

SOUTH AFRICA / JUDGMENT

M v M and Another (230/2016)

[2016] ZAFSHC 132 (4 August 2016)

[2016] ZAFSHC 132**COURT**

Free State High Court, Bloemfontein

BEFORE

M C Mokgobo

CASE / FILE NUMBER

230/2016

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Policy**IN****THE HIGH COURT OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 230/2016****In**

the matter between:

G

G

M.....Ap

plicant

and

T

A

M.....1st

Respondent

STANLIB

WEALTH MANAGEMENT

LTD.....2nd

Respondent

HEARD

ON: 26 MAY 2016

JUDGMENT

BY: MOKGOBO, AJ

DELIVERED ON: 4 AUGUST 2016

Introduction

[1] This is an application for an order set out in the notice of motion. For ease of reference, the specific terms of the relief sought are reiterated hereunder:

1.1 That applicant is entitled to payment of 50% of 1st respondent's investment under investment number LA....., held or administered by the 2nd respondent, as soon as the investment falls due to the 1st respondent or his estate pursuant to his passing.

1.2 The 2nd respondent is directed to note the order in paragraph 1 above against their records and immediately effect the required payment directly to the applicant when the aforementioned investment falls due.

1.3 Until the 1st respondent's interest falls due and payment to the applicant is made in accordance with paragraphs 1 and 2 above, the applicant is entitled to 50% of all pay-outs, proceeds, interest, pension, drawdowns and/or payments of whatsoever nature made to the 1st respondent, or designated nominee, out of or as a consequence of the aforementioned investment.

1.4 The 1st and 2nd respondents are directed to take such administrative steps as may be required to give effect to the order in paragraph 3 above.

1.5 In the alternative to prayers 1-4 above:

Judgement

is granted in favour of the applicant against the 1st respondent for payment of the amount of R1 070 021, 28, together with interest at 9% per annum, a tempora mora, to date of payment in full.

[2] Applicant is Gaongalelwe Masiba, an adult female employed at the Department of Social Development and 1st respondent is Thabo Abel Masiba, a major male person. The 2nd respondent is Stanlib Wealth Management Limited, a company registered in terms of the Laws and Statutes of the Republic of South Africa, conducting business as a fund and asset manager

[3] Before dealing with the factual matrix of this matter, it is prudent at this juncture to mention that 2nd respondent pointed out raised that applicant had cited the incorrect entity namely, Stanlib Limited instead of Stanlib Wealth

Management Limited. Although Stanlib Limited and Stanlib Wealth Management Limited are entities that form part of the Stanlib Group

of Companies they are separate and distinct entities. The investment with the investment number LA..... which is the subject matter of this application was made with and administered by Stanlib Wealth Management Limited and not Stanlib Limited. However, by consent between the parties, Stanlib Wealth Management Limited was substituted for Stanlib Limited.

Facts

[3] Applicant and 1st respondent were married to each other in community of property in 1982. In 2013, applicant instituted divorce proceedings against 1st respondent and that culminated in a deed of settlement agreement reached between the parties. In April 2015 the marriage between the parties was dissolved by Daffue J. The settlement agreement was made an order of the court. The relevant parts of the settlement agreement, encapsulated in the divorce order are set out in paragraphs 4 and 5. The agreed terms thereof are the following:

Paragraph 4

In terms of Sect 7 of the Divorce Act, an amount of equivalent to 50% of the Plaintiff's pension interest in the pension fund known as GOVERNMENT EMPLOYEES PENSION FUND and whereas the Plaintiff's membership number is 9....., shall be paid over to the Defendant as on the date of the final divorce order.

Paragraph 5

5.1 The Defendant undertakes to pay 50% of his investment with Stanlib, with investment number LA....., with current value of R 2 140 042. 55 within 30 days of the final divorce order being granted to Plaintiff.

5.2 The Defendant further undertakes to pay the Plaintiff the amount of R250 000. 00 within 30 days of the final divorce order being granted.

5.3 The Defendant undertakes to pay the above amounts to the Plaintiff within the specified timeframe as stated above, and further confirms that he is indebted to the Plaintiff in the amount of at least R1 320 021.28.

[4] The 1st respondent had been in the employment of Telkom and was a member of the Telkom Retirement Fund. Upon his resignation/retirement from Telkom and prior to the dissolution of the marriage, he transferred his pension proceeds to a linked annuity fund administered by Stanlib Wealth Management Limited. He receives a monthly payment of around R13800.

[5] Around July 2015, applicant's attorney approached 2nd respondent to give effect to the divorce order. The 2nd respondent refused to give effect to the court order and contended that the invested amount is a benefit which enjoys the protection

afforded by section 37A (1) of the Pensions Fund Act, 24 of 1956. Mr Mlungisi Mdwaba, apparently an employee from the Legal Department of the 2nd respondent confirmed the legal status of the benefit, however, he went further and advised that the viable option under the circumstances would be to attach the member's bank account in which he receives the monthly payments. (See page 23 of the paginated papers). On the strength of that advice, applicant approaches this court for an order set out in the notice of motion.

