

Held: The second respondent is joined in the main application instituted by the applicant under case 54017/2022.

Held: The second respondent is ordered to pay within thirty days of this order an amount of R675 613, 91 plus interest in the amount of R102 130, s57 to the trust account of the applicant's attorneys of record.

Held: The first respondent is ordered to pay the costs of this application including the costs of the urgent application under case 24479/22 on a party and party scale

JUDGMENT

MNCUBE, AJ:

INTRODUCTION:

[1] The applicant Ms L N has instituted two applications. The main application which is opposed is for a declaratory order in which the applicant is seeking the following relief-

1. That it be declared that the Applicant is entitled to the remaining pension benefits held under preserved by order of Case No 24479 / 2022 of this Honourable Court as per the decree of divorce issues by the Kempton Park Regional Court under case number :GP/KP/RC 322/2019, dated 18 March 2020.

2. That the second respondents be ordered to pay to the applicant an amount of R675 613 , 91 plus any interest that may have accrued thereon, being the remainder of the first respondent's pension benefits, which was previously held as a pension interest with Alexander Forbes Retirement Fund(Provident Section)

3. Directing that the Respondent(s) who oppose this application pay the costs thereof at the rate of attorney and own client.

3. Granting such or alternative relief as this Honourable Court may deem appropriate.'

[2] The second interlocutory application is for the joinder of the second respondent Nedbank which is unopposed and duly granted in terms of Rule 10 of the Uniform Rules at the commencement of the proceedings.

FACTUAL BACKGROUND:

[3] The applicant and the first respondent are former spouses. They were married to each in community of property. The applicant who was the plaintiff in the main action for divorce issued summons on 10 February 2019 against the first respondent under case GP/KP/RC 322/2019 in Kempton Park Regional Court. While the divorce was pending, she instituted an

interlocutory application in which she sought a preservation order directing Alexander Forbes Financial Service Retirement Fund, Alexander Forbes Administration and Barloworld and Equipment (Pty) Ltd who were cited as respondents to preserve 50% of the first respondent's pension interests. The preservation order was granted by the Regional Court on 11 June 2019 in favour of the applicant. The first respondent resigned from work on 28 February 2019 before the finalisation of the divorce and received half share of the pension benefits.

[4] On 18 March 2020 the marriage between the applicant and the first respondent was dissolved by a decree of divorce. In the decree of divorce the Regional Magistrate ordered that 50% of the preserved pension benefit be paid to the applicant. On 13 May 2022 the former pension fund administrators (Alexander Forbes Financial Service Retirement Fund, Alexander Forbes Administration) discharged their obligations and paid the remaining half share of the pension benefits into the first respondent's bank account. The first respondent's bank account is held with the second respondent Nedcor t/a Nedbank. The payment of the remaining half share of the pension benefits prompted the applicant to obtain on an urgent basis another preservation order from this court under case 24479/22 in respect of the pension benefits held by the second respondent.

ISSUES FOR DETERMINATION:

[5] As per the decree of divorce an order was made that the half share of the first respondent's pension benefits that had been preserved be paid to the applicant. The issue in this application is whether or not this court can declare that the applicant is entitled to the remaining pension benefits as forming part of the joint estate (and order for the release of the preserved half share of the pension benefit).

SUBMISSIONS MADE:

[6] The written heads of arguments and oral submissions made by both parties has been considered. Adv. Tshabalala on behalf of the applicant submits that the applicant is entitled half of the pension benefits by virtue of section 7(7) of the Divorce Act 78 of 1979 as the pension benefits form part of the joint estate. He submits that the pension benefits have been divided and will not form part of the joint estate. The applicant places reliance on the case of ***Ndaba v Ndaba (600/2015) [2016] ZASCA 162 (4 November 2016)*** in substantiating the fact that pension interest forms part of the joint estate. Lastly the contention is that there is no basis for opposing the application.

[7] Adv. Hashe on behalf of the first respondent contends that the joint estate has other assets which must be divided equally in order to be equitable. He argues that it would be unfair for the court to grant the relief that the applicant is seeking. He proposes as a more equitable solution that the funds (pension benefits) be preserved until a Receiver is appointed.

