Case Law Update

Karin MacKenzie

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Overview

I am going to be dealing with five cases, starting with the minority judgments in the *Mongwaketse* case that Alec has just discussed.

The remaining cases are concerned with:

- the requirements for anti-dissipation orders in relation to accrued pension benefits
- the treatment of living annuities for purposes of accrual claims in divorce, and
- arrear pension contributions where the state as employer is in default

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Municipal Employees Pension Fund v Mongwaketse (969/2019) [2020] ZASCA 181 (23 December 2020)

Ponnan JA (Dissent)

- What is the nature of the claim against the fund, and
- Does the adjudicator have the jurisdiction to determine it?

Original complaint poorly formulated – relied on fund rules for relief

Adjudicator appears to have determined matter on basis of enrichment (outside of fund rules)

Complexity of enrichment principles not properly understood

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Analysis of principles of enrichment law through the cases, requirements set out and difficulties with tripartite relationships discussed

Four requirements to succeed in enrichment action, all of which must be proved by the plaintiff:

- The defendant must have been enriched
- The plaintiff must have been impoverished
- The enrichment must be at the complaint's expense (causation)
- There must be no legal ground supporting the enrichment

Ponnan questions whether the complainant did not have a contractual claim against the employer for unauthorized deductions – implies the employer was the party with the enrichment claim against the fund

Jurisdiction

Did the adjudicator have jurisdiction over a claim based in unjustified enrichment?
Can an enrichment action be accommodated within the definition of a complaint?

Concludes that a finding that she was not a member of the fund makes it difficult to rely on the categories in the defn of a complaint in support of her claim

The return of an undue payment does not involve the administration of the fund, the investment of its funds or the application of its rules

He states at para [84]

> *"Had both the MEPF and Ms Mongwaketse taken the correct view that she was not and had never become a member, it is difficult to see how the Adjudicator could have jurisdiction to decide the complaint. Jurisdiction appeared to rest on the view, wrongly held as it turns out, that her claim fell to be treated as if she were indeed a member. However, if the Adjudicator had concluded, as she should have, that such a view was unsupportable, she had no power other than to dismiss Ms Mongwaketse's claim for want of jurisdiction."*

He concludes there was no jurisdiction.

Moreover, the claim ought not to have succeeded on the merits. Appears to rely on the failure to prove the fund's enrichment but may also be because, in his view, the employee was not the party with the enrichment claim.

WeinerAJA (Dissent)

Agrees the adjudicator lacked jurisdiction, but differs on Ponnan JA's interpretation of "complaint" and "complainant"

Suggests that the complaint as formulated (relying on the rules of the fund for redress) and the response from the fund (treating the complainant as a former member) would have fallen within the definition of a complaint, but once it was established that the complainant was not a member, the administration, investment or rules of the fund could have had no further relevance and the complaint as properly formulated would have fallen outside the definition.

For that reason unnecessary to comment on merits of the matter (enrichment).

Comment:

In my view the minority dissenting judgments are more compelling

On the jurisdictional point I agree with the minority judgments - current defn of complaint does not include claims of this nature for the reasons they state.

However the extension /confirmation of the adjudicator's power to determine these types of is probably a desirable outcome for complainants in this position.

Merits:

On the merits the problem is that there was no proper quantification of the fund's enrichment.

The majority says (1) the expenses of the fund were notional, and (2) complainant did not derive any benefits from the expenditure.
However, as to (1) what about premiums to third parties for risk benefits? What about costs of administering the "benefit"? These are usually significant costs, and not notional, and as to (2) the test to determine the enrichment of the fund is not based on whether or not the complainant derived benefit from the expenditure, it is determined by what the fund has left over from the undue payments (ie the fund also derived no benefit from the risk premiums paid or the administration costs, and as such it represents a loss/reduction in the amount of its enrichment).

Therefore I agree enrichment (or amount of it) was not proven.

Anti-dissipation orders

The next two cases concern the requirements for the granting of an anti-dissipation interdict in circumstances where a pension benefit accrues to a spouse in the course of divorce proceedings which have not been finalised.

Requirements for a temporary interdict:

- *Prima facie* right
- Apprehension of irreparable harm if the temporary interdict is not granted (and final relief is granted in due course)
- The balance of convenience must favour the applicant
- There is no satisfactory alternative relief

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Anti-dissipation orders

Anti-dissipation order:

- special type of interdict preventing a party from dealing fully with his/her own asset pending resolution of other claims.
- Remedy is invasive as it prevents an owner from dealing unrestrictedly with his/her own property.
- For this reason earlier cases set a high bar for obtaining such relief and developed additional requirements to those for ordinary interdicts.

In pension matters anti-dissipation orders are typically brought to preserve a benefit for purposes of pension splitting on divorce, payment of maintenance claims or for deductions from benefits in terms of section 37D(1)(b)(ii). The earlier requirements have been progressively relaxed in recent years in the context of pension benefits.

