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IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 164/2014

In the matter between:

B[...] L[...]

Applicant

and

F[...] J[...] L[...]

First Respondent

METROPOLITAN RETIREMENT
ADMINISTRATORS

Second Respondent

HEARD ON:

14 AUGUST 2014

JUDGMENT BY:

E.K. TSATSI, AJ

DELIVERED ON:

30 OCTOBER 2014

INTRODUCTION:

[1] This is an opposed mandatory interdict application. The applicant, who was the former spouse of the first respondent, sought a mandatory order against the first and second respondents. The order was to compel the first and second

respondents to provide certain information pertaining to the first respondent's pension fund.

[2] The applicant sought the order in the following terms:

- 2.1 that the first and second respondents be ordered to furnish to the applicant within 10 (ten) days of the granting of this order, a true and proper statement, together with substantiating documents, reflecting the value of the benefits paid to the first respondent which he held in the Transnet Retirement Fund;
- 2.2 that the first and second respondents be ordered to furnish to the applicant, within 10 (ten) days of the granting of this order, a true and proper statement, together with substantiating documents reflecting the value of the first respondent's pension interest in the Transnet Retirement Fund as at 14 October 2008;
- 2.3 that the applicant be granted leave to approach this Honourable Court, on the same papers amplified – if so advised – for an order that the first respondent be ordered to pay to the applicant whatever amount appears to be due to the applicant in terms of the aforesaid statements rendered;
- 2.4 that the first respondent be ordered to pay the costs of this application, save in the event if it being opposed by the second respondent in which event first and second

respondents be ordered, jointly and severally, to pay the costs of the application;

2.5 Further and alternative relief.

FACTS

- [3] It was agreed at the hearing of this application that both counsel for the applicant and respondent file supplementary heads ten days from the date of the hearing. I only find supplementary heads of argument filed on behalf of the applicant.
- [4] The applicant and first respondent were married in community of property on 2 September 2000 in Bloemfontein. The parties divorced in 2008. According to the court order 50% of the first respondent's pension interest in the Transnet Retirement Fund was to be paid to the applicant. The first respondent was also ordered to cause the records of the second respondent to be endorsed so as to give effect to the transfer.
- [5] The first respondent's pension fund benefits allegedly accrued to him in September 2012. Subsequently the applicant attempted to secure her 50% share of the allowed pension fund benefits. This she did by asking her attorneys to write letters to the first respondent reminding him of transferring the pension benefits to the applicant. In response thereto, the first respondent transferred an amount of

R156 634.79 to the trust account of the applicant's attorney of record. According to the first respondent the R156 634.79 amount was the 50% of the applicant's share. In addition an amount of R5 090.18, was paid on behalf of the applicant as her legal costs.

- [6] The applicant believed that on 23 November 2009 the value of the first respondent's pension fund interest was approximately R 1298 724.41. As a result the applicant's share was supposed to be R639 909.37. Letters were written to the second respondent asking the second respondent to confirm the value of the benefits by the first respondent. At the time of the hearing no answer was forthcoming from the second respondent. There was a letter dated 23 November 2009 from Metropolitan Retirement Administrators indicating the value of the first respondent's pension fund at the date of divorce. The applicant decided to approach this court for an order as stated in the notice of motion.

ISSUES

- [7] The main issue is whether or not the applicant satisfied the requirements of a mandatory interdict to compel respondents to furnish certain documentation pertaining to a pension fund to the applicant.

SUBMISSIONS

- [8] It was submitted on behalf of the applicant that the applicant was entitled to be provided with the required documents to establish the value of her real 50% pension fund interest. An argument on behalf of the applicant was that the application before court was not about payment of any money. The application was about access to the documents required. The first respondent was previously employed by Transwerk, which was the predecessor of Transnet. The name of the applicable pension Retirement Fund was amended on 1 December 2000 and it was now known as Transnet Retirement Fund.
- [9] Counsel for the applicant further submitted that the Supreme Court of Appeal said that it could be accepted for the purposes of the present case that a court in appropriate circumstances had the jurisdiction to order a party against whom an applicant had no cause of action and who was not a party or intended party to litigation with the applicant. The court could order such a party to supply the required information – **Krygkor Pensioenfonds v Smith** 1993 (3) SA 459 (A).
- [10] Counsel for the first respondent submitted that the application was ill-conceived. A further submission was that this kind of application did not enjoy judicial approval. It was counsel for the first respondent's contention that the issue on the pleadings was Transwerk not Transnet. The court should not condone this error as no application to request an amendment was before court. The court ordered the

payment of 50% of Transwerk Pension Fund to the applicant not Transnet.

- [11] It was argued on behalf of the first respondent that an order of a court of law stands until set aside by a court of competent jurisdiction. Until that was done the court order must be obeyed even if it was wrong. So trite was this principle, charged counsel for the first respondent, that a party may be barred from approaching the court. This may be the case until such party obeyed an order of court. It was not possible for the first respondent to provide information requested. The first respondent has already given the applicant all the information that she needed.

THE LAW

- [12] It is trite that the three requirements for an interdict are a clear right, an injury actually committed or reasonably apprehended and the absence of any other satisfactory remedy – **Setlogelo v Setlogelo** 1914 AD 221.

- [13] Section 7 of the Divorce Act 70 of 1979 reads as follows:

“(7) (a) In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension

interest which, by virtue of paragraph (a), in a previous divorce-

- (i) was paid over or awarded to another party; or
- (ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-
 - (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;”

(I was referred to the above Act by counsel for the applicant.)

