THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 1293/2012

In the matter between:

SANETTE GIBSON	**APPLICANT**
And	
RORY GIBSON	**FIRST RESPONDENT**
GLACIER FINANCIAL SOLUTIONS (PTY) LTD	**SECOND RESPONDENT**

Coram: ROGERS J

Heard: **22 OCTOBER 2013**

Delivered: **8 NOVEMBER 2013**

JUDGMENT

ROGERS J:

[1] The applicant seeks enforcement of the provisions of a consent paper relating to an alleged pension interest of the first respondent. At the hearing the applicant was represented by Mr W Pretorius and the respondent by Mr E Spamer. This case illustrates how the lack of care in drafting provisions of this kind can give rise to considerable difficulty.

[2] The decree of divorce incorporating the consent paper was granted on 27 May 2003. The applicant and the respondent were the plaintiff and defendant respectively in the divorce action. Clauses 1.5 and 1.6 of the consent paper provide as follows (correcting for obvious typographical errors) :

1.5 1.5.1 Eiseres sal geregtig wees op een-helfte van die Verweerder se pensioenbelang wat in die Sanlam Preservation Pension Fund, verwysingnommer 1036177-R Gisbson belê is en ook geregtig wees op een-helfte van die Verweerder se pensioenfonds wat namens Verweerder deur Sanlam in die Geldmark belê is.

1.6 1.6.1 Ten einde uitvoering hieraan te gee magtig die partye hiermee onherroeplik die voormelde Fonds om sy rekords, in ooreenstemming met Artikel 7(8)(a)(ii) van die Wet op Egskeiding te endosseer ten einde die bepalings hiervan te inkorporeer.

1.6.2 Die Verweerder sal verplig wees om Eiseres te vergoed vir die verlies in werklike terme, indien enige, van die gedeelte van die pensioen wat aan haar toegeken word ingevolge hierdie bepaling vir die termyn tussen die datum van die egskeiding en die daum waarop die voordele aan haar toekom.

1.6.3 Eiseres sal verplig wees om Verweerder te vergoed vir die waarde van die belasting wat betaalbaar is op daardie gedeelte van die pensioenbelang wat haar toekom, vir welke doel sy die voormelde Fonds hiermee magtig om die voormelde belasting te verreken teen die bedrag wat haar toekom.

1.6.4 Die Verweerder sal nie geregtig wees om sy voormelde pensioenbelegging oor te dra aan enige ander Fonds of enige wysiging ten opsigte daarvan te maak en/of aan te gaan of dit oor te plaas na ’n ander Fonds sonder die voorafverkreë skriftelike toestemming van Eiseres nie. Insgelyks sal die Verweerder nie geregtig wees om die bedrag wat in die geldmark deur Sanlam belê is op enige ander wyse te belê sonder Eiseres se voorafverkreë skriftelike toestemming nie.’

[3] I shall refer to the fund mentioned in clause 1.5.1 as the SPPF. The consent paper described the SPPF as a ‘preservation pension fund’. At the time the divorce

was granted neither the Pension Funds Act 24 of 1956 nor the Income Tax Act 58 of 1962 contained a definition of this expression. Prior to the amendments brought about to the Income Tax Act by Act 3 of 2008, the Income Tax Act contained definitions for the expressions 'pension fund', 'provident fund' and 'retirement annuity fund'. By way of Act 3 of 2008, and with effect from 22 July 2008, definitions were inserted into the Income Tax Act of 'pension preservation fund' and 'provident preservation fund'; and the definitions of 'pension fund', 'provident fund' and 'retirement annuity fund' were simultaneously amended. From the statutory definition in the Income Tax Act, one sees that the essential features of a 'pension preservation fund' are that it is a registered pension fund organisation (i) the members of which comprise former members of a 'pension fund' or 'provident fund' whose membership of the latter fund has terminated and who upon such termination elected to have lump sum benefits transferred to the pension preservation fund; (ii) in which a member is entitled, prior to his retirement date in the pension preservation fund, to make one withdrawal from the fund (which might be his full fund value, thus terminating his membership); (iii) and in which the member, on reaching his retirement date, is entitled to a retirement benefit, of which up to one-third may be commuted to a single payment and the rest of which must be paid in the form of an annuity. Pension funds of this kind existed prior to 2008 but they were not separately distinguished for purposes of the Income Tax Act.

