

SOUTH AFRICA / JUDGMENT

M. v Haywood N.O and Others (15781/15)

[2024] ZAGPPHC 437 (29 April 2024)

[2024] ZAGPPHC 437**COURT**

North Gauteng High Court, Pretoria

BEFORE

Malatsi-Teffo

CASE / FILE NUMBER

15781/15

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(1)Reportable: No.**(2)****Of interest to other judges: No****(3)****Revised.****29/04****/2024****CASE NO: 15781/15**

In the matter between: M[...]
M[...]
APPLICANT
And
MARIE
HAYWOOD(N.O)
1st RESPONDENT
(In her capacity as a
trustee in the insolvent Estate of Cornelius Waldo M[...]
Retha Stockhoff
(N.O) 2nd RESPONDENT
((In her capacity as a
trustee in the insolvent Estate of Cornelius Waldo M[...])
C[...] W[...]
M[...]
3rd RESPONDENT
Master of the High
Court,Pretoria 4th RESPONDENT
Sanlam Life Insurance
LTD
5th RESPONDENT

JUDGMENT

MALATSI-TEFFO AJ

INTRODUCTION

- [1] This is an interlocutory application wherein an order was made on 21 August 2023 in terms of which, a rule nisi was granted returnable on the 2nd of October 2023. By agreement between the parties, the rule nisi was postponed to November 2024. Mr M[...] (“the 3rd respondent”) played no role in these proceedings.
- [2] Mr M[...] seeks the setting aside of the order or dismissal of the application, in the alternative, the postponement of the application to be heard in the normal course. Costs are sought on the attorney-client scale.
- [3] Ms M[...] (“The applicant”) on the other hand seeks confirmation of the rule nisi granted of 21 August 2023.

THE BRIEF BACKGROUND

The facts are gleaned from the documentary and oral evidence presented by both the Applicant and 3rd Respondent;

- [4] During 2015 Applicant issued divorce proceedings out of this Court under the different case number, against 3rd Respondent.

- [5] On 23 May 2018, a decree of divorce, dissolving the marriage relationship between Applicant and 3rd Respondent was granted by this Court.
- [6] When the decree of divorce was granted, it was also ordered that the remainder of the outstanding issues in the divorce proceedings, be postponed to 29 October 2018.
- [7] The outstanding issues that were postponed to 29 October 2018, were Applicant's:
- 7.1) accrual claim,
- 7.2) maintenance claim; and
- 7.3) cost claim.
- [8] By agreement between the parties, the postponed outstanding issues were turned to arbitration. The arbitration hearing took place from 15 to 18 October and was finalized on 15 November 2018.
- [9] All the issues that were dealt with during the arbitration hearing, were issues and matters incidental to the matrimonial cause that was postponed by the order of the Court to 29 October 2018.
- [10] The arbitration award was granted in favour of the applicant, however, she could not enforce it against the 3rd Respondent as he wanted to seek the reconsideration of the award.
- [11] After a consultation with the senior counsel, Ms. M[...] was advised that the arbitration hearing, and consequently, the arbitration award were null and void because it was conducted in violation of Section 2 of the Arbitration Act 42 of 1956 (as amended). She was advised that since her claims for accrual-, maintenance- and cost were still in esse, she should simply re-enroll for adjudication and finalization in court thereof.
- [12] Following the advice, Applicant, in 2021 brought an application for a declaratory order, that she be authorized to enroll for adjudication thereof her aforementioned claims, as well as a declaratory order that, pending finalization of the mentioned claims, an interim maintenance order would find application.
- [13] In the process, 3rd Respondent was finally sequestrated at the insistence of Applicant, as a result of his failure to make payment of arrear maintenance owed by himself to Applicant.
- [14] Applicant's counsel alleged that when the application for reenrollment came before the Court, Thlapi J struck the application from the roll, because the Master of the abovementioned the High Court was not cited as a party, and further because the trustees of the insolvent estate of 3rd Respondent were not yet finally appointed.

