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**REPUBLIC OF SOUTH AFRICA**



**SOUTH GAUTENG HIGH COURT, JOHANNESBURG**

Case no: 2014/3044A

(1) REPORTABLE: YES  
(2) OF INTEREST TO OTHER JUDGES: YES

.....  
DATE

.....  
SIGNATURE

In the matter between:

[M.....], S.....

Appellant

And

[M.....], E.....

Respondent

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**JUDGMENT**

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### Headnote

Divorce- division of joint estate – forfeiture of benefits

Divorce Act 70 of 1979 – SS 7, 9 – interpretation

S 7(8) (a) (i) – meaning – empowers court to make order against pension fund despite it not being a party to the litigation – not an independent source of power to effect a forfeiture- various circumstances where a S7(8) (a) (i) order is appropriate set out

S 9 is only source of power to order forfeiture – whereas S7(3) empowers a court to transfer assets from one estate to another – limited criteria to be used to determine a justification for a forfeiture

Dictum in *JW v SW* 201(1) SA 545 (GNP) considered and distinguished – correctness of remarks about absence of fairness in S9 orders questioned

Pension interest of one spouse – what bases can exist for other spouse to obtain a transfer of such interest

### **SUTHERLAND J:**

[1] The respondent, E..... M..... sued her husband, S..... M..... for divorce. The matter was heard before the Regional Magistrate, Johannesburg. The litigants were in agreement to dissolve their marriage. In a pre-trial agreement it was stipulated that there was only one issue in contention; i.e. “whether the plaintiff /respondent is entitled to 50% of the pension interest of the defendant/appellant [who] has pleaded forfeiture of same”.

[2] The court ordered the joint estate, which was in community of property, to be divided and further ordered that: “25% of the defendants’ pension interest .... be paid to the plaintiff”.

[3] The appeal is against the order relating to the pension interest. The effect of the order is that the respondent forfeited half of her interest (by reason

of the joint estate) in her husband's pension interest. The appellant wants a total forfeiture.

- [4] The magistrates reasons are muddled and it is plain that he was confused about the proper meaning of the provisions of sections 7(7), 7(8)(a)(i) and 9 of the Divorce Act 70 of 1979.

- [5] The provisions read:

“Section 7: Division of assets and maintenance of parties

(1) ....(6)

(7) (a) 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.

(b) The amount so deemed to be part of a party's assets, shall be reduced by any amount of his pension interest which, by virtue of paragraph (a), in a previous divorce-

(i) was paid over or awarded to another party; or

(ii) for the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

(c) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

(8) Notwithstanding the provisions of any other law or of the rules of any pension fund-

(a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that-

(i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member;

(ii) ....

(b) ....

(emphasis supplied)

Section 9: Forfeiture of patrimonial benefits of marriage

(1)When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited.

(2)In the case of a decree of divorce granted on the ground of the mental illness or continuous unconsciousness of the defendant, no order for the forfeiture of any patrimonial benefits of the marriage shall be made against the defendant.”

- [6] The only witnesses were the two litigants. The appellant testified that the respondent left the common home for a reason of which he is unaware. He said the only point of dispute was that he believed that her half share in his pension interest should be forfeited because she had liquidated her pension benefits in 2008 and allegedly not shared the benefits with him. The respondent’s evidence was that she was expelled from the bedroom and later, to escape assault and abuse by him left the home. She testified that she resigned from her job in 2008 and her pension benefits were paid to her. She said she used the funds to pay for the education of the children. The appellant said he too paid a portion of the costs of education. She said her motive to resign was to get the funds from her pension fund to finance the children’s private education. The appellant denied this. There was a debate in evidence about inadequate disclosure of information about how she had deployed the funds received. That was the essence of the body of material evidence presented.
- [7] The magistrate embarked on an enquiry to determine if forfeiture by the respondent, as contemplated by section 9, was justified. The elements for

consideration in that section are threefold: (1) What is the duration of the marriage? (2) Why did it break down? (3) Did either spouse commit substantial misconduct? The enquiry requires an assessment, in the light of these factors, about whether an 'undue benefit' will accrue to one spouse if forfeiture is not made. In *Wijker v Wijker 1993 (4) SA 720 (AD)* at 727 E - F it was held that the question of whether there is a benefit is a question of fact and the question of whether the benefit was undue is a value judgment. Moreover, these three factors need not all be present in order to establish that a benefit is undue; however only these factors and no others must be weighed. (See: *Botha v Botha 2006 (4) SA 144 (SCA)*)

