

**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
(PRETORIA DIVISION)**

CASE NO: 8434/2021

DOH:29 OCTOBER 2021

REPORTABLE: NO

**OF INTEREST TO OTHER JUDGES: NO
REVISED.**

In the matter between:

M [....] 1 C [....] M [....] 2

APPLICANT

And

K [....] E [....] M [....] 3

1st RESPONDENT

GOVERNMENT PENSION FUND

2ND RESPONDENT

DISCOVERY RETIREMENT ANNUITY

3RD RESPONDENT

LIBERTY LIFE RETIREMENT ANNUITY

4TH RESPONDENT

J U D G M E N T

MALI J

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL
BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE
AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 21 JULY 2022**

INTRODUCTION

1. This is an application for the attachment of 50% of the applicant's Pension Fund Interest awarded to the first respondent in terms of the Divorce Settlement Order dated 12 November 2020. The purpose of the attachment is to settle the maintenance arrears due in terms of the Order for the minor children in the amount of R 13 000.00 (thirteen thousand rand).

2. The applicant and the first respondent will be referred hereinafter as Mrs and Mr M [....] 3. The application has its genesis from the urgent court where it was struck off the Roll due to lack of urgency. Mrs M [....] 2 and Mr M [....] 3, divorced on 22 December 2020. Mrs M [....] 2 is a member of the second respondent, GOVERNMENT EMPLOYEE PENSION FUND ("*GEPF*").

3. Mrs M [....] 2 further seeks that the GEPF must be ordered to make a monthly payment for maintenance in the amount of R10 000, for the two "**minor children**" and other needs and expenses. (own emphasis) In the alternative she seeks that the maintenance contribution be paid in lump sum of R800 000 (eight hundred thousand rand) or any amount available therein, whichever is lesser. In the alternative, Mr M [....] 3 withdrawal benefits of 50% share of the Pension Fund Interest awarded to him, be attached to settle the maintenance arrears due in terms of the Order for the minor children in the amount of R 13 000.00 (thirteen thousand rand).

4. It is also Mrs M [....] 2's prayer that Mr M [....] 3's withdrawal Benefits of 50% share, alternatively Pension / Provident Fund or Annuity interests from the fourth respondent LIBERTY LIFE RETIREMENT ANNUITY ("*Liberty*") be attached to Settle the Maintenance Arrears due in terms of the Order for the minor children in the amount of R 13 000.00 (Thirteen thousand rand).

5. The applicant by virtue of minimal value of Mr M [....] 3's interest in third respondent DISCOVERY LIFE RETIREMENT ANNUITY ("*Discovery*") elected not to proceed with an order against Discovery.

BACKGROUND FACTS AND APPLICANT'S CASE

6. It is common cause that Mrs and Mr M [...] 2/3 were married to each other and later divorced, amongst other clauses of the settlement agreement is the maintenance of two children; first one a minor and second one T [...] M [...] 4 a major. At the time of the hearing of this application he was a student and not yet self-supporting.

7. Mr M [...] 3 resigned from Makone Consulting Engineering on 02 February 2021. It is not in dispute that he started to work for his own company, TSERNMACA (PTY) LTD.

8. The applicant's case is that the first respondent complied with the order only as far as paying R10 000 for October 2020; paid R7000 December 2020 and R10 000 January 2020. For the month of November 2020 he did not make any payment.

9. Sec 28(2) of the Constitution of the Republic of South Africa provides that the best interests are of paramount importance in all matters concerning the child.

10. Section 26(4) of the Maintenance Act 99 of 1998 (*"Maintenance Act"*) provides as follows:

"Notwithstanding anything to the contrary contained in any law, any pension, annuity, gratuity or compassionate allowance or other similar benefit shall be liable to be attached or subjected to execution under any warrant of execution or any order issued or made under this Chapter in order to satisfy a maintenance order."

