

SOUTH AFRICA / JUDGMENT

Sentinel Retirement Fund and Another v Masoanganye (1003/2017) [2018] ZASCA 126 (27 September 2018) [2018] ZASCA 126

COURT

Supreme Court of Appeal

BEFORE

Lewis, Cachalia, Saldulker, Mbha, Makgoka

CASE / FILE NUMBER

1003/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1003/2017

In the matter between:

SENTINEL RETIREMENT FUND FIRST APPELLANT

GARY MEYER SECOND APPELLANT

and

RICHARD MASOANGANYE FIRST RESPONDENT

LINDA MARTIN NDEBELE SECOND RESPONDENT

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS THIRD RESPONDENT

Neutral citation: Sentinel Retirement Fund v Masoanganye (1003/2017)

[2018] ZASCA 126 (27 September 2018)

Coram: Lewis, Cachalia, Saldulker, Mbha and Makgoka JJA

Heard: 4 September 2018

Delivered: 27 September 2018

Summary: Payment of a pension benefit to a curator bonis appointed in terms of restraint order issued under the Prevention of Organised Crime Act 121 of 1998 – whether precluded by s 37A(1) of Pension Funds Act 24 of 1956.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Makume J sitting as court of first instance):

1 Save as is set out below the appeal is dismissed with no order as to costs;

2 The order of the high court is amended as follows:

(a) The applications in Parts A and B are dismissed;

(b) Para 54.2 of the order is set aside and the following is substituted in its place:

‘The First applicant is ordered to pay the first and third respondents’ costs of the urgent application.’

(c) Para 54.4 of Part B of the order is amended to read:

‘The first applicant is ordered to pay the pension benefits of the second respondent into a special bank account designated for this purpose by the first respondent.’

(d) Para 54.5 of the order is set aside and the following is substituted in its place:

‘The First applicant is ordered to pay the costs of the first and third respondents.’

(e) A copy of this order must be served on the second respondent forthwith.

Cachalia JA (Lewis, Saldulker, Mbha and Makgoka JJA concurring)

[1] Section 37A(1) of the Pensions Fund Act 24 of 1956 (‘the PFA’) protects any benefit or right to any benefit provided for in the rules of a registered fund from attachment or being subjected to any form of execution against a judgment or order of a court of law. The narrow issue that arises in this appeal is whether the payment of a member’s benefit to a curator bonis pursuant to a restraint order in terms s 26 of the Prevention of Organised Act 121 of 1998 (‘POCA’), falls foul of this protection. The pension fund contends that it does. The curator bonis and the National Director of Prosecutions (‘the NDPP’) assert the opposite. The high court ruled in their favour.[1] The pension fund appeals to this court with its leave.

[2] Some background is necessary. The first appellant, Sentinel, is a pension fund (the Fund), and the second appellant, Mr Gary Meyer, its legal manager. Mr Meyer deposed to the papers on the Fund’s behalf. The second respondent, Mr Linda Martin Ndebele, is a member of the Fund. In 2014, he terminated his services with his employer and his withdrawal benefit accrued to him. He thus became entitled to a lump sum benefit equal to his fund credit. On 19 June 2015, he elected to have his withdrawal benefit paid to him in terms of the Fund’s rules. He remains a member of the Fund until the benefit is paid, but is not party to

the present dispute.

[3] The third respondent is the NDPP. It prosecuted Mr Ndebele and succeeded in having him convicted in the high court on racketeering

charges in contravention of POCA on 21 February 2011. The court found that he had formed a criminal enterprise with another person and had benefitted from the illegal sales of electricity to Eskom to the value of R 8.9 million. His appeal against this conviction is pending.

[4] Shortly after Mr Ndebele's conviction, on 9 March 2011, the NDPP obtained a provisional restraint order, coupled with a rule nisi, against him in terms of s 26 of POCA. The order required disclosure and surrender, of his 'realisable property'

and prohibited any dealing with it. The rule was confirmed on 31 May

2011. In terms of clause 1.6 of the restraint order, the first

respondent, Mr Richard Masoanganye, was appointed curator bonis subject to the provisions of the Administration of Estates Act 66 of 1965, and the supervision of the Master of the High Court. Clause 1.7 authorised the curator to take control of Mr Ndebele's property

and to administer it. At issue here is whether the curator's authority extends to requiring Mr Ndebele's pension pay-out to be paid to the curator once Mr Ndebele has elected to receive his pay-out and ceases to be a member of the fund.