[15] On 18 May 2023 Applicant, brought a new application citing the Master and the trustee ,in addition, Applicant by means of a notice of motion dated 7 June 2023 also sought a declaratory order that it be declared that Sanlam Life Insurance Limited i.e., 5th Respondent, be entitled in terms of Section 37D(d)(i) & (iA) of the Pension Fund Act 24 of 1956 (as amended), to deduct from 3rd Respondent's pension benefits, arrear maintenance owed by him to Applicant, to a maximum amount of R1,085,033.00.

THE BRIEF SUMMARY OF THE RULE NISI HEARING

[16] In her notice of motion, Applicant is seeking the following relief which is opposed by the 3rd Respondent:

1. That the applicant is authorized to enrol for adjudication her accrual-maintenance and cost claims which were previously postponed to 29 October 2019....

2. That it be declared that, pending finalisation of the claims referred to in prayer

1 supra, the Rule 43 order dated 31 March 2017 shall remain in full force and effect.

3. That it be declared that the 5th respondent is entitled to in terms of s37D

(i) & (iA) of the Pension Funds Act no 24 of 1956 to make certain deductions from the 3rd Respondent's pension benefits, in terms of the Act the amount to a maximum of R1 085 033.00(ONE MILLION EIGHTY-FIVE THOUSAND AND THIRTY-THREE

RAND) plus interest, being the amount owing for the maintenance of the applicant in terms of the court maintenance court order

[16] 3rd Respondent's Counsel ("Mr Klopper") submitted that Applicant's conduct is vexatious and did not disclose the full and true facts. She failed to disclose the true facts and directly relevant historical background. He submitted that the principle of ex parte applications is that the Applicant, choosing to approach the Court on an ex parte basis, had to comply with the very strict requirement to disclose all material, relevant and true facts openly and clearly before the court.

[17] He stated that the 3rd Respondent, was not served with any of the three notices of motion which Applicant launched in court, neither was he and both trustees served with the notice of set down for the hearing of 21 August 2023 wherein a rule nisi was ordered. He thus could not attend the hearing. He further submitted that the principle of audi alterem partes is of fundamental nature, and constitutionally protected right. He is therefore of the view that 3rd respondent's constitutional right has been violated. He, therefore, stated that in terms of the rules of court, a person against whom an order has been granted in his absence during an application launched and not served on that person must be granted the right for the matter to be subjected to re-consideration.

- [18] The applicant's counsel ("Mr Jacobs") contended that by the time the application was issued i.e., 18 May 2023, the 3rd Respondent had no legal interest in the relief sought, as he was divested of his estate (he was already sequestrated). He stated that the application was thus served on the trustees of the insolvent estate (First and Second Respondents) of the 3rd Respondent.
- [19] Mr Jacobs argued that the relief sought by means of the notice of motion declaratory order that Applicant be authorized to re-enroll her claims for accrual-, maintenance- and cost relief, is the relief that may impact upon the insolvent estate that vests in the trustees of the insolvent estate. In other words, the relief sought does not in any way whatsoever affect the person or status of the 3rd Respondent.
- [20] Mr Klopper contended that the request for an order to re-enrol a matter 'allegedly' struck on 29 October 2018, as there was no enrolment for the outstanding issues on 29 October 2018, constitutes a failure to disclose true facts and mislead the court, the Applicant also provides incorrect information, or vague as to what transpired regarding the court date as mentioned above. He submitted that that the matter was simply not enrolled for 29 October 2018, because it was referred to arbitration instead of
- proceeding before the Court on the stated date, therefore the matter was in all probability, struck from the roll.
- [21] Mr. Jacobs argued that the referral to arbitration was by agreement between the parties and nobody went to court on the postponed date as they were busy with the arbitration, therefore they are not certain on what transpired on that day. They could not get any records for that day in the court file.
- [22] Mr. Klopper stated that the request for the previously existing Order granted in terms of Rule 43, to be confirmed as binding and effectively re-instated, where the true facts are that all the previous existing Rule 43 orders have been finally substituted by an Order by the Maintenance Court, constitutes an attempt to mislead and fails to disclose the true facts. Furthermore, the reason for not disclosing payments made by 3rd respondent from November 2018 to May 2021 constitutes a failure to disclose the

facts.