[4] It would appear that the SPPF was a 'pension preservation fund' of the kind just described. The first respondent's investment confirmation from Sanlam, a copy of which is annexed to the founding affidavit, reflects an investment date of 24 October 2002 (presumably the date on which the first respondent's membership of a pension fund associated with his employment terminated); an opening net investment amount of R388 378,42; a planned retirement date of 19 June 2008 (his 55th birthday); and an election to invest the funds in a money market fund and a dollar hedge fund. The first respondent was permitted to make one taxable *ad hoc* withdrawal from the SPPF prior to his selected retirement date. On retirement the first respondent was obliged to purchase a life annuity with the remaining funds, though one-third of the fund value could be commuted at that stage into a lump sum.

[5] According to the first respondent's answering affidavit, he exercised his right to make an *ad hoc* withdrawal about two months prior to the divorce, pursuant to which he received a sum of R107 195 on 20 March 2003. The first respondent says that because of this withdrawal and because the SPPF suffered a capital loss between October 2002 and May 2003, his net investment in the SPPF as at the date of divorce (27 May 2003) was only R194 211,17.

[6] Upon reaching his selected retirement date of 19 June 2008 (about five years after the divorce) the first respondent utilised the full investment value as at that date to purchase an annuity. Mr Pretorius said that on his understanding the first respondent was not permitted to make the one-third withdrawal as he had already taken an earlier *ad hoc* cash benefit. This does not seem to me to accord with the description of the SPPF in the investment confirmation annexed to the founding affidavit (though its rules have not been placed before me). As I read that document (as well as the subsequent definition of 'pension preservation fund' inserted into the Income Tax Act), the first respondent was entitled to make one pre-retirement withdrawal (which he did in March 2003) and upon reaching his retirement age to commute one-third of his retirement benefit to a lump sum. Be that as it may, the position is that upon reaching his selected retirement date on 19 June 2008 the first respondent used the full fund value to purchase a life annuity. At that date he ceased to be a member of the SPPF and instead became the holder of an annuity policy issued by an insurer (Sanlam).

[7] For reasons which are not explained, the parties took no steps to give effect to clause 1.6.1 of the consent paper by notifying the SPPF that its records were to be endorsed to reflect the terms of the consent paper. The applicant appears to have made no enquiries about the first respondent's alleged pension interest until March 2011 when her representative directed a request to Sanlam. On 5 April 2011 Sanlam replied that the Pension Funds Act did not permit any deduction to be made from a life annuity, and that the terms of the consent paper were a matter between the applicant and the first respondent. The applicant's representative requested certain information from Sanlam but the latter replied that it could not provide information without the first respondent's authority. In May 2011 the applicant's attorney spoke with the first respondent personally and later sent a letter to the

latter's attorneys requesting the first respondent's authority for the applicant to obtain information from Sanlam. Despite a reminder dated 23 May 2011 nothing further was heard from the first respondent or his attorneys.

[8] The present application was launched on 26 January 2012. Because the applicant had not been able to obtain information from Sanlam or the first respondent, she was not able to provide precise information as to the value of the first respondent's alleged pension interest in the SPPF as at the date of the divorce. Based on the investment confirmation which she annexed to her founding affidavit, she said that the net value in the SPPF as at 27 May 2003 was not likely to have been less than the opening net investment value of R388 378,42 as at 24 October 2002, and on this basis she sought payment of half of that sum, R194 189,21, together with a CPI adjustment as from 27 May 2003 until 19 June 2008, giving a total of R261 965,15 on which she sought *mora* interest as from 19 June 2008. The legal basis for the CPI adjustment was not explained in the founding papers.

[9] In the answering papers the first respondent mentioned the pre-divorce capital withdrawal he had made from the SPPF and the capital loss which the SPPF had sustained, and alleged that the investment value as at the date of divorce was only R194 211,17. He said in his affidavit that the applicant was entitled to 50% of that amount, namely R97 105,58. He pointed out that the applicant was responsible for the payment of any tax associated with that sum. He stated that he was willing to make payment to her of R97 105,58 less the necessary tax deduction. He alleged that he had been unable to ascertain what the tax deduction was.