[8] The marriage was 25 years long. Self-evidently, it was a long marriage. However the spouses ceased to share their personal lives from 2008. Their relationship de facto lasted about 19 years. No substantive comment is made about this factor by the magistrate. As to the cause of the breakdown the magistrate stated he could make no finding for want of evidence to support either version. This circumstance is the outcome of the manner of presentation of the case; i.e. both parties wanted a divorce and the accusations of the one against the other were therefor not canvassed with a view to a definitive factual finding. Lastly, the magistrate concluded that he could make no finding about substantial misconduct either, for similar reasons.

[9] In the result, the magistrate held that no case for forfeiture had been proven. On the basis of what evidence was before the magistrate this is a

finding that cannot be criticised. Moreover, the sole basis advanced by the appellant to justify a forfeiture was, in any event objectively, misdirected. The primary contention for a forfeiture was the idea that the respondent, upon resigning from her long term job, liquidated her pension fund benefits and did not 'share' the proceeds with the appellant. The very notion of the appellant not sharing in these benefits is problematic. The money received by the respondent from her pension fund went *ex lege* into the joint estate. (See: *Government Employees Pension Fund v Naidoo & Another* 2006(6) SA 304 (SCA)) The appellant had a half share in such moneys during the course of the marriage. There were no 'benefits' in existence at the time of the divorce to take into account. (See: *Eskom Pension and Provident Fund v Krugel & Another* 2012 (6) SA 143 (SCA)) Moreover, to a large extent it was common cause that some, if not all, of the funds paid out to the respondent were used on the affairs of the joint estate and the family. Whatever was left over, if anything, fell into the basket of assets the parties had agreed to divide equally.

[10] That should have been the end of the case. However an astonishing further enquiry was embarked upon.

[11] The magistrate thought that section 7(8)(a)(i) vested him with a distinct discretionary power to grant what was, in effect, another form of forfeiture. Relying on the finding that the respondent had tried in her testimony to conceal assets which she de facto controlled, he ordered that she get only 25 % of the appellant's pension interest instead of 50 %. Manifestly, such

conduct by the respondent, deplorable though it may be, is not relevant to the marriage relationship per se. It seems that the magistrate might have approached this mendacity on the premise that it was 'substantial misconduct'. If this is so, it was in error because the 'substantial misconduct' contemplated in section 9 is confined to conduct relevant to the marriage relationship (although not necessarily a cause of the breakdown) not conduct about how the case was presented in a court, which could only have been relevant to a costs order. Ironically, he made no costs order. The order made that the respondent 'forfeit' half of her share in the appellant's pension interest was therefore doubly wrong; ie a finding had already been made that a case for forfeiture was not proven and moreover the respondents conduct in court was a non sequitur as regards the issue of either forfeiture or the division of the estate.

- [12] Section 7(8) must be read with section 7(7). Section 7(7)(a) provides that the contingent 'pension interest' that a member of a pension fund has in the future benefits from a pension is to be classed as an asset in that person's estate for the purposes of a division of assets on divorce. It follows that if that person is married in community of property the pension fund interest is an asset in the joint estate of which that person and the non-member spouse each has a undivided half share. Section 7(7)(c ) expressly excludes a marriage out of community of property from the application of that provision. Accordingly, *ex lege*, the respondent had a undivided half share in the pension interest of the appellant. This was the also clear understanding of the parties and frankly acknowledged by both.

- [13] Accordingly, that 'pension interest' is part of the bundle of assets to be divided up between the divorcing spouses. Of course, the 'pension interest' is simply a value calculated as at the date of divorce. It is that 'value' which falls into the reckoning of the total value of the basket of assets along with all of the other assets in the joint estate. (See: *Maharaj v Maharaj 2002 (2) SA 648 (D) at 651E.*) The value of the half share in the joint estate is then known. The assets are then apportioned. If there is a dispute of fact about what comprises all the assets, the remedy is to appoint a receiver to unearth the assets, value them and divide them.
- [14] The function of section 7(8)(a)(i) is to enable a court to give effect to a division of the joint estate by ordering a Pension fund to recognise that division and pay or appropriate a portion for the non-member spouse. This is an extraordinary power given to a court to make an order binding on a person who is not a party to the proceedings; ie the pension fund. The provisions of the section mean that if the spouses are married in community of property that the share of the non-member in the member's pension interest, alluded to in section 7(7), as being the '...part of the pension interest ... due ....to the other party ....' may be subject to an order against the pension fund (see: *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer 2014 (5) SA 373 (SCA) at [17] – [20] and [22].*)
- [15] When it is necessary to make an order in terms of section 7(8)(a)(i)?



