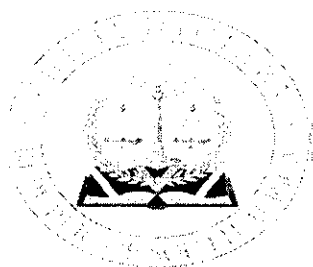


REPUBLIC OF SOUTH AFRICA




IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 15438/2015

23/3/2016

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	23.03.2016
SIGNATURE	DATE

RISIMATI JOSEPH NTSANWISI

Applicant

and

FELAMUNI PINKIE KHOZA

First Respondent

GOVERNMENT EMPLOYEES PENSION FUND

Second Respondent

SOUTH AFRICAN REVENUE SERVICES

Third Respondent

REASONS FOR JUDGMENT

AC BASSON, J

[1] The applicant – Colonel Risimati Ntsanwisi - is an adult male colonel in the South African Police Services. The first respondent is Ms Khoza (previously Mtsanwisi – “the respondent”). The second respondent is the Government Employees Pension Fund (“the Fund”) and the third respondent is the South African Revenue Service (“SARS”).

[2] It is common cause that the applicant and the respondent were previously married in community of property. A decree of divorce was granted on 29 June 2012. In addition to the decree of divorce it was ordered -

“2.THAT the joint estate shall be divided.

3. THAT part of the pension (50%) interest in the Government Employees Pension Fund to be paid out to the defendant in terms of section 7 (7) of the Divorce Act 70 of 1979.

4. THAT an endorsement of this order be made in the records of the said fund until payment of this order in terms of section 7(8) of the Divorce Act 70 of 1979 ”.

[3] It is common cause - and is also evident from the court order – that apart from the order that the respondent is entitled to 50% of the applicant’s pension fund interest, the joint estate has not been divided at the time of the granting of the divorce. In fact it is common cause that at the time of the hearing of this application on 8 February 2016 – almost 4 years later - the

joint estate has still not been divided. According to the replying affidavit, the process is yet to commence and is far from being finalised. Why this process has not begun is unclear. A liquidator has also not been appointed to divide the joint estate.

- [4] The amount to which the respondent is entitled to in terms of the divorce order is R 2 212 168.80 (before tax). SARS calculated the amount of R 206 851.63 as the amount of tax payable by the respondent in respect of this amount. The Fund paid out an amount of R 2 005 309.07 to the respondent being 50% of the applicant's pension interest at the time of the divorce less tax into the respondent's nominated bank account. This amount was paid over to the respondent on 19 August 2014 (about 2 years after the decree of divorce was granted).
- [5] On 24 March 2014 – almost two years after the decree of divorce has been granted – the applicant and the respondent entered into a settlement agreement in terms of which it was agreed that the parties will approach the regional Court of Mbombela for an order varying the order (dated 29 June 2012) in respect of respondent's entitlement to 50% of the applicant's pension interest. To this effect the parties agreed as follows:

“2.1 The parties record that the Plaintiff is a member of the Government Employees Pension Fund (“the fund”).

2.2 The parties agree that the Defendant shall be entitled to an amount of R 1,479,000 (one million four hundred and seventy nine

thousand Rand) of the Plaintiff's pension interest in the fund as defined in section 1 of the Divorce Act 70 of 1979."

- [6] Effectively the parties therefore agreed that the respondent would no longer be entitled to 50% of the applicant's pension fund interest (R 2 212 168.80 before tax) but that she will be entitled to a lesser amount.
- [7] The variation was granted on 17 April 2014 and the Fund was directed to endorse its records to reflect the respondent's entitlement pending payment or transfer to the respondent of the allocated portion of the pension interest in terms of the provisions of section 37D(4) of the Pension Fund Act 24 of 1956.
- [8] On 19 August 2014 the Fund, being unaware of the variation order and acting in accordance with the order dated 29 June 2012, proceeded to pay an amount of R 2 005 309.17 (50% of the applicant's pension fund interest less tax) into the respondent's nominated bank account. Prior to the payment the Fund had applied for a directive from SARS informing them of the above-mentioned payment to the respondent. SARS accordingly calculated the amount of tax deductible from the pension fund based on 50% of the applicant's pension interest at the time and forthwith issued a tax directive stipulating that an amount of R 206 851.63 must be deducted from the payout as tax.

