

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, PORT ELIZABETH)**

CASE NO: 2323/2011

Date Heard: 21 June 2012

Date Delivered: 28 August 2012

REPORTABLE

In the matter between:

BELINDA FRITZ
Applicant

and

FUNDSATWORK UMBRELLA PENSION FUND
Respondent

First

MOMENTUM GROUP LIMITED
Respondent

Second

RITA BERNADETTE FRITZ
Respondent

Third

RITA BERNADETTE FRITZ N.O.
(o.b.o. the minor child B M F)

Fourth Respondent

JUDGMENT

GOOSEN, J:

1] The applicant was married in community of property to the late Stephen Fritz (“the deceased”). Two children were born of the marriage. On 17 October 1992 the marriage relationship between the applicant and the deceased was dissolved by order of this court. In terms of the decree of divorce custody of the minor children

born of the marriage was awarded to the applicant and the deceased was ordered to pay maintenance for the two children as well as the reasonable medical, dental and pharmaceutical expenses incurred in respect of the minor children. A division of the joint estate was ordered.

- 2] At the time of the decree of divorce no order was made in respect of the applicant's interest in any pension interest which had then or was to accrue to the deceased.
- 3] The deceased subsequently married the third respondent and a child, the fourth respondent was born of the marriage. The deceased died on 10 July 2009.
- 4] The applicant now seeks a declaratory order that she is entitled to one half share of the pension interest or benefit of the deceased as at the date of the granting of the decree of divorce, together with interest thereon from the date of divorce to the date of payment of such portion of the pension interest.
- 5] The first respondent is cited as being the pension fund which is alleged to hold the deceased's pension interest and the second respondent is cited as the administrator of said fund.
- 6] The first and second respondents opposed the granting of the relief sought by the applicant upon the basis, *inter alia*, that at the time of the granting of the decree of

divorce the deceased was not a member of the first respondent pension fund the deceased having become a member of the fund only after the divorce order. Although a pension interest was transferred to the first respondent when the deceased became a member of the fund it is not known what the status was of any pension interest held by the deceased as at the time of the decree of divorce. The respondents also opposed the order sought on the basis that the divorce does not comply with the provisions of the Divorce Act insofar as the respondents are concerned and is accordingly not enforceable against them.

7] The allegation that the deceased was not a member of the first respondent at the time of the divorce order is not disputed by the applicant. Indeed, as is apparent from the heads of argument filed on behalf of the applicant, the applicant has “abandoned” the relief it sought against the first and second respondents although the applicant persists in seeking the declaratory relief set out in the notice of motion. Notwithstanding the “abandonment” the first and second respondents appeared at the hearing by reason of the fact that the applicant had, in “abandoning” against the respondents made no tender as to their costs. The third and fourth respondents abide the decision of the court.

8] The applicant’s application is founded upon the allegation that the deceased was, at the time of the divorce, a member of the first respondent pension fund and had accrued a pension interest in said fund. This allegation, it is now accepted, is incorrect. The applicant however persists in its motion for declaratory relief upon the basis that when the deceased became a member of the first respondent a pension

interest which had been accrued in a prior fund was transferred to the first respondent. Accordingly, it is suggested, there is evidence to suggest that the deceased had been a member of a fund as at the date of the decree of divorce. On the basis that said pension interest then formed part of the joint estate established by the community of property regime that applied to the applicant and deceased's marriage, the order of division of the estate entitles the applicant to one half share of the pension interest as at that date.

9] It is necessary briefly to set out the circumstances giving rise to this application.¹ As indicated the deceased passed away on 9 July 2009. He was, at the time of his death, a member of the first respondent pension fund. Pursuant to the rules of said fund a death benefit payable by the first and second respondents became payable to the deceased's dependant beneficiaries. On 18 March 2010 the applicant was informed that the second respondent had resolved to pay out the deceased's death benefit to his dependants and beneficiaries in the amount of 87% to the third respondent and 13% to the fourth respondent.

10] On 23 March 2010 the applicant obtained an interim interdict prohibiting the proposed payment pending the institution of an application for declaratory relief. A final order was granted in May 2010 requiring the institution of the application within 30 days of the granting of the order. This was not done. Instead the applicant apparently gave consideration to the referral of a dispute to the Pension Funds Adjudicator.

¹ The full circumstances appear from a reading of both the applicant's and respondents' papers together with relevant correspondence annexed to the papers.

11] On 4 August 2010 the applicant's attorneys addressed a letter to the respondents' attorneys regarding the matter. The reply suggested that the matter had been referred to the Pension Funds Adjudicator, although it appears that this was not so. A reading of the papers suggests that the parties each believed that the other had or would refer the matter.