[14] In **Sempapalele v Sempapalele** 2001 (2) SA 306 (O) Musi J, after having considered the Divorce Act, held at 312E – H that

“... (A) spouse seeking a share in the pension interest of the other spouse must apply for and obtain an appropriate court order during the entire proceedings.”

He quoted Part of section 7 of the Divorce Act and said:

“In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled. . . .”

APPLICATION OF THE LAW

[15] A mandatory interdict directs a person to do something he or she was in law obliged to do. In this case the first and second respondents were directed, through an application, to furnish to the applicant a true and proper statements, together with documents reflecting the value of the benefits paid to the first respondent.

[16] The applicant relied on the court order and on section 7 of the Divorce Act, as stated above, to demonstrate a clear right. In addition the applicant demonstrated the first respondent's conduct showed interference with the exercise of her clear right. (See **Bok v The Transvaal Gold Exploration and Land Co** (1883) 1 SAR 75 at 76.) The interference of the threat to the right will continue for as long as the respondents refuse to provide the applicant with the information and documents that she required (**Philip Morris Incorporated and Another v Marlboro Shirt Company SA Ltd and Another** 1991 (2) SA 720 (A) at 735B. I am satisfied that the applicant has demonstrated a clear right for the relief sought.

- [17] The applicant has shown that there may be injury committed or reasonably apprehended by the respondents' refusal to provide her with the information and documents that she required. There was no doubt that this caused the applicant hardship. The term "injury" should be understood to mean infringement of the right which has been established and resultant prejudice. A reasonable apprehension of injury is one which a reasonable man or woman might entertain on being faced with the facts and therefore the applicant needed not establish on a balance of probabilities that the injury will follow (**Free State Gold Areas Ltd v Merriespruit (Orange Free State) Gold Mining Co Ltd and Another** 1961 (2) SA 505 (W)). This means that on the basis of the facts presented to me I must decide whether there was any basis for the entertainment of a reasonable apprehension of injury by the applicant. I am of the view that if the respondents have nothing to hide, then there was nothing to worry about. I particularly refer to the first respondent as the second respondent did not oppose the application. The letter from Metropolitan Retirement Administrators dated 23 November 2009, stated that the first respondent's total market value on date of divorce, 14 October 2008, amounted to R1 298 724.41 minus first divorce endorsement of R18 911.67 equals R1 279 812.74, 50% of R1 279 812.74 amounted to R639 906.37. The first respondent did not deny the contents of the said letter. There is therefore a reasonable possibility that the applicant was entitled to R639 906.37 and not R156 634.79 plus R5 090.18 as the

amounts that were paid into the applicant's attorney trust account on behalf of the applicant. I am mindful of the fact that the application before me was not about the amounts of money paid, but about giving necessary information and documents to the applicant.

[18] The third requirement for granting of the mandatory interdict was proof that there was no other satisfactory remedy available to the applicant. Generally I will not grant the order if the applicant could obtain alternative legal remedy or some other form of relief (**Peri-Urban Areas Health Board v Sandhurst Gardens (Pty) Ltd** 1965 (1) SA 683 (T) at 684G). I am of the view that the applicant attempted through her legal representatives to negotiate with the respondents to provide her with the information and documents that she requested. The applicant did not succeed. She has got no alternative but to approach this court.

[19] The court order handed down on 14 October 2008 stated that the applicant was entitled to 50% of Transwerk Pension Fund. The first respondent wanted to make an issue about the change of name from Transwerk to Transnet. The Metropolitan letter dated 23 November 2009 confirmed that the first respondent was a beneficiary of Transnet Retirement Fund. There was no doubt that the same Transwerk Pension Fund benefits mentioned in the court order dated 14 October 2008 were the same ones that were now in the custody of Transnet Retirement Fund. I fully agree with counsel for the applicant that the said amendment could not have caused

any hypothetical damages to the first respondent. The reason being that it was always the applicant's intention to claim fifty percent of the first respondent's pension fund interest as at the date of divorce. Besides I do not see why the applicant should make to suffer to the change that was not her fault.

[20] It was stated by the first respondent's counsel that the applicant did not apply to court for the amendment of Transwerk to Transnet. As counsel for the applicant rightly said in his heads of argument that the court made an order and made the amendments *mero motu* after having heard the *viva voce* evidence of the applicant. I am of the view that such amendments will not cause the first respondent any prejudice.

[21] I am of the view that the applicant is entitled to the relief sought to enable her to determine the true value of her fifty percent share of the pension fund benefits. The applicant was entitled to the fifty percent share as provided for in section 7 of the Divorce Act above. The applicant has therefore made out a case on a balance of probabilities for the relief sought.

[22] I accordingly make the following order:

22.1 That the first and second respondents are ordered to furnish to the applicant, within 10 (ten) days of the granting of this order, a true and proper statement,

together with substantiating documents, reflecting the value of the benefits paid to the first respondent, which he held in the Transnet Retirement Fund.

22.2 That the first and second respondents are ordered to furnish to the applicant, within 10 (ten) days of the granting of this order, a true and proper statement, together with substantiating documents reflecting the value of the first respondent's pension interest in the Transnet Retirement Fund as at 14 October 2008.

22.3 That the applicant is granted leave to approach this court on the same papers duly amplified – if so advised – for an order that the first respondent be ordered to pay to the applicant whatever amounts appears to be due to the applicant in terms of the aforesaid statements rendered.

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

E.K. TSATSI, AJ

On behalf of applicant:

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Instructed by:
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BLOEMFONTEIN

On behalf of first respondent:

Adv. S. Tsangarakis
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