[5] I shall consider this question in due course. But first it is necessary to understand the genesis of the dispute in the high court. On 8 June 2015 the curator informed the Fund that it considered Mr Ndebele's pension benefit realisable property once he ceases to be a member, and requested his banking account details. Mr Meyer, on behalf of the Fund, took the view that s 37A of the PFA protected this benefit from being paid to the curator and also that Mr Ndebele's bank account details were confidential and could not be disclosed to a third party.

[6] The Fund then approached the Gauteng Division of the High Court, Johannesburg to interdict the curator from attaching Mr Ndebele's

pension benefit and to obtain a declaratory order that the benefit may not be attached as realisable property in terms of the restraint

order. It also sought certain alternative and ancillary forms of relief, which are not relevant for present purposes. In its answering

affidavit resisting the relief claimed, the curator said that he did not wish to attach the pension benefit in the hands of the Fund; he only wanted information pertaining to Mr Ndebele's bank accounts so that steps could be taken to prevent the unlawful

dissipation of the money once it was paid to him. In addition, the curator maintained that the Fund's cause of action was

misconceived because it had lost sight of the fact that should any monies be paid to him in this capacity, it would remain in Mr Ndebele's ownership and be held by the curator in trust in accordance with the provisions of the Administration of Estates Act.

Section 37A(1) of the PFA

- [8] Pension benefits are protected as a matter of social security policy. Sections 37A and 37D thus limit the circumstances under which deductions or reductions may be effected from a benefit.[2] Under s 37B, for example, a benefit payable in terms of the rules of a fund does not fall into an insolvent estate and may not be attached or appropriated by the trustee of the insolvent estate or by creditors. Another instance is that a lump sum benefit payable upon a member's death does not usually form part of the deceased estate but must be distributed equitably in terms of s 37C among the deceased's dependants. It cannot be attached by the deceased's creditors.
- [9] Similarly, s 37A(1),[3] with which we are concerned, explicitly protects a 'benefit . . . or right to such benefit' from 'being reduced, transferred or otherwise ceded, or being pledged or hypothecated, or liable to be attached or subjected to any form of execution under a judgment or order of a court of law . . . ' (emphasis added). Deductions are permitted only under the provisions of the Income Tax Act 58 of 1962 and the Maintenance Act 99 of 1998, and in accordance with s 37D. Section 37A(3) provides for some exceptions regarding the settlement of certain debts, which have no bearing on this appeal.[4] This raises the question whether a restraint order issued under POCA relating to the property of a defendant constitutes an 'attachment'

or 'any form of execution under a judgment or order of a court of law' as envisaged in s 37A(1) of the PFA.

- [10] Because pension benefits are protected in accordance with social security policy, the language used in s 37A(1) must be construed broadly to support this purpose. An 'attachment', in ordinary legal parlance, is the taking of property into the actual or constructive possession of a court of law, and 'execution', in this context, the enforcement of a court order or judgment.[5]
- [11] A restraint order in terms of s 26 of POCA may prohibit any person from 'dealing in any manner with any property to which the order relates'.[6] The order with which we are concerned prohibits any dealing with the property and also requires disclosure and surrender of the property to a curator bonis under the supervision of the court. So, once the order is executed and the curator bonis takes possession of the property there can be little doubt that the restraint constitutes both an attachment and a form of execution under an order of a court of law within the meaning of s 37A. And therefore falls within the section's protective cloak.[7]

[12] This accords with what was said in *Van Heerden & another v National Director of Public Prosecutions & another*[8] where the high court said that a restraint order granted under s 26 of POCA ‘may well be viewed as a form of execution . . . within the meaning of s 37(A)(1)’. [9] It reasoned as follows: The purpose of a restraint order is to preserve property pending a possible confiscation order in terms of s 18 of POCA. Once a confiscation order is made, the high court may order the restrained property to be realised in terms of s 30. And because a pension benefit cannot be realised pursuant to a confiscation order, it cannot be restrained in terms of s 26 of POCA.[10]

[13] But there is a more compelling reason why a benefit or right to a benefit as contemplated in s 37A(1) cannot be made the subject of a restraint order. In terms of s 14 (1)(a) of POCA a restraint order is made in respect of any realisable property held by the defendant concerned.[11] (emphasis added.) This must mean that only realisable property over which a defendant may claim a right of ownership may be restrained.