- [23] Mr Jacobs acknowledged that it was an error on their part, he thus moved for an amendment of paragraph 1.2 of the rule nisi, to in its amended form read as follows:
- "1.2. That it be declared that pending finalization of the claims referred to in prayer 1supra, the maintenance order granted by the Magistrate's Court on 14 March 2022*
- ,shall remain in full force and effect"*
- [24] Mr Klopper argued that the official documentation provided by SANLAM demonstrates that the product is not subject to section 37D of the Pension Funds Act.

... We acknowledge receipt of the Notice of Motion and supporting documentation in the above matter, received on 31 July 2023. Sanlam Life Insurance Limited is the administrator of the retirement annuity plan of the maintenance debtor on behalf of the Professional Provident Society Retirement Annuity Fund (‘the Fund’). We shall not be opposing the matter, but wish to advise that the full amount being

claim in your papers is not available for deduction and payment _

COMMON

ISSUES

- [26] It is common cause that the 3rd respondent was finally sequestered on 8 October 2021, and that the First and Second Respondents were duly appointed as the trustee of his insolvent estate. In the circumstances, he was divested from his insolvent estate, which is being administered by the First and Second Respondents.
- [27] It is common cause that Applicant’s accrual-, maintenance- and cost claims were by agreement between the parties referred to arbitration instead of proceeding therewith before the Court on 29 October 2018.
- [28] It is further common cause that there was no appearance before the Court on 29 October 2018, and that the matter was, in all probability, struck from the roll.

THE ISSUE

- [29] Whether the rule nisi dated 21 August 2023 should be made final or be set aside.

THE LEGAL PRINCIPLE AND ANALYSIS

Non service results

- [30] Mr Klopper lamented that 3rd Respondent was not served with the papers; thus, he was denied the opportunity to present his side of the story. He further contended that the applicant had not disclosed all the information to the court and had misled the court hence the order. It is for that reason that he calls for the interim relief (rule nisi) to be set aside so that the matter gets to be reconsidered.
- [31] He referred to the case of *Laurenco v Ferela (Pty) Ltd (No)[1]* where it was held that the dominant purpose is that an aggrieved party is provided a mechanism designed to redress imbalances, injustices, and oppression following from order granted in his/her absence.
- [32] The applicant’s counsel submitted that at the time of issuing these notices, 3rd respondent was already sequestered, and his estate was diverted to the Master/trustees. As such both trustees were served with the motions as she believed that the orders sought in the motions were not status matters, therefore personal service on the 3rd respondent was not necessary.

- [33] Perhaps it will be logical if one first turns into the rule nisi, by considering its procedure, in general, and the nature and effect of the order granted on 21 August 2023. The SCA [2] described the rule nisi as follows;

The rule nisi procedure

- [34] 'A rule nisi is an order issued by a court, at the instance of a party, calling upon another party or parties to show cause on a stipulated date before that court why relief, as claimed, should not be granted. The procedure, which derives from English law, has been employed by our courts for well over a century.[3] Its use and development is underpinned by the principle that a court will not grant relief which impacts or constrains the rights and interests of a party without affording that party an opportunity to be heard (*audi alteram partem*). It is also premised on the acceptance that the interests of justice require the balancing of rights and interests to ensure that what is worthy of immediate protection is not prejudiced by the time it takes to hear all interested parties”.
- [35] It is clear from this description that the vital part of the rule nisi and its process is to ensure that (a) notice is given to an affected party; (b) a *prima facie* case is made out for the relief sought; and (c) such relief may be granted unless cause is shown why it should not be granted

Notice is given to an affected party;

- [36] Judge Davies made an interim order and insisted that the order must be served upon Mr. M[...]. The term of the order issued by Judge Davies indicates that he was cognizant of the fact that it is a status[4] matter and the granting of the relief may impact the rights of Mr M[...]. Hence the insistence of service on Mr M[...] as an affected party to ensure that he is afforded an opportunity to be heard.
- [37] On 15 September 2023, the Sheriff of the court served Mr. M[...] with the court order of 21 August 2023. Mr M[...] was initially not in possession of the notice of motion, however upon notification, the applicant furnished him with the entire batches of court motions in this matter. This enabled Mr M[...] to file his replying affidavits and the heads of argument. To me, this whole process rectified the non-service lamented by the 3rd respondent.