APPLICABLE LEGAL PRINCIPLES:

[8] The relief that the applicant seeks is two- fold- (i) she seeks an order declaring that she is entitled to the pension benefits which is preserved by the second respondent and (ii) she seeks an order directing the second respondent to pay the pension benefits. It appears to me that the nature of the relief is both declaratory and a mandamus.

[9] A mandamus is an order that a court issues directing a party to either do something or refrain from doing something. It is a remedy against the effects of an unlawful action that has taken place. It may be granted where there is a clear duty to perform the act ordered. To grant a mandamus the following requirements must be proved-

- (a) A clear right;
- (b) An injury actually committed or reasonably apprehended, and
- (c) The absence of similar protection by any other ordinary remedy.

[10] A declaratory order is a flexible remedy which may be accompanied by other forms of relief including a mandatory order. It is valuable in a constitutional democracy. See ***Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others 2005(2) SA 359 (CC)*** para 107- 108. A declaratory order is an order by which a dispute over the existence of a legal right is resolved which right can be existing, prospective or contingent.

[11] To obtain a declaratory order the following requirements must be met-

- (a) The court must be satisfied that the applicant has an interest in an existing , future, or contingent right and
- (b) Once the court is satisfied it must be considered whether or not the order should be granted. See ***Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd 2005(6) SA 205 (SCA)*** paras 16- 17.

EVALUATION:

[12] The crux of the applicant's case is that she is entitled to the half share of the pension benefits which are preserved and held by the second respondent. The contention by the first respondent is that the application is premature and it will be proper to adjudicate on the half share of the pension benefits when the joint estate is divided.

[13] It is common cause that the divorce court ordered that the 2nd respondent pay out 50% of the pension benefit. The applicant's right to this half share of the pension benefit is based upon a court order which remains binding and valid unless set aside. Adv. Hashe argues that the application is premature and proposes that an appropriate time to divide the remaining preserved the pension benefit is when the division of the joint estate is effected. I then posed a question to Adv Hashe whether such a proposal would not be contrary to the order of the Regional Court which directed that in addition to granting the division of the join estate the applicant be paid the preserved pension benefit. Mr Hashe in answering to the court's query argues that the estate had not been divided. He contends that the first respondent stands to lose more. He supports the contention on the basis that a person with a larger financial power is capable of anything.

[14] I disagree with the contention with respect. The court order which demonstrates the intention of the Regional Magistrate is clear when applying trite legal principle applicable to interpretation of court orders. Trollip JA observed in **Firestone South Africa (Pty) Ltd v Gentiruco AG 1977 (4) SA 298 (A)** at 304 as follows '*(T)he court's intention is to be ascertained from the language of the judgment or order as construed according to the usual, well-known rules... Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole to ascertain its intention.*'

[15] In order to get the true intention of the court order, it is imperative to read the whole court order contextually. The relevant part of the divorce order reads as follows-

*"3. The Defendant's pension benefits held by Alexander Forbes Financial Services (Pty) Limited Retirement Fund (Alexander Forbes under membership number: **xxxx be paid** to the Plaintiff."*

Clause 3 of the decree of divorce was inserted in addition to the normal order for division of the joint estate. Clause 3 therefore gives a clear directive in respect to the pension benefits which had to be paid to the applicant. This interpretation that the applicant was ordered to receive the

half share of the pension benefits is substantiated by clause 4 which states it **shall all be paid to the applicant** . There is therefore no mistaken on what the true intention of the Regional Court was when it ordered the former pension fund/ pension fund administrators to release the pension benefits to the applicant. There is no ambiguity with the interpretation of the order. An order of a court binds all those whom it applies¹. In the absence of any appeal or review against the divorce order, it stands to be adhered to. Failure thereto amounts to civil contempt of court. See **Fackie NO v CCII Systems (PTY) LTD 2006 (4) SA 326 (SCA)** para [9].

[16] The applicant's founding affidavit stands unchallenged and sets out clearly how she obtained the right to the half share of the pension benefit. The first respondent has placed no evidence to gainsay the averments made by the applicant². The second respondent correctly elected in my view not to oppose this application. Apart from the lack of evidence at the instance of the first respondent to oppose the relief sought, the legal arguments advanced on behalf of the first respondent are in my humble view bad in law. I hold this view simply because what the preservation order aimed to do was to merely safeguard the applicant's right to the pension interests of the applicant (before the termination of the membership to the relevant pension fund). In other words, she was entitled to the pension benefits unless a forfeiture order was granted in favour of the first respondent in terms of section 9 of the Divorce Act 70 of 1979.

