

SOUTH AFRICA / JUDGMENT

M.M.R v J.D.P and Others (6889/2021) [2023] ZALMPPHC 48 (17 July 2023)

[2023] ZALMPPHC 48

COURT

Limpopo High Court, Polokwane

BEFORE

Mthimkulu SS

CASE / FILE NUMBER

6889/2021

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REPUBLIC OF SOUTH
AFRICA

IN THE HIGH COURT OF
SOUTH AFRICA

(LIMPOPO DIVISION,
POLOKWANE)

Case Number: 6889/2021

REPORTABLE: NO

OF

INTEREST TO OTHER JUDGES: NO

REVISED:NO

DATE:17/7/2023

In

the matter between:

M[...]
M[...] R[...]
APPLICANT
AND
J[...]
D[...] P[...]
FIRST
RESPONDENT
GOVERNMENT
EMPLOYEES PENSION FUND
SECOND
RESPONDENT
THE
MASTER OF THE HIGH COURT, POLOKWANE
THIRD
RESPONDENT

JUDGMENT

MTHIMKULU SS AJ:

Introduction:

- [1] This is an application for an order to attach pension benefits due to the First Respondent for future maintenance of two minor children born from the marriage between the Applicant and the First Respondent. This court granted an interim order on 26 October 2021. A rule nisi was issued and thereafter extended, by agreement between the parties, in an endeavour to settle the matter. The issue to be decided is whether the Applicant is entitled to a final order that, the Second Respondent ought to be interdicted from paying out the First Respondent's share of the Applicant's pension interest with the Second Respondent for purposes of future maintenance of the minor children.

Facts:

- [2] The Applicant and the First Respondent were previously married to each other. The marriage relationship between them was dissolved on 2 July 2021. Two minor children were born from the marriage between the Applicant and the First Respondent, being B[...] a daughter born on 3[...] m[...] 2009 and S[...], a daughter born on 1[...] J[...] 2015.
- [3] During the divorce proceedings the aspect of maintenance was not ventilated and in terms of the decree of divorce the aspect of maintenance in respect of the minor children was referred to the Maintenance Court. As a result, there is currently no maintenance order in place.

- [4] Although the bonds of marriage between the Applicant and the First Respondent were dissolved on 2 July 2021, the Applicant and the First Respondent still live together. The Applicant is employed as a professional nurse and the First Respondent as per his counsel's submissions is a "tenderpreneur".
- [5] The Applicant contends that the First Respondent's lack of financial contribution in the marriage and towards the minor children has been a bone of contention between them throughout their marriage. The First Respondent would on numerous occasions receive copious amounts of money from tenders and would proceed to dissipate the money. According to the Applicant the First Respondent's conduct has been that he would contribute as and when he pleases.
- [6] The Applicant earns a net salary of R11 000,00 (eleven thousand rands). The minor children's maintenance needs per month amounts to approximately R9 880,00 (nine thousand eight hundred and eighty rands). It is the Applicant's submission that she is struggling financially to provide for herself and her minor children's needs on a monthly basis.
- [7] It is further the Applicant's contention that the First Respondent contributes as and when he feels like it. Not only that, the First Respondent would rather spend his money on luxuries. In a span of five months the First Respondent contributed towards maintenance of the children in an amount of approximately R600,00 (six hundred rand). It is the Applicant's contention that from the First Respondent's bank statements, one can see that the First Respondent withdraws huge amounts of money at casinos and spends it on lavish purchases.
- [8] The First Respondent contends that he has no intention of dissipating the proceeds of his pension interest to defeat the Applicant's maintenance claims. It is his contention that the Applicant's application is premature in that the Applicant has approached this court when there is no maintenance order in place and the First Respondent has not acted in contravention of any maintenance order.
- [9] It is further his submission that he is not in arrears in respect of his maintenance obligations towards his two minor children. It is the First Respondent's submission that there is not a single iota of evidence to suggest that he will not comply with his maintenance obligations in the future. He further submits that he is a businessman who relies on sporadic tender contracts for survival. Further that, this submission should not be construed to absolve him from his reciprocal duty to contribute to the support of his two minor children bearing in mind his means.

The Law:

- [10] The question to be decided is whether the Applicant is entitled to a final order that, the Second Respondent retains the First Respondent's pension interest for purposes of future maintenance of the latter's minor children.

[11] Section 28(2) of the Constitution of the Republic of South Africa provides that; “A child’s best interests are of paramount importance in every matter concerning the child.” This is the starting point in matters concerning children.

[12] Section 26 (4) of the Maintenance Act 99 of 1998 (“Maintenance Act”) provides as follows:

“Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order.”

[13] Section 26 (4) of the Maintenance Act makes provision for the attachment of pension, annuity, gratuity or other similar benefits on the basis of the maintenance that is currently due and to a large extent the amount of maintenance that is outstanding and not necessarily that which is payable in future. It

makes provision for payment of arrear child maintenance, on behalf of the child, from the retirement fund member’s retirement

benefits.

[14] Section 26 (4) of the Maintenance Act specifically deals with arrear maintenance and not future maintenance. In *Mngadi v Beacon Sweets and Chocolates Provident Fund and Others* [2003] 7 BPLR 4870 (D) at 4874, the court held that:

“It is clear from the above section, including subsection (4) that arrear maintenance is referred to and not amounts which will become

applicable in the future.”

[15] Section 37A (1) of the Pension Funds Act 24 of 1956 provides that:

“Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No.58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including 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 fund, be capable of being reduced, transferred or otherwise

ceded, or of being pledged or hypothecated, or able to be attached or subjected to any form of execution under a judgment or order of court of law,.....Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependent or dependents during such period as it may determine.”

[16] Section 37 A (1) of the Pension Funds Act 24 of 1956 prohibits the reduction, hypothecation, cession, transfer and attachment of retirement benefits, unless such is specifically permitted by the Pension Funds Act 24 of 1956, the Income Tax Act 58 of 1962 and the Maintenance Act 99 of 1998.

Application of the law:

[17] Section 37A (1) of the Pension Funds Act 24 of 1956 prohibits the reduction, hypothecation, cession, transfer and attachment of retirement benefits, unless such is specifically permitted by the Pension Funds Act, Income Tax Act 58 of 1962 and the Maintenance Act 99 of 1998. Retirement funds are empowered by Section 37D of the Pension Funds Act to “deduct from a member’s or deferred pensioner’s benefit, member’s interest or minimum individual reserve, or the capital value of a pensioner’s pension after retirement as the case may be –

(iA) any amount payable in terms of a maintenance order as defined in section 1 of the Maintenance Act.”

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