CASE NUMBER: 20665/2021

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

……………………………… ……………………………

SIGNATURE **DATE**

In the matter between:

ELIZABETH OOSTHUIZEN N.O. Applicant

and

DJP BARNARD First Respondent

L GOOSEN Second Respondent

EMMERENTIA HEINEMAN Third Respondent

THE MASTER OF THE HIGH COURT, PRETORIA Fourth Respondent

GLACIER FINANCIAL SOLUTIONS Fifth Respondent

JUDGEMENT

Coetzee AJ:

Introduction:

[1] This is an opposed application in terms whereof the Applicant, as the executor of the estate of the late Deon Barnard (hereinafter referred to as 'the deceased'), seeks a declaratory order that the estate of the deceased is lawfully obliged to accept a claim against the estate by the First and Second Respondents in the amount of R1 821 345.62.

[2] The First and Second Respondent are the biological children of the deceased, who are currently about 29 and 34 years of age, respectively. The claim flows from the deceased's failure to comply with a term in a settlement agreement, wherein he agreed with his former spouse, that, upon his death, his entire pension be paid to the "minor children". The "minor children" refers to the First and Second Respondent who were, at the time, about 11 and 16 years old, respectively. The application is opposed by only the Third Respondent, the life partner of the deceased and sole heir of his estate. The Master of the High Court, Pretoria, is cited as the Fourth Respondent and Glacier Financial Solutions as the Fifth Respondent. The deceased's former spouse is not a party to the application.

Common cause facts:

[3] The following material facts were common cause between the parties:

[3.1] On the 5th of July 2004, the deceased concluded a settlement agreement in divorce proceedings with Delia de Klerk Barnard, with whom he was married in community of property. The agreement was incorporated into a decree of divorce on 23 July 2004, under the same case number. The deceased was the Defendant in the divorce action. The settlement agreement, specifically paragraph 2, 3, and 4 thereof, provides as follows:

[3.1.1] *"2.*

ONDERHOUD

2.1 Die Verweerder onderneem om aan die Eiseres te betaal die bedrag van R750.00 (Sewe Honderd en Vyftig Rand) per maand, per kind ten aansien van die minderjarige kinders se onderhoud."

2.2 Belde partye sal alle mediese kostes van die minderjarige kinders om die helfte betaal.

2.3 Beide partye sal alle skoolklere, skolastiese en tersiere opleidings kostes van die minderjarige kinders om die helfte betaal."

[3.1.2] *"3.*

VERDELING VAN GEMEENSKAPLIKE BOEDEL

3.1 Die eiseres sal die huisinhoud buiten die bates hieronder gelys as haar uitsluitlike eiendom behou.

3.2 …

3.3 …

3.4 Die Verweerder (the deceased) onderneem dat met sy afterwe sy volle pensioen aan die minderjarige kinders (minor children) oorbetaal moet word.”

[3.1.3] “4.

Geen ooreenkoms tussen die partye sal van krag wees of bindend op die partye wees, nie tensy die ooreenkoms op skrif gestel en deur beide partye onderteken is nie.”

[3.2] The deceased did not comply with paragraph 3.4 of the settlement agreement (as more fully dealt with hereunder).

[3.3] On the 23rd of May 2017 the deceased’s pension interest, in the Transnet Retirement Fund in the amount of R1 821 345.62, was paid to him.

[3.4] The deceased invested the amount of R1 821 345.62 at the Fifth Respondent [“Personal Portfolio Preservation Pension Fund”] with entry date 1 June 2017.

The Third Respondent was nominated as the sole beneficiary of the preservation pension fund.

[3.5] On the 6th of June 2017, the deceased signed his last Will and Testament nominating the Third Respondent as the sole beneficiary of his entire estate.

[3.6] The deceased passed away on the 3rd of February 2020.

[3.7] On the 21st of September 2020, the First and Second Respondents lodged a claim with the Applicant in the amount of R1 821 345.62, being the pension interest paid to the deceased by the Transnet Retirement Fund and later invested with the Fifth Respondent.

[3.8] On the 29th of September 2020, the Fifth Respondent notified the Applicant *inter alia* of the following:

"The client was invested in the following portfolios: Personal Portfolio Preservation Pension Fund. The entry date of this plan was 1 June 2017.

The member could have chosen (nominees) to receive the death benefits from the fund. On this plan, Emmerenthia Heineman, the life partner of the deceased, was the only nominated beneficiary.

