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REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED.

.....

DATE.....

SIGNATURE:.....

CASE NO: HCA18/2015

In the matter between:

B. S. M. (nee M.)

APPELLANT

and

N. A. M.

RESPONDENT

JUDGMENT

MAKGOBA JP

- [1] This is an appeal against the judgment and order of the Regional Court, Sekhukhune regarding the division of the joint estate in a divorce action. The order granted by the Regional Magistrate in the Court a quo amounts to what is colloquially termed “a blanket division”. The appellant is dissatisfied with the said order as it stands and contends that the Court a quo should have gone a step further and specifically ordered that the division of the joint estate shall include the parties’ respective pension interests held in their respective pension funds.
- [2] A further basis or ground of appeal raised by the appellant is that the omission by the Court a quo to make an order specifically in relation to the parties respective pension interests amounts to an order of forfeiture by the parties in relation to each other’s pension interest.

Factual Matrix

- [3] The respondent instituted divorce proceedings against the appellant in the Regional Court for the Regional Division of Limpopo sitting in Sekhukhune. He prayed for a decree of divorce, division of the joint estate and ancillary relief. The respondent did not in his particulars of claim plead for payment to him of the appellant's pension benefit. Equally, the appellant counter claimed for a decree of divorce, division of the joint estate and ancillary, relief. She also did not plead and pray for payment to herself of the respondent's pension benefit in her particulars of counter-claim.
- [4] At the time of the divorce the appellant was employed at Great North Transport since 2007 and was a contributor to a pension fund thereat. The details of the pension fund are not disclosed. The respondent was employed by the SAPS and was therefore a contributor to the Government Employees Pension Fund.

[5] The matter proceeded to trial and at the commencement of the trial the parties' respective legal representatives informed the court from the bar that the only issues to be decided by the court were plaintiff's pension benefit and maintenance of the minor child.

The matter proceeded to evidence and judgment was delivered without any application for amendment of the pleadings having been applied for or made by the parties regarding the issue of the pension interest. In the result the court gave a judgment in the very terms prayed for by the parties in their respective prayers regarding the division of the joint estate.

[6] The Court a quo in coming to its decision not to award pension interest to the appellant or respondent expressed itself as follows:

"In this matter the parties are both members of pension funds.

The pension funds were however not disclosed to the Court. Neither of the parties claimed any portion of pension interest held by them in their pleadings. It is the defendant when she gave viva voce evidence that she asked the Court to order that 50% of the plaintiff's pension interest be entertained."

The Issues

[7] The legal issues to be decided in this appeal are the following:

- 7.1. Whether a pension interest of a party automatically or by operation of law forms part of the joint estate of the parties.
- 7.2. Whether it is necessary that a claim in regard to such pension interest be specifically pleaded in the divorce papers.
- 7.3. Whether an omission by a Court in divorce proceedings to award a non-members spouse 50% (or any portion) of his/her member spouse's pension interest amount to an order of forfeiture by the non-member spouse of his/her member spouse's pension interest.
- 7.4. Whether the omission by the Court in divorce proceedings and in its judgment to order an endorsement or assignment of any part of the pension interest to a non-member spouse

in terms of section ⁶ 7(8)(a) of the Divorce Act 70 of 1979
deprives the non-member spouse of his/her share of the
pension interest.

7.5. What remedy, if any, is available to a non-member spouse to
enforce his/her rights in regard to the pension interest in the
absence of a declaration or assignment by the divorce Court
in terms of Section 7(8)(a) of the Divorce Act 70 of 1979.

The Law

[8] Section 7(7)(a) of the Divorce Act 70 of 1979 reads as follows:

*“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”*

Section 7(8)(a) of the Divorce Act 70 of 1979, reads as follows:

*“(8) Notwithstanding the provision of any other law or of the
rules of any pension fund-*

(a) *The Court*

granting a

*decree of divorce in respect of any 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) ”.

