THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 714/2018

In the matter between

M N **APPELLANT**

and

F N **RESPONDENT**

Neutral citation: *M N v F N* (714/2018) [2019] ZASCA 185 (3 December 2019)

Coram: Petse DP, Leach, Swain and Mbatha JJA and Dolamo AJA

Heard: 26 November 2019

Delivered: 3 December 2019

Summary: Divorce Act 70 of 1979 – ss 7(7) and (8)*(a)* – Pension Funds Act 24 of 1956 (PFA) – reference to 'pension fund' in Divorce Act – means 'pension fund organisation' in PFA – object of providing annuities in a pension fund or lump sum payments in a provident fund – reference in court order to right and interest in

named pension fund – includes right and interest in pension and provident fund sections of Fund.

ORDER

On appeal from: Limpopo Division of the High Court, Polokwane (Makgoba JP and Semenya J sitting as court of appeal):

1 The appeal succeeds with costs excluding the costs incurred by the appellant at the hearing on 12 September 2019.

2 The order of the court a quo is set aside and replaced with the following order:

'The appeal succeeds with costs and the order of the regional court Polokwane, is set aside and replaced with the following order of this court:

(a) It is declared that the order of the North Eastern Divorce Court issued on 6 December 2004, that 50 per cent of the respondent's right and interest in the University of the North Pension Fund be paid to the appellant, includes the respondent's right and interest in the pension fund section, as well as the provident fund section, of the University of Limpopo Retirement Fund.

(b) The respondent is ordered to pay the costs of the application.'

JUDGMENT

Swain JA (Petse DP, Leach and Mbatha JJA and Dolamo AJA concurring):

[1] The origin of the present dispute lies in the terms of an order of divorce granted as long ago as 6 December 2004, by the North Eastern Divorce Court, (the Divorce Court) in which the bonds of marriage between the appellant, Mrs M N and the respondent, Mr F N, were dissolved. That portion of the order whose proper interpretation is placed in issue, reads as follows:

'That the joint estate shall be divided and 50% of the plaintiff's right and interest in the University of the North Pension Fund when it becomes due and payable to plaintiff be made out to defendant, calculated to date of this order.'

[2] The order was granted in terms of a settlement agreement between the parties and in accordance with the provisions of s 7(8)*(a)* of the Divorce Act 70 of 1979 (the Divorce Act). This section provides that the court granting a decree of divorce in respect of a member of a pension fund, may make an order that any part of the pension interest of that member which, by virtue of s (7), is due or assigned to the other party to the divorce action, shall be paid by that fund to the other party, when any pension benefits accrue in respect of that member.

[3] At the time the order was granted, payment of a pension interest to the non-member spouse, depended upon the rules of the particular fund. This usually occurred when the member spouse retired, was dismissed or when some other defined 'exit event', arose. As pointed out by the Constitutional Court in *Wiese v Government Employees Pension Fund & others* [2012] ZACC 5; 2012 (6) BCLR 599 (CC) para 6:

'The problem was that a non-member spouse would be severely prejudiced if the value of his or her benefit was frozen at the date of divorce and the beneficiary would have had to wait for a later exit event.'

The Constitutional Court also noted that in order to cure this defect, various amendments were made to the Pension Funds Act 24 of 1956 (the PFA) which introduced the 'clean-break' principle. In the result s 37D(4)*(a)* of the PFA provides that for the purposes of s 7(8)*(a)* of the Divorce Act, the portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce, is deemed to accrue to the member on the date on which the decree of divorce is granted. The object of this amendment to the PFA was to ensure that the non-member spouse, receives payment of the amount assigned from the member's pension interest, in terms of a decree of divorce and within the statutorily defined periods, as set out in s 37D(4)*(b)* of the PFA.

[4] In order to render the provisions of ss 37D(4)*(a)* and 37D(4)*(b)* of the PFA applicable to divorce orders, or decrees for the dissolution of customary marriages,

granted prior to 13 September 2007, in which any portion of the pension interest was assigned to the non-member spouse, s 37D(4)*(d)* of the PFA provides as follows:

'Any portion of the pension interest assigned to the non-member spouse in terms of a decree of divorce or decree for the dissolution of a customary marriage granted prior to 13 September 2007 are for purposes of any law other than the Income Tax Act, 1962, including, but not limited to, section 7(8)*(a)* of the Divorce Act, 1979, deemed to have accrued to the member on 13 September 2007 and must be paid or transferred in accordance with paragraphs *(a)* and *(b)*.'

[5] Because the decree of divorce was granted on 6 December 2004, the portion of the pension interest of the respondent, assigned to the appellant as the non-member spouse in terms of the order, was deemed to have accrued to the appellant on 13 September 2007 and had to be paid in accordance with ss 37D(4)*(a)* and 37D(4)*(b)* of the PFA. The appellant therefore lodged a claim with Alexander Forbes Financial Services, the administrator of the University of the North Pension Fund, whose name in the interim had been changed to the University of Limpopo Retirement Fund (the Fund), for payment of the amount owed to her, in terms of the court order.