[10] For purposes of argument Mr Pretorius accepted that the value of the first respondent's interest in the SPPF as at 27 May 2003 was R194 211,17.

[11] Various important amendments were made to s 37D of the Pension Funds Act during 2007 and 2008. Those amendments were not in force at the time the divorce was granted on 27 May 2003. At the time the parties concluded the consent paper in May 2003, they and their advisers were plainly under the impression that the first respondent's interest in the SPPF was a pension interest to which the provisions of s 7(8) of the Divorce Act applied. They remained under that impression

when they filed their affidavits in the present proceedings. They evidently believed that, at the time the consent paper was concluded and the divorce granted, the first respondent had a 'pension interest' as defined in s 1(1) of the Divorce Act; that such interest thus formed part of the first respondent's estate for purposes of the divorce; and that pursuant to the divorce order and notification to the SPPF, the latter would be obliged, when in due course pension benefits accrued to the first respondent, to pay 50% of the 'pension interest' to the applicant. Because s 37D of the Pension Funds Act had not yet been amended so as to deem the accrual of benefits to the first respondent to occur at the date of divorce, the parties would have expected that the SPPF would only become obliged to pay the half-share to the applicant on some future date when the first respondent became entitled to benefits in terms of the rules of the SPPF. (In terms of amendments affected to s 37D of the Pension Funds Act in 2007 and 2008 the portion of the 'pension interest' assigned to the non-member spouse in terms of a divorce decree was deemed to accrue to the member spouse on the date of the divorce decree and became payable to the non-member at that time. This meant that the non-member spouse no longer had to wait what might be many years before pension benefits under the rules of the pension fund accrued to the member spouse. The amendment to this effect was initially enacted in a new para (e) added to s 37D(1) with effect from 13 September 2007. With effect from 1 November 2008 the said para (e) was deleted and a similar provision (together with other amendments) was inserted by way of new sub-sections (4) to (6) of s 37D.)

[12] Mr Pretorius submitted in written and oral argument that the parties and their advisers had been under a misapprehension when the consent paper was concluded and when they filed their affidavits in the current proceedings. I think he is right. Section 7(7) of the Divorce Act provides that 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 certain qualifications not here relevant, be deemed to be part of that person's assets. This deeming is necessary, because the 'pension interest' defined in s 1(1) of the Act is an interest which a member of a pension fund has in benefits which may accrue in the future but which does not yet constitute an asset vesting in his estate. It is only in respect of such a 'pension interest' that a court may make an order in terms of s 7(8). The order contemplated

by s 7(8) is an order that the whole or part of the 'pension interest' as quantified in the definition of that expression must be paid by the pension fund to the non-member when pension benefits accrue to the member. If pension benefits have already accrued to the member prior to the divorce, the accrued benefit may constitute an asset in the member's estate but it is not a 'pension interest' as defined in s 1(1). The court could thus not in terms of s 7(8) make an order binding on the pension fund in respect of such an accrued pension benefit. The parties would, though, be at liberty to make an arrangement in their consent paper, operative *inter se*, regarding the payment of money from one to the other in respect of the accrued pension benefit. This appears to be the effect of two leading judgments of the Supreme Court of Appeal, namely *Old Mutual Life Assurance Co (SA) Limited & Another v Swemmer* 2004 (5) SA 373 (SCA) paras 19-20 and *Eskom Pension and Provident Fund v Krugel & Another* 2012 (6) SA 143 (SCA) paras 11-12.

[13] The definition of 'pension interest" in s 1(1) is thus critical when it comes to orders that may competently be made in terms of s 7(8) of the Divorce Act (as read, since 13 September 2007, with the relevant provisions of s 37D of the Pension Funds Act). The definition, to which there have been no amendments since it was inserted into the Divorce Act in 1989, reads thus (the underlining is mine):

' **"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;

(b) is a member of a retirement annuity fund which was *bona fide* established for the purpose of providing life annuities for the members of the fund, and which is a pension fund, means the total amount of that party's contributions to the fund up to the date of the divorce, together with a total amount of annual simple interest on those contributions up to that date, calculated at the same rate as the rate prescribed as at that date by the Minister of Justice in terms of section 1(2) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), for the purposes of that Act;'

[14] Sub-section (6) was, by way of s 16(c) of Act 22 of 2008, inserted into s 37D of the Pension Funds Act with effect from 1 November 2008. This sub-section,

which can be viewed as an indirect modification of the definition of 'pension interest' in the Divorce Act, reads thus:

'Despite paragraph (b) of the definition of "pension interest" in section 1(1) of the Divorce Act, 1979, the portion of the pension interest of a member of a pension preservation fund or provident preservation fund (as defined in the Income Tax Act, 1962), that is assigned to a non-member spouse, refers to the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund if his or her membership of the fund terminated on the date on which the decree was granted.'