[14] Now in terms of s 1 of the PFA a ‘benefit’ in relation to a fund, means any amount payable to a member or beneficiary in terms of the rules of that fund. But in terms of s 5(1)(b) of the PFA ‘all the assets, rights, liabilities and obligations’ of a fund are deemed to belong to the fund. A ‘benefit’

payable to a member is, therefore, deemed to belong to the fund and not to the member. A member only has a personal right to the benefits due to him or her from the fund. It follows that a ‘benefit’, as defined, belongs to the fund for so long as it is in the hands of the fund, and not to the member. It therefore cannot be subject to any restraint under POCA.[12] The fact that a payment becomes due and has accrued to the member does not change this.

[15] The high court, however, found that once the benefit became due to be paid to the member the Fund no longer ‘[had] any title or hold to such benefit’.[13] It also said that his membership in the Fund ceases when he ‘becomes entitled to receive the pay-out of the benefit’.[14] But the learned judge erred in assuming that once the benefit accrued to the member it was no longer an asset of the Fund. Before the benefit became payable it was an asset of the Fund. It remained so even after Mr Ndebele elected to receive it. All that happened with the election was that a corresponding liability was created in the books of the Fund. This much, I think, is common cause between the parties.

[16] This brings me to the real issue in this case; whether the restraint order requires the Fund to pay the money into Mr Ndebele’s

personal banking account and not to an account designated by the curator. The high court held that once a benefit is paid to the

member, and he ceases being a member, the protection afforded to the benefit by s 37A(1) falls away and the pay-out then becomes part of the general estate of the former member. For this conclusion the learned judge relied upon the judgments in *Van Aarsten v Van Aarsten*[15] and *Foit v First Rand Bank BPK*. [16] I did not understand the Fund to take issue with the correctness of this statement of the law.[17]

[17] That being so can there be any impediment to the Fund having to make payment of the benefit to the curator instead of into Mr Ndebele's bank account directly? I think not. A payment to a curator bonis does not divest a defendant of the ownership of the money. And there is nothing in POCA or in the terms of the restraint order that suggests the contrary. In this respect the position of a curator bonis differs from an executor, administrator, trustee in insolvency or liquidator. The court appoints a curator to take control and manage the property of a person, who by law – in this case by virtue of the restraint order – may not do so. The curator steps into the shoes of the defendant and administers the property in compliance with the order. A payment to the curator is, therefore, in truth and effect a payment to the defendant himself.[18] It is akin to a payment made into a trust account of the defendant's attorneys.[19] And once the payment is made to the curator it becomes the defendant's realisable property and subject to the same restraint as it would have been had it been paid directly to the defendant.

[18] There are also pragmatic reasons for requiring a pay-out to be made to the curator instead of to Mr Ndebele directly; there seems no sense for the law to oblige a Fund to pay him directly as he would immediately have to effect a transfer to the curator in accordance with the terms of the restraint.[20] In fact, there is a very real risk that the money will be dissipated instead of being transferred to the curator. The threat is manifest in this case as it appears that Mr Ndebele has attempted to obtain payment to him directly by falsely informing the Fund that the criminal charges against him had been withdrawn.

[19] I conclude, therefore, that the high court correctly dismissed the Fund's application to, in effect, interdict the pay-out of Mr Ndebele's pension benefit to the curator.

[20] What remains is costs. In dismissing the Fund's application the high court ordered costs against it and Mr Meyer on a punitive scale as between attorney and client. But its judgment is devoid of any reasoning and the facts do not support this order. There was no proper reason for the court to depart from the ordinary rule, much less to order Mr Meyer to be personally liable for any of the costs.