[6] The response of Alexander Forbes Financial Services (the fund administrator), to the claim of the appellant, by way of a letter dated 29 September 2011, was as follows:

'We refer to the Final Order of Divorce dated 6 December 2004 in the Divorce Court of South Africa and confirm as follows:

We have calculated the divorce benefit due to you in terms of the Final Divorce Order in accordance with Section 7(8)*(a)*(ii) of the Divorce Act as read with Section 37D of the Pension Funds Act. The value of the pension interest (the benefit which your ex-spouse ("the member") would have been entitled to in terms of the Rules of the Fund) on the date of divorce is R167 656.53.

In terms of the final divorce order, you are entitled to 50% of your ex-spouse's pension interest in the Fund. The amount of R83 828.27 is due and payable to you in terms of the final divorce order (Plaintiff) and this amount less tax plus fund return (where applicable) has been paid by means of an electronic bank transfer on 26/09/2011 into your bank account as provided by you.'

It was then added, that the payment was made in full and final settlement of any amounts owed to the appellant, by the Fund.

[7] The attorneys for the appellant replied stating that the amount tendered was not accepted in 'full and final settlement of any amounts owed by the fund in terms of the divorce order.' It was added that the appellant's instructions were that she had been advised by the fund administrator that they were awaiting confirmation from the respondent, 'as to whether payment should be effected from his Provident- or retirement fund or from both funds'. It was then added that 'our client is legally entitled to 50% of your members pension interest in the University of the North/Limpopo's pension/provident fund(s)'.

[8] The response of the fund administrator was that the appellant was only paid from the pension fund section, because;

'The court order clearly states that we should pay from the pension fund section only, should the parties [have] intended for the payment to be deducted from the pension fund and provident fund section the court order should have clearly stated that the defendant (Mrs. N) is entitled to a portion from the pension and provident fund section. The payment to Mrs N was calculated according to what the court order stated.'

[9] The appellant therefore instituted application proceedings in the regional court, Polokwane, for an order varying the order granted by the Divorce Court, to read as follows:

'50% of the Plaintiff's rights and interest in the University of Limpopo Retirement Fund, (Pension and Provident Section), be paid out to the Defendant, calculated as on date of divorce, and that an endorsement of this order be effected in the records of the University of Limpopo Retirement Fund, (Pension and Provident Section), and that the University of Limpopo Retirement Fund, (Pension and Provident Section), be ordered to effect such payment to the Defendant as on date of divorce, in terms of section 7(7) read with (8) of the Divorce Act 70 of 1979.'

[10] For reasons that will become apparent, the relief sought was erroneous and unnecessary because the order granted did not require variation to make its meaning clear. Properly construed, in the context of the Divorce Act and the PFA, the fund administrators were obliged to make payment from both the provident and

pension sections of the Fund. The appellant should rather have sought a declaratory order as to the meaning of the order, combined with an order directing the fund administrator to make payment to her, in accordance with its terms.

[11] In the result, the appellant embarked upon a long and no doubt costly, legal battle to vindicate her right to payment from both the pension and provident sections of the Fund, in terms of the court order. The application in the regional court was opposed by the respondent, on the basis that it was agreed between the parties that 50 per cent of his pension interest would accrue to the appellant, but it was never agreed that the appellant would have a share in his provident fund. However, as correctly submitted by the appellant, it was common cause that neither on the date of divorce, nor the date of enforcement of the order, was the respondent a member of a provident fund. He was a member of a pension/retirement fund which comprised both a pension and provident section. The respondent also submitted that ss 7(7) and 7(8) of the Divorce Act only dealt with a pension benefit and not a provident fund. In addition, the definition of 'pension fund' in s 1(1) of the PFA, did not include a provident fund.

[12] On 14 November 2014 the regional court dismissed the application with costs on the basis that the PFA provided separate definitions for 'pension preservation fund' and 'provident preservation fund', and as a consequence the one did not include the other. In addition, it was held that the appellant had not alleged that the Fund also incorporated a provident fund, before being renamed as the University of Limpopo Retirement Fund. The regional court then concluded that, on the facts of the case, the order sought was not sanctioned by the Divorce Act.

