

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

CASE NO: 18272/2007

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In the matter between:

LINDA PETERS

Applicant

and

ROY ARNOLD PETERS

Respondent

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JUDGMENT DELIVERED ON 2 DECEMBER 2008

GAUNTLETT, AJ:

15 [1] The applicant was married in community of property to the respondent. On 15 May 1996 the parties were divorced. The court order specified that "the joint estate is divided". Even if the order had not done so, division of course would have been the consequence, simply by operation of law (Gates v Gates 1940
20 NPD 361-363; Keyser v Keyser 1979(4) SA12 (T) at 15F; Maharaj v Maharaj 2002(2) SA648 (D) at 649H-I).

[2] Nearly 12 years later, the applicant has applied for a declaratory order sought (in its latest form) in these terms:

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“1. The respondent's pension interest (under pension number 612057 in the Cape Town Municipal Pension Fund) as at 15 May 1996 formed part of the parties' joint estate.

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2. Upon the parties' divorce, half of the pension interest vested in the applicant.

3. The applicant is entitled to payment of half of the pension fund [already paid out to the respondent] as at 15 May 1996.

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4. The applicant is granted leave to apply on these papers, duly supplemented, for an order directing the respondent to pay to the applicant an amount equivalent to half of the pension benefit (once the applicant has ascertained the Rand value of the pension benefit).

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5. The respondent to pay the costs of this application.”

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(The phrase which I have inserted into paragraph 3 above is to clarify the fact that the claim is directed solely against the respondent and not the pension fund itself, in view of the fact that a payout of the pension interest occurred a number of years ago to the respondent).

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[3] In argument the relief sought was slightly adjusted, in terms of the formulation that I have just outlined, without objection.

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[4] The pension benefit in question, it is common cause, has been paid to the respondent, and no portion has been received by the applicant. The applicant seeks no relief against the pension fund itself. As it happens, the applicant notified the pension fund

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soon after the divorce – attaching the decree of divorce and a notice of intention to amend which, as I indicate below, in the circumstances was not itself moved, clarifying the fact that the claim to half of the joint estate specifically included the pension interest – but nothing turns on that now.

[5] The first question which arises for determination is whether (as the respondent contends) the fact that the present relief was not sought at the time the decree of divorce was granted bars the application.

[6] Section 7(7)(a) of the Divorce Act, 70 of 1979 (“the Act”) provides:

15 *“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.”*

(The provisions of sub-sections (b) and (c), counsel agree, have no application in this matter).

[7] Section 7(8) provides further:

25 *“(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 sub-section (7) is due or assigned to the other party to the*

present case), a person has no personal patrimony. ("Pension interest", it is to be noted, is defined under the Act as meaning;

5 *"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")*.

10 [10] In the third place, it was accepted that the effect of the statutory device of a deeming provision is to establish that consequence in law, whether or not it is naturally so. In the present context, the deeming provision thus legislates for the *ex lege* inclusion of the pension interest in the joint estate. In short,

15 in law it is so.

[11] I accordingly hold that the applicant, as at the date of divorce, became entitled by operation of law to a half share in the pension interest vesting in the joint estate. This is pursuant to

20 s.7(7)(a). S.7(8)(a) – contemplated an order at the time of divorce against a pension fund – does not arise in this case; the order is sought only against the other erstwhile spouse, to whom a payout has occurred, not against the fund concerned.

25 [12] Given this conclusion, it is unnecessary to consider the applicant's reliance in particular detail on a prior agreement between the parties that the pension interest would indeed be

divided in this way. Leaving aside the rather equivocal facts in this regard, advanced moreover in motion proceedings, it seems to me that an agreement between the parties (other than of course one recorded in, and hence part of, the court order) would be legally ineffective as against the terms of the order itself. The order would only be assailable in substance on narrow and radical grounds (Union Government v Schierhout 1925 AD 323), or be open to correction in its formulation in very restricted circumstances (Mostert N.O. v Old Mutual Life Assurance Co Limited 2002(1) SA82 (SCA) at 96 D-E) none of which are advanced here.

[13] Similar considerations apply to the respondent's rather faint converse attempts to suggest an *ex post facto* agreement by the parties to divide their assets in terms other than the strict division by value contemplated by the divorce order. It appears from the evidence in this regard that what took place between the parties was a pragmatic division – as is predictably the case – of the parties' modest physical possessions. As the applicant aptly describes this process in her replying affidavit:

“This was done on a very single ‘rough and ready’ and unscientific basis. Respondent and I simply divided up these items on the basis of convenience which we were prepared to accept was roughly fair in the circumstances, other than in respect of the motor vehicle and immovable

property which respondent dealt with on his own, as dealt with below".

(She testifies in the latter respect that the parties' immovable
5 property was in fact sold by the respondent, and she received no
part of the proceeds).

[14] No case is made out of a waiver or abandonment by the
applicant of her rights under the order.

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[15] As already noted, on the peculiar facts of the present case
the applicant does not seek to invoke section 7(8) of the Act, least
of all – as I have noted – against the pension fund. Thus the
considerations raised in Sempapalele v Sempapalele 2001(2) SA
15 306 (O) and in Maharaj v Maharaj 2002(2) SA 648 (D) regarding
the need for that relief to be sought at the time of the decree of
divorce itself, do not arise here. It is unnecessary to say anything
further in relation to those cases and what they determined.

20 [16] Thus in the present case the pension interest question fell
within the joint estate; the joint estate was divided by operation of
law and, as it happens, by court order on divorce; and the
respondent thereupon became entitled to it. The alleged
agreement after the divorce I do not find sufficiently established;
25 or, for the reasons I have given, legally relevant. Similarly the

alleged agreement before divorce is, in my view, not adequately established and would also in any event legally ineffective against the terms of the order. No other valid defence has been raised by the respondent to the relief claimed by the applicant in this application. The suggestion that he has now spent the paid out pension interest is not a defence to the declaratory relief: in any event, the pension interest amounts to a separate fund, which in turn appears to have been applied for the acquisition of certain particular assets, apparently still substantially *in esse*. I accordingly grant an order in terms of the draft and as quoted earlier in this judgment, together with an order of costs.

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GAUNTLETT, AJ