IN THE HIGH COURT OF SOUTH AFRICA /ES

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 27836/06

DATE: 7/9/2007

NOT REPORTABLE

IN THE MATTER BETWEEN:

GOODMAN CHILOANE	APPLICANT
AND	
KEDIBONE PATRICIA CHILOANE	RESPONDENT

JUDGMENT

RAULINGA, AJ

This is an application to rescind or vary two orders granted in favour of the respondent on 27 September 2006 and 23 November 2006 respectively under case no 27836/06. The respondent opposes the application. Applicant is represented whereas the respondent is unrepresented.

The applicant (the husband and defendant in the divorce matter) and the respondent (the wife and plaintiff in the divorce matter) had been married in community of property. Their marriage had been dissolved by an order of this court on 7 May 2004.

The divorce order made provision for the custody of the parties' minor child and maintenance. There is neither a deed of settlement for the division of the joint estate, nor any provision as to how the "pension interest" may be dealt with.

It appears from the papers that since the decree of divorce was granted in 2004 there had been a lot of mud-slinging between the parties, until respondent decided to approach the court on motion proceedings.

The respondent in her application for the division of the joint estate, included a claim of half of the applicant's pension interest.

0n 27 September 2006 applicant having failed to file notice of intention to oppose MURPHY, J made the following court order:

1. The applicant, Ms Kedibone Patricia Chiloane, is hereby authorised to take all steps necessary for the sale and transfer of the common marital home situated at 2 Chestnut Ave, Heuweloord Extension 2, Centurion, Pretoria and shall be authorised to sign all necessary papers and other documentation for that purpose.

2. The registrar of this court is hereby authorised to sign all necessary papers and other documentation related to the sale and transfer of the abovementioned property on behalf of the respondent Goodman Chiloane in the event that the latter should refuse to do so.

3. The respondent is ordered to hand to the sheriff or the applicant the keys of the abovementioned property immediately upon service of this order upon him and to allow the applicant unrestrained access to the property for the purpose of its sale and transfer.

4. The proceeds of the sale of the house shall be deposited into the trust account of a conveyancer of this court appointed by the applicant for the purpose of the transfer of the property and such conveyancer shall be authorised to pay to the applicant her half of the proceeds.

5. It is declared that the applicant is entitled to one half of the pension interest of the respondent in terms of section 7(8)(a) of the Divorce Act 70 of 1979.

6. The registrar is directed to notify forthwith the pension fund of which the respondent is a member that an endorsement be made in the records of the fund that one half of the pension interest is so payable to the applicant and that he (the registrar) should be notified of such endorsement within one month of the pension fund being informed.

It is this order that applicant prays should be rescinded or varied because it was obtained by default.

After this order was obtained by respondent, applicant launched an application for the order to be rescinded or set aside.

In his founding affidavit the applicant raises a number of averments, some of

which are ancillary to the main issues and are found not to hold water and should be dismissed without further ado. The main issues will be dealt with hereunder.

Mistakes by both parties which have no material bearing on this application are condoned. It is for this reason that the court wishes to entertain the main issues ie whether the court can rescind or vary the orders of 27 September 2006 and 23 November 2006 or not; whether the court can award a portion of the "pension interest" of the applicant to the respondent or not.

0n 23 November 2006 applicant and his counsel failed to appear in court and the application was dismissed by MOTATA, J with costs. Applicant wishes that this order should as well be rescinded.

The order of 23 November 2006 is a consequential flow from the order of 27 September 2006. A rescission or variation of the order of 27 September 2006 automatically rescind the order of 23 November 2006.

Rule 42(1) which applicant sought to invoke is couched as follows:

1. The court may, in addition to any other powers it may have, *mero motu*, or upon the application of any party, rescind or vary:

    (a) an order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby;

(b) an order or judgment in which there is an ambiguity or a patent error, or omission, but only to the extent of such ambiguity, error or omission;

(c) an order or judgment granted as the result of mistake common to the parties.

