

SOUTH AFRICA / JUDGMENT

M.P.M v T.R.T and Another (2023/118970) [2025] ZAGPJHC 319 (25 March 2025)

[2025] ZAGPJHC 319**COURT**

South Gauteng High Court, Johannesburg

BEFORE

Noko

CASE / FILE NUMBER

2023/118970

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Policy**REPUBLIC****OF SOUTH AFRICA****IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, JOHANNESBURG.****Case****Number:**2023-118970**(1)****REPORTABLE:** NO**(2)****OF INTEREST TO OTHER JUDGES:** NO**(3)****REVISED:** NO**SIGNATURE****DATE:** 25 March 2025.**In**

the matter between: M[...]
P[...]
M[...]
Applicant
And
T[...]
R[...]
T[...]
First Respondent
GOVERNMENT
EMPLOYEE PENSION FUND
Second Respondent

JUDGMENT

NOKO J

Introduction

- [1] The applicant brought an urgent application for an interim interdict restraining the second respondent from paying out 50% of the first respondent's pension benefit pending the finalisation of the divorce action between the applicant and first respondent.
- [2] The respondent is opposing the application and disputes that the applicant has made out a case for urgency and that the requirements for interim interdict were met.

Parties

- [3] The applicant is M[...] P[...] M[...], an adult female resident at 4[...] M[...] Street, W[...], Johannesburg.
- [4] The first respondent is T[...] R[...] T[...], an adult male resident at 4[...] M[...] Street, W[...], Johannesburg.
- [5] The second Respondent is the Government Employees. Pension fund (GPEF), a pension fund established in terms of Section 3 of the Government Service Pension Act 57 of 1973, subject to the provisions of the Government Employees Pension Law in 1996, with its head office at 34. Hamilton Streer, Pretoria.

Background

- [6] The factual background is uncomplicated and is set out as follows. The applicant and the first respondent were married to each other in community of property which marriage still subsists. The first respondent instituted divorce proceedings on 14 November 2023 which are pending. There are three minor children born of the marriage whose details are not relevant for the purposes of this judgment.

- [7] The applicant was informed that the first respondent was dismissed on 20 February 2025 and was further informed by her attorneys that the second respondent may pay the pension benefits anytime.

Urgency

- [8] The applicant submits that the reasons underpinning the approach to Court on urgent basis is informed by the advice she received from her attorneys that since the first respondent has been dismissed there would be no hurdle that would hinder the second respondent to process payment of the pension benefit to the first respondent unless the court issue an interdict.
- [9] The applicant contended that if the normal process is undertaken there is a greater chance that the application may be adjudicated in 2026 and at that time it would be late for her to obtain an equitable redress. In addition, there is no prejudice which can visit the first respondent for the said funds being stayed pending the finalisation of the divorce.
- [10] The applicant was notified that the financial circumstances of the first respondent has taken a knock and has reneged on his previous undertaking to increase maintenance for the children. Though he has made another undertaking that he would not cash on the pension pay outs it would be foolhardy to take his word just after he reneged on 24 February 2025 from paying extra for his own children.
- [11] The respondent contends that the urgency in this matter is self-created as the applicant's attorneys have since made it known to the first respondent's attorneys in November 2024 that an urgent application will be instituted. There is no explanation why same was not instituted then. There were extremely truncated dies prescribed by the applicant which made the first respondent to prepare the opposition under severely curtailed circumstances which

was not warranted and amount to abuse which the court should not countenance.

- [12] I had regard to submissions made by both parties and am persuaded that there was no evidence that urgency was self-created. The changed circumstances were conveyed to the applicant on 24 February 2025 and these proceedings were launched soon thereafter on 4 March 2025. The date of November 2024 becomes irrelevant under these circumstances. The applicant satisfied the principles elucidated in the locus classicus in *East Rock Trading*[1] that a party must set out succinctly the basis for urgency as the process set out in rule 6(12)(a) of the Uniform Rules of Court is not just there for asking. Further that a party should most importantly set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course. I therefor conclude that this matter deserves of the attention of the urgent Court.

Interdict

- [13] The applicant asserts that by virtue of marriage in community of property she has a right to 50% of the assets of the parties. Further that since the pension benefits are part of the assets as set out in section 7(7) of the Divorce Act[2], she has clear right to at least 50% thereof.
- [14] The applicant avers that she harbours a reasonable apprehension that the first respondent may withdraw the pension pay out since his dismissal which appears to have been unceremonious. The first respondent has instructed his attorneys to renege on the undertaking he made that maintenance amount would be increased and this was communicated to the applicant's attorneys on 24 February 2024.
- [15] The respondent contends that the averments set out in this paragraph are unfounded as undertaking requested by the applicant's

attorneys in November 2024 was given which was to the effect that the assets of the parties would not be dissipated. The assurance was also made again in February 2025 through exchanges from attorneys of both parties that assets would remain safe. Launching these proceedings despite that assurance is an abuse and should be frowned upon by the Court.

- [16] The applicant further contends that there is no prejudice which will visit the first respondent as the remainder of the pension benefits can be processed in his favour. In addition, the 50% which is the subject of this application would not be spent by the applicant and the first respondent may in the long run benefit therefrom if a proper case is made. In view hereof the applicant submit that the balance of convenience is in her favour for the purposes of obtaining an interim order.
- [17] There has been a concerted effort by the first respondent, argued the applicant, to delay the finalisation of the divorce and if the assets are not preserved there would be no assets to share at the end of the divorce which could possibly be in two years from the date of launching of the urgent application. The fact that the first respondent has lost employment weigh in favour of the applicant that if she await launching civil action for damages against a party who is unemployment the order may not be worth the paper. Worse the prospects of employment in his situation are weakened by the bleak record predicated his dismissal.

