IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 282/2018

In the matter between:

S. S. I. I. W. Applicant

and

R. R. W. First Respondent

GOVERNMENT EMPLOYEES PENSION FUND Second Respondent

ABSA BANK LTD Third Respondent

HEARD ON: 29 MARCH 2018

JUDGMENT BY: C REINDERS, J

DELIVERED ON: 26 APRIL 2018

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[1] This is the extended return date of a *rule nisi* issued by this court on 24 January 2018. The applicant, Mrs W., and the first respondent, Mr W., are embroiled in divorce proceedings. On 18 April 1992 the couple were married out of community of property with the inclusion of the accrual system. Summons were issued by Mrs W. on 13 June 2017 in which she claims, amongst others, dissolution of the marriage bond and ancillary relief. These proceedings are still pending

[2] Mrs W. brought this application on an urgent ex parte basis, with the primary purpose of the relief sought by her (as set out in the notice of motion) to secure and preserve an amount equal to fifty percent of Mr W.'s pension benefit, pending finalisation of the main action. The second respondent is the Government Employees Pension Fund (the GEPF) of which the first respondent is a member, whilst the third respondent is Absa Bank (Absa) with whom Mr W. holds an account.

[3] Having been satisfied that a proper case had been made out, Jordaan J on 24 January 2018 granted interim relief with immediate effect in the following terms:

> "3. That a rule *nisi* is hereby issued calling upon the respondents to show cause, if any, on **THURSDAY, 22 FEBRUARY 2018** at **09h30** or so soon thereafter as the matter may be heard, as to why the following order should not be granted:
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> 3.1 That pending the finalisation of the divorce action under case no 2967/2017 in this Honourable Court:

3.1.1 The second respondent is ordered and directed to pay one half of the first respondent's pension benefit, which was previously held as a pension interest at the second respondent, into the Trust Account of the applicant's Attorneys, alternatively in the event that the Pension Fund has already been paid to the first respondent ot (sic) furnish full particulars of such payment and any possible reinvestement;

3.1.2 Alternatively and in the event that the abovementioned amount of monies had already been paid to the first respondent, that the first respondent is ordered and directed to pay one half of the first respondent's pension benefit, which was previously held as a pension interest at the second respondent, into the Trust Account of the applicant's Attorneys;

3.1.3 Alternatively and in the event that the above mentioned amount of monies has already been paid to the first respondent and if the first respondent did deposit the said amount of monies at the third respondent, that the third respondent is ordered and directed to pay 50% of any credit held on behalf of the first respondent into the trust account of the applicant's attorneys;

3.1.4 The monies referred to in prayer 3.1.1 alternatively prayer 3.1.2 and 3.1.3 *supra* remains in the Trust Account of Honey Attorneys only to be paid out to the applicant, alternatively to

such party as the Court may order in accordance with the final Decree of Divorce.

3.2 Costs of the application to be paid by first respondent and if the second and third respondent oppose the application then in such an event that the first, second and third respondents are ordered to pay the costs of the application jointly and severally, the one paying the other to be absolved from payment."

[4] Mrs W. moves for confirmation of prayers 3.1.2, 3.1.4 and costs to be paid by Mr W. who opposes the application. In her founding affidavit she indicates the reason for the relief sought as a fear of not obtaining proper redress at a hearing in due course as her share of the accrual of Mr W.'s estate (funds from GEPF) might have been squandered by him, thus disabling her from recovering same. In his opposing papers filed on 9 March 2018 Mr W. confirms that upon his retirement he received payment in the amount of R 1 491 334.00 on 2 December 2017, which amount constitutes two thirds of his pension. However, on 2 January 2018 an amount of R 1 400 000.00 was paid over by him to his brother as settlement of his indebtedness in respect of "several loans to me over the years." In her replying affidavit Mrs W. denies having knowledge of such loans. Not only was same never mentioned during any settlement negotiations but are no particulars of the averred loans forwarded by Mr W. in his affidavit. Furthermore, it came to her knowledge on 16 March 2018 that Mr W. invested an amount of R 1 400 000.00, which investment was ceded to Mr W.'s brother.

[5] Section 3 of the Matrimonial Property Act 88 of 1984 ("the Act") directs as follows:

> (1) At the dissolution of a marriage subject to the accrual system, by divorce or by death of one or both of the spouses, the spouse whose estate shows no accrual or a smaller accrual than the estate of the other spouse , or his estate if he is deceased, acquires a claim against the other spouse or his estate for an amount equal to half of the difference between the accrual of the respective estates of the spouses.
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> (2) Subject to the provisions of s 8(1), a claim in terms of ss (1) arises at the dissolution of the marriage and the right of a spouse to share in terms of this Act in the accrual of the estate of the other spouse is during the subsistence of the marriage not transferable or liable to attachment, and does not form part of the insolvent estate of a spouse.

The Supreme Court of Appeal recently confirmed that this claim arises when an order of divorce is granted.

