IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

REPORTABLE

CASE No 7821/03

In the matter between:

PUMLA VIOLA MAGEWU	**Applicant**
And	
TAMSANQA COSMOS ZOZO	**First Respondent**
TELKOM RETIREMENT FUND	**Second Respondent**
OLD MUTUAL EMPLOYEE BENEFITS	**Third Respondent**

JUDGMENT DELIVERED ON THIS 3Oth DAY OF APRIL 2004

HLOPHE, JP:

1. INTRODUCTION

[1] This is an application for the retention of pension benefits and the payment of future maintenance claims out of a pension fund benefit due and legitimately owned by the First Respondent. This court granted an interim order on the 22nd of September 2002. Today is the return day of the *rule nisi* previously issued by this court. The crisp issue to be decided is whether the Applicant is entitled to a final order that, the second and third respondents retain the first respondent's pension/withdrawal benefit for so long as the first respondent's minor child requires support and maintenance. Secondly, that the second and third respondents pay the sum of R1 800

per month to the applicant, so long as the child is in need of support and maintenance in respect of the first respondent's future maintenance obligations towards the child. The Applicant appeared in person. The First Respondent was represented in court by Mr van der Merwe.

2. FACTS

[2] The Applicant and First Respondent were previously involved in a relationship. They are the natural parents of the minor child Xola born 23 September 1995. The parties terminated their relationship in 1996. The child was then sent to live with his maternal grandparents in the Eastern Cape for a few years. During a portion of that time the First Respondent, the natural father of the minor child Xola, contributed towards the maintenance of the child. The exact amount is in dispute. However, it is of no material relevance to the present application.

[3] In 1999 Xola went to live with the Applicant. The parties were unable to come to any agreement regarding his maintenance. The Applicant initially approached the Wynberg Maintenance Court for an order in 1999 and was granted an interim order in October 2001. During this period the First Respondent paid no maintenance despite the fact that he was gainfully employed and must have known of his legal duty to maintain the minor child. On the 7th of December 2001 the interim order issued by the Wynberg Maintenance Court was made final. In terms of the order, the First Respondent is obliged to make a monthly maintenance payment of R1 800 in respect of Xola. The Applicant had difficulty in ensuring that the monthly maintenance obligations were met by the First Respondent. She applied and was granted an emolument order in terms of which, First Respondent's employer Telkom, was obliged to deduct the monthly maintenance from the First Respondent's salary and make payment to the Applicant.

[4] The Applicant received notification dated 13 August 2003 that the First Respondent had left the employ of Telkom and accordingly the employer could no longer be bound by the emolument order in place as from August 2003. First Respondent failed to pay the monthly instalment at the end of August 2003. The First Respondent did not pay maintenance from August 2003 until 15 January 2004. The First Respondent made a single payment of R1 800 on the 10 November 2003 in terms of an order made by this court on 10 November 2003 when the First Respondent brought an interim interdict application for the suspension of the order

granted on 27 October 2003 pending the rescission application on 20 November 2003. On 20 November 2003, this court ordered the First Respondent to pay R1 800 on or before the 2nd of day of each month, pending the hearing on 3 March 2003. Despite this and the order of the Wynberg Maintenance Court, which remained valid, the First Respondent failed to pay the total outstanding amount until 15 January 2004. Currently the First Respondent is not in arrears. He was probably advised to pay all arrear maintenance before the hearing of this application. This much became clear to the court as Mr van der Merwe in argument stressed that the First Respondent was not in arrears at all. This was clearly in an attempt to persuade the court to find in favour of the First Respondent.

[5] Telkom retrenched the First Respondent. The pension fund benefit due to the First Respondent from Old Mutual is approximately R126 000 The First Respondent was also a beneficiary of a "retrenchment package" offered by Telkom at his retrenchment of R278 000 net. In addition, the First Respondent owns a house in Somerset West with a bond registered in favour of ABSA Bank to the value of R300 000. The current value of the house is R375 000. The Applicant currently earns an income of approximately R250 000 per annum. The First Respondent has since his departure from Telkom embarked on a business venture, which he alleges, will cost him R110 000 in start up capital.