11. Section 40 of the Maintenance Act provides for the recovery of arrear maintenance. It creates a new offence, that is, the failure to abide by a maintenance order. In *Mngadi v Beacon Sweets & Chocolates Provident Fund*

and others [2003] 2 ALL SA 279 (D) ("Mngadi") Nicholson J held that the provisions of Chapter 5 of the Maintenance Act dealt with arrear maintenance and the mechanism available for recovering money already due. The Act was not considered to secure future maintenance.

ATTACHMENT IN RESPECT OF FUTURE MAINTENANCE

12. It is settled that our law allows for the securing of pension fund benefits to secure the future maintenance obligation. Section 37A (1) of the Pension Funds Act 24 of 1956 provides that,

“Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 2008 , 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 of a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be able to be attached or subjected to any form of execution under a judgment..... 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 dependent or dependants during such period as it may determine.

13. *In Magewu v Zozo (7821/03) [2004] ZAWCHC 18; [2004] 3 All SA 235 (C)* Hlope JP when faced with application for attachment for future maintenance; the JP ordered the first respondent to pay future maintenance although he was not currently in arrears but based on his past conduct in failing to comply with the court orders. The court also took into account the first respondent's unemployed status due to retrenchment.

ANALYSIS

14. Mr M [...] 3 does not deny non- payment. There are three defences raised by the respondent. The first argument proffered on his behalf is that the non- payments complained about does not arise from the court order. Although both parties signed the settlement agreement in September 2020, nevertheless, it was made an order of court on 22 December 2020. I fully agree with this contention that the order does not apply retrospectively.

15. Secondly, the same argument as above is raised regarding the 31st December 2020 payment of R 7000.00. I reiterate the court order does not apply retrospectively, the payment he made in October 2020 did not arise from the court order. I do not suggest in any manner that he was not supposed to maintain his children voluntarily, something which under normal circumstances should happen. I am of the view that Mr M [...] 3 owes R 3000 because according to the order he was supposed to make a payment of R10 000.00 instead he made a payment of R 7000.00.

16. Thirdly, that he could not make payment due to financial hardships due to covid-19 pandemic, as he was not an essential worker. This submission is not seriously challenged on behalf of Mrs M [...] 2. On behalf of Mrs M [...] 2 the court is referred to the case of Mngadi and other cases, which led to a dissipation order for future maintenance payments.

17. In the Mngadi case, the father of the two children in question had resigned from his job primarily with the intention to frustrate his maintenance obligations. There is no evidence that Mr M [...] 3 resigned from his former employer to thwart paying maintenance. In fact, Mr M [...] 3 submitted that he was awaiting the payment of his 50% share from Mrs M [...] 2's pension interest in order to meet his maintenance obligations. Having said that I fully acknowledge that the respondent is legally bound to meet his maintenance obligations, with or without court order. I do not disregard Mrs M [...] 2's evidence pertaining to the non- payment of maintenance.

18. In the present matter, to start with the attachment sought does not arise from Mr M [...] 3's pension benefits; and his conduct is near to none to the conduct compared to that of the parties in other matters. See *Magewu v Zozo* above.

CONCLUSION

19. In conclusion there is a court order, dated 22 December 2020. I have already addressed the October 2020 payment and the argument pertaining to the arrears in respect of December 2020. Furthermore, Mrs M [...] 2 has a legal remedy already built in the settlement agreement, to approach the maintenance court. In the event my calculation is incorrect I am of the view that one month or less than half a month arrear maintenance amount does not attract a dissipation or attachment order against Mr M [...] 3. It will not be in the interests of administration of justice to grant the order. Having regard to the above, the application cannot succeed.

ORDER

In the result the application is dismissed with costs.

N.P. MALI
JUDGE OF THE HIGH COURT

APPEARANCES

On Behalf of the Applicant:

Adv. V Mukwevho

Instructed by Shapiro-Ledwaba Inc

On behalf of the First Respondent:

Adv. A Baloyi

Instructed by David Maripane

Attorneys

On Behalf of the Third Respondents:

Keith Sutcliffe & Associates Inc.