[9] From the reading of the aforementioned legislative provisions it is clear that Section 7 of the Divorce Act opens a window for parties engaged in divorce proceedings to have access to the pension interest of either of them for purposes of achieving an equitable distribution of their assets.

It provides that the pension interest of a party should be deemed to be an asset in his estate for that purpose. This means that the interest is not ordinarily part of the joint estate, but shall be such for purpose of division upon divorce.

[10] Section 7(8) of the Divorce Act 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 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 an undivided half share.

- [11] This simply means that ex lege the spouses have an undivided half share in the pension interest of each other.
- 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 date of divorce. It is that "value" which falls into the reckoning of the total value of the basket of assets along with all the other assets in the joint estate. When the value of each spouse's half share is then known, the assets in the joint estate are then apportioned.

**See : Maharaj v Maharaj 2002(2) SA 648 (D) at 651 E,
MS v. ME Case No 3044 A /2014 South Gauteng High Court (29
October 2014) per Sutherland J.**

[12] The function of Section 7(8)(a) (i) is to enable the 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 a person who is not a party to the proceedings, that is, the pension fund.

The provisions of this subsection mean that if the spouses are married in community of property that 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 another party may be subject to an order against the pension fund (See: **Old Mutual Life Assurance Co (SA) Ltd & Another v. Swemmer 2004 (5) SA 373 (SCA)** at [17-[20] and [22].)

[13] It is clear from the wording of Section 7(8) (a) that the Court has a discretion in considering an order in terms of subsection 8(a)(i). Obviously such discretion must be exercised judiciously, taking into consideration relevant factors. In the present case the learned Regional Court Magistrate in the Court a quo did not grant the order in terms of Section 7(8)(a)(i) of the Divorce Act. He had the

discretion to do so, and therefore his failure to grant such order cannot be faulted in the circumstances of this case.

[14] In the matter of **Eskom Pension and Provident Fund v. Krügel and Another 2012(6) SA 143 (SCA)** the Supreme Court of Appeal held:

“ A pension fund’s right to make deductions from a pension benefit is highly circumscribed and may be exercised only as expressly provided by s37D and s37A of the PFA [Pension Funds Act 24 of 1956]. Relevant for present purposes is s37D which, in s(1)(d)(ii) allows a fund to “deduct from a member’s benefit or minimum individual reserve, as the case may be... any amount assigned from such benefit or individual reserve to a non-member spouse, in terms of a degree granted under section 7(8)(a) of the Divorce Act, 1979.”...The first respondent’s entitlement, form the provisions of s7 (7) and s7 (8) of the Divorce Act, which deal with the pension benefits of a divorcing member of a pension fund.”

[15] In my view the Supreme Court of Appeal dicta above, read with the relevant statutory provisions, constitutes a finding (or at the very least a very strong intimation) that although a pension interest of a member spouse is deemed to form part of the assets that constitute the patrimonial benefits of the marriage, a non-member

spouse becomes entitled to a percentage of the pension interest only when it is assigned to him or her in terms of Section 7(8)(a) of the Divorce Act.

[16] To sum up my view, where the parties are married in community of property, if a non-member spouse institutes a claim for pension benefits in terms of Section 7(7) of the Divorce Act in divorce proceedings against the member spouse for 50% of his/he pension interest and in the absence of a forfeiture order, such an order will be granted by the Court granting the decree of divorce in terms of Section 7(8)(a)(i) of the Divorce Act. Absent this order the non-member spouse will not be able to enforce a claim for such pension interest against the pension fund concerned.

[17] It is appropriate in this case to look into and deal with some case law relating to the claim for pension interest/benefits in divorce proceedings.