In *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 4 SA 298 (AD) at 306F-307H the court per TROLLIP, JA held that:

> "0nce a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been

fully and finally exercised, its authority over the subject-matter has ceased. There are, however, a few exceptions to that rule. Thus, provided the court is approached within a reasonable time of its pronouncing the judgment or order, it may correct, alter or supplement it in one or more of the following cases:

(1) The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, that the court overlooked or inadvertently omitted to grant.

(2) The court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter 'the sense and substance' of the judgment or order.

(3) The court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention. This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance.

(4) Where counsel has argued the merits and not the costs of a case (which nowadays often happens since the question of costs may depend upon the ultimate decision on the merits), but the court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.

The above list is not exhaustive: the question whether the court has an inherent general discretion power to correct any other error in its own judgment or order in appropriate circumstances, especially as to costs, raised but not decided. 0n the assumption that the court has discretionary power this should be sparingly exercised, for public policy demands that the principle of finality in litigation should generally be prescribed rather than eroded."

These exceptions were regurgitated in *De Villiers and Another NNO v BOE Bank Ltd* 2004 3 SA 459 (SCA).

In casu the matter was brought to the attention of the court within a reasonable time, however because the two orders were obtained by default, there were no heads of argument or oral argument by both parties. The court will liaise its judgment and make its findings in relation to the record and the orders. It will also liaise its findings on the heads of argument and oral arguments in the flow of issues in this application. See *Thompson v South African Broadcasting Corporation* 2001 3 SA 746 (SCA).

When the order of 27 September 2006 was obtained, applicant avers that he received the notice, but because there was no date of set down he ignored the notice. The notice was served on him in August 2006. He did not immediately bring it to the attention of his attorney. When the order of 23 November 2006 was dismissed his counsel had forgotton to peruse his diary and only realised in the afternoon of the same day that he was due to appear for the applicant that morning. Applicant was also not present in court. It must be emphasised that he was the applicant in this matter when he defaulted. See *Maujean t/a Audio Video Agencies v Standard Bank of SA Ltd* 1994 3 SA 801 (C) in which the court dealing with a matter in terms of rule 31(1) *inter alia* held:

> "… as to the meaning of the word 'wilful' in the context of a default, that it connoted deliberateness in the sense of knowledge of the action and of its legal consequences and a conscious and freely taken decision to refrain from giving notice of intention to defend, whatever the motivation for this conduct might be."
>
> (At 803H-I.)

"Further, that the fact that the applicant's conduct could in a sense be regarded as praiseworthy did not derogate from the fact that it had been deliberate and intentional and had constituted 'wilful default' which was a bar to the application: because he had had the opportunity to place his case before the court, but had failed to avail himself of it, his position differed materially from that of the person against whom judgment was granted without his knowledge and who desired the opportunity to contest the case brought against him: the applicant had acquiesced in the judgment being taken against him and had lost the right to re-open his case."

In the first instance applicant knowing fully well that the set down of the matter could be anticipated, avoided notice to oppose motion and thereby was in default. In the

second instance the applicant and his counsel knew about the pending application in court and both of them defaulted. The applicant was the one who initiated that application.

It is in the interest of justice that there should be relative certainty and finality as soon as possible concerning the scope and effect of orders of court. Persons affected by such orders should be entitled to know, within a reasonable time after the issue thereof that the last word has been spoken on the subject. See *First National Bank of Southern Africa Ltd v Van Rensburg NO and 0thers: In re First National Bank of Southern Africa Ltd v Jurgen and 0thers* 1994 1 SA 677 (T).

The divorce decree in this matter was granted in 2004. Since then there had been no settlement agreement as to the division of the joint estate.

I will revert to the orders later when I conclude this judgment.

I now turn to another emotional issue of the "pension interest" and how it must be dealt with in this application.