- [16] First, to assume a simple division of a joint estate, if the value of a half share of the joint estate is larger than a pension fund member's pension interest, then a division can take place without disturbing the members pension interest, because the pension interest will remain wholly within that spouse's half share. No order in terms of section 7(8)(a)(i) is necessary.
- [17] Second, if the value of a half share of the joint estate is less than a pension fund member's pension interest then, logically, some of that pension interest will have to be 'appropriated' to the non-member's post – divorce estate. In such a case, a part of the pension interest can be ordered to be paid to the non-member spouse. The parties could agree to precisely such an order in the agreed value to make up the equal shares. (In this case, on the defendant's claim for an ordinary division, to give effect to her claim to an undivided half share, a section 7(8)(a)(i) order in her favour was necessary.)
- [18] Third, in a marriage out of community of property where no question of a division of a joint estate arises, section 7(3) of the *Divorce Act* empowers a court to redistribute assets 'as may seem just'. The parties might agree to a redistribution order. Again, if the value of the assets of the spouse who has agreed to, or is ordered to, transfer to the poorer spouse are of a value large enough to meet that order without taking the pension fund

interest into account, no order in terms of section 7(8)(a)(i) is necessary, and that spouse retains the whole of the pension interest.

[19] Fourth, where the assets of the spouse subject to an order in terms of section 7(3) whose assets are not valuable enough to give effect to the order without taking the pension interest into account, and a portion of the pension fund interest has therefore to be appropriated to give effect to that order, then an order in terms of section 7(8)(a)(i) is necessary. As in the third example, there has to be a section 3 order in existence, anterior to the section 7(8)(a)(i) order becoming necessary.

[20] Fifth, in the case of a joint estate, if a forfeiture order in terms of section 9 is appropriate, such order relates to the compulsory sacrifice by one spouse of a part of that spouse's half share in the whole estate. A forfeiture order does not relate, in principle, to a portion of each individual asset, but to an overall value, even though for obvious practical reasons, the order per se can, and often does, identify specific assets to be transferred to make up the value of the portion to be forfeited. If sufficient assets exist to facilitate the forfeiture calculation without taking having to appropriate some or all of the pension fund interest no section 7(8)(a)(i) order is necessary.

[21] Sixth, in the case of a joint estate, if a forfeiture order is appropriate, and to give effect to it, a part (or all) of a non-member's half share in a member's pension interest has to be appropriated to bring about the specific division

subject to the forfeiture order, then an order in terms of section 7(8)(a)(i) is necessary. However, anterior to such a section 7(8)(a)(i) order there has to be a forfeiture order in terms of section 9.

[22] Therefore it was completely illogical, in this case, as the magistrate did, to find that no forfeiture was appropriate and then order the pension fund to pay a sum to the non-member, the respondent. If no forfeiture was appropriate, then the magistrate should have made an order in favour of the respondent directing the pension fund to pay to her a half share of the appellant's pension interest.

[23] The magistrate referred to and relied upon the decision in *JW v SW 2011 (1) SA 545 (GNP)*. In that matter the court found that there was no grounds for a forfeiture. Then that court considered making an order in terms of section 7(8)(a)(i). Ostensibly the magistrate's notion of his powers derived from what was stated in that judgment at paragraphs [34] – [36]:

“[34] I turn now to consider the defendant's counter-claim in respect of the plaintiff's pension interest. Section 7(8)(a) of the Act provides that the pension interest of a party shall be deemed to be part of her/his assets in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled.

[35] Section 7(8)(a) of the Act provides as follows:

- '(8) Notwithstanding the provisions of any other law or the rules of any pension fund —
- (a) the court granting a decree of divorce in respect of a member of such a fund, may make an order that —
- (i) any part of the pension interest of that member which, by virtue of subsection (7), is due or assigned to the other party to the divorce action concerned, shall be paid by that fund to that other party when any pension benefits accrue in respect of that member. . . .'