However, the Board of Trustees is by law (Pension Funds Act, section 37C) responsible to make sure that not only nominees but all potential dependants of the member are carefully considered to receive a portion of the benefits. For that reason we need more information about the dependants of the member.

The rules of the fund stipulate that:

- *The death benefits are not an asset of the deceased's estate and are not inheritable.*
- *The Trustees of the Fund decide to whom the payment is made. However, any recommendations for beneficiaries will be considered.*

The client's divorce was finalized in 2004. At that state, the order only stated that the client's pension should be paid to the children in equal shares, in the event of his death.

We are not liable for the divorce order as it was finalized before the client invested with Glacier.

A claim would only have been considered if the client was alive and there was a compliant Final Divorce Order."

[3.9] On the 26th of November 2020, the Third Respondent objected to the First and Second Respondents' claim against the estate.

Issues that require determination:

[4] The parties identified the main issue to be the interpretation of the wording of clause 3.4 of the settlement agreement. The question is whether the deceased's obligation to comply with the demand extended past the date when the children reached the age of majority, whether the clause amounts to a *stipulatio alteri*, whether the clause amounts to a *pactum successorium*, and whether the claim, if it existed, can be enforced against the deceased estate.

[5] In deciding these issues, the conclusion should be whether the Applicant is lawfully entitled or obligated to accept the claim against the estate by the First and Second Respondents in the amount of R1 821 345.62.

[6] The parties also require a determination on the issue of costs.

<u>Applicable legislative framework</u>:

The enforceability of clause 3.4 needs to be considered with the context of the relevant legislative framework mentioned hereunder.

[7] Section 1 of the Divorce Act, Act 70 of 1979, defines pension interest as follows:

"*pension interest", in relation to a party to a divorce action who –*

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office;

(b) is a member of a retirement annuity fund which was bona fide established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same

> *rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act;*"

[8] The common law position has always been that the member spouse's pension interest does not form part of the joint estate. The Divorce Amendment Act 7 of 1989 inserted sections 7(7) and 7(8) into the Divorce Act, thereby introducing the concept of sharing a pension interest upon divorce.

[9] Section 7(7)(a) reads as follows:

> "*In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.*"

Section 7(7) is a deeming provision that must be invoked during the divorce proceedings to deem such pension interest to be an asset in the joint estate when determining the patrimonial consequences of the divorce. It is only by means of this deeming provision that a non-member spouse would be able to secure a part of the member spouse's pension interest.

[10] Section 7(8) of the Divorce Act reads as follows:

> "*(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-*

> *(a) the court granting a decree of divorce in respect of a member the court granting a decree of divorce in respect of a member of such a fund, may make an order that-*
>
> > *(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;*
> >
> > *(ii) an endorsement be made in the records of that fund that that part of the pension interest concerned is so payable to that other party;*
>
> *(b) any law which applies in relation to the reduction, assignment, transfer, cession, pledge, hypothecation or attachment of the pension benefits, or any right in respect thereof, in that fund, shall apply mutatis mutandis with regard to the right of that other party in respect of that part of the pension interest concerned.*"

[11] In the matter of *Ndaba vs Ndaba* (600/2015) [2016] ZASCA 162, the primary issue in this appeal concerned the proper interpretation of section 7(7) and (8) of the Divorce Act and whether a non-member spouse in a marriage in community of property is entitled to the pension interest of a member spouse in circumstances where the court granting the decree of divorce did not make an order declaring such pension interest to be part of the joint estate. After considering section 7(7)(a) and 7(8) of the Divorce Act, the court held that the intention of the legislature by inserting section 7(7)(a) into the Divorce Act was

to enhance the patrimonial benefits of the non-member spouse over that which, prior to its insertion, had been available under the common law. The court found that for marriages in community of property that are dissolved by divorce, there is no need to refer to the pension interest of the non-member spouse when dividing up the joint estate. The pension interest of each party is automatically included in the deed of settlement that is made an order of court. The court did, however, point out that a specific order in terms of section 7(8) of the Divorce Act is still required if spouses want a retirement fund to make a deduction and payment to the non-member spouse in terms of section 37D(1)(d)(i) of the Pension Funds Act, 24 of 1956.

[12] Section 7(8) of the Divorce Act, read together with section 37D(4)(a) of the Pension Funds Act, sets out the conditions with which a divorce order must comply for the fund concerned to be able to give effect to a non-member spouse's claim. This includes conditions that the order must specifically provide for the non-member spouse's entitlement to a "pension interest" as defined in the Divorce Act, the relevant fund must be named or identifiable, the order must set out a percentage of the member's "pension interest" or a specific amount, and the fund must be expressly ordered to endorse its records and make payment of the "pension interest".