[6] The 1st respondent does not oppose the application whereas 2nd respondent opposes the application and its opposition is grounded on the following: by the relief sought, applicant is attempting to found a cause of action against the 2nd respondent for payment and further applicant is attempting to execute the terms of the settlement agreement upon 2nd respondent. Secondly, the investment in question is a pension benefit and enjoys the protection provided for in terms of Section 37A (1) of the Pension Funds Act.

Issues

[7] Upon perusal of the papers and submissions during the hearing, the following issues are to be determined:

- whether the relief sought in the notice of motion is an attempt by applicant to enforce the deed of settlement or to found a cause of action against the 2nd respondent.
- whether the applicant is entitled to the monthly pay out due to 1st respondent and does the protection provided for under Section 37A (1) of the Pension Funds Act 24 of 1956 apply only to the capital amount or does it extend to the monthly pay-out received by a member from the fund.

The Law and application

[8] The issues that have to be determined revolve around the deed of settlement and will be resolved in that context and of course, the applicable legislation. The relevant parts of the Deed of Settlements have been set out above. For convenience, the provisions of section 37A (1) of the Pension Funds Act, 24 of 1956, which appears to be the alpha and omega of this matter, are set out hereunder:

37 A Pension benefits not reducible, transferable or executable

- (1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred

or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay such any benefit or any benefit in pursuance of such contributions, or part thereof, or any one or more of the dependants of the member or beneficiary, or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

[10] It is common cause that the deed of settlement was an agreement entered between applicant and the 1st respondent. The 2nd respondent was not a party to the agreement. Counsel for applicant had correctly conceded that the deed of settlement cannot be enforced against the 2nd respondent. However, he contended that the purpose of the relief sought in prayers 1, 2, and 4 of the notice of motion is not to

enforce the agreement but merely a declaratory order that the interest of applicant be noted against their records that applicant

is entitled to 50% of the investment held under investment number LA 4039502 administered by 2nd respondent. The relief sought in prayer 3 is also not an attempt to enforce the deed of settlement but rather an attempt to enforce the advice given to the applicant by Mlungisi Mdwaba, apparently an employee from the legal department of the 2nd respondent. Paragraph 5 of applicant's founding affidavit should be read in conjunction with her replying affidavit. It was

further his contention that it had always been the intention of the parties to share in their pensions. He further contended that the protection under section 37A (1) of the Pension Funds Act, applies only to the capital amount and not to a monthly pay-out. It was further his contention that if the monthly pay-out due to a member is exempted from attachment that would imply that pensioners are immune against debt collection procedures. He could not provide any authority to substantiate his latter submission.

[11] Adv. Cilliers, for the 2nd respondent, submitted that the relief sought is clearly an attempt by applicant to enforce the Deed of Settlement against the 2nd respondent and for his contention he relied on paragraph 5 of applicant's founding affidavit. It was further his contention that section 37A (1) of the Pension Funds Act provides enhanced protection to pension benefits and applies to both the capital amount and monthly pay-out under the control of the Fund. For his submissions, he referred me to the judgments, *Elesang v PPC Lime Limited and Others* 2007 (6) SA 328 (NC) para 40 and *Ehlers v Nedcor Defined Contribution Provident Fund and Another*

[2002] 3 BPLR 3141 (PFA).

[12] I now turn to the first issue to be determined namely: whether applicant is attempting to enforce the Deed of Settlement or

attempting to found a cause of action against the 2nd respondent.

[13] I am in agreement with Counsel for applicant that the Deed of Settlement cannot be enforced because the 2nd respondent was never party to the agreement and further, the amount held under investment number LA....., administered by 2nd respondent is a living annuity protected under section 37A (1) of the Pension Funds Act. However, his contention is irreconcilable with the applicant's founding affidavit. I am saying this on the following grounds. The applicant, in her own founding affidavit, purportedly drafted on the strength of advice given to her by Mr Mdwaba, it is her own say so that she seeks to enforce her rights in terms of the Deed of Settlement. When the 2nd respondent raised the issue in its answering affidavit that the Deed of Settlement cannot be enforced, she replied and stated that her intention is not to enforce the Deed of Settlement but merely to execute her rights to claim half of 1st respondent's monthly pay-out as advised by Mr Mdwaba. The above averments are clearly contradictory and as the 2nd respondent, correctly raised the issue in its answering affidavit, raise more questions than answers. For instance, if her intention is not to enforce the Deed of Settlement but merely to enforce the advice given to her by Mr Mdwaba, then why such an averment in paragraph 5 of her founding affidavit as alluded above? Further, if the applicant's intention was merely to claim half of 1st respondent's monthly pay out in terms of prayers 3 of her notice of motion, then what is the relevance or purpose of the relief sought in prayers 1,2 and 4 in her notice of motion. A closer scrutiny of Mr Mdwaba's letter, page 23 of the papers, poses some difficulties. For one moment, he expressed the view, that monthly payments can be attached and in the same vein he goes further to say that he is not sure whether, operationally, Stanlib, being the fund, can adhere to an order instructing the splitting of monthly payments. He is further adamant that their business rules would not allow third party payments. This advice, to say the least, is abstruse and misleading. It would, in my view, be reckless if not dangerous to rely on such advice. In any event attaching a bank account of the 1st respondent is a matter between the 1st respondent and the bank and has absolutely nothing to do with the 2nd respondent.