[36] It is clear from the wording of the section that the court has a discretion in considering an order in terms of ss(8)(a). Obviously such a discretion must be exercised judiciously, taking into consideration relevant factors. Whereas, in considering forfeiture, considerations of fairness should not come into play (the court being confined to the three factors mentioned in s 9), such considerations would, in my view, apply in considering an order under ss(8)(a)."

[24] I understand this dictum to mean that a discretion is conferred in respect of section 7(8) (a) because the word '*may*' is the operative verb in relation to the power to make an order. I agree. This discretion will, necessarily, be exercised to give effect to the anterior orders about division of assets, as addressed above. In that context it must be a narrow discretion; withheld if the need to give effect of the division of assets does not require it, but logically, if the need to give effect to the division ordered does require it, the order cannot logically be refused.

[25] The notion that a substantive yardstick of '*fairness*' is wholly absent from section 9 is, in my view, overstated, given the purpose of section 9, which, as I understand its import, enumerates critical elements of what is the very stuff of fairness, in the specific context of a disintegrating marriage. Moreover, in *Wijker v Wijker* (supra) at 727E-728B, it was held that the enquiry into '*undueness*' was indeed a value judgment. A discretion, in the sense contemplated in Section 9, judicially exercised, cannot be free of an equitable core precisely because it is founded on a value judgment. A court considering an exercise of that discretion should, of course, do so within the context of the objectives of the statute, and, more narrowly, within the context of the section. These objectives are the equitable apportionment of assets between divorcing spouses. What is rejected in

*Wijker v Wijker* at 731C-F is the notion that it is unfair that one spouse can benefit from the efforts of the other and to right this inequity a forfeiture order must be considered; the court held that this outcome is precisely what community of property contemplates, and contributes nothing to a section 9 enquiry; the decision does not banish fairness *per se* from the enquiry.

[26] More importantly, given the interpretation placed by me on sections 7(7) and 7(8) above, if the judgment in *JW v SW* intends to say that a distinct original power to redistribute the assets of one party to another exists in terms of section 7(8), I must respectfully disagree. The only sources of a re-distributive power vested in a court are those in section 9 which provides for forfeiture and those in section 7(3) which provides for a redistribution. (If a court simply orders an equal division, whether in accordance with an agreement or in the face of resistance, a section 7(8)(a)(i) order is only necessary in the circumstances described above in the second example given.)

[27] It is therefore plain that as a result of the failure by the magistrate to apply the provisions of the Divorce Act properly, because of a misapprehension as to their meanings, the order in paragraph 3 of the order of the Regional court, Johannesburg dated 31 March 2014 must be set aside.

[28] The paradox of this result is that the appellant, through his efforts to overturn an irregular *de facto* partial forfeiture has succeeded in turning

the clock back. The question is again live as to whether a forfeiture order is appropriate, and only if so, is an order in terms of section 7(8)(a)(i) necessary to give effect to it. Moreover, if forfeiture is not appropriate, the question arises whether the equal division agreed upon by the litigants requires the respondent's as yet undivided half share in the appellants' pension interest to be transferred to her, in which case a section 7(8)(a)(i) order in her favour is necessary. The approach of the litigants to the mechanisms by which their joint estate might be divided was premised on an incorrect understanding of the legal machinery. Their approach might differ once they appreciate the correct position.

- [29] The appropriate way forward is that the matter be remitted, pursuant to section 19(c) of the Superior Courts Act 10 of 2013, for a fresh enquiry and decision by the trial magistrate.

### **The Order**

- [30] The appeal succeeds.
- [31] The whole of paragraph 3 of the order of the Regional court, Johannesburg, dated 31 March 2014 is a nullity and is set aside.
- [32] The case shall be remitted to the magistrate to enquire into:
- 32.1. whether an order against the respondent in terms of section 9 of the Divorce Act should be made, and

32.2. whether an order in terms of section 7(8)(a)(i) of the Divorce Act is necessary to either give effect to the division of the joint estate or to give effect to a forfeiture order, if any.

[33] The orders in paragraphs 1 and 2 of the order of the Regional court, Johannesburg dated 31 March 2014, remain unaffected by this order.

[34] There will be no order as to Costs.

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SUTHERLAND J

I agree.

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DEWRANCE AJ

Hearing: 14 October 2014

Judgment: 29 October 2014

For the Appellant: M D Hlatswayo, Attorney.

For the Respondent: Adv R Liphosa , instructed by Ramunasi Attorneys, Ref: R Ramunasi