

SOUTH AFRICA / JUDGMENT

Moephuli v Government Employees Pension Fund and Another (14405/2016) [2017] ZAGPPHC 505 (21 August 2017)

[2017] ZAGPPHC 505

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar

CASE / FILE NUMBER

14405/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA DIVISION)

Case

No. 14405/2016

Date: 21/8/2017

In

the matter between:

MOR

MOEPHULI APPLICANT

and

GOVERNMENT

EMPLOYEES PENSION FUND 1st

RESPONDENT

TPS

TINDISA 2nd

RESPONDENT

JUDGMENT**MILLAR,AJ**

1. This is an application in which the applicant seeks an order that the first respondent reinstate her interest in the pension fund of which she is a member, the second respondent as at 7 December 2015.
2. The applicant sued the second respondent, her former husband for inter alia a decree of divorce in the regional court for the division of the north west held at Mmabatho. The summons was served by substituted service pursuant to a court order and thereafter an order of divorce granted on 5 November 2014.
3. The order read:
 - a. "THAT the bonds of marriage subsisting between the PLAINTIFF and the DEFENDANT be and are hereby dissolved. An order for the division of the joint estate that each party to remain with his/her pension fund" (Annexure "X1" page 14).
4. The applicant states that, she then on no less than 7 occasions, prior to 7 December 2015, attended at the offices of the first respondent in order to ensure that the terms of the order were properly recorded. She did this so she stated because "This was important to me as my pension interest held with the 1st Respondent is my single biggest asset and the purpose thereof is to ensure my wellbeing upon retirement." [1]
5. This is not disputed by the first respondent who admitted, it had received the court order of 5 November 2014 and had updated its records accordingly.
6. Without the applicant being informed until September 2015, it transpired that the second respondent had in the meantime and on 3 July 2015 obtained a second order for divorce in the Regional Division of Gauteng Pretoria. This second order was substantially the same as the first order save that it provided very specifically for the payment by the first respondent of half of the applicant's pension fund interest to the second respondent.
7. Upon the applicant becoming aware of the second order, her legal representatives wrote to the second respondent's legal representatives on 9 October 2015 and brought to their attention that the second order was void.[2] They also wrote to the first respondent[3]
8. It is admitted by the first respondent that it received the letter. Notwithstanding this, the first respondent took the view that the second court order was valid and binding on it and that it had to comply which it duly did.

9. The first respondent contends that it was entitled to ignore the letter that had been sent to it and was only obliged to have regard to the court order. This argument seems to me to be specious.
10. If it was obliged to have followed a court order and could ignore the letter, then no satisfactory explanation was given as to why it chose the second court order over the first. The first respondent asserts that it was under the genuine impression that it was a variation of or attempt to correct the first order, is not borne out by the papers filed by the first respondent. Furthermore, it is apparent from the orders themselves that they were granted in different courts in different provinces and that the second order made no mention whatsoever of the first.
11. The fact that the second order was void is a matter of law.[4]
12. The first order was in its terms as clear and unequivocal as the first as to what had been ordered in respect of the pension fund. There is no cogent explanation from the first respondent as to why it chose the second order over the first. Even if the first respondent had believed both to be valid and binding, for the reasons set out below, it ought not to have made any payment to the second respondent until the dispute relating to the two different court orders had been resolved.
13. The attempt to lay the cause of its incorrect payment to the second respondent at the door of the applicant is misplaced.
14. At the very least, the first respondent should have declined to make any payment until such time as there had been a clarification as to which order was to be enforced.
15. The first respondent has a duty of care to its members for the very reasons advanced by the applicant[5] and must have been aware that if payments were incorrectly made from a particular member's pension fund credit, this would cause damages to not only the member concerned - the applicant, but to the general membership at large. The first respondent's control of the pension fund places this duty upon it.
16. It is surprising that notwithstanding the attention of the first respondent having been brought to the matter, that it ignored the applicant and proceeded nonetheless. It did so recklessly and negligently in my view.
17. That the applicant has suffered the damages claimed as a result of the conduct of the first respondent is clear.
18. The applicant sought a punitive costs order in the matter. Having considered the matter, I am of the view that a punitive costs order is not warranted in the circumstances.
19. In the circumstances, I make the following order:
 - 19.1 The first respondent is ordered to amend its records to reflect that the order of the Court at Mmabatho under reference NW/MMB/RC/546/2013 as being the only order governing the applicant's pension fund interest.

19.2 The first respondent is ordered to replace and/repay the sum of R229 338,93 together with such interest as may have accrued thereon from 9 December 2015 to date of payment, both days inclusive.

19.3 The first respondent is ordered to implement the order referred to in paragraph 1 above within 15 days of service of a copy of this order upon it and to confirm in writing to the applicant's attorneys once it has done so.

19.4 The first respondent is ordered to pay the costs of the application.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

- [1] Founding affidavit paragraph 4.7 page 8
- [2] Annexure "X4" page 16
- [3] Annexure "XS" page 18.
- [4] see THE MASTER OF THE HIGH COURT (NORTH GAUTENG HIGH COURT,PRETORIA) v Motala NO and Others 2012 (3) SA 325 (SCA).
- [5] Founding affidavit paragraph 4.7 page 8

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