[13] In terms of section 37A(1) of the Pensions Funds Act benefits cannot be reduced, transferred, ceded, pledged, hypothecated, attached or taken into account to determine debtor's financial position. Section 37A(1) is interpreted

to prohibit the payment of a fund benefit to a third party. Payments must be made directly to the member or beneficiary.

[14] Paragraph 3.4 of the settlement agreement does not meet the requirements of Section 7(8) of the Divorce Act, read together with section 37D(4)(a) of the Pension Funds Act. The Transnet Retirement Fund and the Fifth Respondent did not have any discretion in the payment thereof to the non-member spouse, to the children, a liquidator of divorced parties' estate or to an executor of an estate, as it is strictly bound by the provisions of the Pension Funds Act. The agreement could only have been enforceable *inter partes*.

Is the relevant clause a *stipulatio alteri* (contract for the benefit of the third party)?

[15] In *McCullough v Fernwood Estate Ltd* 1920 AD 204, page 205 – 206 Innes CJ described a *stipulatio alteri* in the following terms:

> "*An agreement for the benefit of a third person is often referred to in the books as a stipulation. This must not be taken, however, in the narrow meaning of the Civil law, for in that sense the* stipulatio *did not exist in Holland. It is merely a convenient expression to denote that the object of the agreement is to secure some advantage for the third person. It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. The third person having once notified his acceptance and thus established a* vinculum juris *between himself and the promisor would be liable to be sued, as well as entitled*

to sue. If, for instance, the stipulated benefit took the form of an option to purchase specified property at a certain price, the acceptance of the offer would involve a liability to pay the price which could be legally enforced. Otherwise the third person would be in the position of being able to sue upon a contract involving reciprocal obligations without being liable to an action if he refused to discharge his part of them."

[16] Acceptance by the third party may be express or implied and, where the contract is a beneficial one, will not require strong evidence to support it.[1]

[17] If the contract is entirely beneficial in the sense that it amounts to a donation, the third party, if a minor of sufficient age and intelligence to understand that he is being offered and is accepting a donation, may accept without the assistance of his guardian.[2] Acceptance on behalf of minors and unborn children may be made by the court[3] and if the contract amounts to a donation, by the Master or even by any person stepping in.[4]

[18] The Applicant argued that clause 3.4 of the settlement agreement complies with the basic requirements of a *stipulatio alteri* in favour of the First and Second Respondent and that, as a result thereof, a contractual right to the value of the deceased's pension monies accrued to them upon his passing. The Applicant argued that the deceased's pension was an asset in the joint estate, as at the date of the divorce, as he was previously married in community of property with his former spouse. It was argued that the parties'

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[1] *Estate Greenberg v Rosenberg and Greenberg* 1925 TPD 924 930.
[2] *Buttar v Ault* 1950 4 SA 229 (T) 239A.
[3] *Ex parte Isted* 1948 2 SA 71 (C)81-82.
[4] *Buttar v Ault* 1950 4 SA 229 (T).

intention was clearly that the children should get the benefit of the deceased's pension, and that the clause does not indicate that such a right would lapse upon the children reaching the age of majority.

[19] The Third Respondent argued that there was no acceptance of the benefit on behalf of the First and Second Respondent while they were minors, and they did not accept the alleged benefit after they attained the age of majority. The Third Respondent further argued that neither the First, nor the Second Respondent made any attempt to hold the deceased to the undertaking after they attained the age of majority, or at any time before or after the deceased received the payment of his pension interest and reinvested it with the Fifth Respondent, while he was still alive.

[20] The benefit in the settlement agreement was purely beneficial for the First and Second Respondent and acceptance of such benefit could have been implied. Whether or not clause 3.4 of the settlement agreement created a *stipulatio alteri* in favour of the First and Second Respondent, must however also be considered with the considerations on whether or not the clause also amounts to a *pactum successorium.*

Does the relevant clause amount to a *pactum successorium*?

[21] The Third Respondent stated in paragraph 13.5 of the Answering Affidavit, in the alternative, that clause 3.4 of the settlement agreement limited the deceased's right to nominate a beneficiary in terms of the Pension Funds Act,

that it limited the deceased’s testamentary freedom; and/or is *contra bonos mores* and is accordingly unenforceable. The reasons why the Third Respondent alleged the above, were not fully set out. The Applicant argued that clause 3.4 of the settlement agreement, has been incorporated into an order of court and that such must be complied with until set aside. It was further contended that the court order has never been challenged, by either the deceased or his erstwhile wife who were the parties to that agreement. I shall deal with this issue on the relevant common cause facts.