[6] The First Respondent contends that he has no intention of dissipating the proceeds of his pension fund to defeat Xola's maintenance claims. The Applicant appears to accept that the First Respondent does not have the intention to frustrate his maintenance obligations. The Applicant's main contention, however, is that the First Respondent's actions in the past and his current manner of responding to his maintenance obligations, does not give her the security to believe that the First Respondent will comply with his maintenance obligations. Her fears are based on her dealings with the First Respondent regarding the maintenance of their child. The Applicant wishes to secure the pension fund benefits so as to ensure that the First Respondent will comply with the maintenance order. The Applicant has doubts whether the First Respondent's business plans will provide the minor child with sufficient security that the First Respondent's maintenance obligations towards him will be met. Furthermore, the Applicant contends that the information given by the First Respondent regarding his proposed business ventures, is extremely vague and that the First Respondent has no more than a mere hope that he will generate additional income in the future.

3. The Law

[7] The question to be decided is whether our law allows for the securing of pension fund benefits to secure the future maintenance obligation of a person? Section 37A (1) of the Pension Funds Act, 24 of 1956, (The Act) provides:

> " Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act

No. 58 of 1962), and the Maintenance Act, 1998, 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 or order of court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section 65 of the Magistrates' Court Act, 1944 (Act No.32 of 1944), and in the event of a member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend any benefit in pursuance of such contributions, or part thereof: 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"

[8] Section 26(4) of the Maintenance Act, 99 of 1998, ('The Maintenance Act') provides:

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

The maintenance order in this application was made under section 18 read with section 16 of the Maintenance Act. In section 16 the Maintenance Act refers expressly to an order issued or made under this chapter, being Chapter 5. The Maintenance Act provides that, where any order is granted in terms of the Maintenance Act and the person against whom such an order was made, fails to comply with that order, such an order may be enforced by the attachment of property, emoluments or debts as contemplated by the Maintenance Act in sections 27, 28 and 29 respectively.

[9] 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)** 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.

[10] Although the **Mngadi** case *(supra)* and the present case are similar in that they both require the court to consider an order to secure pension fund benefits for future maintenance, it is important to set out the differences between these two cases. 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. In *casu* it is common cause that Telkom retrenched the First Respondent and he did not resign in order to thwart his maintenance obligations. Secondly, the First Respondent in this present matter is not currently in arrears. At one stage he was in arrears. However, the First Respondent was no longer in arrears when this matter was heard. In the **Mngadi** case, however, the First Respondent was in arrears with regard to his maintenance obligations.

[11] In the **Mngadi** case, the applicant had first approached the Pension Fund Adjudicator to consider her application. The Adjudicator had considered the provisions of section 26(4) of the Maintenance Act against those of the section 37A of the Pensions Act. The Adjudicator had found that the Maintenance Act did not permit the Fund to attach the third respondent's withdrawal benefit to secure the payment of maintenance in respect of the two minor children. Nicholson J analysed section 37A of the Pensions Act and held that the section can be divided into its constituent parts as follows-

1. "The savings preamble that preserves the position in the Pension Funds Act itself, the Income Tax Act 58 of 1962, and the Maintenance Act, 1998, and expressly makes the rest of the subsection subject to those Acts.

2. The Prohibition provides that no benefit in the extended sense, be provided shall be capable of being reduced, transferred or otherwise ceded, or of

being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law. (Even the rules of the Fund cannot provide for such and in addition the Fund is empowered to withhold or suspend payment of thereof)[sic].

3. The proviso protecting dependants entitles the fund to 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 benefits of such dependant or dependants during such a period as it may determine." (at 284 E-J).

Nicholson J considered that the last proviso was an empowering one enabling the fund to pay dependants without specifying those arising out of maintenance courts. The court accepted that the provisions of Chapter 5 of the Maintenance Act were in terms of the maxim *generalia specilibus non derogat*, meant that in this instance that the Maintenance Act had taken precedence over the general provisions of the Pension Funds Act (at 284J- 285A).

[12] Chapter 4 of the Maintenance Act governs maintenance and other orders. Section 15 of the Maintenance Act codifies the common law duty of parents to support their children. This duty rests upon both parents and accordingly does not discharge the duty to support a child where one spouse earns substantially more than the other. In *casu* Mr van der Merwe drew the court's attention to the fact that the Applicant earns a significant salary that would enable the Applicant to maintain Xola in a manner to which he is accustomed. This fact however, does not absolve the First Respondent from the reciprocal duty to contribute to the support of the minor child Xola, of course, bearing in mind their respective means. In addition, the Maintenance Act provides in Section 2(2) that the provisions of the Act may not be interpreted as allowing any person liable to maintain another from being excused from doing so. This serves to preserve the joint common law duty of support.