Issues

- [18] The issue for determination is whether the applicant has made out a case for an interim interdict.

Legal principle and analysis

- [19] The principles underlying application for interdicts both final and interim were laid down many decades ago. For the final interdict is Setlogelo[3] and for the interim interdict requirements are laid out in Webster.[4] The critical distinction between the two is that in the latter a litigant need only show a prima facie right even if it is open to some doubt whereas in the former one has to prove a clear right. In addition, there is extra requirement for the balance of convenience where a litigant seeks an interim interdict.
- [20] The reason underpinning my decision to highlight the distinction is motivated by the way the applicant crafted her papers. The notice of motion states that the applicant seeks “An order interdicting the Second Respondent from paying out 50% of the First Respondent’s pension benefit in the Second Respondent to him pending the finalisation of the divorce action between the Applicant and First Respondent”. [5] In sync with the notice of motion the applicant in her founding affidavit at para 4.2 refer to an interim order.[6] On the other hand, paragraph 9[7] of the applicant’s founding affidavit refers to final interdict and listed the three requirements in para 9.2.1. instead of four requirements required in interim applications.[8]
- [21] That notwithstanding, the applicant made reference to the fourth requirement of the interim interdict in para 11.2 that “... it is submitted that the balance of convenience is in favour of the Applicant for the relief sought in an event that Court is of the view that the requirement for final interdict are not established.”[9] It would be absurd for the court to find itself bound by an interpretation which may end up with injustice or even absurdity on the basis that the Court should only see issues as labelled or characterised by the litigants. If a final interdict is granted it would mean that the 50% would never be accessed even after the divorce except with another court order. This is not what was intended by the parties. If the facts and evidence presented before court justify the conclusion of an interim interdict the court should grant same despite the declared but confusing wishes of a litigant. The Court should be able to conclude on the interpretation of the correct legal principle without finding itself being paralysed by having to adhere to the litigant’s incorrect or mistaken reading of legal principles.
- [22] The respondent repeated the averments that he would not go back on his promises that the assets would not be dissipated. It is difficult for one to take such undertaking seriously since the respondent has recently withdrawn his undertaking to increase the maintenance. The withdrawal makes sense as he no longer has an income. The fact that he had to withdraw an undertaking he made before is consistent with someone who is saying he has no other means of survival or to take care of the children. There is therefore no reason to believe that the respondent may not go back on his words. This would not be the first time.
- [23] The respondent has further failed to demonstrate any prejudice which will visit him if the said 50% is frozen. In any event this has the same consequence with his undertaking but with force. It is mindboggling where the respondent summoned the energy and financial muscle to oppose the application if the essence of the order being sought is in sync with his undertaking. The fact that he is able to provide funding to oppose the urgent application but

have no money for the maintenance should say a lot about his intentions. This conduct lend credence to the suspicion that he may want to cash the pensions and benefit therefrom to the exclusion of the applicant.

[24] In the premises the opposition was ill-advised and unsustainable.

Costs

[25] The question of costs is within the discretion of the court. It was held in Bam[10] that “[T]he general rule relating to the costs is that costs follow the result. Re-imbursing a successful party of his or her out of pocket expenses is a settled principle which brooks no further ventilation.” The applicant has asked for costs at punitive scale. Ordinarily such order is warranted in exceptional circumstances where conduct of the litigant attract the wrath of the court. The Constitutional Court held in Mkhathshwa[11] “... that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court’s extreme opprobrium and disapproval of a party’s conduct.”[12] The opposition by the first respondent was vexatious and frivolous. The costs at punitive scale is justified.

Order

[26] In the premises I make the following order:

1. The applicant’s non-compliance with the Rules is condoned and the matter to be heard as one of urgency in terms of Rules 6(12) of the Uniform Rules of Court.
2. The second respondent is interdicted from paying out 50% of the First Respondent’s pension benefit pending the finalisation of the divorce action between the applicant and the First Respondent.
3. The first respondent is ordered to pay the costs of the application on a scale between attorney and client.

M V NOKO

Judge of the High Court

Gauteng Division, Johannesburg

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Dates:

Hearing:

11 March 2025.

Judgment:

25 March 2025

Appearances:

For the Applicant:

S M Nkabinde

Instructed by :

Mary Jane Mphahlele Attorneys Inc.

For the First Respondent:

TJ Loabile-Rantao

Instructed by:

Thaga Attorneys.

[1] East Rock Trading 7 Pty Ltd and Others v Eagle Valley Granite and Others (11/33767)[2011] ZAGPJHC 196 (23 September 2011).

[2] Act 70 of 1979.

[3] Setlogelo v Setlogelo 1914 AD 227.

[4] Webster v Mitchel 1948

(1) SA 1186 (W)

[5] See prayer 2 of the Applicant's Notice of Motion at CL 25-3.

[6] See Applicant's Founding Affidavit at CL 25-8.

[7] Id at CL 25-12.

[8] Id at CL 25-13.

[9] Id at CL 25-14.

[10] Bam v Holtzhausen and Others (2024/097438)

[2025] ZAGPPHC (21 February 2025).

[11] Mkhathswa and Others v Mkhathswa and Others [2021] ZACC 15.

[12] Id at para 21.

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