These next two cases mark a return to the more stringent test (discussed below) and are important for that reason.

MWS v NSS and Another Unreported judgment of the High Court (North West Division, Mahikeng), case no DIV 129/2019 handed down on 9 March 2020

Member spouse belonged to the GEPF and had a substantial benefit after 30 years of teaching. She resigned and a benefit accrued to her in the middle of divorce proceedings.

Non-member spouse applied to Court to prevent the fund from paying the benefit out until finalization of the divorce. He alleged she was likely to dissipate the asset since she had claimed forfeiture of benefits, and because she was not transparent with him about her financial affairs.

The member spouse set out her financial circumstances in some detail in response, and claimed that she had resigned due to ill health occasioned in part by the anxiety caused by the non-member spouse's conduct in the marriage. She required access to her benefit to sustain her and to pay for her medical treatment.

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Court adopting the more stringent test for granting anti-dissipation order

Relied on *Knox D'arcy Ltd v Jamieson and Others* 1996(4) SA 348 (SCA). This requires that there be some *mala fides* or state of mind on the part of the owner of the asset indicating that they intend to dissipate it to frustrate the other party's claim.

In the context of pension benefits, this approach has been followed in the past. It was stated at para [25]:

> *"In NCM v VTM Bloem J, applied the principles restated in the Carmel Trading Case, supra, to an anti-dissipating application relating to pension interest in a pending divorce action. He held the view that "the applicant was required to satisfy the court, through credible evidence, that the first respondent was wasting or secreting assets with the intention (particular state of mind) of defeating her claim in the divorce proceedings". Compare Magewu v Zozo and Others."*

MWS v NSS

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Court applied the stricter test and concluded there was no evidence of the requisite intent to dissipate the benefit to frustrate the non-member spouse's claim.

The Court was also reluctant to deprive the member spouse of access to her benefit as she would need it to support herself, pay for her medical expenses and defray the debts of the joint estate.

In these circumstances the freezing of the benefit would not be desirable and the Court refused to grant the application.

VM v ZM Unreported judgment of the High Court (Eastern Cape Division, Grahamstown), case no 1421/2019, handed down on 13 September 2020

The member spouse's benefit accrued o him during divorce proceedings and the non-member spouse approached the Court for an anti-dissipation order interdicting the fund from making payment of the benefit until finalization of the divorce proceedings. In this case the non-member spouse alleged that the monies were needed for the ongoing maintenance of the minor children.

Once again the stricter approach was applied and the Court concluded that the requirements for anti-dissipatory relief had not been met. There was no history of the non-member spouse shirking his responsibilities, or any credible evidence that he would dissipate the benefit with the intent of avoiding his obligations.

Court referred back to the *Knox D'arc*y case with approval as well as authorities in the same line.

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Court concluded at para [51]:

> *"I am unable to find that if the rule nisi is discharged the first respondent will get rid of the funds or that his intention is of defeating the claims for the creditors. I am also unable to find that the intention of the first respondent is not to pay school fees and to maintain his children."*

Also referred to *RS v MS* 2014(2) SA 511 GSJ, where the following statement was endorsed:

> *"… It is perhaps apposite to point out that, as of the draconian nature, invasiveness and conceivable inequitable consequences of such anti-dissipation relief, the courts have been reluctant to grant it, except in clearest of cases."*

Both judgments require proven intent on the part of the member spouse to dissipate the benefit to defeat claims on it.

They also recognize the injurious effect of freezing the asset indefinitely when it may well be required for immediate sustenance.

Montanari v Montanari (1086/2018) [2020] ZASCA 48 (5 May 2020)

This case answers the question that has been controversial for years – does a living annuity owned by one spouse constitute an asset for purposes of calculating an accrual claim in divorce proceedings?

The parties married in 1999 out of community of property, with accrual. The respondent was an annuitant under three living annuity contracts purchased with the proceedings of various retirement fund benefits.

In 2014 divorce proceedings were instituted by the respondent in which he also sought a declarator that his living annuities were not assets in his estate and were consequently not subject to the applicant's accrual claim.

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The trial court accepted the respondent's contention that the annuities belonged to the insurer and that for this reason they did not form part of his estate for purposes of calculating accrual.

The Court reasoned that the purpose of a living annuity was to provide an income stream to annuitants so that pensioners do not become a burden on the state. Viewing it as an asset to be shared would defeat this object.

Also it could operate unfairly to an annuitant who may acquire an immediate liability to transfer value from an asset he could only access over a lifetime

The trial Court did accept that the annuity was relevant in determining maintenance obligations.

Montanari v Montanari

On appeal to the SCA the Court held that the trial Court had posed the wrong question. The issue was not whether or not the assets underlying an annuity contract belonged to the annuitant or the insurer (the question the High Court had posed) but rather whether the right to claim the monthly annuity could be valued as an asset.