A *prima facie* case is made out for the relief sought

- [38] On a declaratory order for the applicant to reenroll for adjudication of the outstanding issues from the decree of the divorce order, Mr. Klopper submitted that the applicant could have simply reenrolled the matter a long time ago. Instead, she was focusing on other applications like sequestrating Mr. M[...], the issues have thus become moot; and cannot be reenrolled. In his submissions, he considered the applicant to be a vexatious litigant.
- [39] It is common cause that the parties did not attend court on 29 October 2018 because they agreed to take these issues to arbitration. It is further not disputed that the arbitration proceeding took place from 15 to 18 October and was finalized on 15 November 2018.

[40]v It is not clear from the information presented as to what happened in court on that day, whether the matter was struck off, or was not finally set down nobody seems to know. Significantly, the parties did not attend court for the adjudication of the outstanding issues as they took the matter to arbitration.

[41] The Applicant indicated that she was unfortunately enlightened by the Senior Counsel later on, that arbitration was the wrong forum for the abovementioned process and that the award she got out of the arbitration, was null and void because it violated the arbitration act.

[42] It appears that she was further advised that she had no automatic right to simply reenroll her accrual and maintenance-cost claims in this court and that she had to explain the situation and seek authorization and leave from the court in the form of a declaratory order, the process which she has embarked on. It is clear to me that the outstanding issues that were postponed to the 29th of October 2018 are standing still. They thus need to be carried through, and the only way in this instance is to set the matter down for adjudication in this court. I see nothing vexatious in the Applicant's conduct. There is indeed, a prima facie case for seeking the declaratory order to reenroll the matter.

[43] On the declaratory order that the 5th respondent is entitled to in terms of s37D (i) & (iA) of the Pension Funds Act no 24 of 1956 to make certain deductions from the 3rd Respondent's pension benefits, Mr Klopper submitted that Mr M[...] does not have a pension fund with Sanlam. He said that the only product provided by Sanlam through the PPS provisions to Mr. M[...] is insurance against incapacity to work and death. The product is not a pension fund or annuity and is not one that could ever be subject to the provisions contained in Section 37D(d)(i) & (iA) of the Pensions Fund Act.

[44] It is evident from the letter sent by Sanlam to the Applicant and also the benefit statement attached by the 3rd respondent, which confirms that the benefit is defined as "U PPS Retirement Annuity (voordeelstaat), that it is a subject to such provision. Nevertheless, this is the process I believe the 5th respondent will deal with in its assessment of the claim.

[45] To add on that, a letter was dispatched to Sanlam for the claim of arrear maintenance of the applicant against the 3rd respondent. In response, Sanlam notified the applicant's attorneys, that Sanlam does not intend to oppose the relief sought and that the facility has R515 535.00 (five hundred fifteen thousand, five hundred and thirty- five rand). In essence, Sanlam confirms that such maintenance is claimable through this facility held for 3rd respondent. The letter from Sanlam's legal advisor attached by the applicant and the benefit statement attached by the 3rd respondent, are sufficient evidence that such facilities do exist. A case has therefore been made for a declaratory order in this respect.

[46] Whether the 3rd respondent is indebted to the Applicant in the amount of R1,085,033.00. in respect of arrear maintenance. The applicant asserted that it is the arrear maintenance and that as a creditor in Mr. M[...]’s insolvent estate, she has lodged a claim with the trustees who have proven the claim against the estate in the second meeting of creditors. This to me simply means that if the estate has sufficient funds, then the arrear maintenance will be

settled upon the distribution process. Incidentally, the trustees have the option to accept or reject the claim depending on verification and proof thereof. The 3rd Respondent denied that he owed the applicant and specified in his affidavit the amount he paid without substantiation thereof. He has also not shown this court the current balance thereof, he simply stated that he paid the applicant. Be that as it may, the arrear maintenance issue is currently in the hands of the trustees. Without proof, these allegations remain unfounded.