[18] In the earlier decision of the Free State High Court in **Sempapalele v. Sempapalele and Another 2001(2) SA 306 (O)** it was held as follows:

The law prior to the introduction of Section 7 of the Divorce Act 70 of 1979 had stated that the pension interest was not part of an asset of the spouse who was a member of a pension fund and hence could not be part of the joint estate of the member and his/her spouse. Section 7 did not abolish the existing law but provided a mechanism for parties engaged in divorce proceedings to have access to the pension interest of either of them for the purpose of achieving an equitable distribution of their assets. The section provided that the pension interest of a party would be deemed to be an asset in his/her estate. This meant that the interest was not ordinarily part of the joint estate but would be such for the purpose of division upon divorce. Further, that a spouse seeking a share in the pension interest of the other spouse had, in terms of Section 7 (7)(a), to apply for and obtain an appropriate Court order during the divorce proceedings. In the present case the applicant had failed to obtain a Court order awarding her a share in the first respondent's pension interest in terms of section

7 of the Act at the hearing of the divorce matter. She could not now get such an order.

[19] The principle laid down in **Sempapalele** was followed in the judgment of another Court of the same division in case number 3981/2010 delivered on 25 April 2013 and reported as **ML v. JL SAFL 11[2013] ZAFHC 55**.

Both judgments are judgments of single judges of the Free State Division.

[20] The above judgments were not followed, and in fact overruled in a judgment of two judges (Jordaan J and Reinders AJ) of the same division in **Motsetse v Motsetse [2015] 2 ALL SA 495 (FB)** delivered on 12 March 2015. At page 499 in paragraph 18 it was held:

*“[18] In paragraph 57 of that judgment it appears that the Court concurs with the findings in the **Sempapalele** judgment. In particular, the Court found that a pension interest does not automatically fall within the ambit of a customary division of the joint estate and it can only be part of a division if a specific order is made by a Court in that regard. The Court found that it has to*

be *pertinently* pleaded and claimed. I am unfortunately not able to agree.”

[21] The Court in **Motsetse** referred, with approval, to the decision of the Kwazulu –Natal division in **Maharaj v. Maharaj and Others 2002(2) SA 648 (D)** and to the decision of the Eastern Cape Provincial Division in **Fritz v. Fundsatwork Umbrella Pension Fund and Others 2013(4) SA 492 (ECP)** and came to the following conclusion/ decision:

“[21] The result of the aforementioned is that, when parties by deed of settlement agree to a blanket division of a joint estate or when an order of Court orders division of a joint estate, the pension interest of such parties who have such interest automatically fall to be divided as part of the joint estate. Such an agreement or order defines the rights of the parties in regard to the proprietary rights in and to the joint estate....

Thereafter, if the parties cannot agree as to giving effect to such orders defining their rights, the Court can be approached to grant orders either appointing liquidators or deciding the issue as to the actual division of the estate Those latter types of orders do not have to be issued at the time of granting the decree of divorce. The orders that a Court is authorised (and not obliged) to

make in subsection 7(8) of the Divorce Act are orders that are aimed to give effect to the defined rights of the parties.”

[22] In essence the judgment in **Motsetse** is to the effect that where a settlement agreement provides for a blanket division of a joint estate or a Court order orders a blanket division of a joint estate (as in the present case before me), all pension funds to which any of the spouses belong and had an interest in at the date of divorce are involved, in the sense that all such pension interests are deemed to be part of the estate. If after the dissolution of the marriage, the parties dispute the division, a court can be approached to either deal with the matter itself or appoint a liquidator.

Furthermore, it is not necessary that the issue of pension interest be specifically applied for or pleaded in the divorce proceedings.

[23] In the matter of **Kotze v. Kotze and Another [2013] JOL 30037 (WCC)** the Full Court of the Western Cape Division held that:

Where parties who were married to each other in community of property in subsequent divorce proceedings do not deal with a

pension or provident fund interest which either or both of them may have had in separate pension or provident fund either by a way of settlement agreement or by an order of forfeiture, each of them nonetheless remain entitled to a share in the pension or provident fund to which the other spouse belonged and such share is to be determined as at the date of divorce by virtue of the provisions of Section 7(7)(a) of the Divorce Act 70 of 1979.