- [9] The applicant attempted to reverse the payment in light of the amendment order but was unsuccessful.

Order sought

- [10] The applicant approached this court for an order compelling the respondent to repay an amount of R 526,309.17 being the amount "overpaid" to the respondent consequent to the variation order.

- [11] The applicant also seeks an order that the Fund be ordered to apply for a new tax directive from SARS for a recalculation of the tax amount deductible from the applicant's pension fund in light of the varied court order and that SARS be ordered to repay the amount of R 206,851.63 (being the whole tax amount deducted in respect of the pension fund payment in terms of the initial court order).

Basis of opposition

- [12] The respondent opposed this application on the basis that the only issue that was settled between the parties was the *reduced* entitlement that she had to the applicant's pension fund interest and that he forfeited any claim against her pension fund interest. The issues pertaining to the division of the remaining assets of the joint estate remain unsettled. She submitted that, depending on how the remaining assets were going to be divided, the difference between the excess paid out to her in respect of the pension fund and the reduced pension fund interest may very well be set off against the value of some of the other assets remaining in the joint estate. She further

points out that it was not the agreement between her and the applicant that she had to repay the difference between the pension amount received by her and the reduced amount *before* they have resolved the division of the remaining assets of the joint estate. According to her, should the parties not agree on the division of the joint estate, a liquidator will in any event have to be appointed and that one of the issues that will have to be taken into account would be the difference between the pension interest received by her in terms of the divorce order and the lesser amount subsequently agreed upon in terms of the settlement agreement.

[13] SARS likewise opposed the application but on different grounds. The applicant seeks repayment from SARS of an amount of R 206 851.63 on the basis that the tax should have been calculated on the amount of R 1 479 000.00 (the reduced amount agreed upon) and not on the amount of R 2 212 168.80 (being the amount awarded in terms of the divorce order). The applicant therefore seeks repayment of the entire amount of tax that was calculated on the amount that was paid over to the respondent in terms of the divorce order.

[14] In brief it is SARS's contention that the order sought against it is premature in the circumstances and that such a payment will not be in accordance with the provisions of the Income Tax Act.¹ According to SARS the applicant must first ensure that the amount that was overpaid to the respondent be refunded to the Fund. Once such payment has been made, the Fund will then legally

¹ Act 58 of 1962 and more particular Chapter 11 Part 1 paragraph 5.

be compelled to apply to SARS for a new tax directive. Until such time as a new tax directive has been applied for by the Fund, SARS cannot do a re-assessment of the amount of tax payable and thus cannot legally comply with the order which is being sought by the applicant.

- [15] The applicant disputes the contention that the overpaid amount should only be paid back once the joint estate has been divided. According to him it should be taken into account that the parties were married in community of property and whatever the net value of their joint estate was at the time of the divorce will be divided equally between them. The pension fund pay-out does not, according to the applicant, form part of the joint estate and there can never be a set-off as proposed by the respondent. Furthermore, there is a financial impact in that the applicant will only receive back what he has paid over to the defendant as the share in his pension fund at a later stage. By that time he will effectively have lost the compounded interest he would have been entitled to. Further according to the applicant, the parties clearly intended the issue pertaining to their respective pension funds to be excluded from the division process.

- [16] The applicant's cause of action is based on the *condictio inebiti*. The essential elements of this cause of action are: (i) the respondent must be enriched; (ii) the applicant must be impoverished; (iii) the respondent's enrichment must be at the expense of the applicant; and (iv) the enrichment must be unjustified or *sine causa*.