Does the applicant have a clear right?

[17] The applicant has demonstrated that the court order (decree of divorce) granted by the Regional Court has not been set aside. She has demonstrated that she has a right to the half share to the pension benefit as ordered by the divorce court and as a legal consequence to the marriage in community of property. There is no order for forfeiture in terms of section 9 of the Divorce Act 70 of 1979. Applying the **Ndaba** case, the applicant has a clear right to the preserved pension benefit.

Is there an injury actually committed or reasonably apprehended by the applicant?

¹See *Minister of Water and Environmental Affairs v Kloof Conservancy [2016] 1 All SA 676 (SCA)* para 14.

²This court deems the right to ventilate issues important enough to allow the first respondent to place legal arguments. This indulgence equates to upholding the right of access to court as compounded in section 34 of the Constitution which right must be jealously guarded by courts. See *Beinash & Another v Ernst & Young and Others 1999 (2) SA 116 (CC)* para 17.

[18] The applicant has proved that she there is an injury in a form of her right to the pension benefit being limited or denied in contravention of a court order. The divorce decree entitles the applicant to receive what is legally due to her. What the first respondent contends in opposition is to limit this right pending "division of the joint estate" The practical effect of the divorce decree is that it divided one part of the joint estate in a form of pension benefit. The remainder of the assets which form part of the joint estate may be divided excluding the pension benefit.

The absence of similar protection by any other ordinary remedy.

[19] The Regional Court became *functus officio* after granting the order. This factor is indicative that the applicant has no remedy other than to seek the intervention of this court is accessing what is due to her. The submission made on behalf of the first respondent that this application is premature is in my view incorrect. Apart from the fact that the Regional Magistrate is *functus officio*, it is trite that once a court has pronounced a final order, the matter is *res judicata*. This closes the door to the applicant to litigate on the same matter. The essence of the current application (whether in terms of mandamus or declaratory) is nothing more than enforcement of the applicant's right.

[20] In the event that my finding that both remedies are applicable on the facts of this matter (being a mandamus and declaratory order), the notice of motion clearly sets out at the very least that the applicant seeks a declaratory order. The averments set alleged in the applicant's founding affidavit that she has a right stand unchallenged. It follows that there is no merit to the opposition to the relief she seeks.

CONCLUSION:

[21] I am satisfied that the applicant has proved the requirements in respect of both the remedies (a mandamus and declaratory orders). I am further satisfied that it is in the interest of proper administration of justice that a declaratory order be granted in favour of the

COSTS:

[22] The last aspect to be addressed is the issue of costs. Awarding of costs is at the discretion of the court which must be exercised judicially. See **Affordable Medicines Trust and Others v Minister of Health and Others 2006 (3) SA 247 (CC)**. In the exercise of discretion an appropriate and just cost order is one in which the costs follow the course.

Order:

[23] In the circumstances the following order is made:

1. It is declared that the applicant is entitled to the remaining pension benefits held under preservation order under case 24479/22 as per the decree of divorce granted by the Kempton Park Regional Court on 18 March 2020.
2. The second respondent is joined in the main application instituted by the applicant under case 54017/2022.
3. The second respondent is ordered to pay within thirty days of this order an amount of R675 613,91 plus interest in the amount of R102 130,57 to the trust account of the applicant's attorneys of record –

Name: Baloyi Masango Incorporated

Bank: The Standard Bank of South Africa Limited

Account No: [...]

Branch Code: 011545

Reference: BMP3351

4. The first respondent is ordered to pay the costs of this application including the costs of the urgent application under case 24479/22 on a party and party scale.



**MNCUBE AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA**

Appearances:

On behalf of the Applicant : Adv. N. Tshabalala
Instructed by : Baloyi Masango Incorporated
777 Arcadia Street
Arcadia, Pretoria

On behalf of the : Adv. S. Hashe
Instructed by : R. Masilo Attorneys
235 Meyer Street
2nd Floor Commerce & Industry Chambers
Germiston

Date of hearing : 29 August 2022

Date of Judgment : 30 November 2022