This sub-section was not in force either at the time of the divorce in May 2003 nor when the first respondent's interest in the SPPF terminated in June 2008.

[15] The first respondent was not a member of a retirement annuity fund at the date of the divorce. Para (b) of the definition of 'pension interest' was thus not applicable.[1] As to para (a) of the definition, the SPPF was a 'pension fund' as defined in the Pension Fund Act. However, para (a) is effectively limited to occupational pension funds, ie pension funds in which the member spouse is an in-service employee, because it is only in respect of such a fund that the member would become entitled to benefits 'on account of his resignation from his office'. A pension preservation fund is a fund in which is invested the lump sum to which a person has become entitled by virtue of the termination of his membership of an occupational pension fund, the idea being to preserve and enhance the lump-sum benefit until the person reaches an ordinary retirement age (which he might typically select as being 55, 60 or 65), unless he prefers in the meanwhile to withdraw some or all of his investment as a lump sum (something he can do once only). The member of a pension preservation fund does not have an entitlement to benefits which will accrue to him by virtue of his resignation from office. In that respect, the

[1] Neither of the parties' counsel suggested in argument that the SPPF was a retirement annuity fund as contemplated in para (b) of the definition of 'pension interest'. A pension preservation fund is certainly not a retirement annuity fund as ordinarily understood. A major difference between a retirement annuity fund and a pension preservation fund is that in the case of a pension preservation fund the member has an opportunity, prior to reaching his retirement date, to withdraw some or all of his pension interest as a lump sum. If this right is exercised in full, the member will never receive an annuity. An extensive interpretation of para (b) so as to include a pension preservation fund would also give rise to difficulties in applying the quantification formula in para (b). The formula requires one to total the contributions and add interest thereon at the specified rate from the date each contribution was made up to the date of the divorce. This formula presupposes that the contributions cannot be withdrawn, which is true for a conventional retirement annuity fund but not for a pension preservation fund. The formula cannot readily accommodate the case where the member spouse of a pension preservation fund has made a substantial withdrawal from the fund prior to the date of divorce.

interest is similar to the deferred pension of a person whose status as an in-service member of a pension fund has come to an end by virtue of the termination of his employment. As in the case of the interest of a deferred pensioner (see the *Eskom* case *supra*), the interest of a member of a pension preservation fund is not a 'pension interest' to which any value can be ascribed under para (a) of the definition.

[16] As noted, the new sub-section (6) of s 37D of the Pension Funds Act has altered the position (with effect from 1 November 2008) so that effectively the definition of 'pension interest' in the case of a member of a pension preservation fund means 'the equivalent portion of the benefits to which that member would have been entitled to in terms of the rules of the fund <u>if his or her membership of the fund terminated</u> on the date on which the decree was granted' (my emphasis) – this overcomes the difficulty that the member of a pension preservation fund does not become entitled to any benefits 'on account of his resignation from his office'. Unfortunately, however, this new sub-section was not in force at any relevant time.

[17] I thus agree with Mr Pretorius' argument that the terms contained in clauses 1.5 and 1.6 of the consent paper rested on a mistaken assumption by the parties that s 7(8) applied to the first respondent's interest in the SPPF, and that the affidavits filed in the present proceedings perpetuated the misapprehension. The question is what to do. In his heads of argument Mr Pretorius contended that the only benefits which have accrued or will accrue to the first respondent pursuant to his interest in the SPPF are the monthly payments in terms of the annuity purchased on 19 June 2008. The extent of these payments is to some extent a matter within the first respondent's discretion, because he can elect to take a lesser or greater monthly amounts within certain parameters. Mr Pretorius' argument in his written submissions was that the applicant was entitled to 50% of every payment which has been made or will in the future be made to the first respondent in terms of the annuity policy. This was also the contention advanced by him orally in his opening address. At that stage I was leaning towards the view that the applicant was entitled to 50% of the fund value as at the date of the divorce.

