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**IN THE HIGH COURT OF SOUTH AFRICA  
(GAUTENG DIVISION, PRETORIA)**

**Case Number:** 871/2020

REPORTABLE:NO

OF INTEREST TO OTHER JUDGES:NO

**DATE:** 17-05-2021

In the matter between:

**J KE.D N[...]**

**APPLICANT**

and

**M B P[...]**

**FIRST RESPONDENT**

**GOVERNMENT EMPLOYEE PENSION FUND**

**SECOND RESPONDENT**

**DEPARTMENT GOVERNMENT  
PENSION ADMINISTRATION**

**THIRD RESPONDENT**

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**JUDGMENT**

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**KUBUSHI J,**

*This judgement is handed down electronically by circulating to the parties' representatives by email and by uploading on Caselines*

[1] The purpose of this application is to reviewed and set aside the decision of the second and third respondent to apportion the pension benefits that accrued to the deceased, D J N[.], between the applicant and the first respondent. The applicant is further seeking a declaratory order that the first respondent was not customarily married to the deceased and that any purported marriage between the deceased and the first respondent be declared null and void.

[2] The first respondent is opposing the application insisting that she was married to the deceased by custom.

[3] The parties have in a joint practice note conceded that there is a material dispute of fact as regards the existence of the customary marriage between the deceased and the first respondent that cannot be resolved on the papers as they stand. The parties are of the view that the issue should be dealt through oral evidence.

[4] This court has directed that the application be determined on the papers filed on Caselines without oral hearing as provided for in this Division's Consolidated Directives re Court Operations during the National State of Disaster issued by the Judge President on 18 September 2020.

[5] The guiding principles, as regards disputes of fact, are set out in the *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd case*,<sup>1</sup> as follows:

“Where a dispute of fact is shown to exist, the court has a discretion as to the future course of the proceeding. If the dispute of fact cannot properly be determined by *viva voce* evidence under Rule 9 the parties may be sent to trial in the ordinary way (either on the affidavits as constituting the pleadings, or else with a direction that pleadings be filed); otherwise the application maybe dismissed with costs.”

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<sup>1</sup> 1949 (3) SA 1155 (T).

[6] As already conceded, there is a material dispute of fact which cannot be resolved on the papers as they stand. In the exercise of my discretion I do not think that the issues pertaining to the dispute of fact can be resolved by *viva voce* evidence but must be referred to trial.

[7] The issue of whether the first respondent was a customary marriage spouse to the applicant's deceased husband, and thereby entitled to share in his pension benefits, requires determination at the trial.

[8] I, therefore, make the following order:

1. The application is referred to trial.
2. The issue to be determined at trial is whether the first respondent was a customary marriage spouse to the applicant's deceased husband, D J N[. .], and thereby entitled to share in his pension benefits.
3. The pleadings filed on record are to serve as the pleadings at the trial and the parties are given leave to file any pleadings which may be considered as necessary to take the process to the conclusion of the trial.
4. Costs are reserved for determination at the trial.

**E.M KUBUSHI**  
**JUDGE OF THE HIGH COURT**  
**GAUTENG DIVISION, PRETORIA**

Appearance:

Applicant's Counsel	: Adv. Lungile Tyatya
Applicant's Attorneys	: Masike Inc Attorneys
First to Fourth Respondent's Counsel	: Charles Mnisi
First to Fourth Respondents	: Tladi L.B Attorneys
Date of hearing	: 20 April 2021
Date of judgment	: 17 May 2021