[21] In regard to the costs in this court, it should be borne in mind that this court granted leave, no doubt in part, because the judgment of the high court contained incorrect statements of law pertaining to when the protection of a benefit afforded by s 37A(1) ends. The effect of those incorrect statements had potentially far reaching consequences for the industry that went beyond the dispute between the parties in this case. The Fund was, therefore, obliged to appeal to clarify this issue. The Fund has also obtained some success in this court by having the punitive costs orders in the high court set aside. I would therefore relieve it from

having to pay the costs of the appeal.

[22] The following order is made:

A Cachalia

Judge of Appeal

Appearances:

For Appellant: P van der Berg SC (with him H Drake)

Instructed by:

Shepstone & Wylie Attorneys, Johannesburg

McIntyre Van Der Post, Bloemfontein

For First Respondent: R G Cohen

Anthony Berlowitz Attorneys, Johannesburg

Lovius Block, Bloemfontein

For Third Respondent: W Coetzer (with him M S Mbatha)

The State Attorney, Johannesburg

The State Attorney, Bloemfontein

[1] Case No: 22289/2015.

[2] Eskom Pension and Provident Fund v Krugel [2011] ZASCA 96; 2011 (4) All SA 1 (SCA); 2012 (6) SA 143 (SCA) para 8.

[3] 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 a 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 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 dependant or dependants during such period as it may determine.

[3] 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 a 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 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 dependant or dependants during such period as it may determine.

[4] 'Pension benefits not reducible, transferable or executable

- (3) The provisions of subsection (1) shall not apply with reference to anything done towards reducing or obtaining settlement of a debt- (a) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976 (Act 101 of 1976), applies, arose before the commencement of that Act; (b) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976, does not apply, arose before the commencement

of the Financial Institutions Amendment Act, 1977; (c) which a fund may reduce or settle under section 37D, to the extent to which a fund may reduce or settle such debt; or (d) which is owed to a fund by a member in respect of arrear contributions, but excluding amounts which are in arrear due to the

failure of the employer concerned to pay the member's contributions to the fund after deduction thereof from the member's remuneration.'

[4] 'Pension benefits not reducible, transferable or executable

- (3) The provisions of subsection (1) shall not apply with reference to anything done towards reducing or obtaining settlement of a debt-

- (a) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976 (Act 101 of 1976), applies, arose before the commencement of that Act;
- (b) which, in the case of a fund to which the Financial Institutions Amendment Act, 1976, does not apply, arose before the commencement

of the Financial Institutions Amendment Act, 1977;

- (c) which a fund may reduce or settle under section 37D, to the extent to which a fund may reduce or settle such debt; or
- (d) which is owed to a fund by a member in respect of arrear contributions, but excluding amounts which are in arrear due to the

failure of the employer concerned to pay the member's contributions to the fund after deduction thereof from the member's remuneration.'

[5] The Shorter Oxford English Dictionary 3 ed 1973.

[6] Section 26(1) of POCA.

[7] Compare Rennie NO v South African Sea Products Ltd 1986

(2) SA 138 (C) 143 A-G.

[8] Van Heerden & another v National Director of Public Prosecutions & another (16910/11)

[2015] ZAWCHC 96 (22 June 2015).

[9] Ibid para 37.

[10] Ibid.

[11] Section 14(1)(a) of POCA.

[12] Compare Lendlease Finance (Pty) Ltd v Corporacion De Mercadeo Agricola & others 1976 (4) SA 464 (A) 489 where it was held that an applicant seeking to attach property must satisfy the court that the property belongs to the respondent.

[13] At para 19.

[14] At para 40.

[15] Van Aarsten v Van Aarsten 2006

(4) SA 131 (T) paras 21-23.

[16] Foit v First Rand Bank BPK 2002

(5) SA 148 (T) at 152G-H and 154E-155H.

[17] In Van Heerden & another v National Director of Public Prosecutions & another (fn 7 above) paras 38–42 the issue was discussed but not decided.

[18] Compare Minister of the Interior v Cowley NO 1955

(1) (NPD) at 307 at G-H.

[19] Elesang v PPC Lime Ltd & others 2007 (6) SA 328 (NCK) paras 41-42.

[20] Van Heerden & another v National Director of Public Prosecutions & another (fn 7 above) at para 42.

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