[13] Aggrieved at the outcome, the appellant unsuccessfully appealed to the Limpopo Division of the High Court, Polokwane (Makgoba JP and Semenya J). The appeal was opposed by the respondent on three grounds. First, the appeal was lodged out of time. Second, the appeal was deemed to have lapsed because the appellant had failed to prosecute it within the prescribed period provided for in rule 50(1) of the Uniform Rules of Court, read with rule 51(9) of the Magistrates' Courts Rules. Third, the appeal did not have merit. The court a quo upheld in limine, the first two points and then noted that the appeal 'ought to be struck from the roll'. However,

it then went on to find that the 'application for condonation for the late noting and prosecution of the appeal would have been a futile exercise in that such application would not have been entertained in isolation. The appeal court would still have to determine whether, on the merits, the appeal would have reasonable prospects of success'.

[14] The court a quo then proceeded to deal with the merits of the appeal. The appellant submitted that the court should place more emphasis on the words 'Pension Fund' in construing the court order, because there was only one fund and the order stated that the appellant was entitled to 50 per cent of the respondent's rights in the pension interest of the respondent, in that fund. The administrator of the fund was therefore bound to make payment from the Pension Fund which, by definition, encompassed the Provident Fund as well. This argument was rejected simply on the basis that the order was *perfecta* and could not be varied. The Divorce Court had ordered the Fund to pay as per the parties' settlement agreement and it was not suggested that the order was granted by mistake.

[15] Having concluded that the appeal failed on the merits, the court a quo added that, because the respondent had 'been dragged to court, 18 years after the final order was made', the appellant should be ordered, 'to pay punitive costs of seeking to prosecute a lapsed appeal', as a mark of its displeasure. The appeal was then dismissed with costs on the attorney and client scale. Special leave to appeal was thereafter granted by this court.

[16] At the hearing of the appeal, counsel for the respondent submitted that the order granted by the Divorce Court had to be interpreted in the context of the settlement agreement, concluded between the parties. In this regard, reliance was placed upon the following passage in the opposing affidavit of the respondent, the contents of which were admitted by the appellant in reply:

'That the decree of divorce, annexure "MJN4" to the Founding Affidavit, was granted as a result of the agreement between myself and the applicant, in which we agreed that 50% of my pension interest would accrue to the applicant. We did not agree that the applicant would have a share in my Provident Fund. The applicant is therefore not allowed to vary an order

which was granted with her agreement, to now incorporate aspects that were not agreed on when the matter was finalised in 2004.'

[17] However, these averments were made in reply to the following averments made by the appellant, in her founding affidavit:

'On the date of the divorce the Respondent and I inter alia agreed to an order in terms whereof I would be entitled to 50% of his pension interest in the University of the North Pension Fund. The Honourable Court is respectfully referred to the final decree of divorce attached hereto and marked annexure "MJN4".'

[18] In this regard the appellant correctly submitted that the divorce order did not state that the appellant was entitled to 50 per cent of the respondent's pension interest in the 'pension fund section', but that she was entitled to 50 per cent of the respondent's pension interest in the University of the North Pension Fund. Neither at the date of the divorce, nor the date of enforcement of the divorce order, was the respondent a member of a provident fund. The respondent was a member of the University of the North Pension Fund, which at all relevant times was the one and only fund, albeit that its name was subsequently changed to the University of Limpopo Retirement Fund.

[19] From the outset, the case of the respondent was that the order of the Divorce Court correctly recorded the agreement of the parties and that the appellant was not allowed to vary its terms, to include terms that were not agreed upon. At no stage did the respondent seek any variation of the order, to reflect what the respondent maintained was the true agreement between the parties. It is quite clear that the reliance by the respondent on the fact that the parties never agreed that the appellant, 'would have a share in my Provident Fund', amounted to no more than an opportunistic reliance by the respondent on the erroneous interpretation placed on the order by the fund administrator.

[20] As pointed out above, and for the reasons that follow, no variation of the order of the divorce court was necessary because the reference to 'the plaintiff's right and interest in the University of the North Pension Fund' included not only his right and interest in the pension fund, but also the provident fund. This is because s

7(8)*(a)*(i) of the Divorce Act, refers to 'any part of the pension interest of that member' in respect of which the court may make an order that it be paid to the non-member spouse.

[21] 'Pension Interest' in turn, is defined in the Divorce Act, as follows:

'**Pension interest**', in relation to a party to a divorce action who –

(a) is a member of a *pension fund* (excluding a retirement annuity fund), means the benefits to which that party as such a member would have been entitled in terms of the rules of that fund if his membership of the fund would have been terminated on the date of the divorce on account of his resignation from his office.' (Emphasis added.)

[22] '[P]ension [F]und' is defined in the Divorce Act as follows:

'. . . means a pension fund as defined in section 1(1) of the Pension Funds Act, 1956, irrespective of whether the provisions of that Act apply to the pension fund or not.'

The PFA must then be consulted to ascertain the meaning of 'pension fund', which in turn is defined as follows:

'**[P]ension fund** means a pension fund organisation.'

'[P]ension fund organisation', is then defined in the PFA as follows:

'*(a)* any association of persons established *with the object of providing annuities or lump sum payments* for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members.' (Emphasis added.)