As already indicated above, the respondent approached this court with an application claiming half of the applicant's "pension interest". Applicant contends that respondent did not raise this matter during the divorce proceedings and that she is now barred from making such a claim by way of motion proceedings.

When the divorce decree was granted no order as to the division of the joint estate was made and it is common cause that no order as to the position of the "pension interest" could have been made.

"Pension fund" and "pension interest" are defined in section 1(1) of the Divorce Act, as amended by section 1 of Act 7 of 1989, as follows:

"Pension fund" means a pension fund as defined in section 1(1) of the Pension Fund Act 24 of 1956, irrespective of whether the provisions of that act apply to the pension fund or not;

"pension interest" in relation to a party to a divorce action who-

(a) is a member of a pension fund (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his

resignation from his office;

(b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the minister of justice in terms of section (2) of the Prescribed Rate of Interest Act 55 of 1975, for the purpose of that act.

Prior to 1 August 1989, the "interest" which a spouse who was a member of a pension fund had in respect of a pension benefit which had not yet accrued was generally not regarded as an asset in his or her estate or, where the marriage was in community of property, as an asset in the joint estate. The amendment changed the position as it was then, to make it possible for a spouse who is not a member of the "pension fund" to have access to the "pension interest" of a spouse who is a member of the fund. *0ld Mutual Life Assurance Co Ltd and Another v Swemmer* 2004 5 SA 373 (SCA).

Although the legislature tried to resolve the matter through the amendment, this issue is still a major cause of conflict between divorcing and divorced spouses. The courts have made strides in the interpretation of this difficult issue. At last a "pension interest" is an asset of the joint estate of spouses in a marriage in community of property.

In *De Kock v Jacobson and Another* 1999 4 SA 346 (W), LABE, J held *inter alia*, "that the right to the pension which had accrued upon the applicant's retirement was not a pension interest" as defined in section 1(1) of the Divorce Act 70 of 1979. (At 349A/B-B/C.)

Held further that there was no reason in principle why the accrued right to a pension by one of the parties to a marriage in community of property should not form part of the community of property existing between the parties prior to their divorce. (At 349G/H-H.)

Held further that there was no logical reason why both the components of the pension right should not form part of the joint estate. (At 350G.)

I cannot agree more with LABE, J, a right to a "pension interest" in a pension fund that has not yet accrued and a right to the pension which has accrued upon the

retirement or resignation of one spouse, is like athletes who are competing in the comrades marathon, the one crossing the line a few seconds before the cut-off time and the other crossing the line a few seconds after the cut-off time. Whereas both have traversed the same distance at almost the same time, the one receives the accolades whereas the other becomes is a loser.

It can be further argued that section 7(8) provides that 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 attaching a part of the pension interest 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 am of the view that where a spouse seeking a share in the pension interest of the other spouse who had not, in terms of section 7(7)(a) applied for and obtained a court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted. The court may then in terms of section 7(8) award such an order.

In the decision of *0ld Mutual Life Assurance Co Ltd and Another v Swemmer, supra*, VAN HEERDEN, AJA (as she then was) was at pains to elucidate the meaning of "pension interest" and how it should be approached.

She *inter alia* held that the definition of "pension interest" also had the effect of circumscribing the powers of the court granting a decree of divorce to make orders in terms of section 7(8)(a). 0nce a part of the pension interest of the member spouse became "due" or "is assigned" to the non-member spouse in the course of the divorce proceedings, the court could order such part of the pension interest had to be paid by the pension fund concerned to the non-member spouse when any pension benefits accrue in respect of the member spouse. The court could also order that an endorsement be made in the records of the fund concerned to the effect that the part of the pension interest thus allocated to the non-member spouse was so payable to such spouse. That portion of the pension interest allocated to the non-member spouse would be payable by the fund concerned only at some future date when the "pension benefits" in question accrue to the member spouse. This date would be determined by the rules of the pension fund

governing the relationship between it and the member spouse. Moreover, there was no provision in the relevant sections of the act for the pension fund concerned to be ordered to pay to the non-member spouse interest or capital growth on the portion of the pension interest allocated to that spouse from the date of divorce to the date of eventual payment. (Paragraph [20] at 384E-385B.)

