonably expects the absent party would want placed before the court;

38.5. The *ex parte* applicant must disclose and deal fairly with any defences of which s/he is aware or which s/he may reasonably anticipate, in particular, the *ex parte* applicant must disclose all relevant adverse material that the absent party might have put up in opposition to the order.

39. The court has a discretion, which must be exercised judiciously, when confronted with non-disclosure of material facts. Non-disclosure of material facts in *ex parte* applications need not result in the setting aside of the *ex parte* order. Each case should be considered on its own merits and facts, and the court has a discretion it must exercise judiciously.

40. On a reading of the papers, the applicant disclosed the material facts regarding the alleged settlement and subsequent payment by the applicant to the first respondent. What the applicant had not disclosed is the steps taken by him in order to demonstrate that he has acted diligently since his appointment as the receiver and liquidator of the joint estate. This appears to be the sole basis of the first respondent's non-disclosure argument.

41. In reply however, the applicant has responded to the allegation that no steps had been taken by him to verify the true nature of the pension.

42. In the exercise of discretion in order to determine whether to confirm or to set aside the *ex parte* order, regard must be had to numerous factors, including (a) the extent of the non-disclosure, (b) the question whether the judge hearing the *ex parte* application might have been influenced by proper disclosure, (c) the reasons for non-disclosure, and (d) the consequences of setting the provisional order aside.[2]

43. Having considered the above factors, as well as the pleadings filed, the extent of the non-disclosure and whether the judge hearing the *ex parte* application might have been influenced by a proper disclosure, I am satisfied that it does not favour the setting aside of the order.

44. That leaves the matter of costs.

Costs

45. The applicant seeks costs on an attorney client scale.

46. The Constitutional Court has restated the standard for costs on this scale, *"More than 100 years ago, Innes CJ stated the principle that costs on an attorney and client scale are awarded when a court wishes to mark its*

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2 *REDISA* (*supra*) at para 52

disapproval of the conduct of a litigant. Since then this principle has been endorsed and applied in a long line of cases and remains applicable. Over the years, courts have awarded costs on an attorney and client scale to mark their disapproval of fraudulent, dishonest or mala fides (bad faith) conduct; vexatious conduct; and conduct that amounts to an abuse of the process of court. [3]

47. Having regard to the correspondence between the parties and the evidence before me, the first respondent's conduct clearly indicates bad faith. I am satisfied that a case has been made out for a punitive cost order in these circumstances.

Order

48. In the result, I make the following order:

48.1. Paragraph 2.1 of the *rule nisi* is hereby confirmed.

48.2. Paragraphs 2.2. and 2.3 of the *rule nisi* is discharged.

48.3. The first respondent is ordered to pay the applicant's costs on an attorney client scale.

F KARACHI

ACTING JUDGE OF THE HIGH COURT

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3 *Public Protector v South African Reserve Bank* 2019 (6) SA 253 (CC) at [223]

Appearances:

For the applicant: Adv S. Kelly

For the Respondent: Adv W F Wannenburg

Date of the hearing: 25 October 2021

Date of the judgment: 26 November 2021