The Court examined the nature of a living annuity in terms of the definition in the Income Tax Act and the policy documents. Such instruments are

- Annuitant owned and purchased from an insurer with the proceeds from a pre-retirement product;
- Non-commutable and payable for the lifetime of the annuitant subject to the protections of sections 37A and 37B of the PFA;

Montanari v Montanari

- The annuitant can determine the levels of draw-down within certain parameters as well as the investment portfolios of the underlying capital, and may nominate beneficiaries for the balance of the capital after death.

Once a living annuity is purchased the underlying capital is no longer accessible to the annuitant.

However, this was not a bar to regarding his right to the annuity as an asset – the right itself formed an asset in his estate. The Court endorsed the earlier findings in *De Kock v Jacobson.* That case correctly found that an annuitant's right against a pension fund on accrual of his benefit had two components: a right to a cash payment and a right to monthly payments by way of pension.

Montanari v Montanari

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Court held the same principle must apply to a living annuity.

It is the right to claim the monthly annuity, not the value of the underlying asset transferred to the insurer, which constitutes an asset in the separate estate of the annuitant.

Actuarial evidence before the trial court indicated that a market value could be placed on the income stream generated by the underlying capital.

The Court then remitted the case back to the trial court for the admission of evidence on the value of the respondent's right to an annuity.

Montanari v Montanari

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Does this solve the problem?

Partially… It confirms a spouse's right to claim a monthly annuity is an asset on which a capitalized value can be placed, and such asset falls to be included in any calculation of accrual on divorce.

This must be equally applicable to an ordinary annuity or pension, as well as to a marriage in community of property, since the principles are identical.

A significant question which must still be answered is how the transfer of value is to be effected.

There will be circumstances where a spouse will struggle to transfer half the value of an asset s/he does not have immediate access to

Montanari v Montanari

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Can the other spouse share in the annuity payments instead? What happens on premature death of the annuitant?

These questions will still arise in practice and there remains uncertainty in this regard.

My own view is that incremental court jurisprudence is unlikely to deliver a cohesive solution and that legislative intervention is required.

Post Office Retirement Fund v The South African Post Office Soc Ltd and Others Unreported judgment of the High Court (Gauteng Division, Pretoria), Case no 35043/2020

This case is about arrear contributions to a pension fund and an ill-fated attempt by the fund to recover them.

The Post Office – an organ of state, regulated by statute – and the participating employer in the fund was already under severe financial pressure when its problems were exacerbated by the coronavirus pandemic, the National State of Disaster and the hard lockdown of the country last year.

Its losses stood at over a billion rand. As a result it fell into arrears with its pension contributions.

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The fund brought an urgent interdict application to High Court in which the following relief was sought:

- a declarator that the Post Office was in breach of Rule 3 (regulating payment of contributions);
- an order directing payment of the arrear contributions for the previous three months and
- an order directing the future timeous payment of contributions.

Post Office Retirement Fund

The amounts owing included employee contributions deducted from salary.

The fund is established by statute with rules promulgated under it. The employer's submission that the fund rules did not give rise to statutory obligations, but were at best contractual obligations, was therefore incorrect according to the fund. It was not open to the employer to resort to "self-help" in the avoidance of its financial obligations, and as an organ of state it had a heightened duty to advance the rule of law.

The Post Office argued that the contribution rule had to be interpreted flexibly. It should be permitted to pay contributions when it could. Otherwise, so it was argued, employees' payments would be prioritized over service delivery.

The Court confirmed there was no dispute the monies were owing, and formulated the question for decision as follows:

> [48] There appears to be no dispute on the papers that SAPO failed to remit pension contributions to the Fund for the months of May to July 2020 or that it may not be able to pay the contributions in the immediate future. Instead what SAPO is saying is that the Fund give it time to gather funds to be able to pay off the amounts owing.
>
> [49] The crux in this matter is whether SAPO should be ordered to pay the amounts it accepts owing on the time lines suggested by the Fund. Remember, the Fund wants SAPO to pay the outstanding contributions in the amount of R121 000 000, excluding interest, within five (5) days of this order and to continue with the monthly payments of R40 000 000. The question is, is this feasible?

Post Office Retirement Fund

The Court held payment was impossible (seemingly relying on supervening impossibility of performance due to covid and lockdown).

The Court was further concerned that payment of the arrear pension contributions may prejudice service delivery by the employer. Lastly, it was held that Courts should not make orders which are not capable of implementation (?)

The Court directed the parties to settle the matter. The application was dismissed with a costs order on the attorney client scale against the fund.

Post Office Retirement Fund

Comment:

- Supervening impossibility of performance has specific and onerous requirements – not dealt with in the judgment.
- No doubt statutorily prescribed processes for administration/curatorship or even liquidation of the employer in these circumstances but it had not availed itself of any of these.
- It is the above procedures and not the Courts which determine under which circumstances debtors are excused. No basis to dismiss the complaint.

THANK YOU

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