[23] As correctly pointed out by A B Downie *Essentials of Retirement Fund Management*, (2019) para C2 at 12:

'It is important to note that the differences between pension and provident funds do not stem from the Pension Funds Act which does not distinguish between the two types of fund. The Pension Funds Act treats both pension and provident funds the same under the description of a "pension fund organization" covered earlier in this chapter. The differences between pension funds and provident funds mentioned in this chapter, stem from the *Income Tax* Act.'

[24] In terms of the Income Tax Act 58 of 1962, the main difference between a pension fund and a provident fund, is as follows: In a pension fund, the member is required to purchase an annuity with at least two-thirds of the final benefit and is restricted to taking one third of the final benefit, as a lump-sum cash payment.

However, in a provident fund, the member may take the full amount of the final benefit as a lump-sum cash payment. Consequently, the reference in the definition of a ‘pension fund organisation’ in the PFA, to the object of ‘providing annuities or lump sum payments’, includes both pension funds and provident funds.

[25] It is therefore clear that the reference to a ‘pension fund’ in the Divorce Act, means a ‘pension fund organisation’ in the PFA, which in turn includes both pension and provident funds. Consequently, properly interpreted, the reference in the court order to ‘. . . 50% of the plaintiff’s right and interest in the University of the North Pension Fund’ (now the University of Limpopo Retirement Fund), includes both the pension fund section, as well as the provident fund section, of the University of Limpopo Retirement Fund.

[26] Consequently, the justice of the case required that the court a quo uphold the appeal and substitute the order of the regional court with a declaratory order, in terms of the prayer for ‘Further and/or alternative relief’ in the notice of motion, declaring that the order of the divorce court issued on 6 December 2004 that 50 per cent of the respondent’s right and interest in the University of the North Pension Fund be paid to the appellant, was to include the respondent’s right and interest in the pension fund section, as well as the provident fund section, of the University of Limpopo Retirement Fund.

[27] A remaining issue is that of the non-joinder of the fund administrator, which was raised as a point in limine before the regional court. The regional court found that although the fund administrator was an interested party, there was no application for joinder by either party and this was an insufficient reason to dismiss the application. Before the court a quo, the issue was again raised. The court a quo found that the respondent was correct in submitting that the fund administrator ought to have been joined, but concluded that the appeal should in any event be dismissed on the merits. However, at the hearing of the appeal counsel for the appellant, by consent, handed up a letter in which the fund administrator stated that it abided the decision of this court and consequently waived any right to be joined in the proceedings.

[28] Nevertheless, it is necessary to point out that in *Old Mutual Life Assurance Co (SA) Ltd & another v Swemmer* 2004 (5) SA 373 (SCA) para 26, it was stated that deeds of settlement and divorce orders relating to pension interests, should be carefully formulated in order to ensure that they fall within the ambit of ss 7(7) and 7(8) of the Divorce Act, because:

'If this is done, then all that would be required of the pension fund in question is to perform administrative functions to give effect to the order, without the rights of the fund or the relationship between the fund and the member spouse being affected in any way, and it would not be necessary to join the fund as a party to the divorce proceedings.'

In the present case, the order was formulated in accordance with the provisions of these sections of the Divorce Act and properly construed only required the fund administrator and the Fund, to perform administrative functions, to give effect to it. Consequently, it was unnecessary for either of these entities to be joined, as a party to the proceedings.

[29] As regards the issue of costs, the appeal was originally set down for hearing on 12 September 2019, but could not be finalised in the absence of the respondent as the new attorneys of the respondent had not been furnished with the notice of set down of the appeal, by the registrar of this court. Consequently, the order of costs in favour of the appellant will exclude the costs of the abortive appeal hearing.

[30] I grant the following order:

1 The appeal succeeds with costs excluding the costs incurred by the appellant at the hearing on 12 September 2019.

2 The order of the court a quo is set aside and replaced with the following order:

'The appeal succeeds with costs and the order of the regional court Polokwane, is set aside and replaced with the following order of this court:

(a) It is declared that the order of the North Eastern Divorce Court issued on 6 December 2004, that 50 per cent of the respondent's right and interest in the University of the North Pension Fund be paid to the appellant, includes the respondent's right and interest in the pension fund section, as well as the provident fund section, of the University of Limpopo Retirement Fund.

(b) The respondent is ordered to pay the costs of the application.'

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K G B Swain

Judge of Appeal

Appearances:

For the Appellant:	M L Haskins SC
	Instructed by:
	DDKK Inc. Attorneys, Polokwane
	Phatshoane Henney Attorneys, Bloemfontein
For the Respondent:	L Grobler
	Instructed by:
	Koor Attorneys, Johannesburg
	Rampai Attorneys, Bloemfontein