Compare: **AB v JB 2016 (5) SA 211 (SCA)**

[6] In **Reeder v Softline Ltd and Another 2001 (2) SA 844 (W)** it was held that although the claim only arises at the date of divorce, a spouse married with the accrual regime at least has a contingent right before the claim arises to obtain an interdict to prevent it from being squandered. The applicant's right will become a vested right if the contingencies materialise.

See: **Reeder *supra*** at p 848 J- 849 B.

[7] I align myself with Cloete J (as he then was) where he concluded and I quote:

> "A spouse married out of community of property and subject to the accrual has a contingent right to share in the accrual of the estate of the other spouse which is conferred by the Act. It seems to me that that right would be protectable by interdict *pendente lite*, whether the lis is a divorce action in which the right is asserted, or a claim in terms of s 8(1) of the Act…….Where, however, proceedings to enforce the claim of a spouse to participate in the accrual of the estate of the other spouse have been instituted, that contingent right can, it seems to me, be protected if a proper case is made out."

[8] In **RS v MS and Others 2014 (2) SA 511 (GJ)** at 514 para [18] the court made the following remarks:

> "But, even if these jurisdictional requirements are present, then an applicant must still show a well grounded apprehension of irreparable loss should the interdict *pendente lite* not be granted. It is perhaps apposite here to point out that, because of the draconian nature, invasiveness and conceivably inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in the clearest of cases."

[9] On a conspectus of the papers filed before me it would appear that the claim of Mrs W. will have to be calculated taking into account various assets, which may include two immovable properties, movables and Mr W.'s pension fund. On face value it would in my view be incorrect to merely assert that the applicant is entitled to preservation of fifty percent of the pension fund.

[10] The parties are not married in community of property but out of community of property and Mrs W.'s claim would be, after all

calculations had been done, for an amount equal to half of the difference between the accrual of the respective estates. In as far as it was applicable, I have a similar difficulty as Cloete J in ***Reeder supra*** at 851 I-J where he concluded that the value of the right which is sought to be protected, has not been quantified. No attempt whatsoever was made by Mrs W. to quantify the values of the respective estates and arrive at a calculation of the amount that she seeks to have protected.

[11] The evidence tendered by applicant in reply (albeit hearsay) is that the monies had been deposited into an account which was ceded to the brother of the first respondent. I am not convinced that this constitutes “squandering” as alleged by the applicant. Mr W. avers that those monies are in any event due and owing to his brother and would not form part of the accrual. Whether this is so are findings for another court to consider if and when the determination of the accrual is to be determined by such court. Separate therefrom the respondent has two immovable properties. On the papers before me I cannot come to the finding that he intends to squander or is squandering these assets with the sole purpose of leaving the applicant with a hollow judgment. I wish to reiterate that the applicant on the dissolution of the marriage acquires a claim for payment and not a transfer of assets. It is incumbent upon the applicant to show in these proceedings that the respondent’s conduct is intended to squander his assets to leave her with a hollow judgment. In the absence thereof I cannot confirm the interim order *pendente lite* and it needs to be uplifted.

[12] Part of the record before me includes an order granted on the 22nd February 2018 by Gcabashe AJ. Paragraph 6 thereof directs that the two immovable properties of the first respondent will serve as security for the applicant's claim, and paragraph 7 thereof prohibits *pendente lite* the selling, transferring, donating, alienating, or encumbering of the immovable properties. I have not been addressed on these orders by any of the parties and make no ruling thereon. Neither of these orders form part of the *rule nisi*. These orders therefore stand until they lapse, are uplifted or amended by court. The costs on 22 February 2018 stood over.

[13] The usual result is that a cost order should follow suit. I am in my discretion entitled to deviate from this principle. On the papers before me the parties through their legal representatives were embroiled in settlement proceedings. A draft Deed of Settlement had indeed been prepared and the outcome of the pension payment was awaited. Mrs W.'s legal representative wrote various letters in this regard, the earliest dating back as far as 6 October 2017 and wherein particulars of Mr W.'s pension fund were requested. For purposes hereof I have to assume that Mr W.'s attorney informed him hereof but the first respondent through his attorney failed to supply these particulars and in general failed to react to these letters. Follow up letters were send to which no reaction came forth. The undeniable impression created is that the Mr W. on purpose kept these information from the applicant whilst he realised that the applicant's attorney relied on their *bona fides* (in anticipation of settlement) to be supplied with the information. Moreover, although Mr W.'s attorney has been on record all throughout, Mr W. instructed him not "to accept service of any application." That Mr W. attempted

to keep information relating to the pay out of his pension fund from the applicant, is evident. This conduct by the first respondent has led to this application and the divorce clearly not being finalised. I cannot condone this. My disapproval will be reflected in the cost order.

[14] Accordingly the following orders are granted

14.1 The provisional order dated 24 January 2018 is uplifted.

14.2 The first respondent is ordered to pay the costs including the costs of 22 February 2018.

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C. REINDERS, J

On behalf of the Applicant:	Adv. J. C. Coetzer Instructed by: Honey Attorneys BLOEMFONTEIN
On behalf of the Third Respondent:	Adv. F.G. Janse van Rensburg Instructed by: J.G. Kriek & Cloete BLOEMFONTEIN