[22] The leading judgment on the *pactum successorium* is that of Rabie JA in *Borman en De Vos NNO en ‘n Ander v Potgietersrusse Tabakkorporasie Bpk en 'n Ander* 1976 (3) SA 488 (A), in which the learned Judge of Appeal stated (at 501 A) — "'n *Pactum successorium* (of *pactum de succedendo*) is, kort gestel, 'n ooreenkoms waarin die partye die vererwing (successio) van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (*mortis causa*) van die betrokke party of partye reël. (Kyk die artikel '*Pactum Successorium*' deur C.P. Joubert, in *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*, 1961 bl. 18, 22: 1962 op 47, 99). *'n Voorbeeld van so 'n ooreenkoms is waar A en B met mekaar ooreenkom om mekaar oor en weer as erfgenaam in te stel*; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan) aan B sal bemaak; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan, of 'n bepaalde saak wat aan horn behoort) aan C sal bemaak. (Kyk in die algemeen die gemelde artikel van Joubert in *Tydskrif* 1961 op 21, 22; 1962 op 95 - 98; *Nieuwenhuis v Schoeman's Estate* 1927 EDL 266; *James v. James' Estate*, 1941 EDL 67; *Van Jaarsveld v. Van Jaarsveld's Estate* 1938 TPD 343; *Ahrend and Others v Winter* 1950 (2) SA. 682 (T)). 'n Ooreenkoms van hierdie aard druis in teen die algemene reël van ons reg dat nalatenskappe *ex testamento of ab intestato* vererf, en word as ongeldig beskou (Joubert, Tydskrif 1961 op 19; 1962 op 47- 48; 93-103; *Voet*, 2.4.16; Van der Keessel *Praelectiones ad Gr* 3.1.41 (Prof *Gonin* se vertaling, band 4 op

> bl. 33), behalwe in die geval waar dit in 'n huweliksvoorwaardekontrak beliggaam is (Joubert *Tydskrif* 1962 op 48, 58-64; 93 e.v.; *Voet* 23.4.60; Van der Keessel *Praelectiones ad Gr* 3.1.41; *Ladies' Christian Home and Others v S.A. Association* 1915 CPD 467 op 471-2; *Ex parte Executors Estate Everard* 1938 T.P.D. 190 op bl. 194)." (My emphasis.)

[23] Any agreement in terms of which the contracting parties purport to regulate the devolution (*successio*) of the estate or part of the estate of one or both of them after the death of such a party is an invalid *pactum successorium*.[5]

[24] In *Ex parte Calderwood: In re Estate Wixley,* 1981 3 SA 727 (Z) it was found that the foundation of the *pactum successorium* is that the person who contracts with regard to his or her own succession purports to bind him- or herself to that contract. If he or she retains the right to revoke his or her promise unilaterally, the contract will not be a prohibited *pactum successorium*.

[25] Where an agreement provides for an immediate devolution of rights and merely postpones the enjoyment of those rights until the death of one of the contracting parties, the agreement takes effect *inter vivos* and not *mortis causa*, and is accordingly valid.[6]

[26] In *Jubelius v Griesel* 1988 2 SA 610 (C) the vesting test was determined as the most useful in identifying an invalid *pactum successorium*: "[The test] … has a bearing on the time when the right to the promised benefit is withdrawn from the giver and vests in the beneficiary. If the transfer of the right in terms

[5] *McAlpine v McAlpine* 1997 1 All SA 264 (A).
[6] *Keeve v Keeve* 1952 1 All SA 244 (O); 1952 1 SA 619 (O); *Varkevisser v Estate Varkevisser* 1959 4 SA 196 (SR).

of the agreement takes place immediately or at least before the death of the giver, the transfer occurs inter vivos and can thus not be interpreted as a *pactum successorium*, even if its use is postponed until after the giver's death.

[27] The vesting test, as a means of identifying an invalid *pactum successorium*, was approved by the Supreme Court of Appeal in *McAlpine v McAlpine* 1997 1 SA 736 (A) where it was found to be: "*…an eminently appropriate one for determining whether or not a contract amounts to a pactum successorium."* The application of this test involves the distinction drawn in our jurisprudence between vested and contingent rights. The word "vest" could have different meanings. A right can be said to vest in a person when he owns it; or the word "vest" can be used to draw a distinction between "what is certain and what is conditional – a vested right is distinguished from a contingent or conditional right". The court concluded that the agreement was subject to a suspensive condition of survivorship as, for either brother to receive a benefit in terms of the agreement, he would have to outlive the other. As such it constituted an invalid *pactum successorium*.