[18] In a strange turn of events, Mr Pretorius informed me after the morning tea adjournment that he had taken instructions and that his client now wanted to be paid

50% of the fund value as at the date of the divorce, together with interest as from 19 June 2008, but that his colleague for the respondent, Mr Spamer, was going to contend that Mr Pretorius' initial argument was correct and that the first respondent should only have to pay 50% of each monthly annuity payment as it was paid to him.

[19] Unfortunately, it appears to me that both of these positions suffer from the same essential defect, namely an attempt to superimpose on clauses 1.5 and 1.6 of the consent paper an arrangement of expediency which happens to suit one party or the other but which is not in accordance with the consent paper. What clauses 1.5 and 1.6 envisaged was that, purportedly in accordance with s 7(8) of the Divorce Act, the first respondent's supposed 'pension interest' in the SPPF would be calculated as at the date of the divorce, with 50% of such value being assigned to the applicant; that the SPPF (not the first respondent) would pay the said amount to the applicant when benefits accrued to the first respondent; that the SPPF would be authorised to deduct from the amount payable in due course to the applicant the tax attributable to that portion of the pension interest; and that the only financial commitment undertaken personally by the first respondent was to compensate the applicant for the loss in real terms, if any, which the value of her assigned share of the pension interest suffered between the date of the divorce and the date on which she became entitled to receive the money from the SPPF. (Even this latter personal obligation of the first respondent appears to be misconceived, because if s 7(8) applied the Fund would have to pay the 50% interest calculated at the date of divorce, regardless of a subsequent decrease in the value of the overall pension interest. Perhaps this compensation obligation was designed only to meet the somewhat unlikely eventuality that by the time pension benefits in the SPPF accrued to the first respondent the entire fund value was less than the applicant's 50% share as at the date of the divorce.) As I have explained, the first respondent's 'pension interest' in the SPPF had no value in terms of the definition of 'pension interest' in s 1(1) of the Divorce Act, because no amount would ever become payable to him by the SPPF on account of 'resignation from his office'.

[20] If this is the effect of clauses 1.5 and 1.6, neither of the positions adopted by the parties can be said to reflect a proper interpretation and application of the decree of divorce as read with the consent paper. Both the applicant and the first

respondent adopt a position in which the consent paper has to be read as imposing a personal obligation on the first respondent, not a statutory obligation on the relevant pension fund. On the first respondent's latest position, this personal obligation relates not to the interest which the first respondent had in the SPPF at the date of the divorce but to his entitlement in terms of an annuity policy purchased in June 2008. However, the annuity insurer (Sanlam) is not obliged to make monthly payments to the applicant. Indeed, unless s 7(8) of the Divorce Act is operative, Sanlam would be prohibited by s 37A(1) of the Pension Funds Act from paying a portion of each month's annuity directly to the applicant instead of to the first respondent. Furthermore, the monthly annuity payments from Sanlam would be the product of the full fund value over the entire period of the first respondent's investment in the SPPF and in the ensuing annuity policy, meaning that the applicant would effectively benefit from investment return subsequent to the date of divorce rather than what was clearly intended in the consent paper, namely a pension interest calculated in accordance with the Divorce Act as at the date of divorce.

[21] One would come closer, in practical effect, to the intention of the parties by saying (as Mr Pretorius eventually asked me to say) that the first respondent was required, when he reached his selected retirement date in the SPPF, to pay the applicant 50% of his fund value as at the date of the divorce. Mr Pretorius for the applicant accepted that 50% of that fund value as at 27 May 2003 amounted to R97 105,58. If the first respondent was personally obliged to pay that sum (or the said amount after deduction of tax) to the applicant on 19 June 2008 (his selected retirement date in the SPPF), one might expect that he would also be obliged to pay *mora* interest at 15.5% from 19 June 2008 to date of payment (such interest, if payable on the full amount of R97 105,58, would now exceed R80 000). In his answering affidavit, made at a time when the parties were both still under a misapprehension regarding the applicability of the legislation, the first respondent tendered to pay the applicant the capital sum of R97 105,58 less the tax to be borne by the applicant but did not tender interest, and in argument Mr Spamer contended that the first respondent should not be ordered to pay *mora* interest. The question of tax raises difficulties of its own, because typically tax becomes payable when a pension fund pays a benefit. If s 7(8) of the Divorce Act is inapplicable and if clauses

1.5 and 1.6 of the consent paper merely reflect a payment obligation between the parties *inter se*, it is not clear on what basis tax would be payable at all (unless the first respondent's payment to the applicant was of a revenue nature, in which case the tax would have to be borne by the applicant, not the first respondent).