[13] The common law has always catered for a creditor who fears that the debtor has the intention of dissipating the funds to frustrate the creditor's claims. This has been in the form of an interdict. In **Knox D'Arcy Ltd and others v Jamieson and others 1996 (4) SA 348 (A) at 372C** the court held that the common law remedy in such a

situation has always been available. There has been no need to name it specifically. In the **Mngadi** case *(supra)* the court granted an anti-dissipation interdict. The interdict served to restrain the Pension Fund from paying pension benefits to an intentionally recalcitrant father. In order to have an anti–dissipating order granted by the court, the applicant must show that the debtor is dissipating or likely to dissipate the funds with the intention to defeat he creditor's claims. See **Knox D'Arcy Ltd and others** *(supra)* at **372A – 373H, Mngadi** *(supra)* at **287B-G.**

6. Application of Law To Facts

[14] It is clear upon a reading of the Maintenance Act and the relevant provisions of the Pension Funds Act that the two Acts together do work in a manner to provide relief to an applicant who has a maintenance order that has not been abided by the judgment debtor. The Maintenance Act was designed to alleviate the manner and conditions under which maintenance system was previously run, in that it opened new legal avenues to deal with recalcitrant fathers. However, according to the court papers and arguments before the court the First Respondent is not currently in arrears having settled them on the 15th of January 2004. This, however, does not and cannot spell the end of the matter for the Applicant.

[15] The Maintenance Act does not create a closed list of mechanisms available in law to assist children who have claims of maintenance and their specific situations are not expressly set out in the Act. Section 2(2) of the Maintenance Act provides that it may not be interpreted so as to derogate from the common law duty of support relating to the liability of persons to maintain other persons. In this instance, it is clear that the Applicant's case may not fall flat due to the fact that the First Respondent is not currently in arrears. Nicholson J correctly set out that courts may not adopt a *non possumus* approach where a fund is available and may be used to secure the right to maintenance for children. See **Mngadi *(supra)* at 287A.** In any event, there seems to be no reason, in logic, why such an order should not be made having regard to the best interest of the child.

[16] Indeed to follow such a narrow interpretation would be to ignore the constitutional duty of the court to develop new mechanisms of granting the Applicant a means to vindicate her constitutional rights by a narrow reading of the law. In **Fose v Minister of Safety and Security 1997 (3) SA 786 (CC): 1997 (7) BCLR 851 (CC)** at paragraph 69 Ackerman J held:

> "I have no doubt that this court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot be properly upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated. ***The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal."*** (My emphasis) (Footnote omitted).

[17] Mr van der Merwe argued on behalf of the First Respondent that the Applicant has in essence approached the court to grant her an interdict *in securitatem debiti* on the basis that she requires security for payment of First Respondent's future maintenance obligations to Xola. Further, he argued, that such an interdict is not available were the Applicant has not shown that the First Respondent has no intention of dealing with the funds in a *mala fide* manner. Mr van der Merwe relied on **Knox D'Arcy Ltd and others v Jamieson and others 1996 (4) SA 348 (A) 372** in support of his contentions.

[18] In my judgment there is a simple answer to Mr van der Merwe's contentions. Section 28(2) of the Constitution provides "A child's best interests are of paramount importance in every matter concerning the child". In **Bannatyne v Bannatyne and another 2003 (2) BCLR 111 (CC)** the Constitutional Court dealt with the entrenched rights of children in Section 28 of the Bill of Rights, and the laws relating to maintenance. In the words of Mokgoro J, " Children have the right to proper parental care. It is universally recognised in the context of family law that the best interests of the child are of paramount importance. While the obligation to ensure that all children are properly cared for is an obligation that the Constitution imposes in the first instance on their parents, there is an obligation on the state to create the necessary

environment for parents to do so" (at 375 C). Furthermore, Mokgoro J held that the State must provide the legal and administrative structure necessary to achieve the realisation of rights in Section 28. The Maintenance Act is recognised as part of the States infrastructure "designed to provide speedy and effective remedies at minimum costs for the enforcement of parents' obligations to maintain their children" (at 376A-E).

[19] The Constitutional Court was aware that despite the intention of the legislature to create an enabling environment for the recovery of maintenance, there were several difficulties regarding the operation of the Maintenance Act. The Commission on Gender Equality placed before the court material relating to the inadequately trained staff, insufficient facilities and resources. The court considered these factors and stated the role of the courts in such circumstances.

> " Systematic failures to enforce maintenance orders have an impact on the rule of law. The courts are there to ensure that the rights of all are protected. ***The Judiciary must endeavour to secure for vulnerable children and disempowered women their small but life sustaining legal entitlements.*** *If court orders are habitually evaded and defied with impunity, the justice system is discredited and the constitutional promise of human dignity and equality is seriously compromised for those most dependent on the law."* (at 377B para 27) (My emphasis).

The Constitutional Court went further to add that the function of the State was therefore more than just to create a framework to ensure children's rights were protected but also to create system that would put such a framework to effective use. "Failure to ensure their effective operation amount to a failure to protect children against those who take advantage of the weaknesses of the system" (at 377 para 28).

[20] In **Bannatyne v Bannatyne** *(supra)* the Constitutional Court held at paragraph 29, that the logistical difficulties of the maintenance system were compounded by the gendered nature of the maintenance system. The Commission on Gender Equality had submitted material to the effect that on the breakdown of marriage or relationships as in this case, the custodial parent is usually the mother. This creates an additional financial burden on women and inhibited their ability to find employment.

> "Divorced or separated mothers accordingly face the double

> disadvantage of being overburdened and under-resourced in terms of means. Fathers, on the other hand, remain actively employed and generally become economically enriched. Maintenance orders are therefore essential to relieve this financial burden (at 377 para29).

Furthermore, the Constitutional Court held that such disparities undermined the achievement of gender equality, a founding value of the Constitution. The enforcement of maintenance payments was therefore considered not only a measure to secure the rights of children, but also to uphold the dignity of women and promote the foundational value of achieving equality and non-sexism.

> "Fatalistic acceptance of the insufficiencies of the maintenance system compounds the denial of rights involved. Effective mechanisms for the enforcement of maintenance obligations are thus essential for the simultaneous achievement of the rights of the child and the promotion of gender equality." **Bannatyne v Bannatyne *(supra),* at 378A para 30.**

> "The appropriate relief required by Section 38 is relief that is effective in protecting threatened or infringed rights. Where legislative remedies specifically designed to vindicate children's rights as effectively and cost-effectively as possible fail to achieve that purpose, they do not provide effective relief." (at 378C para 31).

[21 In my view, although the First Respondent is not currently in arrears, he has been in arrears on several occasions before. Though he does not indicate the intention to

thwart his future maintenance claims towards Xola, the child in this instance has no security that his future maintenance claims will be met. The First Respondent has not conducted himself in a manner that would create the impression that the provision of Xola's maintenance is of paramount importance to him. In fact, the Applicant has had to approach the court for an emolument order to ensure that the First Respondent abided by his maintenance obligations. Once the First Respondent was retrenched the Applicant had no avenue to turn to, as an emolument order could no longer be enforced. In that same month of August 2003, the First Respondent failed to show his *bona fides* by failing to pay maintenance until he was probably advised of the precarious legal position he had placed himself by his attorneys. Payment was then made on 15th of January 2004 in full.

[22] It is clear that without the constant operation of the law to force the First Respondent to abide by his maintenance obligations, the First Respondent is not willing to do so - hence he has been dragged to court again in these proceedings. These facts create the impression that the Applicant "must run after" the First Respondent each time she wishes to secure maintenance for their son. The Applicant makes use of the current maintenance system and as tedious as it may be, she has been able to turn to the courts to ensure that Xola receives maintenance from the First Respondent. The Applicant, who appeared in person, has argued that it has been time consuming and the Applicant has had to request leave days from her employer to pursue the First Respondent. The Applicant's entire dealings with the First Respondent regarding Xola's maintenance have served to disempower her and are an attempt to infringe on her human dignity and equality as she is at the mercy of the First Respondent unless she takes legal action.

[23] The First Respondent has indeed established a close corporation and has other business ventures in mind. However, the Applicant, due to her knowledge of the First Respondent regarding his attitude towards maintenance, does not believe that without the force of law the First Respondent will direct a portion of his income towards the satisfaction of the maintenance order currently in place. The Applicant fears and reasonably so, that the Pension Fund benefits may be lost in the vague business dealings of the First Respondent and she will have no claim against the First Respondent to ensure that the minor child receives maintenance. Why should the Applicant be expected to go back to court again to enforce maintenance obligations

against the First Respondent?

[24] In all the circumstances of the case, although the intention of the First Respondent has not been considered to be an attempt to directly thwart the maintenance order, his conduct in the current matter does not serve to create the impression he is willing to abide by the maintenance order. The attachment of pension fund benefits in respect of future maintenance claims in *casu*, is a direct and effective means of ensuring that the rights of the child and dignity of women are upheld. There is no reason why in this instance, the pension fund should not be directed to withhold the withdrawal benefit in order to secure the future maintenance claims of the minor child Xola.

[25] In my view, the *rule nisi* previously issued by this court is hereby confirmed. There shall be no order as to costs.

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Hlophe, JP