[28] The present case is, in my view, a clear instance of a right conditional upon survivorship, an uncertain event. The pension benefit vested in the "minor children" only upon the death of the deceased. The deceased did not retain the right to revoke his promise unilaterally. For these reasons I find that paragraph 3.4 of the settlement agreement amounts to an invalid *pactum successorium* and is therefore unenforceable.

[29] In conclusion it is appropriate to refer to the observations made by the court in *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) 373 (SCE) par. 26, in which the importance of carefully formulating settlement agreements and divorce orders relating to pension interests, was emphasized. This is to ensure that they fall within the ambit of section 7(7) and 7(8) of the Divorce Act. The dispute in the present case could have been avoided had this been heeded.

[30] <u>Costs</u>:

The Applicant seeks an order for costs on the scale as between attorney and client against the Third Respondent, while the Third Respondent seeks an order for the application to be dismissed with costs on an attorney and own client scale, to be paid jointly and severally by the Applicant and Mr. Johann Jordaan, *de bonis propriis*, the one paying the other to be absolved. Mr. Jordaan is a Trust and Estate Consultant. He deposed to the founding affidavit as agent of the Applicant.

[31] Counsel for the Third Respondent argued that the estate was already burdened financially and that it cannot afford to pay the costs of the current application. It was also argued that any cost order against the estate would have a direct and diminishing impact on the inheritance of the Third Respondent, as sole heir of the estate. The Applicant appointed Adv. J. Stroebel to address the court on the *de bonis propriis* cost order only. It was argued that the conduct of the Applicant has not been improper, *mala fide*,

negligent or unreasonable, nor has there been any material departure from their responsibility of office. It was contended that neither Ms. Oosthuizen, nor Mr. Jordaan hold any interest or favour to any party and they have acted in the best interest of the estate to bring this dispute to finality.

[32] In the matter of *City of Tshwane v Marius Blom and GC Germishuizen Incorporated and Another* [2013] 3 All SA 481 (SCA) at 490 the following was stated:

> *"The dispute between the parties is essentially about the interpretation and application of section 8 of the Rates Act, the provisions of which are far from clear and thus susceptible to different interpretations. The respondents were entitled to come to court and challenge the correctness of the construction of the section contended for by the appellant. In these circumstances, there can be no basis for the contention that their conduct was vexations such as to warrant the special order for costs."*

[33] The court must guard against censuring a party by way of a special cost order when with the benefit of hindsight, a course of action taken by a litigant turns out to have been a lost cause. While the court should express its displeasure in an obvious abuse of its process in punishing those who bring unsubstantial applications to court, the court is mindful that each person is equal before the law and has and should have access to justice.[7]

[34] In the matter of *Webster v Webster en 'n Ander* [1968] 3 All SA 392 (T), 1968 (3) SA 386 (T) 389 – 390 the court concluded:

[7] *McHendry v Greeff and Another [2015] JOL 34291 (KZD), page 11.*

> *"Waar partye geding voer oor hul onderskeie regte ten opsige van 'n boedel, is dit gewoonlik die billikste om die boedel te laat betaal tensy een van hulle klaarblyklik te kwader trou handel."*

[35] In the matter of *Ndebele and Others NNO v Master and Another* 2001 (2) SA 102 (C) 112 A-B a deceased estate was ordered to pay all costs of an application where confusion and consequent litigation, had been caused not by any fault on the part of the deceased, but nevertheless by the fact that he died leaving two documents which contained conflicting final instructions with regard to the disposal of his estate.

[36] After considering all the facts of the matter and in exercising my discretion, I am inclined to order the costs of the application to be paid by the deceased estate.

Order:

1. The application is dismissed.

2. The cost of the application is to be paid by the deceased estate.

L. COETZEE
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 24 January 2023.

Appearances:

Applicant's Counsel:	Adv. R. Ellis
Instructed by:	Lombard & Partners Inc.
Third Respondent's Counsel:	Adv. J.F. Grobler S.C.
Instructed by:	Avery Inc.
Counsel on behalf of the executrix and her Estate and Trust Consultant:	Adv. J. Stroebel