[47] On the issue of reconsideration of the matter, it was held in the case of ISDN Solutions (Pty) Ltd v CSDN Solutions CC and Others[5], that the purpose of Rule 6(12)(c) is to offer an aggrieved party a mechanism to redress imbalances in injustices and oppression from the granting of an order in his absence. A court has wide discretionary powers and reconsideration may involve a deletion of the order, either in whole or in part. The relevant factors requiring consideration include whether an imbalance, injustice, or oppression has resulted, whether alternative remedies are available, the nature of the order, and the reason for the order being sort ex parte .

[48] Mr Klopper contention that the third respondent's version did not disclose all the true and relevant facts and his affidavit misled the court is not convincing. From the founding papers and the submissions in court to me the applicant has done her utmost good faith and has disclosed all the relevant facts for the court to come to an informed decision. It is apparent that the mistake that the applicant made with respect to the rule 43 /maintenance court assertion has been rectified by the amendment he moved for, which has not caused any prejudice to the respondent case. It is very clear that the applicant was not willful in not disclosing, from the evidence presented that was a mere human error.

[49] The reason presented by the applicant for why the rule nisi should be made final, to me was convincing considering all evidence. In my view, there is no imbalance considering the nature of the order granted, and the nature of the order is not oppressive considering all the facts presented. Moreover, in the interest of justice, the only option for the parties is to reenroll in the matter, get the issues adjudicated, and come to the finality of this matter. The issues raised by the 3rd respondent can be dealt with in the sought court. I am therefore not persuaded that the third respondent has met the requirements to set aside the rule nisi.

COSTS

[50] Applicant prayed that the person opposing the notice of motion should be ordered to pay for the costs. On the other hand, 3rd respondent prayed for punitive costs against the applicant. The normal principle is that cost follow the result.

CONCLUSION

[51] There has not been any good cause shown by the 3rd respondent as to why the relief granted by means of the rule nisi should not be made final.

[52] It therefore follows that the rule nisi stands to be confirmed.

ORDER

1. The following order is hereby made final:

1.1. It is declared that the applicant is authorized to enroll for adjudication her accrual-maintenance and cost claims which were previously postponed to 29 October 2019

1.2. It is declared that, pending the finalization of the claims referred to in prayer 1.1 supra, the maintenance order granted by the magistrate's court on 14 March 2022 shall remain in full force and effect.

1.3. That it be declared that the Fifth Respondent is entitled to in terms of Section 37D (d)(i) & (iA) of the Pension Funds Act number 24 of 1956 to make certain deductions from the Third Respondent's pension benefits, the details of which is set out hereunder, in terms of the Act being an amount owing in terms of an order made by a court in terms of a maintenance order as defined in Section

1 of the Maintenance Act 1998, to a maximum of R1,085,033.00 (ONE- MILLION, EIGHTY-FIVE THOUSAND AND THIRTY-THREE RAND) plus interest, being the amount owing

for the maintenance of the applicant in terms of the court maintenance court order together with interest at a rate of 10,25% from the respective dates which is due and payable in terms of court orders dated 31 March 2017 and 23 May 2018.

The Third Respondent pension benefits:

Sanlam Life Insurance Limited and a member of its Professional Provident Society Retirement Annuity Fund

(PPS Retirements Annuity Fund) with the following membership details:

Plan Number: 0[...]

Product Type: Retirement Annuity (434P)

Product Name: The Renaissance Plan for Retirement

1.4 Payment of the deduction from the Third Respondent's pension benefits be made to the Applicant's Attorneys of record Seymore Du Toit & Basson Inc Attorneys, Nelspruit, within 30 (thirty) days of granting of this order

2. The 3rd respondent shall pay to the applicant the cost of this application.

MALATSI-TEFFO

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

APPEARANCES:

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Instructed by: SEYMOUR

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Date of hearing:

22 November 2023

Date of

judgment:

29 April 2024

This judgment has been handed down remotely and shall be circulated to the parties by way of email, and be uploaded on case line. Its date and time of handdown shall be deemed to be 29 April 2024

[1] 1998

(3) SA 281 (T)

[2] MEC for the Department of Health, Eastern Cape v BM (213/2021)

[2022] ZASCA 140

[3] See Setlogelo v Setlogelo 1914 AD 221; see also Grant-Dalton v Win and Others 1923 WLD 180 at 185.

[4] S23(6) Insolvency Act 24 of 1936

[5] 1996

(4) SA 484 W

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