The court concluded that section 7(7)(a) of the Divorce Act "deems" a member spouse's "pension interest" to be an asset in his or her estate for the purposes of the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. "Pension interest" is narrowly defined and simply establishes a method of ascertaining the value of the "interest" of the member of the pension or retirement amenity fund concerned as accumulated up to the date of the divorce.

In *Sempapalele v Sempapalele and Another* 2001 2 SA 306 (O) at the time of divorce the member spouse's "pension interest" had not accrued, apparently when the application was launched the "pension interest" had accrued and paid to the member spouse. The decree of divorce incorporated a deed of settlement signed by the parties. The deed of settlement provided a blanket division of the joint estate. In *casu* as in the *Sempapalele* case, the "pension interest" had not accrued at the time of the divorce, however there was no deed of settlement for the division of the estate nor was such an order made by the court at the time of the divorce. It simply follows that in the absence of such a settlement between the parties, a court order must be obtained. This will include instances in which there is no agreement between the parties and one of them approaches the court for such an order, after a divorce decree is granted.

In *Maharaj v Maharaj and 0thers* 2002 2 SA 648 (D) similar facts as in this case presented themselves.

The court held "that section 7(7)(a) of the act provided that, in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled, the pension interest of a party would be deemed to be a part of his/her assets … When the joint estate of the spouses married in community of property was to be divided, therefore, it was proper to take into account the value of a pension interest held by one of them at the date of divorce as an asset in the joint estate." (At 651C-D/E and E-E/F.)

In a democratic and open society based on human dignity, the achievement of equality and the advancement of human rights and freedom, the approach of the courts should be one that is innovative and reduces hardships rather than exacerbate them. Some of these hardships are occasioned by complicated trial procedures which bar people from access to justice. The courts are in a position to allow parties access to justice without deviating from court rules.

Based on the above reasoning, it is my conclusion that this court can in terms of section 7(8) make an order on the "pension interest" of a member spouse.

The second exception under rule 4(2)(1) as further elucidated in *Firestone South Africa (Pty) Ltd v Gentiruco AG, supra,* is applicable in this application. The court may clarify its judgment or order if on a proper interpretation the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order.

The order of 23 November 2006 is set aside. The order of 27 September 2006 is varied and substituted for the following:

1. Mr M K Malema of the firm of attorneys Malema, Musi & Partners is hereby appointed liquidator and is authorised to take all steps necessary for the sale and transfer of the common marital home situated at 2 Chestnut Ave, Heuweloord Extension 2, Centurion Pretoria and shall be authorised to sign all necessary papers and other documentation for that purpose.

2. The applicant is ordered to hand to the liquidator the keys of the abovementioned property immediately upon service of this order upon him and to allow the liquidator unrestrained access to the property for the purpose of its sale and transfer.
3. The liquidator shall be authorised to pay each party his/her half of the proceeds.
4. It is declared that the respondent is entitled to one half of the pension interest of the applicant in terms of section 7(8)(a) of the Divorce Act 70 of 1979.
5. The registrar is directed to notify forthwith the pension fund of which applicant is a member, that an endorsement be made in the records of the fund that one half of the pension interest when it accrues, is so payable to the respondent and that he (the registrar) should be notified of such endorsement within one month of the pension fund being informed.
6. Each party to pay his/her own costs.

J RAULINGA
ACTING JUDGE OF THE HIGH COURT

27836-2006

HEARD ON: 27 SEPT 2006

FOR THE APPLICANT: ADV W C ENSLIN
INSTRUCTED BY: LUDICK ATTORNEYS, PTA
FOR THE RESPONDENT: K P CHILOANE
INSTRUCTED BY: C/O M MOHLAKA, NAPO SECURITY SERVICES, SUNNYSIDE PTA