**REPUBLIC OF SOUTH AFRICA**

**IN THE HIGH COURT OF SOUTH AFRICA**

**LIMPOPO DIVISION, POLOKWANE**

**CASE NO: HCA 11/2017**

**16/2/2018**

**M N** **APPELLANT**

**And**

**F N** **RESPONDENT**

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**JUDGEMENT**

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**SEMENYA J:**

[1] The parties in this appeal, who were married to each other in community of property, were divorced by the then North Eastern Divorce court on the 6 December 2004. The court ordered, among others, that the appellant is entitled to 50% of the respondent's rights and interest in the University of the North (now University of Limpopo) Pension Fund. It was ordered that payment would be made when the money becomes due and payable to the respondent. The order was granted per the parties' settlement agreement.

[2] In 2011, pursuant to the amendment of the Divorce Act 70 of 1979, the appellant approached the administrators of the pension Fund (the administrators), in order to claim payment of the amount due to her in terms of

the court order. Appellant states that she was informed by the administrators that payment would be made from the Pension Fund only, in view of the fact that the court order is silent about the Provident Fund.

[3] Applicant approached the Regional Court with an application for a variation of the Divorce Court order dated the 6 December 2004. Appellant in short sought that the order be varied to read that the appellant is entitled to 50% of the respondent's rights and interest in the University of Limpopo Retirement Fund, (Pension and Provident Section) and not University of the North Pension Fund.

[4] The application was opposed. The Regional Court ruled in favour of the respondent and dismissed the application for variation of the Divorce Court order. The Regional Court found that the definition of Pension Fund in the Divorce Act and Pension Funds Act 24 of 1956 do not include a Provident Fund. This appeal is against the order of the Regional Court.

[5] The appeal is opposed, firstly on the ground that the appeal was lodged out of time, secondly, that the appeal is deemed to have lapsed in that the appellant failed to prosecute it within the prescribed period, of 60 (sixty) days as provided for in Rule 50 (1) of the Uniform rules of Court read with Rule 51(9) of the Magistrates' Court Rules, and, lastly, on the merits.

[6] It is common cause that judgement in the Regional Court was handed down on the 14 November 2014. On the 3 December 2014, and without paying an amount of R1000.00 as security towards the respondent's costs, as required in terms of rule 51 (4) of the Magistrates' Court Rules, appellant proceeded to note the appeal. The said amount was eventually paid on the 27 January 2015. It has to be borne in mind that according to the ruling in **O'Sullivan v Mantel 1981 (1) SA 664 (W) at 668,** the noting of an appeal is not complete until payment of security is made. In the circumstances I make a finding that this appeal was lodged out of time as averred by the respondent.

[7] It is further common cause that the appellant applied for date of hearing of the

appeal on the 27 March 2017. In terms of Rule 6 of the Rules Regulating the Conduct of Proceedings of the Transvaal Provincial Division (now the North and South Gauteng) Division of the Supreme Court of South Africa (now the High Court), the appellant was required to prosecute this appeal within sixty day7that is on or before the 15 May 2015.

[8] It was contended on behalf of the respondent, and correctly so, that the appeal is deemed to have lapsed as envisaged in Rule 51 (1) of the Uniform Rules of Court, in that, the appellant applied for a date of hearing of the appeal without bringing an application for condonation for late prosecution of the appeal. The appellant conceded to this fact. I have no reason to disagree with the respondent in this regard.

[9] On the basis of the above two points *in limine* raised by the respondent the appeal ought to be struck from the roll. Having said so, I am of the view that application for condonation for the late noting and prosecution of the appeal would have been a futile exercise in that such application would not have been entertained in isolation. The appeal court would still have to determine whether, on the merits, the appeal would have reasonable prospects of success.

[10] With regard to the merits, I am of the view that the appeal has no prospects of success. It was contended on behalf of the appellant that the court should place more emphasis on the word "Pension Fund" in deciding whether the appeal should succeed or not. It was contended that there is only one Fund and that the Divorce Court order states that the appellant is entitled to 50o/o of the respondent's rights in the pension interest of the respondent in that Fund. The appellant submitted that the administrator was bound to make payment from the Pension Fund, which, by definition, encompasses Provident Fund as well.

[11] The appellant's submission lends support to the respondent's argument that the order of the Divorce Court is *perfecta* and cannot, on this basis, be varied. The Divorce Court ordered the Fund to pay as per the parties' settlement agreement, which was made an order of court. It was not contended or

suggested that the order was granted by mistake.

[12] The respondent referred the Court a *quo* to the decision in **Fourie v Merchant Investors (Pty) Ltd and Another 2004** (3) **SA 422 (C).** I agree with the sentiments raised in that judgement that:
*"a party, having obtained a court order, cannot then seek to undo the agreement by seeking to clothe its apparent desire not to be bound by its end of the bargain by seeking to appeal against the court order which made an agreement an order of court".*

[13] It is evident that the appellant is aggrieved, in the main, by the administrator's refusal to pay a certain amount, than by the wording and terms of the court order. The respondent is further correct in submitting that the appellant ought to have joined the administrator to these proceedings, as the party, who, according to the appellant, is refusing to give effect to the court order.

[14] On the submissions made by the appellant alone, Ifind that the appeal stands to fail also on the merits.

[15] On the issue of costs, the respondent argued that the divorce action was finalized in 2004. It was finalized in terms of a settlement agreement. However, the respondent is unable to find closure as he is still been dragged to court, 18 years after the final order was made. Iagree with the contention that the court must show its displeasure by ordering the appellant to pay punitive costs of seeking to prosecute a lapsed appeal.

[16] It is ordered:

The appeal is dismissed with costs on attorney and client scale.

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**M V SEMENYA**

**JUDGE OF THE HIGH COURT**

I agree

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**E M MAKGOBA:**
**JUDGE PRESIDENT OF THE HIGH COURT; LIMPOPO DIVISION.**

**APPEARANCES**

ATIORNEYS FOR THE APPELLANT: DDKK ATI. INC.
COUNSEL FOR THE APPELLANT: Att. MC DE KLERK
ADORNEY FOR THE RESPONDENT: MAKWELA & MABOTJA ATT.
COUNSEL FOR THE RESPONDENT: Att. L.M MABOTJA
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