[24] The Gauteng Division held in **Chiloane v. Chiloane (27836/06) [2007] ZAGPHC 183(7 September 2007)** that “a spouse seeking a share in the pension interest of the other spouse who had not in terms of Section 7(8)(a) applied for and obtained a Court order during the divorce proceedings, may do so by way of motion proceedings after the divorce decree is granted.”

Likewise in **M v. M 2012 ZAKZDHC 17** it was held that the fact that no order is made in terms of Section 7(8)(a) of the Divorce Act at the time of the divorce, does not preclude the non-member spouse from later making a claim against the other former spouse for a portion of the pension proceeds.

- [25] It appears clearly from the decisions referred to above that the law as set out earlier in the **Sempapalele** is no longer good law. In **Maharaj v. Maharaj 2002(2) SA 648 (D)** Magid J rejected the decision in **Sempapalele** that, unless a pension interest is dealt with expressly at the time of the divorce, the pension interest can never be shared between the spouses. Magid J pointed out that Section 7(7)(a) of the Divorce Act states quite unequivocally that a pension interest is deemed to be part of the assets of a party in the determination of the patrimonial benefits to which the parties to a divorce action may be entitled. At 650J-651A of the judgment the Court found that a spouse is not precluded from claiming a share of the other spouse's pension interest simply because the divorce order does not expressly refer to such pension interest.

Conclusion

- [26] Having considered and dealt with the legislative provisions as well as case law relating to the pension interest in divorce proceedings, I now come to the conclusion hereunder in order to answer the questions or issues raised in this appeal.

- [27] The pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specified applied for or pleaded to be part of the joint estate – Section 7(7) of the Divorce Act.
- [28] Section 7(8)(a)(i) of the Divorce Act empowers the Court which grants a divorce order to make an order that any part of a pension interest which is due or assigned to the spouse of the member of a pension fund must be paid to the non-member spouse by the fund when any pension benefit accrues to the member.
- [29] An omission by a Court in divorce proceedings to award a non-member's spouse 50% (or any portion) of his/her member spouse's pension interest does not amount to an order of forfeiture by non-member spouse of his/her member spouse's pension interest.
- [30] In terms of Section 37D (1)(d)(i) of the Pension Funds Act 24 of 1956, a pension fund may only deduct the non-member's share of the member's pension interest from the member's pension benefit if the amount has been assigned from such benefit or individual

reserve to a non-member spouse in terms of a decree granted under section 7(8)(a) of the Divorce Act.

Thus, even though the pension interest of a spouse who is married in community of property automatically falls into the joint estate upon divorce and does not have to be specified to be part of the joint estate, an order in terms of section 7(8)(a) is required in order to enable the non-member to compel the pension fund to pay his or her portion of the member's pension interest to him or her. In the absence of an order in terms of section 7(8)(a), the pension fund would refuse to pay any portion to the non-member.

In such event, the non-member spouse would have to claim his or her portion of the pension interest from the member personally.

- [31] The appellant in this appeal finds herself in a position where the Court a quo did not make an order in terms of Section 7(8)(a) of the Divorce Act. This does not mean that she has lost her right to claim her share of the pension interest against the respondent. She is at liberty to do so but she should bear in mind that the respondent has a right to counter claim for his share in the pension interest of the appellant.

[32] In the circumstances the appellant has embarked on a wrong procedure by taking the decision of the Court a quo on appeal. Such an appeal is misdirected and/or ill-advised. On this basis the appeal cannot succeed and the appellant should be liable for the costs of this appeal.

[33] In the result the appeal is dismissed with costs.

**E M MAKGOBA JP
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, LIMPOPO
DIVISION, POLOKWANE**

I agree,

**M MADIMA AJ
ACTING JUDGE OF THE HIGH
COURT OF SOUTH AFRICA,
LIMPOPO DIVISION, POLOKWANE**

APPEARANCES

Heard on : 10 June 2016

Judgment delivered on : 17 June 2016

**For the Appellant : J R Kgarimetsa
J R Kgarimetsa Attorneys
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**For the Respondent : M M Makgaleng
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