[14] The relief sought in the notice of motion emanates from the Deed of Settlement which has been made an order of court. The averments in applicant's founding affidavit, her belated denial in her replying affidavit and the relief sought in prayers 1,2 and 4, are mutually destructive averments, raising some serious doubts about applicant's bona fides. In view of the above, I am inclined to agree with Adv. Cilliers that applicant is indeed attempting to enforce the Deed of Settlement or attempting to found a cause of action against a non-party (the 2nd respondent).

[15] The second issue that has to be determined is whether applicant is entitled to half of the monthly pay-outs received by the 1st respondent and are those benefits enjoying the protection under section 37A (1) of the Pension Funds Act.

[18] In terms of section 37A (1) of the Pensions Fund Act, the 1st respondent's interest in the living annuity administered by Stanlib Wealth Management Limited is a benefit. In terms of Section 1 of the Pensions Fund Act, a benefit is defined as any amount payable to a member or beneficiary. The Act does not distinguish between the capital and monthly pay-outs or proceeds from the living annuity and it is therefore my view, that the term or phrase, any amount, is quite extensive to include both the capital and monthly pay-outs or proceeds. Therefore, any order directing the 2nd respondent as the administrator of the living annuity, to pay half of the monthly proceeds to applicant would amount to a reduction,

transfer, execution or attachment and contrary to spirit and purpose of the Act.

[19] In *Ehlers v Nedcor Defined Contribution Provident Fund and Another*

[2002] 3 BPLR 3141 (PFA), it was held that the monies, once paid into an account, lose their "pension status" and the

protection afforded by section 37A of the Act and therefore become capable of attachment because ownership would have passed from the Fund to the bank. I am mindful of the fact that the above matter is judgment of a Pension Adjudicator, however, the above interpretation

is in my view, correct, relevant and has some persuasive force in determining the issue at hand, with regard to the legal status of pension benefits under the control of the Fund and the position after ownership of the money has passed to the bank.

Conclusion

[20] In view of the above, I am satisfied that from the Deed of Settlement there is no objective rationale to support the relief sought in the Notice of Motion against the 2nd respondent. The applicant is indeed attempting to found a cause of action against the 2nd respondent.

The protection the capital amount enjoys under Section 37A (1) of the Pension Funds Act, equally applies to monthly pay-outs or proceeds due to a member, provided the money is still under the control of the Fund. Once the money is paid by the Fund into the account of the member, ownership will inevitably pass to the bank and the provisions of section 37A (1) of the Pension Funds Act no longer apply.

[21] In view of the above, the contention by Adv. Johnson that applicant is entitled to half of 1st respondent's monthly pay-out, that protection under section 37A

(1) does not extend to monthly pay out and the fact that pensioners are immune to execution steps is, with respect, misplaced.

[22] With regard to the alternative relief, Adv. Johnson has conceded that judgment granted against 1st respondent is not a satisfactory option since the capital amount is protected under section 37A (1). In view of the fact that the 1st respondent has acknowledged his indebtedness to the applicant (see paragraph 5.3 of the Deed of Settlement above) and he did not oppose the application, I am satisfied that judgment granted in favour of the applicant will do him no harm.

Order

[22] The following order is made:

- (a) The application against the 2nd respondent is dismissed.
- (b) Judgment is granted in favour of the applicant against the 1st respondent for payment of the amount of R1 070 021.28, with interest at 9% per annum, a tempore morae, to date of payment in full.
- (c) Both the applicant and the 2nd respondent have attained some measure of success in this application, I order that each party to pay its own costs.

M C MOKGOBO, AJ

On behalf of Applicant Adv. JMC JOHNSON

Instructed by:

BLAIR ATTORNEYS

BLOEMFONTEIN

On behalf of 2nd Respondent Adv. H CILLIERS

ETTIENNE DE HEUS ATTORNEYS

C/O VAN DER MERWE SOROUR

ATTORNEYS

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Prepared on 12 October 2026 · Esheria