[17] It is not in dispute that the Fund transferred the pension benefit to the respondent under the *bona fide* but mistaken belief that it owed a certain amount of money to the respondent. The question whether the respondent has been enriched at the expense of the applicant as alleged by the applicant is, however, a more difficult question to answer in light of the fact that the pension fund interest paid out to her by the Fund remains part of the joint estate. The pension fund interest that a party has is deemed to form part of his or her assets and in the determination of the patrimonial benefits to which a party in any divorce action may be entitled to, this interest is deemed to be part of his or her assets. At the time of the divorce the court order determined that the respondent will be entitled to 50% of the applicant's pension interest. This entitlement was subsequently reduced to a lesser amount. The amount overpaid in respect of the pension fund interest forms part of the joint estate. Although the parties have agreed on what amount the respondent will be entitled to in respect of the applicant's pension interest (as at the time of the divorce) the joint estate must still be divided. The pension benefit owed to the defendant will simply be one of the assets that will have to be considered in the division of the joint estate.²

[18] I have already pointed out that it is common cause that the joint estate has not been divided. The amount overpaid to the respondent forms part of the joint estate and should be taken into account in the division of the joint estate. Should the parties be unable to agree a liquidator can be appointed

² Section 7(7)(a) of the Divorce Act 70 of 1979 states the following: "In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled, the pension interest of a party shall, subject to paragraphs (b) and (c), be deemed to be part of his assets."

to liquidate the joint estate. By necessary implication, depending on the determination of the respondent's share in the joint estate and its value, the respondent may well find herself in a position where she has to pay back the amount that she was overpaid. The reverse is also true. However, before the joint estate has been liquidated it is simply premature to conclude that the respondent has been enriched at the expense of the applicant. I am therefore of the view that the application in its present form is premature and therefore falls to be dismissed.

[19] Furthermore, the applicant clearly has an alternative remedy at his disposal and in fact had an alternative remedy at his disposal long before the present application was launched: A decree of divorce ordering the division of the joint estate was granted on 29 June 2012. This application was heard on 8 February 2016 – almost 4 years later and almost two years after the payment was made by the Fund to the defendant. Despite this extraordinary lapse of time, the applicant has taken no steps to ensure the division of the joint estate or to appoint a liquidator to divide the joint estate in the event the parties are unable to reach an agreement regarding the division. The issue of the overpayment could have been settled long ago had the applicant availed himself of an obvious alternative remedy.

[20] I should also mention that the applicant avers that the respondent may not be in a position to repay the amount overpaid to her in terms of the settlement agreement and allege that she may have squandered some of the money received on a car. It is common cause on the papers that at least

a house forms part of the yet to be divided joint estate. Whatever is owed to the applicant can therefore be recovered from the joint estate. Moreover, if the applicant had a concern regarding the respondent squandering the amount overpaid to her, nothing prevented him from approaching this court for an order that the amount overpaid be frozen in the respondent's bank account pending the final division or liquidation of the joint estate. For reasons unknown to this court the applicant has also decided not to avail himself of this alternative remedy.

[21] In respect of SARS, it is clear that the relief sought against SARS is dependent upon the relief sought against the respondent. In the event I am of the view that the application falls to be dismissed. I am also in agreement with the submission that until the dispute between the applicant and the respondent is resolved and until such a time the Fund has requested a new tax directive, there simply exists no legal basis why SARS should be ordered to repay the total amount of tax levied on the amount of R 2 212 160.80. In the event I am of the view that the application in against SARS likewise falls to be dismissed.

[22] In respect of costs, I can see no reason why costs should not follow the result.

[23] In the event the following order is made:

The application is dismissed with costs, costs to include the costs of the first and third respondents.



AC BASSON

JUDGE OF THE HIGH COURT

Appearances:

For the applicant	:	Adv JC Prinsloo
Instructed by	:	Swanepoel & Partners Inc
For the 1 st Respondent	:	Adv JGW Basson
Instructed by	:	MM Labe Attorneys
For the 3 rd Respondent	:	Adv HA Mphse
Instructed by	:	The Sate Attorney