[22] The difficulty with Mr Pretorius' most recent position is that it requires one to interpret clauses 1.5 and 1.6 as imposing an obligation on the first respondent personally to make a substantial capital payment to the applicant upon reaching his selected retirement date. However, that is not what clauses 1.5 and 1.6 say; those clauses envisage that the capital payment will be made to the applicant by the SPPF. Section 7(8) of the Divorce Act is framed as it is in part because one would not ordinarily expect the member spouse to be able to afford to pay from his own resources a 50% share (or more) of his 'pension interest' as at the date of the divorce. In this particular case, the first respondent did not on 19 March 2008 become entitled to receive from the SPPF a capital sum which would have enabled him to pay the applicant R97 105,58. It is possible that in the event the first respondent had sufficient other resources to do so but there is no evidence before me at this stage to indicate that, if the non-applicability of s 7(8) had been appreciated by the parties when they negotiated the consent paper, the first respondent would nevertheless have agreed personally to make a substantial capital payment to the applicant when he turned 55. He may have agreed to that course; or he may have said that he was only willing to pass on half of each monthly annuity payment after turning 55; or the parties may have agreed that the applicant would be compensated in some other way altogether (for example, by awarding her the whole or a greater share of the net proceeds of the matrimonial home, rather than the 50/50 split agreed in clause 1.1).

[23] Although I may have a view as to what would be fair in all the circumstances, I cannot in good conscience say that either of the solutions offered to me by the parties represents a proper interpretation of clauses 1.5 and 1.6 of the consent paper. The unpalatable truth is that clauses 1.5 and 1.6 were drafted under a misapprehension and thus cannot sensibly be applied to the facts as they actually existed. It is not a permissible process of interpretation, where the provisions agreed upon by the parties cannot sensibly be applied, to adopt an alternative solution just

because it seems fair. Of course, an unforeseen eventuality might be met by a tacit term but then one would need to be confident that if the problem had been raised by an officious bystander both parties would unhesitatingly have given the same reply as to what would happen in the posited eventuality. I cannot on the material before me say that the parties would have unhesitatingly agreed upon the same solution.

[24] In reaching my conclusion I have not overlooked para 15 of the *Eskom* case *supra*. That was a case where the member spouse had become a deferred pensioner in an occupational pension fund prior to the granting of the divorce. The Supreme Court of Appeal held that the benefits contemplated in para (a) of the definition of 'pension interest' in s 1(1) of the Divorce Act had accrued to the member spouse prior to the divorce in consequence of his resignation from office and that the appellant pension fund was thus correct in saying that the relevant provision of the consent paper was not binding on it and could not be endorsed against its records. Para (b) of the definition of 'pension interest' was held to be inapplicable (see para 14 of the judgment). In para 15 Maya JA made the following concluding remark:

'Finally, it should be mentioned that this finding does not leave the first respondent [the non-member spouse] without remedy. The divorce settlement agreement between her and Krugel (who undertook to give on demand any assistance needed in connection with its enforcement) remains binding. It is therefore open to her to claim her share of his deferred pension benefit when it is claimed by him after reaching the age of 55 years.'

[25] It is this passage which perhaps inspired Mr Pretorius to adopt the initial position he did in his opening address, namely that the applicant was entitled to half of each annuity payment as it was made by the insurer to the first respondent as from 19 June 2008. I have already given my reasons for saying that such an outcome cannot be reached as a matter of interpretation of the consent paper. Maya JA's observation in para 15 of *Eskom* is an *obiter dictum.* Maya JA did not say whether, when Krugel (the member spouse) reached the age of 55, the non-member spouse would be entitled to make her claim against the pension fund or against Krugel personally. The former view seems inconsistent with the court's earlier analysis of the law. If the latter view was the one Maya JA had in mind, the court did not explain how the provisions of the consent paper in that particular case could be

interpreted so as to require the member spouse, Krugel, to be personally responsible for making any payments to the applicant or why the terms of the consent paper (which would have been intended to freeze the non-member spouse's share of the 'pension interest' as at the date of the divorce) should entitle her to any particular portion of the monthly annuity payments which might after the passing of many years become payable to Krugel. I do not think para 15 of *Eskom* embodies a general legal principle applicable to all cases. It was an *obiter* observation made with reference to the facts of that particular case.

[26] I have also considered the judgment of Levinsohn DJP in *Protektor Preservation Pension Fund v Bellars & Others* 2009 (4) SA 455 (D), though counsel in the present matter did not refer me to it nor place reliance on it. The *Protektor* case was decided prior to *Eskom* and I doubt whether its reasoning can survive the *Eskom* judgment. The case was also unusual in that the pension fund, far from opposing compliance with the terms of the divorce order, was actively assisting the divorced parties to implement their agreement and was indeed the applicant for relief. Unsurprisingly, there was no opposition, and the court thus did not have the benefit of full argument.

[27] Reverting to the present case, it is perhaps possible, now that the precise problem is appreciated, that one or both of the parties would be able to place before the court evidence of background and surrounding circumstances (ie circumstances prevailing or in mind at the time they negotiated the consent paper) to persuade a court to find that there is a tacit term to cover the eventuality of s 7(8) being inapplicable. If that cannot be done, the applicant might well be entitled to apply for a variation of the decree of divorce (which incorporates the consent paper). Rule 42(1)(c) states that a court may upon the application of an affected party rescind or vary an order or judgment granted as the result of a mistake common to the parties. Even though the divorce was granted more than 10 years ago, it is only now that the difficulty has come to light. If the parties cannot agree upon a re-adjustment of the terms of the consent paper to take account of the common mistake which they made in May 2003, a court might well be persuaded that the proprietary terms of the divorce should be reconsidered.

[28] I thus conclude, with considerable regret, that I cannot grant an order on the current application. Since neither of the parties identified the real problem in their affidavits, and since this judgment does not vindicate the arguments of either side, I think the fairest course would be to make no order as to costs. I consider, further, that the applicant should be granted leave to re-apply for relief upon supplemented papers (whether by way of providing further evidence as to the interpretation of the consent paper or for a variation of the consent paper in terms of rule 42). My granting of such leave is not intended to determine any questions which might arise in relation to the scope and applicability of rule 42, a question on which I was not addressed.

[29] This application was previously enrolled for hearing on 7 June 2012. On that date it was postponed *sine die* with wasted costs to stand over for later determination. At the hearing before me on 22 October 2013 counsel could not agree on the circumstances in which the matter came to be postponed. I thus requested the parties to file affidavits. I have read the affidavits filed by attorneys who dealt with the matter in May and June 2012. It seems to me from the correspondence that the postponement arose from a belated attempt by the applicant to obtain discovery in motion proceedings and by a failure on the part of the applicant's attorneys to deal timeously with the first respondent's attorneys' request for clarity as to the fate of the scheduled hearing. The result was that the first respondent's attorneys briefed counsel who filed heads of argument timeously on 31 May 2012 and who had to be kept on brief until the day before the scheduled hearing. Subsequent to the postponement nothing more was done in connection with the discovery application. I thus think that the applicant should bear the costs wasted by the postponement of 7 June 2012.

[30] In conclusion, I express the sincere wish that the parties reach an amicable and fair solution without the need for further proceedings.

[31] I thus make the following order:

[a] The application is dismissed with no order as to costs, save that the applicant shall pay the first respondent's wasted costs arising from the postponement of 7 June 2012.

[b] The applicant is granted leave to re-apply on the same papers, supplemented as needs be, for the enforcement or variation of the consent paper which was incorporated into the decree of divorce granted on 27 May 2003.

ROGERS J

APPEARANCES

For Applicant:	Mr W Pretorius
	Instructed by:
	Hannes Pretorius Bock & Isaacs
	Somerset West
For First Respondent:	Adv E Spamer
	Instructed by:
	Geldenhuys Inc
	Vredenburg