12] In May 2011 the applicant's attorneys again made enquiries from the respondents' attorneys. The applicant was then informed that since no application had been made it was intended to make payment of the balance of the death benefit to the beneficiaries. An undertaking was sought not to do so and when that was not given the applicant launched a second application to interdict the payment of the benefits held by the respondents. An order was granted on 24 June 2011 and made final on 26 July 2011. This application was launched on 3 August 2011, pursuant to the latter order.

13] Although nothing turns on the fact that the matter was not referred to the Pension Funds Adjudicator the fact that it was not gave rise to a delay in the resolution of the dispute. In consequence the first interdict lapsed and, it appears, the second respondent effected payment of the largest portion of the deceased's death benefit to the third respondent. It was not suggested that this was in any way improperly done. The effect of course is that the respondents' only hold a small portion of the death benefit, namely a sum of approximately R130 000.00 which represents the 13% due to the fourth respondent.

14] Following argument of the matter I raised with counsel the question whether the deceased estate, as represented by the executor, ought not to have been joined in the application by reason of the executor's clear interest in the relief sought. Counsel undertook to consider that matter and, if so advised, to submit further written submissions regarding this aspect. I was however subsequently informed that both parties did not consider that it was necessary to deal with the aspect and accordingly no additional submissions were presented. I shall revert to this aspect briefly below.

15] As indicated, no order was made pursuant to section 7(8) of the Divorce Act at the time of granting the decree of divorce. In now seeking the declaratory relief the applicant relies upon section 7(7) of the Divorce Act which provides that:

- a) 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 amount so deemed to be part of a party's assets, shall be reduced by an amount of his pension interest which, by virtue of paragraph (a), in a previous divorce –

- I. Was paid over or awarded to another party; or

For the purposes of an agreement contemplated in subsection (1), was accounted in favour of another party.

- b) Paragraph (a) shall not apply to a divorce action in respect of a marriage out of community of property entered into on or after 1 November 1984 in terms of an antenuptial contract by which community of property, community of profit and loss and the accrual system are excluded.

16] In *Sempapalele v Sempapalele* 2001(2) SA 313 (O) Musi J, after undertaking an analysis of the import of section 7 of the Divorce Act, held (at 312 E – H) that:

...(A) spouse seeking a share in the pension interest of the other spouse must apply for

and obtain an appropriate Court order during the divorce proceedings. This much is clear from the provisions of ss(7)(a) which states:

'In the determination of the patrimonial benefits to which the parties to any divorce action may be entitled...'

The phrase 'any divorce action' must mean any pending divorce action. This conclusion is supported by the other provisions of the section in terms of which the various orders provided for must be applied for and all granted by the Court hearing the divorce case. (Compare ss(2), (3), (4), (5), (6), (8)(a) and (9).)

To revert to the facts of the instant case, the applicant failed (for whatever reason) to obtain at the hearing of the divorce matter a Court order awarding her a share in the respondent's pension interest in terms of s 7 of the Divorce Act. She cannot now get such an order.

17] Musi J went on to find that the applicant's claim failed on another ground, namely that she had failed to prove her claim, including its quantum, on a balance of probabilities.

18] In *Maharaj v Maharaj and Others* 2002 (2) SA 648 (D&CLD), Magid J expressed disagreement with the finding in *Sempapalele* that a spouse could not, after the finalisation of the divorce action, obtain an order in terms of section 7(7) of the Divorce Act. Magid J agreed with the finding made in respect of the facts of the case, suggesting that this was indeed the true *ratio* in *Sempapalele*, but went on to state (at 650J – 651A) that:

"..if the learned Judge intended to hold that, if there is no reference to a spouse's pension benefit or interest in a divorce order, the other party to a marriage in community of property is forever precluded from claiming to be entitled, as his or her share of the joint estate, to a half-share thereof, I am, with respect, unable to agree with that view."

19] The learned Judge found that the section was inserted into the Act in order to rectify what may have been regarded as an injustice to a spouse who did not have the

pension interest and noted that subsection(7) deems the pension interest to be part of the patrimonial benefits and in so doing applied to a marriage in community of property.

20] On this basis the learned Judge found (at 651E) that:

In my judgment, therefore, when the joint estate of spouses married in community of property is to be divided it is proper to take into account, as an asset in the joint estate, the value of a pension interest held by one of them as at the date of the divorce.

21] The effect of this passage is that an order may be sought in terms of subsection (7) even if a divorce order has already been granted. There is however a very important qualification, as is apparent from the quoted passage itself. In the *Maharaj* matter the evidence indicated that although there had been an order of divorce, division of the joint estate had, as a matter of fact, not yet occurred. In other words, the determination of what constituted the joint estate and its proper division between the parties, as required by the decree of divorce, still had to be undertaken, whether by agreement between the parties or by way of the appointment of a liquidator. In these circumstances it is not surprising that the court in *Maharaj* came to the conclusion that a party may, in respect of an estate yet to be divided, seek to give effect to subsection(7) even after a decree of divorce has been granted.

22] In the event that a court orders division of a joint estate and the parties are not, after such order is made, able to reach agreement regarding the division of the estate, the dispute may be resolved by the court itself or by the appointment of a receiver or

liquidator who gives effect to the division of the estate on behalf of the court (see *Gillingham v Gillingham* 1904 TS 609 at 613; *Revill v Revill* 1969 (1) SA 325 (C)). In giving effect to the division of the joint estate the court will, generally, apply the rules and principles applied to the dissolution of commercial partnerships (see *Ex parte De Wet N.O.* 1952 (4) SA 122 (O); *Van Onselen NO v Kgengwenyane* 1997(2) SA 423 (B) at 428). Whether the division is effected by the court itself or by way of the appointment of a receiver or liquidator, the court is exercising its jurisdiction to determine the patrimonial benefits to which parties are entitled upon the dissolution of a marriage.

23] This, in my view, brings the process of giving effect to an order of division of the joint estate by way of a subsequent appointment of a receiver or by way of the resolution of a dispute in relation to the division by the court, squarely within the ambit of section 7(7) of the Divorce Act which speaks of determining the patrimonial benefits in a divorce action. The definition of "divorce action" which refers to an action by which a decree of divorce or other relief in connection therewith is applied for, is broad enough to cover proceedings whereby the court exercises its supervisory jurisdiction in relation to the division of a joint estate in the absence of agreement between the parties.

24] It follows therefore that I am in agreement with the view expressed by Magid J, namely that until the joint estate is in fact divided, whether by agreement or otherwise, it is open to a court to make an order as envisaged by section 7(7).

25] In this matter of course different considerations apply. Here the evidence establishes that the applicant and the deceased entered into an agreement, apparently to give effect to the order of division of the joint estate. According to uncontested allegations put up by the respondents a written settlement agreement pertaining to the joint estate was concluded between applicant and the deceased in 1995. The agreement is silent as to the pension interest but records agreement in respect of the division of certain movable and immovable assets held in the joint estate.

26] The applicant does not contest the allegation that the joint estate has in fact already been divided pursuant to the order made at the time that the decree of divorce was granted. It must therefore be accepted that the applicant and the deceased reached agreement as to the manner in which to divide their joint estate and divided it in accordance with such agreement.

27] Leaving aside for the moment the content of such an agreement and any disputes that may arise in relation thereto, it seems to me that when once a joint estate has, a matter of fact been divided (whether by agreement or otherwise), a court cannot then grant an order in terms of section 7(7) of the Divorce Act. Where there is no longer a joint estate to be divided an order the effect of which is to “deem” a pension interest to be part of the joint estate is not competent.

28] I need not consider what the effect would be of a challenge to the terms of an agreement regarding the manner of division of a joint estate on the basis of an

alleged fraud or some other cognisable legal basis for avoiding such agreement, since that is not at issue in this matter. Nor need I consider whether a division of a joint estate may be revisited on the basis of the failure (for whatever reason) to include certain assets in the division which ought to have been included. In any action or application brought on such basis the erstwhile spouse and party to the division of the estate would of necessity need to be joined as a necessary party. Where that party is deceased the executor of the deceased estate would undoubtedly be a necessary party. In the circumstances of this matter the failure to join the executor would be an insuperable obstacle to the grant of the relief sought. I need, however, not take this aspect any further.

29] It follows from what I have found above that the applicant's application for declaratory relief cannot succeed. In regard to the question of costs I did not understand counsel to argue that the costs should not follow the result. The application was founded upon a misapprehension as to the facts regarding the deceased's membership of the first respondent. The delays in the prosecution of the application, although explained, had the effect that the largest portion of the deceased's death benefit had already been paid out by the time the application was made. The correspondence addressed to the applicant's attorneys indicated that the applicant's claim was one to be pursued against the deceased estate. These are all factors which indicate that there is no reason to exercise my discretion in favour of the applicant and not order her to pay the costs of the application.

30] I therefore make the following order:

